Forensic and Valuation Services Practice Aid

Communications in Litigation and Dispute Services

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The AICPA's Code of Professional Conduct (the code) has updated the definition of *client* to be defined as both engaging entity (typically engaging attorney or attorney's firm) and subject entity (typically attorney's client). Effective December 31, 2017, the term *client* is defined as "any person or entity, other than the member's employer that engages a member or member's firm to perform professional services (engaging entity) and also, a person or entity with respect to which a member or member's firm performs professional services (subject entity). When the engaging entity and the subject entity are different, while there is only one engagement, they are separate clients" (ET sec. 0.400.07).

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Chapter 1: Objective, Scope, and Structure

Practice Aid Objective and Scope

The objective of this *Communications in Litigation and Dispute Services Practice Aid* (practice aid) is to provide nonauthoritative guidance to members of the AICPA (practitioners) for the provision of litigation and dispute services in the United States of America. This practice aid focuses primarily on the provision of professional services in connection with civil litigation, unless otherwise specified. It is not intended to apply to testimony in the capacity of an official custodian of records, fact, or as a lay witness. Although this practice aid is designed for practitioners providing civil litigation and dispute services in the United States, wider application may be appropriate in certain circumstances. Caution and due care should be exercised when using this guidance beyond the expressed intended use.

Regarding the resolution of disputes through civil litigation in the United States, there are federal, state, local, and private jurisdictions, which provide venues and forums that may be available to disputing parties. Each has unique rules and practices; however, many have adopted the Federal Rules of Evidence and the Federal Rules of Civil Procedure, in part or entirety.[1] Therefore, this practice aid is oriented to these federal rules. Practitioners should obtain and understand the rules and practices for the dispute resolution system that they have been engaged to serve in before any substantive communications occur in a litigation and dispute services engagement.

Litigation and dispute services fall within *forensic accounting services*, a specialized type of consulting service.[2] The AICPA has defined *forensic accounting services* as follows:

> Forensic accounting services generally involve the application of specialized knowledge and investigative skills possessed by CPAs to collect, analyze, and evaluate evidential matter and to interpret and communicate findings in the courtroom, boardroom, or other legal or administrative venue. More simply, in the context of litigation, the term forensic means to be suitable for use in a court of law. . . Litigation and dispute services involve pending or potential legal or regulatory proceedings before a trier of fact in connection with the resolution of a dispute between parties. Other dispute resolution services assist parties with the settlement or determination of a dispute. A trier of fact may be a judge, a jury, a tribunal, a regulatory body or government authority and their agents, an arbitrator, a mediator, a special master, a referee, or another party with authority to decide the outcome of a dispute. Fraud and special investigations typically use recognized forensic accounting techniques to investigate known or suspected bad acts or events.[3]

Specifically, this practice aid is intended to assist practitioners in complying with the "communications with client"[4] general standard in paragraph .07 of CS section 100, *Consulting Services: Definitions and Standards*.[5] In addition to compliance with AICPA consulting communication standards, this practice aid also

- provides practices for effective practitioner communications;

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[1] These rules, along with the Federal Rules of Criminal Procedure for criminal matters, are generally applicable in U.S. federal court proceedings.

[2] *Consulting services* are "professional services that employ the practitioner's technical skills, education, observations, experiences, and knowledge of the consulting process," as defined in paragraph .05 of CS section 100 in AICPA *Professional Standards*.

[3] "Definition of Forensic Accounting Services," AICPA Forensic and Valuation Services Practice Aid *Serving as an Expert Witness or Consultant* (2014), p.5.

[4] *Client* is defined in "Definitions" in the AICPA Code of Professional Conduct (ET sec. 0.400.07). However, for purposes of this practice aid, the term *client* is used herein to describe both the engaging entity (typically, engaging attorney or attorney's firm) and the subject entity (typically, attorney's client), unless otherwise noted. See chapter 3 of this practice aid for additional details.

[5] CS section 100 an be found in AICPA *Professional Standards*.

- describes the purpose, form, and type of expected communications for differing practitioner roles and engagements;
- surfaces issues and risks associated with practitioner communications; and
- highlights adverse party discovery considerations related to practitioner communications.

Many kinds of communication occur during a litigation and dispute services engagement. These may begin with initial client and engagement inquiries between practitioner and client prospect and end with the delivery of practitioner expert opinions expressed through written reports and testimony. The following are some of the common types of practitioner communication in litigation and dispute services engagements:

- Formal and informal written and verbal communications, including
  - emails
  - notes
  - teleconferences
  - text and voicemail messages
  - in-person or virtual (screen-share) working sessions
- Formal written communications, including
  - engagement letters
  - evidentiary memos
  - draft and final expert or consultant reports
  - trial testimony outlines
  - demonstratives
- Formal verbal communications, including
  - the presentation of preliminary and final findings and opinions
  - recorded deposition testimony
  - recorded trial or hearing testimony

Depending on the role and assignment, certain practitioner communications must meet a specified purpose, be disclosed in a particular form, and contain certain disclosures. For example, a written expert witness report to be used in a litigated dispute in federal civil court must disclose a complete statement of expert opinions and the basis and reasons for them.[6] In other cases, the purpose and form of practitioner

[6] FRCP 26(a)(2)(B) of the Federal Rules of Civil Procedure requires an expert witness report to contain (1) a complete statement of all opinions the witness will express and the basis and reasons for them; (2) the facts or data considered by the witness in forming

communications are uniquely tailored based on the role of the practitioner, engagement requirements or norms, work produced, requests from the client, and numerous other considerations.

In addition, depending on engagement variables, there is a possible wide range of parties that may have an interest or right to obtain practitioner communications. Following is a non-exhaustive list of potential parties having an interest in practitioner communications prepared for litigation and dispute resolution:

- Triers of fact or surrogates
  - Judge and jury
  - Arbitrators
  - Mediators
- Clients
  - Legal counsel and law firm
  - Underlying legal counsel client (directors, management, and advisers)
  - Expert witness (if practitioner serves as consultant expert)
- Adverse parties
  - Legal counsel and law firm
  - Named adverse persons and entities (directors, management, and advisers)
- Third parties
  - Investors
  - Creditors
  - Lenders
  - Insurers
  - Independent auditors
  - Regulators
  - Governmental agencies
  - Press and media
  - Rating agencies
  - Attorneys, law firms, advisers, and investigators for other parties (audit and special board committee, management, accused parties, and so on)

Practitioner communications in litigation and dispute services engagements are limited to two forms — written and verbal. The types of communication that may be generated by practitioners as part of a litigation and dispute resolution engagement are numerous. They may be oral comments, emails, written notes, formal written reports, interview summaries, walk-throughs, graphs, spreadsheets, or verbal testimony, just to name a few. Lastly, the subject matter, contents, substance, and details of certain communications may be governed by law, rule, or agreement of the disputing parties. For example, legal counsel representing disputing parties may enter into an agreement to have practitioners prepare and disclose certain communications in an agreed-upon form and manner.

The form, type, subject matter, contents, substance, and details of each communication will be dictated by the law, rule, facts, circumstances, applicable dispute resolution proceeding rules, client legal counsel instructions, and the disputing parties. As such, this practice aid and the associated supplemental guidance discussed, does not address all communications that may be prepared and produced by practitioners for litigation and dispute services engagements. Instead, this practice aid considers practitioner communications prepared for civil litigation and produced in commonly used dispute resolution proceedings.

Practice Aid Structure

This practice aid is organized (*a*) in the order of the likely progression of practitioner communications that occur during the life cycle of an engagement, and (*b*) based on the role of practitioners in the engagement

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the opinions; (3) any exhibits that will be used to summarize or support the opinions; (4) the expert's qualifications, including a list of all publications authored in the previous 10 years; (5) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and (6) a statement of the compensation to be paid for the study and testimony in the case.

(for example, expert witness or consultant).[7] Also included is a summary of litigation and dispute services standards and guidance applicable to practitioners.

Communications prepared and used in litigation and dispute services engagements may vary significantly based on a practitioner's role and the nature and scope of services. To provide guidance relevant to certain roles and services, supplemental resources have been, or will be, prepared to accompany this practice aid. At the time of publication, the following supplemental guidance is available:

- Communications for Service as Neutral in Litigation and Dispute Services
- Communications for Family Law in Litigation and Dispute Services

In addition to this practice aid, the AICPA issued nonauthoritative guidance for providing other forensic accounting services that can be found in the Forensic and Valuation Services Library.

[7] An *expert witness* is defined as "[a] person formally designated to render an opinion(s) before a trier of fact is an expert witness. If designated as an expert witness, the practitioner's litigation-related work may be required to be produced to opposing parties through a process called discovery." A *consultant* is defined, in part, as "[a] person retained to advise about facts, issues, strategies, and other matters is a consultant. The consultant does not testify about his or her expert opinion before a trier of fact unless the consultant's role is subsequently changed to an expert witness during the pendency of the litigation." "Roles of the Practitioner," AICPA Forensic and Valuation Services Practice Aid *Serving as an Expert Witness or Consultant* (2014), p.5.

Chapter 2: Relevant Standards and Guidance

Practitioners providing litigation and dispute services are required to adhere to relevant standards and guidance that governs members of the AICPA and the practice of public accountancy. In general, the governing bodies for such standards and guidance are as follows:

- AICPA
- State CPA licensing boards
- Federal courts
- State and local courts
- Private dispute resolution (alternative dispute resolution, or ADR) organizations.

Each of these governing bodies and the standards and guidance applicable to practitioners providing litigation and dispute services is summarized as follows.

AICPA

Practitioners are required to comply with AICPA standards and encouraged to refer to nonauthoritative guidance when providing litigation and dispute services. AICPA standards fall under the Code of Professional Conduct (the code) and CS section 100 in AICPA *Professional Standards*.

Code of Professional Conduct

Professional conduct of practitioners is governed by the code.[8] In particular, practitioners providing litigation and dispute services should adhere to the standards found in part 2 of the code, "Members in Business," as well as the definition of a *client*. The relevant portions of the code include the "Confidential Client Information Rule" (ET sec. 1.700.001); the "Integrity and Objectivity Rule" (ET sec. 2.100.001); the "Conflicts of Interest for Members in Business" interpretation (ET sec. 2.110.010); and the "General Standards Rule" (ET sec. 2.300.001). Relevant parts of each of these are outlined as follows.

Paragraph .07 of "Definitions" (ET sec. 0.400.07) defines *client* in part as follows:

> Any person or entity, other than the member's employer that engages a member or member's firm to perform professional services (engaging entity) and also, a person or entity with respect to which a member or member's firm performs professional services (subject entity). When the engaging entity and the subject entity are different, while there is only one engagement, they are separate clients.[9]

The "Confidential Client Information Rule" states the following:

> A member in public practice shall not disclose any confidential client information without the specific consent of the client unless this requirement is circumvented by a validly issued and enforceable summons or subpoena.

[8] The AICPA Code of Professional Conduct, effective December 15, 2015, updated for official releases through August 31, 2017.

[9] For purposes of this practice aid, the term *client* is used to describe herein both the engaging entity (typically engaging legal counsel) and subject entity (typically engaging legal counsel's client), unless otherwise noted.

The “Integrity and Objectivity Rule” states the following:

> In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others.

The “Conflicts of Interest for Members in Business” interpretation states the following:

> A member may be faced with a conflict of interest when undertaking a professional service. In determining whether a professional service, relationship, or matter would result in a conflict of interest, a member should use professional judgment, taking into account whether a reasonable and informed third party who is aware of the relevant information would conclude that a conflict of interest exists.
>
> A conflict of interest creates adverse interest and self-interest threats to the member’s compliance with the “Integrity and Objectivity Rule” [2.100.01]. For example, threats may be created when
>
> a. a member undertakes a professional service related to a particular matter involving two or more parties whose interests with respect to that matter are in conflict, or
>
> b. the interests of a member with respect to a particular matter and the interests of a party for whom the member undertakes a professional service related to that matter are in conflict.

The “General Standards Rule” states the following:

> A member shall comply with the following standards and with any interpretations thereof by bodies designated by Council.
>
> a. *Professional Competence*. Undertake only those professional services that the member or the member’s firm can reasonably expect to be completed with professional competence.
> b. *Due Professional Care*. Exercise due professional care in the performance of professional services.
> c. *Planning and Supervision*. Adequately plan and supervise the performance of professional services.
> d. *Sufficient Relevant Data*. Obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.

CS section 100

Practitioners providing services for litigation and dispute services engagements must abide by CS section 100. Paragraph .04 indicates that CS section 100 covers “any AICPA member holding out as a CPA while providing consulting services,” including valuation and litigation and dispute services. CS section 100 requires that practitioners adhere to the following standards:

Paragraph .07 of CS section 100 discusses the following general standards established under the “Compliance With Standards Rule”:

- *Client interest*. Serve the client interest by seeking to accomplish the objectives established by the understanding with the client while maintaining integrity and objectivity.
- *Understanding with client*. Establish with the client a written or oral understanding about the responsibilities of the parties and the nature, scope, and limitations of services to be performed, and modify the understanding if circumstances require a significant change during the engagement.
- *Communication with client*. Inform the client of (*a*) conflicts of interest that may occur pursuant to the "Integrity and Objectivity Rule" of the code, (*b*) significant reservations concerning the scope or benefits of the engagement, and (*c*) significant engagement findings or events.

CS section 100 makes clear the importance of communication in litigation and dispute services engagements. It is imperative that practitioners and the client establish a clear understanding of "the responsibilities of the parties and the nature, scope, and limitations of services to be performed" and that this understanding be maintained throughout the engagement. Practitioners should also communicate with the client about possible conflicts of interest, significant reservations, and significant findings and events.

VS section 100

When litigation and dispute services engagements are "to estimate value that culminates in the expression of a conclusion of value or a calculated value," VS section 100*, Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset*,[10] provides an exemption to the standard reporting requirements for certain litigation-related engagements. Under paragraph .50 of VS section 100, "[a] valuation performed for a matter before a court, an arbitrator, a mediator or other facilitator, or a matter in a governmental or administrative proceeding, is exempt from the reporting provisions. This exemption applies whether the dispute settles or proceeds to trial. This exemption, however, only applies to the reporting provisions of VS section 100 and not to the developmental provisions. Paragraph .50 goes on to state that "[t]he developmental provisions of the statement still apply whenever the valuation analyst expresses a conclusion of value or a calculated value."

Paragraphs .16 and .17 of VS section 100 address establishing an understanding with the client. Although CS section 100 allows for an understanding with the client to be written or oral, VS section 100 states that such an understanding be "preferably in writing." Furthermore, "[i]f the understanding is oral, the valuation analyst should document the understanding by appropriate memoranda or notations in the working papers. As required by VS section 100, at a minimum, an understanding with a client should include the following matters:

- Nature, purpose, and objective of the valuation engagement
- Client's responsibilities
- Valuation analyst's responsibilities
- Applicable assumptions and limiting conditions
- Type of report to be issued
- Standard of value to be used

VS section 100 contains a section, "The Valuation Report," in paragraphs .47 to .77. Subject to the litigation reporting exemption described previously, this section describes the three types of written

[10] VS section 100 can be found in AICPA *Professional Standards*.

reports that a valuation analyst may use to communicate the results of a valuation engagement. According to paragraph .48, the three forms of a valuation report are as follows:

a. Valuation engagement — detailed report

b. Valuation engagement — summary report

c. Calculation engagement — calculation report

There is also an oral report, a fourth type of valuation report, discussed in paragraph .78.

VS section 100 describes the structure and contents of each of these three types of reports. The AICPA provides nonauthoritative guidance on VS section 100 in its SSVS Toolkit.[11] The toolkit includes a webcast on understanding VS section 100, engagement letter templates, compliance checklists, and sample valuation reports. Practitioners may find this toolkit instrumental in providing comprehensive and effective communication with clients.

Other Guidance

Practitioners who are members of the AICPA's Forensic and Valuation Services (FVS) section, which includes professionals who hold the Certified in Financial Forensics (CFF) and Accredited in Business Valuation (ABV) credentials, have unlimited access to the Forensic and Valuation Services Library (FVS Library). This is a searchable, web-based research tool that provides access to the authoritative guidance mentioned previously and other authoritative and nonauthoritative guidance. The FVS Library offers practitioners the following resources:

- AICPA *Professional Standards*
- Up-to-date practice aids
- AICPA accounting and valuation guides
- Engagement templates
- Toolkits
- Publications

Practitioners should periodically access this material to ensure full, complete, and timely knowledge.

State CPA Licensing Boards

Individual state boards of accountancy, or their equivalent, are the licensing authority for CPAs. Each state licensing board is established by state law and has its own standards and code of conduct. Typically, rules of state boards of accountancy are also codified as state law. Although most states follow, or have similar standards to the AICPA, practitioners should adhere to the rules of the state in which they are licensed. Violation of state board of accountancy laws, rules, and standards can result in the suspension or revocation of a practitioner's CPA license, monetary penalties, and other adverse actions.

Federal Courts

The federal civil court system has rules of evidence and civil procedure. Practitioners must comply with these rules to be able to participate fully in federal court proceedings. If practitioners have questions about the federal rules, inquiries should be made to the client's legal counsel or a legal adviser retained by the practitioner. Failure to follow the federal rules may result in practitioner's work product or testimony

[11] Statement on Standards for Valuation Services Toolkit.

being excluded from the proceedings. Relevant parts of the Federal Rules of Evidence (FRE) and Federal Rule of Civil Procedure (FRCP) are summarized as follows.

Federal Rules of Evidence

The Federal Rules of Evidence (FRE) govern the introduction and use of evidence for both civil and criminal proceedings in federal court. Practitioners should be generally familiar with the FRE when engaged for a matter to be heard in federal court and specifically consider the following sections of the FRE when engaged as an expert or consulting expert:

FRE Article IV: Relevance and Its Limits (Rule 401–403)

Rule 401 of the FRE states the following:

> Evidence is relevant if
>
> a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> b) the fact is of consequence in determining the action.

Rule 402 goes on to state the following:

> Relevant evidence is admissible unless any of the following provides otherwise:
>
> - The U.S. Constitution
> - A federal statute
> - These rules
> - Other rules prescribed by the Supreme Court
>
> Irrelevant evidence is not admissible.

Rule 403 adds the following:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Typically, evidence is relevant if it tends to prove or disprove an alleged fact. Rule 402 mandates that only relevant evidence is admissible. But a court may exclude relevant evidence if the court determines that this evidence is unduly prejudicial.

FRE Article V: Privileges

In federal courts, Rule 501 is the basis for the attorney-client privilege. This rule provides that "[t]he common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege." This privilege, which belongs to the client, exists primarily to encourage clients to freely share information with their legal counsel so their legal counsel can provide effective legal advice, without being concerned that such confidential information will be disclosed to third parties.

Practitioners should be aware that the accountant-client privilege is not recognized under federal law and does not attach to communications between the client and accountant. Even though many states recognize an accountant-client privilege, in lawsuits filed in federal court that apply federal law, information exchanged between a CPA and a non-attorney client will not be shielded from disclosure.[12]

On the other hand, when an accountant is hired by legal counsel who is providing legal advice to a client, the decision in *U.S. v. Kovel* (*Kovel*) extends the attorney-client privilege to communications between the accountant and the client. Because *Kovel* extends the privilege only when the accountant is hired by legal counsel, it is important to recognize that the communications between the accountant and the client, prior to the accountant being hired by legal counsel, are not privileged, as decided by *U.S. v. Cote*. If a client communicates with an accountant and then later consults with legal counsel, there is no privilege. But the privilege may attach when the client communicates with both client legal counsel and the accountant simultaneously if the accountant was hired by client legal counsel. The privilege may also attach when the client communicates first with client legal counsel, who then hires the accountant, provided the other requirements to assert the privilege are met.

Under federal law, Rule 502 determines whether the attorney-client privilege has been waived. "When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceedings only if

1) the waiver is intentional;
2) the disclosed and undisclosed communications or information concern the same subject matter; and
3) they ought in fairness to be considered together.

Rule 502 also states that "a disclosure does not operate as a waiver" under the following three conditions:

1) The disclosure is inadvertent.
2) The holder of the privilege or protection took reasonable steps to prevent disclosure.
3) The holder promptly took reasonable steps to rectify the error, including (if applicable) Federal Rule of Civil Procedure 26(b)(5)(B).

Kovel privileges, as extended to practitioners in litigation and dispute services engagements, are limited to communication that the client either makes expressly confidential or could reasonably assume would be understood to be confidential. Therefore, the client, legal counsel, and practitioners should take the necessary steps to establish and maintain a reasonable expectation of privacy. This includes using a confidential legend on all written communications and encrypting virtual communications.

FRE Article VII: Opinions and Expert Testimony

Article VII of the FRE, which covers expert testimony, is of particular relevance to practitioners in litigation and dispute services engagements as it covers expert testimony. This article opens with Rule 701 that explains the circumstances under which a nonexpert witness may testify. This includes circumstances in which the witness's opinion is based on rational perceptions, will help resolve issues, and is not within the scope of Rule 702.

[12] An exception might apply in a federal case if the court is applying state law, in which case, it will look to the state laws to guide privilege issues.

Rule 702, “Testimony by Expert Witnesses,” is central to practitioners serving as expert witnesses. It states the following:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> b) the testimony is based on sufficient facts or data;
>
> c) the testimony is the product of reliable principles and methods; and
>
> d) the expert has reliably applied the principles and methods to the facts of the case.

This means that, for expert testimony to be admissible, it must be outside the understanding of the average lay person, and the witness must qualify as an expert in the subject area. In addition, the testimony must be based on sufficient facts or data and be the product of reliable principles and methods.

Thus, although opposing legal counsel may attempt to attack the credibility of an expert witness because the practitioner lacks testifying experience, is unpublished, or has a limited amount of experience, those facts alone should not necessarily disqualify the practitioner from testifying as an expert under Rule 702. And, in the case of the first-time expert witness, if the case were to come to trial, a jury may well decide to place more weight on the nature of the practitioner’s technical experience than on the extent of testifying experience.

Rule 703, “Bases of an Expert’s Opinion Testimony,” explains the sources of facts available to experts as being

a) firsthand knowledge;

b) information admitted in evidence during the trial; and

c) information made known to the expert before trial.

Rule 703 states that “[i]f experts in the particular field would reasonably rely on … facts or data in forming an opinion” those facts or data do not need to be admissible for the opinion to be admitted. This means that an expert is entitled to rely on otherwise inadmissible facts or data if they are “of a type reasonably relied upon by experts in the particular field.” Thus, there is support for practitioners to rely on another expert, witness, or other facts and data, as appropriate. Practitioners should discuss with legal counsel the suitability of using the work of others. This, at times, may allow experts to testify about what someone told them — a practice that is normally hearsay and not allowed.

Rule 704, “Opinion on an Ultimate Issue,” discusses how an opinion, in general, is “not objectionable just because it embraces an ultimate issue.” According to Rule 705, “an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.” An exception to remember is that fact witnesses cannot offer opinions.

The final rule in Article VII, Rule 706 discusses court-appointed expert witnesses. The topics covered in this rule are as follows:

- Appointment process
- Expert’s role

- Compensation of the expert
- Disclosure to the jury that the court appointed the expert
- Clarification that having a court-appointed expert does not preclude a party from calling its own experts

FRE Article X: Contents of Writings, Recordings, and Photographs (Rules 1002, 1003, and 1008)

Article X of the FRE provides guidance on what form of document is required as evidence. Rule 1002 states the preference of the original document: "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." However, Rule 1003 discusses how duplicates are also generally allowed – "duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."

Ordinarily, the court determines if the factual conditions have been met for admitting evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. However, in a jury trial, as stipulated in Rule 1008, and in accordance with Rule 104(b), the jury determines any issue about whether

- "an asserted writing, recording or photograph ever existed";
- "another one produced at the trial or hearing is the original"; or
- "other evidence of content accurately reflects the content," such as another writing, recording, or photograph, which may explain, modify, or contradict the evidence originally proffered.

Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure (FRCP) govern all civil actions handled in the federal courts. These rules are organized into 11 primary articles, which are as follows:

I. Scope of Rules; Form of Action
II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders
III. Pleadings and Motions
IV. Parties
V. Disclosure and Discovery
VI. Trials
VII. Judgment
VIII. Provisional and Final Remedies
IX. Special Proceedings
X. District Courts and Clerks: Conducting Business, Issuing Orders
XI. General Provisions

Of these 11 articles, the article of greatest relevance to practitioners in litigation and dispute services engagements is Article V, which covers disclosure of witnesses and related issues. Within Article V,

FRCP 26 there is a section, “Duty to Disclose; General Provisions Governing Discovery.” FRCP 26(a)(1)(A) imposes a duty for a party to voluntarily disclose to other parties the following matters:

- List each individual likely to have discoverable information
- List all relevant documentary evidence in the party’s possession or control (unless privileged)
- A computation of each category of damages being claimed
- Any insurance agreements that may be liable to satisfy or reimburse part or all of possible judgments

FRCP 26(a)(2)(A) requires parties to disclose the identity of any expert witness who will present evidence under FRE 702, 703, or 705. FRCP 26(a)(2)(B) requires the expert witness to submit a formal written report, signed by that expert, and not the expert’s firm. The report should include the following items:

- Complete statement of all opinions to be expressed and the bases and reasons for these opinions
- List all data and facts considered
- Exhibits in summary or support of the opinions
- Qualifications of the expert witness
- List all publications authored in the past ten years
- List all other cases in which the witness testified as an expert either in a trial or by deposition
- The witness’s compensation for the work and testimony

Although legal counsel may agree to exchange expert reports at an earlier date (or the judge may order such an exchange), the FRCP requires the practitioner’s identity and report to be disclosed at least 90 days before trial. If practitioners are to provide testimony solely to rebut or contradict another witness’s testimony, the practitioner’s testimony must be disclosed within 30 days after the other expert witness’s disclosure. If an expert witness becomes aware that previous disclosures might be materially incomplete or incorrect, that witness must supplement the written report at least 30 days before trial.

FRCP 26 was amended as of December 1, 2010, to make draft reports protected under the work-product doctrine. FRCP 26 (b)(3)(A) states, “…ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.” Exceptions to this are where they are otherwise discoverable under FRCP 26(b)(1) or where the other party shows that it has substantial need for the materials in order to prepare their case and cannot obtain equivalent information by other means.

FRCP 26(b)(3)(B), commonly known as the work-product doctrine, provides protections “against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's legal counsel or other representative concerning the litigation,” also known as opinion work product. FRCP 26(b)(4)(B) provides protection for drafts of “any report or disclosure required under FRCP 26(a)(2), regardless of the form in which the draft is recorded.”

FRCP 26(b)(4)(C) provides protection for most communications, related to the report, between the expert witness and client legal counsel, regardless of the form of the communications. Exceptions to this protection apply when communications

- relate to compensation for the expert’s work or testimony;

- identify facts or data that the party's legal counsel provided and the expert considered in forming the opinions; or
- identify assumptions that the party's legal counsel provided and that the expert relied on in forming the opinions.

Practitioners in litigation and dispute services engagements should note that many states have rules similar to FRCP 26 but have not adopted the 2010 amended protections. Practitioners should be familiar with the relevant state rules regarding testifying in state courts.

Rules 30 and 31 discuss depositions by oral examination and written questions, respectively. If practitioners may testify at trial, parties have the right to depose the witness. During the deposition, the expert may be asked questions about information not included in the practitioner's report. Practitioners should note that when an objection is raised, the objection will be recorded, but the deposition will continue. A witness may be instructed not to answer only when it is necessary to preserve privilege, to enforce a limitation ordered by the court, or where the question is deemed to be "in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses" the witness or party.

Interrogatories, covered in Rule 33 of the FRCP, are written questions submitted to opposing parties. Unless otherwise stipulated or ordered by the court, they are limited to 25 per party, including subparts. These limits should be kept in mind when interrogatories are composed. The interrogatories must be answered by the party to whom they are directed. If that party is a corporate entity, then an officer or agent of that entity will need to verify the answers. Responses are to be provided within 30 days of being served — unless a longer or shorter time is ordered by the court, or if it would interfere with the time set for completing discovery for hearing a motion or for trial. Interrogatories must be answered under oath, separately and fully, in writing, unless objected to. Any objections must also be specifically stated. Finally, the person responding to the interrogatories must sign them and any objections must be signed by the objecting legal counsel.

Rule 34 of the FRCP requires that requests can include specifically or categorically identified items, but those items must be described with reasonable particularity.

As discussed previously, FRCP 26 requires all parties to disclose the identities of their expert witnesses in a timely fashion. Practitioners should provide written expert reports that include complete statements of all opinions expressed and the bases and reasons for those opinions. If a practitioner's opinions or supporting data is not disclosed in the written report, or supplemental disclosures, the court may strike the expert designation, and the witness will not be allowed to testify, on direct examination, about these opinions or supporting data.

The Judge's Role as Gatekeeper

FRE 702 provides that a witness is qualified as an expert witness by "knowledge, skill, experience, training, or education." A central question is what criteria the courts use to determine whether an expert is qualified. This is because once a witness has been defined as an expert, there is the risk that juries will place greater weight on what that expert says. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (*Daubert*), the Supreme Court stated that judges should act as "gatekeepers" and, thus, protect jurors from experts who lack credibility.

Although the Supreme Court did not outline a definitive set of criteria that a trial judge should use when determining whether or not proposed expert testimony is admissible, it did highlight various factors that a judge may consider. Some of these considerations are whether

- the theory is generally accepted in the expert's community;

- the theory and methodology can be and have been tested;
- the theory and methodology have been subjected to peer review and publication;
- there is a known or potential rate of error and if this rate is acceptable; and
- there are standards controlling the technique.

A hearing, conducted before a judge, where an opposing legal counsel challenges the validity and admissibility of expert testimony is called a *Daubert* challenge.[13] Here, practitioners are required to show that they are qualified, that the opinion is supported by reliable data, and that their methodology and reasoning are scientifically valid and can be applied to the facts of the case.

In *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (*Kuhmo Tire*), the Supreme Court held that *Daubert's* provisions include all expert opinions, not just scientific ones. As a result, practitioners in litigation and dispute services engagements are held to *Daubert* standards. FRE Rule 702 was amended in 2000 to include the standards set forth by the Supreme Court in *Daubert* and *Kumho Tire*.

State and Local Courts

Practitioners performing litigation and dispute services engagements are to be aware of the rules in effect in the relevant jurisdiction for the engagement. Although most states and local jurisdictions have rules that are modeled along the federal rules, they can differ significantly. For instance, some state courts require written reports the same as, or similar to, FRCP 26, but others do not. In the same vein, some state courts require the disclosure of the expert witness and the substance of what the expert will testify to, whereas others do not have this requirement. It is advisable for practitioners in litigation and dispute services engagements to have a discussion with the client legal counsel regarding the rules of the applicable court to ensure that they are understood and followed.

Alternative Dispute Resolution

When disputes are settled in a manner other than through a formal litigation proceeding, the process is referred to as ADR. There are several forms of ADR, the most common of which are arbitration and mediation. ADR can be used for almost any dispute, such as disputes involving breach of contract, insurance, divorce, and lost earnings, among many other matters. ADR is often used because it is widely believed by many to be faster and less expensive than litigation. In addition, the mediators and arbitrators used in ADR generally have expertise specific to the cases at hand, which is often not the case with public court judges.

ADR proceedings are usually less formal than litigation. For instance, hearsay may be permitted and discovery restricted. ADR is usually intended to be confidential, which encourages more open communications. In a mediation, such open communications facilitate settlement negotiations. ADR proceedings may use expert witnesses or expert neutral witnesses and remedies tend to be more flexible than formal litigation. However, because of the private nature of ADR and the independent nature of each case, ADR cannot be used to set legal precedent.

Arbitration

Arbitration is generally structured like a less formal civil trial, but it is not open to the public, and most evidence is usually admitted. Arbitration can be either binding or nonbinding. In binding arbitration, the decision of the third-party neutral has the force of law. Generally, the decision of the arbitrator in binding arbitration cannot later be submitted to a judge or jury for determination (there are very narrow grounds

[13] A formal hearing called *voir dire*, French for "to see, to speak", may be used to challenge the qualifications of an expert witness.

on which an arbitration award can be overturned); however, binding decisions may be subsequently confirmed by a court. Conversely, decisions in non-binding arbitration are considered advisory. In the federal court system, the Federal Alternative Dispute Resolution Act of 1998 (ADRA) governs ADR in federal courts. However, each district court can create and implement its own program.

Arbitration may be administered by a contracted arbitration organization, such as the American Arbitration Association, JAMS, or the Association for international Arbitration. Each arbitration organization will have its own unique proceeding rules. The disputing parties are required to follow the rules of the contracted arbitration organization. Practitioners involved in ADR may want to consult with client legal counsel to gain a better understanding of these rules. For instance, the organization may have model arbitration agreements and may provide a list of approved arbitrators. With a non-administered arbitration, the disputing parties will agree among themselves to the terms of the arbitration proceedings.

Mediation

Mediation is usually nonbinding and is a process that involves structured negotiations to accomplish a settlement of a dispute. As with arbitration, mediation can be subject to rules, but there is generally no finding or award given. The usual mediation process involves the preparation and presentation of a mediation brief and the actual mediation where the disputing parties meet in person with the mediator. After explaining the process, the mediator will typically separate the disputing parties and shuttle back and forth between rooms, listening, conveying offers and counteroffers, and relaying information. If a settlement agreement is not reached, mediation may often continue more informally through follow-up calls or otherwise. If practitioners are engaged to prepare or present, or both, materials for mediation, such materials should be clearly labeled as “For Mediation Purposes Only.”

Chapter 3: Pre-Engagement Communications

Prior to being engaged on any litigation and dispute services engagement, there are communications that take place between the prospective retaining party and practitioner. The ways in which these communications are handled vary based on the individual practitioner's (or his or her employer's) practices, client legal counsel preferences, and underlying legal counsel client expectations. The following are some common pre-engagement communications and related considerations.

Identify the Client for the Engagement

As previously mentioned, practitioners are to identify the client for purposes of complying with the standard of communication with the client required in CS section 100. In "Definitions" in the code, a *client* is defined as any person or entity, other than the member's employer that engages a member or member's firm to perform professional services (engaging entity) and also, a person or entity with respect to which a member or member's firm performs professional services (subject entity). When the engaging entity and the subject entity are different, although there is only one engagement, they are separate clients. The client can be one or more of the parties, triers of fact, or other interested entities involved in the litigation and dispute resolution process. Following are examples of possible clients:

- Litigation and ADR
    - Plaintiff legal counsel or law firm (may include regulators)
    - Plaintiffs
    - Defendant legal counsel or law firm
    - Defendants
    - In-house legal counsel
    - Joint retention by the disputing parties
    - Judge, arbitrators, or tribunal
    - Insurance companies

- Forensic investigation
    - Company legal counsel and law firm
    - Accused party legal counsel and law firm
    - Management legal counsel and law firm
    - Board (special committee) legal counsel and law firm
    - Regulators
    - State agencies
    - Insurance companies

Practitioners may also have more than one client. In most litigation and dispute services engagements, client legal counsel will engage the practitioner as the advocate for the underlying client and to protect any applicable legal privileges, and the underlying client will also agree to the practitioner's engagement terms and conditions. Both the underlying client and client legal counsel usually sign the engagement

letter. In these cases, practitioners may have two clients, legal counsel (as the engaging party client) and the underlying client of legal counsel (as the subject entity client). From a practical standpoint, practitioners receive instructions from client legal counsel on the scope of the assignment, deliverables, deadlines, and communications. On the other hand, practitioners may deal with the underlying client for billings and payments for services rendered. Practitioners should consider these distinctions when determining who will be the recipient of any communications.

Conflicts Check

A *conflicts check* is the process in which an inquiry is conducted to identify if a practitioner (or practitioner's employer) has any prior or ongoing engagements or relevant relationships with any of the parties to the matter and to determine whether those relationships would create a conflict of interest if an engagement is accepted. As defined by the code, "[a] conflict of interest creates adverse interest and self-interest *threats* to the member's compliance with the 'Integrity and Objectivity Rule."[14] Further, CS section 100 requires that practitioners inform the potential client of any conflicts of interest that may occur.[15] If the practitioner (or the practitioner's employer) are conducting audits, reviews, and other attest services, which require Independence, each potential litigation and dispute services engagement should be evaluated to make sure it does not impair independence in accordance with applicable rules.[16] Circumstances that could create a conflict of interest in a litigation and dispute services engagement include (*a*) prior or current engagement by an adverse party; (*b*) close relationships with any party in the dispute; or (*c*) substantial financial benefit based on the outcome of the dispute.[17]

It is important for practitioners to identify and clear all potential conflicts of interest before accepting an engagement.[18] Likewise, practitioners should avoid receiving any confidential information regarding the case or parties until all potential conflicts of interest are cleared. In certain cases, if practitioners have access to confidential information prior to engagement, and the practitioner is ultimately not engaged for any reason, this may taint practitioners, thereby precluding practitioners from accepting any engagement related to the same matter. Therefore, obtaining the necessary information to perform a conflicts check should be one of the first communications with a potential client.

For litigation and dispute services engagements, important information for a conflicts check may include the following:

- Clients, including both engaging entity (legal counsel and law firm) and subject entity (underlying client), together with all legal affiliates[19]
- If client is an entity, state of legal domicile
- Adverse parties (including all legal affiliates) and their legal counsel and law firm
- All individually named plaintiffs or defendants
- Venue of dispute
- Opposing expert, if known

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[14] ET section 1.110.010.02. See also CS section 100, footnote 3.

[15] Paragraph .08 of CS section 100, effective January 1, 1992.

[16] AICPA Independence Rules. See also Sarbanes-Oxley Act of 2002 Title II—Auditor Independence, Sec. 201. "Services outside the scope of practice of auditors, (a) Prohibited activities" at www.sec.gov/about/laws/soa2002.pdf.

[17] ET section 1.110.010.04; AICPA Forensic and Valuation Services Practice Aids *Serving as an Expert Witness or Consultant* (2014), pp. 9–10 and *AICPA's Guide to Family Law Services*, p. 19 for further examples of potential conflicts of interest.

[18] Paragraphs .05–.08 of ET section 1.110.010.

[19] ET section 0.400.07.

Other helpful, but not necessarily mandatory, information might include, without limitation (*a*) the names of the board of directors, senior management, principals, and owners; (*b*) relevant third parties such as lenders, insurers, auditors, or regulators; (*c*) the names of the judge, arbitrators, mediator, or tribunal; and (*d*) the names of client or adverse experts. Usually, this information is requested from client legal counsel, or designee, by practitioners.

Other information is also often requested by practitioners prior to engagement, which may not be directly related to a conflicts check but is pertinent to the performance of work on the engagement. Practitioners may be interested in the following matters, among others:

- Scheduled date or dates for
    - trial, arbitration, or mediation;
    - disclosures, including any expert witness requirements; and
    - any other critical deadlines or anticipated timing of work to be performed
- Type of engagement or description of services requested (damages calculation, forensic accounting investigation, valuation of minority interest);
- Brief description of dispute and relationship of parties involved
- The complaint and answer to the complaint

Practitioners should strive to obtain all information necessary to run a thorough conflicts check and should have a consistent practice for performing and documenting the conflicts check submission, results, and clearances. Sound practice includes, without limitation (*a*) checking information against current and former engagements, proposals, and conflict checks; (*b*) circulating the information internally to others employed by the practitioner's employer or to any entities affiliated with the practitioner's employer; (*c*) identifying all responses that require investigation as a potential conflict of interest; (*d*) investigation of any potential conflicts of interest; and (*e*) the clearance of any potential conflicts of interest, to implement proper safeguards, or to obtain consents and waivers from appropriate parties, or to decline to accept the engagement. It is possible that documents related to a conflicts check could be discoverable; therefore, information should be documented in an objective and unbiased fashion.

In addition to conflicts of interest related to the provision of litigation and dispute services, practitioners should determine whether an engagement presents a business-related conflict. This means that even though there may not be a potential conflict of interest as defined in the code, there is a business rationale for not pursuing or accepting the engagement. For example, even if conflict-free, practitioners may not want to accept an engagement adverse to an important referral source or prospective client. Alternatively, practitioners may have concerns about any number of things, including the reputation of the prospective client, collectibility of fees, or professional liability risk. It is the prerogative of practitioners to decline a litigation and dispute services engagement if a business conflict exists.

From a practice management standpoint, it is important to have a consistent and efficient process for clearing conflicts and an understanding of the importance of the process. Oftentimes, legal counsel reaches out to multiple practitioners at the same time for an engagement; therefore, a prompt, complete, and accurate response is critical in order to be considered for retention on an engagement. Additionally, a standardized process completed within a consistent timeframe will allow practitioners to inform the potential client when to expect a response, which can be particularly helpful in competing for business. If a potential conflict may potentially be resolved by discussing it with the potential client, it may be appropriate to disclose the nature of the potential conflict and other nonconfidential information that will help the parties conclude whether an actual conflict exists.

If no potential conflicts are identified, or the conflicts are otherwise cleared, safeguarded, or waived and practitioners would like to accept the engagement, the subsequent communication with the potential client is generally straightforward. Practitioners will communicate with the potential client and make arrangements for further discussions and engagement contracting.

If a conflict of interest will not allow practitioners to accept the engagement, practitioners should be careful about how this is communicated. Generally, the amount of information disclosed to the prospective client in this situation should be limited to a response that a conflict exists that will prevent the practitioner from accepting the engagement. The disclosure of any more details could violate confidentiality standards because the information could be considered private or attorney work product.[20] This is emphasized by another AICPA practice aid that states the following:

> Typically, practitioners disclose current and former relationships with all the parties to the litigation to the engaging attorney so that client legal counsel and his or her client have the ability to make their own determination about whether a conflict exists. During this process, the practitioner should be mindful not to disclose any information that could be confidential to his or her other clients without prior consent. In some cases, the parties know of, and agree to waive the conflicts of interest; however, the practitioner should exercise caution to avoid improperly disclosing any relationship or service to others that may violate professional client confidentiality.[21]

Nondisclosure Agreements, Confidentiality Agreements, and Protective Orders

As a condition of the engagement, practitioners serving as an expert witness or consultant may become subject to protective orders or confidentiality agreements. Protective orders and confidentiality or nondisclosure agreements exist to guard against the unauthorized disclosure of confidential information. Additionally, the "Confidential Client Information Rule" (ET sec. 1.700.001), which applies to litigation and dispute services, states that "[a] member in public practice shall not disclose any confidential client information without the specific consent of the client," unless the requirement is superseded by a validly issued and enforceable summons or subpoena.

Generally, client legal counsel will provide practitioners with a protective order issued by the court or an agreement between the disputing parties that requires information and data to be maintained in a confidential manner. A typical protective order requires an individual to agree in writing to maintain the confidentiality of the information produced and to protect the information from disclosure outside of the litigation process. Practitioners should carefully review and understand the terms of any agreement or order, and clarify any uncertainty with the client legal counsel, prior to signing it.[22] Practitioners engaged as experts, in particular, should fully understand any limitations on the use of data and information provided, and confirm that the agreement does not limit the development and disclosure of opinions or the basis for those opinions, as required by applicable federal or state court rules.[23]

Practitioners should carefully evaluate security, including physical and electronic access, related to confidential materials received and under practitioners' control and custody. To prevent unauthorized use or disclosure, practitioners might segregate and protect confidential documents and data, as well as practitioner-prepared documents containing such information and data. Additionally, work product containing information extracted from documents subject to a protective order or confidentiality agreement should be appropriately marked with a restrictive legend, such as "Subject to Protective

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[20] AICPA Forensic and Valuation Services Practice Aid *Serving as an Expert Witness or Consultant* (2014), pp. 9–10.

[21] *Ibid*.

[22] Staff who work on the matter may also be required to read and sign the agreement or order, as well.

[23] This is typically not an issue in a protective order issued by the court for purposes of the current litigation, but it can arise when a client drafts a confidentiality or nondisclosure agreement that does not contemplate the data and information being used by an expert witness.

Order," "Contains Proprietary Data," "Controlled Information," "Attorney/Accountant Eyes Only," or "Confidential."

Internal Firm Communications

Practitioners and other personnel employed by a practitioner's employer may send internal communications about a potential case prior to engagement acceptance. These communications are potentially discoverable; therefore, practitioners should limit the information to general facts about the case and general descriptions of work that potentially could be performed.

Scope Discussions and Documentation

Prior to official engagement on a matter, practitioners commonly have discussions with the potential client regarding the scope of the assignment. Depending on the nature and facts of the matter, these communications may be straightforward — for example, the prospect legal counsel giving clear direction on the assignment — or the communications could be more of a brainstorming exercise between practitioner and potential client. Again, because of potential discoverability and because practitioners have little or no time to develop grounded findings, any email or other written or verbal communications should avoid conclusory, pejorative, or definitive statements.

Further, during this time when the assignment scope is being determined, practitioners should keep in mind that professional standards require that practitioners "…undertake only those professional services that the member or the member's firm can reasonably expect to be completed with professional competence."[24] If a practitioner decides that the scope or limitations on scope are unacceptable, the engagement should be declined.

Engagement Proposals

In some circumstances, a potential client will request the submission of a proposal to be used in their process for hiring practitioners for a particular engagement. The type and depth of information provided in proposals can vary significantly based on the anticipated size and nature of the engagement, as well as specific requests from the engaging legal counsel or their client. Some common components of proposals include the following:

- Overview of practitioner employer firm and relevant experience[25]
- Proposed team and relevant experience
- Anticipated work plan and timeline
- Fee arrangement and proposed budget
- Client references

Proposals can be communicated in different formats. A written proposal is typically drafted and sent in letter format in a professional style (for example, on letterhead and sent in a PDF format attached to an email), but a simple written proposal can often be communicated in the body of an email. Sometimes proposals are conveyed during face-to-face (or virtual) meetings, where most information is communicated verbally, with or without an accompanying presentation. Regardless of how the proposal is communicated, information should be presented in an objective and unbiased manner.

[24] Paragraph .06 of CS section 100, "The general standards of the profession are contained in the "General Standards Rule" of the code (ET sections 1.300.001 and 2.300.001) and apply to all services performed by members."

[25] Relevant experience could include representative engagements that practitioners have been involved with in the past, however, caution should be exercised to not disclose confidential information regarding client names or matters.

Chapter 4: Retention and Planning Communications

Moving from initial retention, practitioners will communicate with the client to establish engagement arrangements, prepare budgets and work plans, and agree to invoicing practices. These matters are covered in this chapter.

Engagement Letter[26]

One of the first steps when accepting a new litigation or dispute services engagement should be the preparation of an engagement agreement, preferably in writing, through an engagement letter. An engagement letter is intended to communicate clear roles and responsibilities between practitioner and client. The engagement letter communicates to the client, from a practitioner's perspective, the work to be performed. It should include the terms, conditions, and limitations of the work or project. It clarifies a practitioner's understanding of the expectations of the client and outlines the expectations of how and when the client will pay invoices. A carefully prepared engagement letter is intended to be an enforceable contract between client and practitioner. Considerations for engagement letters include the following.

Defining the Client

An engagement letter should clearly define the client or clients.[27] If a practitioner is engaged by the client legal counsel, it should be clearly stated in the engagement letter to preserve any work-product protections afforded by the work-product doctrine, as discussed previously in chapter 2. The work-product doctrine often extends to materials prepared by a practitioner engaged and instructed by the client legal counsel, making a practitioner's engagement letter a potential exhibit in discovery disputes.

Practitioners should be cautious about communicating directly with the underlying client of the legal counsel client. A discussion of significant engagement findings or reservations may undermine the attorney work-product privilege. Usually, practitioners meet the communications standard by communicating directly with client legal counsel.

The work-product doctrine typically does not apply when practitioners are serving as expert witnesses. Practitioners should be aware that it is possible to be converted from a consulting expert to an expert witness. Once determined and disclosed, practitioners serving as expert witnesses have only limited protections from disclosure to adverse parties. Otherwise, all communications, including, without limitation, past conversations, notes, work products, files, emails, and administrative matters, are subject to discovery.

Scope of Work

The scope of work should be addressed in a practitioner's engagement letter. This includes a formal understanding about whether the role is that of a consultant or testifying expert. When describing the scope of services, it is important to strike a balance between details and overly broad expectations that can result in misunderstandings. In many cases, the practitioner's scope is unveiled as the dispute advances through the litigation proceedings.

Practitioners should be extremely cautious regarding scope limitations that could adversely affect the quality of the work and opinions to be formed. Clearly, every engagement will have limits on the amount of fees available to compensate practitioners. This is normal and typically handled using a budget prepared by practitioners and accepted by the prospective client (see Budgets as follows). However, it may be impractical, and dangerous, for practitioners to agree to perform fixed or capped fee work based on a limited understanding of the dispute or knowledge about how it may unfold in discovery. The same

[26] AICPA Forensic and Valuation Services Practice Aid *Engagement Letters for Litigation Services*.

[27] Refer to chapter 3 of this practice aid, "Identify the Client for the Engagement."

holds true for limits on what practitioners are allowed to request and analyze, the work they believe they should perform, or evidence needed to support assumptions given by the client legal counsel.

Practitioners' reputations are based on quality work, adherence to professional standards, and unbiased opinions. Certain scope limitations may impair the ability to meet these requirements. Therefore, practitioners should be steadfast and clear about the exclusive right of refusal related to unreasonable scope limitations that may put them at undue risk. A client failure to accept or respect this right may require practitioners to resign from the engagement. The practitioner's ability to terminate the engagement should be articulated within the engagement letter.

Fee Arrangements

It is also important that practitioners address fee arrangements in the engagement agreement. The name, address, and phone number for the person responsible for payment, as well as the person responsible for processing payments, should be identified in the engagement agreement — especially if the responsible party is not the client (but, instead, the underlying legal counsel client's client, or an insurance company or other third party). To avoid any perception of bias, it is prudent for practitioners to require payment in full prior to the provision of oral testimony, such as deposition or trial. Other matters related to fee arrangements may include the following:

- Frequency of invoicing
- The level of detail in the line item descriptions (some clients prefer generically worded invoice details to control when information is discovered in the proceedings, and others require very detailed descriptions recorded to the tenth of an hour to comply with court requirements)
- Invoice review, approval, objections, and remedies for contentious items
- Payment expectations
- Actions available for nonpayment, such as work stoppage or the withholding of reports or testimony

The point for fee arrangements is that they should be clearly defined by the engagement arrangements and strictly followed to protect practitioners from business and professional risk.

Timing

Before accepting a new litigation and dispute services engagement, practitioners need to gain an understanding of the timing of the work to be performed and any important dates in the litigation process. These scheduling considerations were previously discussed in the *Serving as an Expert Witness or Consultant* practice aid.[28]

If not learned before retention, practitioners should ask their client for all relevant engagement dates, including reports, schedules, and confirmed calendared events. Additionally, expectations regarding the delivery of work product should be agreed upon, recognizing that dates may change for a variety of reasons. Some practitioners include relevant dates and deadlines in the written engagement letter. Regardless, it is recommended that any important dates and deadlines be periodically checked and confirmed in writing.

[28] AICPA Forensic and Valuation Services Practice Aid *Serving as an Expert Witness or Consultant* (2014), p. 16 (Scheduling).

Terms and Conditions

Following are some terms and conditions for practitioners to consider:[29]

- Notification to the client legal counsel if a practitioner withdraws from an engagement
- Termination of the agreement
- Arbitration or dispute resolution provision, should a disagreement arise
- Limitation of damages for a party in violation of the agreement
- Provision regarding possible challenges to admissibility of practitioner's opinions
- Any relevant indemnity clause

Terms and conditions should be prepared by practitioners after consultation with the practitioners' legal counsel. Practitioners may also check with their professional liability carrier for exemplar engagement terms and language.

Discovery and Privilege[30]

Practitioners should discuss discoverability and legal privilege considerations with the client legal counsel prior to the commencement of work. Discoverability and privilege may depend on the venue (state court vs. federal court), agreement among the disputing parties, or other factors. However, despite any agreement among the parties or the advisement of client legal counsel, consideration should be given to the best way to handle all types of communications to preserve applicable privileges or prevent any undesirable discovery by other parties.

Communication Methods

Communication preferences vary based on client demand and the type and venue of each engagement. In order to prevent involuntary disclosure, some clients prefer phone calls. Alternatively, others are comfortable with emails, as long as certain rules about content and circulation are followed. Regardless of these preferences, written or saved communications, such as texts, emails, and recorded messages, may be discoverable if practitioners are serving as an expert witness and, therefore, communication preferences should be discussed with the client, agreed upon, and adhered to during the pendency of the engagement.

It is advisable that the written engagement arrangement include communication preferences agreed to by practitioners and the client. This may be in the form of a general description of the handling of certain types of communication or a more detailed set of protocols. The following communication preferences may be appropriate to include in the written engagement letter:

- Transfer and handling of materials produced, including confidential information
- Methods for secure data transfer and storage
- Receipt, processing, and security over personally identifiable information that may be legally protected
- Use of email, text, and recorded messaging services

[29] See AICPA Forensic and Valuation Services Practice Aid *Engagement Letters for Litigation and Dispute Services*.

[30] Refer to chapter 2, *FRE Article V: Privileges* for definition of *privilege*.

- Document retention policies and practices
- The completion or termination of the engagement and wrap-up procedures

As communication preferences may change over the course of an engagement, it is also recommended that practitioners periodically confirm protocols and practices or specifically ask the client about the handling of communications.

Budgets and Work Plans

Clients often seek a budget and work plan in the proposal process or before work begins. However, at the onset of a litigation or a dispute services engagement, a budget for fees and expenses may be difficult to estimate. Challenges in estimating fees and expenses can be contributed to several factors, including the early stage the discover process may be in, which hasn't yet produced all the evidence needed to make an accurate estimate; or, perhaps the work has not yet started, or there's simply an inability to predict the actions of the adverse parties in the proceedings.

Litigation and dispute services engagements are generally performed on a time and materials basis (actual time incurred at agreed upon hourly rates). This is to avoid potentially problematic scope limitations for practitioners and to recognize the attendant risks to practitioners. As mentioned previously, these types of matters may also be performed based on a fixed price or capped fee model, which should be carefully considered by practitioners.

Because practitioners rarely have all the facts or documents in their possession when preparing a budget, it may be helpful to prepare a budget and work plans using ranges or for phases of the engagement. One technique to avoid issues related to budgets and work plans is to prepare a budget and plans for an "initial phase" or "phase I" of the engagement designed to scope the work prior to committing to an estimate. Work in phase I might include preliminarily analyzing documents or interviewing the client legal counsel to allow practitioners to prepare a more accurate budget and work plan. Of course, budgets and work plans, including significant changes in estimates and plans that occur over the life of the engagement, should be timely communicated and accepted by the client.

Practitioners must be careful to not document budgets and work plans in too much detail, especially early in the engagement, as this information is available to other parties when practitioners are serving as an expert witness. Adversaries can make it problematic to a practitioners' credibility if a budget and work plan is prepared, and later it is learned that some of the planned procedures could not be performed.

Note-Taking

If notes are taken by a practitioner during phone calls or meetings, the notes should be factual in nature and should not include mental impressions. Practitioners should be aware of the possibility that notes may be discoverable[31] and adhere to their firm's policy, if any, related to the taking and retention of notes. These common practices may be memorialized in a firm's policies and procedures manual or another formalized document.

Billings and Invoice-Related Communications

Important aspects of the billing process are tracking, recording, and reporting time worked and expenses incurred on an engagement. Practitioners should have time, expenses, and billing policies, preferably in writing. Without limitation, these policies should consider the following matters:

- Procedures for requiring a retainer and whether it will be applied to current billings or held and

[31] See chapter 6 of this practice aid, "Discoverability of a Practitioner's Work Product," for additional content regarding this topic.

applied to the final invoice

- Time and expenses allowed to be charged and billed
- Timely and accurate tracking and recording of allowable time and expenses
- Controls for ensuring charging of time and expenses to the proper engagement
- Increments for time incurred (half an hour or tenth of an hour, to be determined by client or venue)
- Level of detail and information required for narratives of time incurred, recorded, reported, and billed (to be determined by client or venue)
- Form and handling of invoicing, statements of account and collections
- Handling of unbilled time and expenses
- Requirements or practices for specific case types (bankruptcy, insurance)
- Procedures for the client or responsible party to dispute any invoiced amount

In addition to having policies on time, expenses, and billing, practitioners should determine client expectations and other requirements.

Prudent business practices should be used to prepare and submit invoices to clients or other parties responsible for payment. That may require the submission of invoices for payment on a periodic (monthly) or task completed basis. In other cases, the venue (bankruptcy court) or an insurance carrier may have a specific invoice submission form and timeframe that must be complied with to receive payment. As previously mentioned, practitioners are advised to request and receive full payment prior to deposition or trial testimony to avoid an appearance of bias.

Actual billings and budgets should be monitored on a regular basis. If the scope of services changes during the engagement, practitioners should communicate with the client immediately and explain the impact on the budget. Signed acknowledgments from the client should be considered if a scope change causes a material increase to a previously communicated budget or fee commitment.

Communications With Staff and Outside Service Providers

Practitioners should discuss with the client any preferences and protocols for communicating with and among internal staff, and, if applicable, outside service providers. This discussion should include confidentiality, professional standards requirements, and applicable protective order or nondisclosure agreement obligations. As appropriate, staff and outside service providers should be informed of the practitioner’s role in the matter, either as a consulting or testifying expert, and its impact on the potential for discovery of communications.

Chapter 5: Ongoing Engagement Communication

Communication between practitioner and client is expected, and often frequent, during a litigation and dispute services engagement. Many of the considerations described in chapter 4 also apply to ongoing engagement communications. However, following are a few additional considerations and details related to ongoing engagement communication.

Teleconferences and Videoconferences

Whenever possible, it is recommended that communications with clients be done over the telephone, by videoconference, or in person. If the practitioner is an expert witness, it is necessary, in most cases, to have the client's legal counsel, or legal designee, participate to protect applicable legal privileges. This practice helps to ensure proper protection to preserve applicable legal privileges and unauthorized discovery by third parties. Care should be taken to use private, secure, and confidential communication tools for any such discussions.

Voicemail, Email, and Text Communications

Communications transmitted using voicemail, email, or text are potentially discoverable by other parties if the practitioner is in an expert witness role. As such, practitioners serving in that role must treat these types of communications with the appropriate level of care, caution, and professionalism to avoid undesirable adverse impacts on the engagement.

In a number of systems, voicemails are preserved and, in many cases, converted into written communications. Therefore, practitioners should assume that all voicemails will be recorded, retained, and potentially transcribed into text so that they might be produced to a third party outside the practitioner and client. This requires the practitioner to be extremely diligent about not saying anything to violate standards of care. Voicemails should be short, concise, factual, and to the point. Expressions of opinion, mental impressions, emotion, and other nonfactual information should be avoided.

Email is a common form of communication in litigation and dispute engagements. The same warnings that apply to voicemails apply to emails — just the facts, presented in a professional manner. Here are a few other pointers that practitioners should consider when using email to communicate in a litigation and dispute services engagement:

- Always address to, or copy, the client legal counsel or legal designee on email communications.
- Discourage the use of email to communicate important and sensitive matters; instead, use the phone.
- Avoid using personal email account addresses for privacy, security, and protection from unwanted third-party requests to access such accounts.
- Keep the content, tone, and information factual and professional.
- Restrict email communications to the fewest recipients practicable.
- Do not put anything in an email if the practitioner would not be confident and comfortable stating the information in front of a trier of fact.

Another common form of communication similar to email is text messaging. Texting has become an accepted means of communication for some clients, but it carries with it the same precautionary warnings described for voicemails and emails because they are also potentially discoverable when the practitioner is serving as an expert witness. Text messages are designed to be simple, direct forms of

communication. As such, it is recommended that practitioners use this means for simple factual sharing to confirm a client meeting.

In-Person Meetings

In-person meetings are face-to-face exchanges between the practitioner and the client over the course of the litigation and dispute services engagement. In-person meetings are often the most effective way to communicate. In addition to the hands-on nature of in-person meetings where information can be shared and reviewed together, meeting in-person allows the parties to use nonverbal communication, like body language or facial expressions. When serving as an expert witness, the practitioner should remain alert to the possibility that a third party other than the client may be able to discover the substance of the communications in any meeting. As such, in-person meetings with an expert witness should be factual in substance and avoid conversation or sharing outside the specific expert's assignment, particularly any topics regarding case management and strategy for which premature disclosure could harm the client.

Web Conferencing

Web conferencing is an umbrella term for various types of online collaboration services. This form of communication typically involves some combination of audio, video, or screen-sharing features. These technologies can increase the efficiency and effectiveness of communication by allowing all participants to view and discuss the same documents using a screen-share function. Web conferencing is subject to the same considerations as voicemail, email, and text messaging.

Engagement Management Communications

Engagement management requires that the practitioner regularly assess the progress of work, the scope of procedures, the ability to meet deadlines, and success in meeting expectations. This requires diligent communication with the client and sufficient planning to produce deliverables.

Engagement Progress

The provision of litigation and dispute resolution services can be a long process and schedules often change. This can result in extended periods of time where little or no work is performed by the practitioner pending progress of the proceedings. In these instances, it is recommended that the practitioner periodically contact the client to learn about developments and adjust the work plan accordingly.

Deliverable Planning

Practitioners need to be cognizant that the client will often request time in advance of communicated deadlines to review draft work product or reports prior to issuance. Similarly, practitioners should anticipate that the client may want to meet and prepare with them for deposition or trial. Therefore, it is important that practitioners plan to allow for this to happen.

Scope Changes

Litigation and dispute services engagements often change or evolve, which may require changes to the scope of services provided by practitioners. It is important to communicate with the client as new findings lead to new questions or additional work and procedures that will need to be performed. This is important from a case management standpoint (keep the client abreast of your findings and how they may affect your expert opinions) and a billing standpoint (keep the client informed that services outside of the budget are being performed and additional costs should be addressed). As previously discussed, practitioners should consider how best to communicate changes in the scope of services, with telephone calls or in-person meetings possibly being the best way to communicate important issues, however, noting that written communications may provide a better record for billing and collection.

Additional Information Requests

Throughout the course of an engagement, it is common for practitioners to identify additional documents or data that would be helpful, or even essential, to an analysis within the scope of the engagement. The information obtained through the discovery may need to be supplemented or work plans adjusted to consider the missing information. This should be timely communicated to the client's legal counsel, observing the same cautions noted herein. (See chapter 7 for further discussion)

Chapter 6: Preparing a Written Expert Witness Report

The AICPA's authoritative literature does not provide guidance for litigation and dispute services practitioners on procedures to be followed when preparing an expert witness report. CS section 100, for example, does not require a written form of communication between an attorney and client and does not mandate the content or form of any written report. VS section 100 includes a reporting exemption for a practitioner serving as an expert witness (although there is no exemption from the developmental provisions when a practitioner is engaged to estimate value). Expert report writing requirements, therefore, emanate from sources outside the AICPA.

The jurisdiction of the practitioner's case is critical in determining whether a written report is required or should be prepared. If the practitioner is serving as an expert witness in federal court and prepares an expert report, the practitioner will be required to provide a report subject to FRCP 26. But if the practitioner is serving as an expert witness in state court, the practitioner may not necessarily be required to provide an expert report. In New York, California, and Texas state courts, for example, a practitioner is not required to prepare a written expert report. However, if a practitioner does, in fact, prepare an expert report subject to any of those three state's respective rules, an opposing party may demand that the report be produced through discovery (although New York's state rules require a court order to produce the report).[32] In certain nonfederal jurisdictions that do not require the practitioner to prepare an expert report, even draft reports may be discoverable if the practitioner prepares an expert report. Consequently, practitioners should confer with the client attorney to understand and properly apply the jurisdictional rules for preparing a written expert report. Because the rules vary depending on the jurisdiction of each case, this chapter focuses on federal court requirements for written expert reports.

Explicit requirements must be followed in all expert witness reports subject to FRCP 26 and, over the years, certain practices for effective report presentation have been widely adopted that should generally be applicable to a wide variety of expert witness reports. This chapter incorporates the FRCP 26 requirements and, at the same time, describes practices that, although not required, practitioners commonly follow to make their reports more effective.

General Considerations for Written Expert Reports

Terms such as *opinion* or *report* have unique meanings in the accounting profession and to general users of financial statements. These terms mean something different to triers of fact, legal counsel, litigants, and other parties involved in litigation and disputes. An expert opinion or report provided as part of a litigation or dispute services engagement is different from an opinion or report issued in connection with a financial statement audit or other attestation engagement. These distinctions, together with the requirements of the FRCP, make it necessary to further explore written communications in litigation and dispute services.

First, not every expert witness assignment will require the preparation and issuance of a written report. Practitioners should ask client legal counsel to determine whether a written report is required and the form and substance of such report. If a written report is not required, practitioners may, nonetheless, want to discuss the pros and cons of documenting certain matters and anticipated oral testimony. Even when practitioners are knowledgeable about the rules of evidence and related legal reporting and disclosure requirements, they should rely on client legal counsel to determine whether a written report is needed and, if so, what report form is appropriate to use in a particular case.

Many practitioners choose to draft an expert witness report after the assignment, materials considered, work performed, bases for opinion, key assumptions, legal remedies or other matters, methods, exhibits, and opinions have been discussed and cleared by client legal counsel. However, other practitioners

[32] See N.Y. C.L.S. C.P.L.R. Section 3101(d)(1), Cal. Code Civ. Proc. Section 2034.210(c), and Tex. R. Civ. P. 192(e)(6) for these New York, California, and Texas state rules, respectively.

prefer to prepare the draft report concurrently with their ongoing discussions with client legal counsel. The FRCP does not preclude legal counsel from assisting the expert, but the expert cannot be a conduit for the opinions of client legal counsel and a practitioner shall not "subordinate his or her judgment to others," as noted in the "Integrity and Objectivity Rule." As part of this discussion, practitioners may be instructed by client legal counsel to develop the expert witness report in a manner that will facilitate settlement, or alternatively, to facilitate testimony at trial. Such requests should be reasonably accommodated.

Prior to distributing the final expert witness report to client legal counsel, practitioners may submit an initial draft of the report for client legal counsel's review to ensure that the report is accurate, consistent, complete, and in compliance with legal requirements.

On occasion, practitioners may be engaged to perform litigation and dispute services by someone other than legal counsel, such as a non-attorney client, for matters that may evolve into formal legal disputes. For example, a company may engage a practitioner to assist with the quantification and filing of a proof of claim for a loss covered by insurance, and the insurance claim could evolve into a formal legal dispute related to a number of issues. Practitioners should be cognizant that written reports and the underlying working papers, in this context, may be discoverable if litigation arises, regardless of whether a practitioner is designated as an expert witness in the matter.

In certain cases, practitioners may be asked by client legal counsel to issue a written expert witness report prior to the required disclosure dates of the proceedings. In turn, client legal counsel may use the expert witness report to negotiate a settlement or concessions from the opposing party. Even though the written report may not ultimately be presented to or evaluated by the court for a decision in the case, practitioners should treat the issued report as a formal expert witness disclosure based upon its potential use and discoverability.

Finally, practitioners should keep in mind that an expert witness report is not evidence or an otherwise admissible item in a trial. With few exceptions, an expert report is considered hearsay, and admissible oral testimony is usually required to get expert opinions considered by triers of fact. In jury trials, the expert's report is not generally introduced into evidence, and the jury will not read the actual report, unless certain exceptions apply. In arbitration hearings, the expert's report may sometimes be accepted as a substitute for the expert's live testimony as a matter of economy.

Identify the Status of a Practitioner's Work Product

If practitioners prepare and distribute drafts of an expert witness report to client legal counsel, the incomplete status of the report should be clearly and conspicuously indicted on the face of each page of the preliminary report. To do this, practitioners are encouraged to add descriptive language, typically in a header, footer, or watermark, such as "Draft," "Tentative and Preliminary," or "Subject to Change."

Also, as previously discussed, certain evidence produced to practitioners and relied upon to form opinions may be subject to confidentiality or nondisclosure restrictions, including court-ordered limitations. As such, information in or referred to in the expert witness report is confidential and subject to protection by practitioners. In these instances, practitioners should include caveats, restrictive language, or references to controlling agreements and orders in the expert witness report to avoid inadvertent disclosure of protected information. This can be accomplished, among other ways, by using cautionary language in the report or through restrictive labeling. Examples of header or footer language designed to meet this objective include "Confidential," "Subject to Protective Order," "Confidential and Privileged," or "Confidential by Court Order."

Discoverability of a Practitioner's Work Product

When a practitioner serving as an expert witness is required to produce a written report in federal court, FRCP 26 eliminates discovery of the expert's draft reports and generally protects direct communications between client legal counsel and the expert, with certain exceptions discussed as follows.[33] Despite this relief, expert witnesses should exercise caution with communications, particularly the preparation of written notes, task lists, outlines, memoranda, presentations, schedules, spreadsheets, emails, letters, summaries, and analyses that may ultimately be determined to be discoverable by the court.

FRCP 26(b)(4)(B) provides that draft expert witness reports are protected from discovery unless client legal counsel provided facts or assumptions reasonably relied upon by the expert witness. Courts define *draft reports* narrowly and have held that such things as notes, task lists, outlines, memoranda, presentations, and letters drafted by the expert or assistants are not draft reports. FRCP 26 protections do not generally extend to the expert witness's own work product, except the draft reports. For this reason, practitioners should confine analyses, theories, and opinions to their draft reports to the extent possible to help ensure protection under FRCP 26.

FRCP 26 (b)(4)(C) provides work product protection of oral, written, or electronic communications between client legal counsel and retained experts, but with certain important exceptions. The exceptions include communications that

- relate to compensation for the expert's work or testimony;
- identify facts or data that client legal counsel provided to the expert and that the expert considered in forming the opinions expressed; and
- identify assumptions that client legal counsel provided to the expert and that the expert relied on in forming the opinions expressed.

Practitioners should be aware that courts have interpreted "facts and data" as broadly discoverable. As noted by one court, facts and data subject to discovery include "anything received, reviewed, read, or authored by the expert, before or in connection with the forming of his [or her] opinion, if the subject matter relates to the facts or opinions expressed."[34]

On the other hand, if the expert witness's notes do not relate to the opinions that the expert will provide at trial, then those notes may be protected as work product under FRCP 26(b)(4)(C). For example, if client legal counsel asks the expert to prepare notes critiquing the work of the opposing party's expert witness to help client legal counsel to prepare for the deposition of the opposing party's expert, those notes might be protected as attorney work product under FRCP 26(b)(4)(C).[35]

Common Practices for Written Reports

Although it is challenging to identify every practice commonly used to prepare an expert witness report, a few are described as follows. In particular, the handling of the unique facts and circumstances of each case, the clarity and understandability of the report, the structure of the report, and quality control are briefly discussed.

Facts and Circumstances Drive Content

[33] Although direct communications between the expert and client legal counsel are generally protected, communications between the expert, the expert's staff, and other non-attorneys are not protected, even if client legal counsel is copied on those communications. For example, *Republic of Ecuador v. Bjorkman*, 2013 U.S. Dist. LEXIS 909 (D. Colo. Jan 3, 2013).

[34] *United States v. Dish Network, L.L.C.*, 2013 WL 5575864, at *2, *5 (C.D. Ill. Oct. 9, 2013).

[35] For example, *Int'l Aloe Science Council, Inc. v. Fruit of the Earth, Inc.*, No. 11-2255, 2012 WL 1900536, at *2 (D. Md. May 23, 2012).

Each case has a unique set of facts and circumstances that drive the content of the expert report. Accordingly, practitioners should prepare each expert witness report carefully and tailor them to account for each matter's facts and circumstances. Conversely, practitioners should avoid "copy and paste" language, unless it accurately and appropriately reflect the actual facts and circumstances of the matter at hand.

Write Reports Clearly and in Plain English

An expert witness report should be accurate, complete, and compliant with legal and administrative requirements. They also should be truthful, accurate, clear, concise, convincing, understandable, well organized, and appropriately referenced. Expert reports should be written in plain English, avoiding overly technical narrative and jargon. Complex subjects or analyses are usually best communicated by supplemental demonstratives, such as an exhibit, chart, table, graphic, or copy of evidence.

Expert reports should exclude unsupportable statements or assumptions, guessing, and speculation. Hedge words or phrases, such as "partially," "a little," or "somewhat," are rarely effective and can be construed as ambiguous and uncertain. Likewise, terms of certainty, like "always" and "never" should be avoided because it is often difficult to support the absence of any other possibilities.

Report Structure

To make the expert witness report logical and, therefore, easier to follow, practitioners should consider the following:

- Provide a title page or heading that lists the formal case caption, court of jurisdiction, case docket number, expert name (and contact information), and date of the report.
- Use sequential numbering for pages, lines, paragraphs, footnotes, demonstratives, and associated exhibits and appendixes.
- Major topics will be labeled with a title that is referenced to a table of contents, especially for reports with many pages and topics.
- Demonstratives are headed with the formal case caption, court of jurisdiction, case docket number, expert name, date of the report, demonstrative identification, and title.

Because expert witness reports can, at times, be lengthy and difficult to digest, many practitioners prefer to provide a summary of opinions in the front part of the report before disclosing the details. This provides context to the work and reporting. In addition, practitioners may include references to evidence or source documents in the body of the report or in footnotes. These citations provide sources for facts, figures, data, and other information referred to in the report and may also make it more convenient for the expert to locate sources in deposition or while under cross-examination. An expert who quickly finds support for communicated information when questioned may be perceived by the trier of fact as a more convincing witness.

Quality Control

Because of the importance of expert witness work to the decision-making process of triers of fact, quality is essential. That means that practitioners must have robust quality control over their work product, reports, exhibits, disclosures, and opinions. As a reminder, the "General Standards Rule" ensures quality through the following standards, among others:

> A member shall comply with the following standards and with any interpretations thereof by bodies designated by Council.

a. *Professional Competence*. Undertake only those professional services that the member or the member's firm can reasonably expect to be completed with professional competence.

b. *Due Professional Care*. Exercise due professional care in the performance of professional services.

c. *Planning and Supervision*. Adequately plan and supervise the performance of professional services.

d. *Sufficient Relevant Data*. Obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.

Inherent in these rules is a requirement that practitioners evaluate their knowledge, skills, education, experience, and training relevant to each assignment to determine whether the prerequisite professional competence exists to accept the engagement and perform the assigned litigation and dispute services. The code requires the work to be executed with the due professional care of a reasonably prudent person having professional competence to perform the work. Practitioners are also required to sufficiently plan and supervise the performance of services by persons under their direct control and to obtain sufficient reliable data as the foundation for professional opinions tendered.

To ensure a complete and effective quality control process, practitioners may employ the following techniques, among others:

- Prepare and comply with a quality control policy designed to meet the standards.
- All work performed is directed and controlled by the practitioner serving as the expert witness.
- Practitioners have qualified supervisory personnel review work performed by less experienced personnel, including spreadsheets, calculations, research, memoranda, and draft deliverables.
- Deliverables, including expert witness reports, are
    - read (in some cases, out loud in a calling exercise), referenced to source evidence, internally cross-checked, recomputed, proofread, and spell-checked by an adequately experienced engagement team member or the practitioner.
    - read and reviewed by a qualified and experienced professional sufficiently removed from the work to be objective and independent.
    - discussed with client legal counsel prior to issuance or disclosure.

Accordingly, quality control in this environment requires professional competence, due professional care, sufficient planning, and timely supervisory oversight to prevent errors and mistakes. It also requires that practitioners plan the expert witness report-writing process with sufficient lead time to review, test as appropriate, and carefully proofread the work product to ensure it is accurate, consistent, and complete. Although there are helpful computer tools, such as automated formula checks and spell checks that can be used to identify and correct certain errors, such tools should not be the sole means of correcting errors.

Elements of a Written Expert Report

Expert witness reports in a federal court case should contain the following sections, with mandatory FRCP 26 disclosures identified and each section further detailed as follows:

- Table of Contents

- Executive Summary
- Background
- Assignment
- Qualifications, including past 4 years of testimony and 10 years of publications (mandatory)
- Opinions (mandatory)
- Materials Considered (mandatory)
- Work Performed and Bases for Opinions (mandatory)
- Expert Compensation and Fees (mandatory)
- Expert Signature (mandatory)
- Exhibits (mandatory)

The specific names given to these sections, the order of presentation, and the means of disclosure can vary depending on the facts and circumstances encountered in each case.

Table of Contents

The table of contents identifies the sections of the expert witness report in the order of each corresponding page where the section begins. The table of contents may aid practitioners in organizing the report into a logical and cogent flow. It also assists readers in identifying topics covered and the location of subject matter. A table of contents is recommended for lengthy written reports but may not be necessary for shorter reports.

Executive Summary

Although optional, an executive summary briefly gives context to the parties, dispute, issues, and claims. It also usually summarizes the assignment, most convincing evidence, key assumptions, foundation, and opinions offered. This concise summary expedites an understanding of the expert report and how it may be used to resolve certain issues in dispute.

Background

Although not required by the federal rules, a description of the background of the case, including the disputing parties, issues in dispute, claims, and relief sought, provides context for the reader of the expert witness report to better understand the role practitioners are serving in the dispute, the assignment undertaken, and the opinions expressed. Practitioners should be clear that background information is intended to assist the reader in more clearly understanding the expert report and that it does not represent findings of fact or law.

As a general rule, practitioners should discuss the inclusion of a background section in the expert report with client legal counsel. Agreement should be reached on topics and content. Practitioners should also discuss and agree on the level of detail to be included, including references to specific court filings and pleadings or any description of the positions of the disputing parties.

Assignment

In the assignment section of the expert witness report, practitioners may describe the following matters, without limitation:

- Who engaged the expert witness

- What the expert witness was engaged to do
- Any key assumptions the expert witness has been asked to adopt by client legal counsel
- Any limitations or restrictions on the work

The party engaging the expert witness will likely be the client legal counsel who engaged the practitioner on behalf of one of the disputing parties. The assignment description is a brief description of the work for which the practitioner was retained, such as analyzing the evidence to determine the amount of damages suffered by one of the disputing parties.

It may also be appropriate to disclose any key assumptions provided by client legal counsel. A common assumption that practitioners are asked to adopt is that actual liability and causation will be found by the trier of fact when engaged as a damages expert. If so, practitioners may find it clarifying to state that damages were independently estimated based on the assumption of liability and causation and that the practitioner has no opinion on these matters because they are legal issues.

Lastly, if the assignment is subject to limitations or restrictions in scope or other areas, practitioners should disclose those conditions. Limitations and restrictions may be encountered when client legal counsel requests certain work not be performed, requested evidence is not produced, or fact witnesses have not yet been deposed, among many other reasons.

Reliance on Other Experts, Witnesses, or Facts or Data

In reaching opinions, practitioners may need to interview, consult with, or rely on the client, another expert, or others. For example, practitioners might rely on an industry expert to provide essential expertise for the expert witness to calculate damages. Rule 703 of the FRE permits an expert witness to rely on another expert, witness, or other facts or data, as appropriate, provided that the matters relied upon are the "kinds of facts or data" that "experts in the particular field would reasonably rely on." Practitioners relying upon others for facts, data, information, or assumptions used as a basis for an opinion should consider disclosing this fact in the written expert report. Practitioners should also discuss the suitability of using the work of another, or other facts or data, with the client legal counsel.

Integrity and Objectivity

Client legal counsel is required to represent an underlying client as an advocate. Conversely, practitioners serving as expert witnesses are obligated to be objective and free from bias in the performance of work and concerning the expression of opinions. Practitioners must remember that they are not advocates for their clients but advocates for their opinions and underlying work. An expert witness needs to maintain integrity and objectivity at all times during the engagement and not become the client's advocate.[36] A practitioner's role as an expert is to form objective professional opinions based on facts or hypotheses. When serving as an expert witness, a practitioner needs to present and defend his or her position with strength and conviction.

Independence

Independence is not required to perform litigation and dispute services. This is set forth in the "Independence Rule" (ET sec. 1.200.001) of the code. However, a lack of independence may create the perception that the expert witness is biased, which can be used by opposing parties to impeach practitioners' credibility and reliability in the eyes of the trier of fact. Additionally, practitioners should be aware that the "Nonattest Services" interpretation (ET sec. 1.295.140.04) of the code and the Sarbanes-

[36] Members are required to comply with the "Integrity and Objectivity Rule" (ET sec. 1.100.001) of the code: "In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others." If practitioners are unqualified to serve as an expert in a case, they should immediately inform client legal counsel and decline the engagement.

Oxley Act of 2002 may preclude practitioners from providing expert witness services to audit and attestation clients.

Qualifications

Practitioners are required by FRCP 26 to disclose personal qualifications to render opinions. This requirement is typically satisfied by practitioners producing a curriculum vitae or resume and by including a description of skills, knowledge, experience, education, and training relevant to the assignment and opinions rendered for the matter at hand. If education, work experience, professional licenses and certifications, professional affiliations and positions, teaching experience, awards, or other items are to be used to qualify the expert, then these things are to be disclosed in the expert report.

The federal rules also require an expert witness to produce a list of all publications authored in the previous 10 years and all other matters in which the expert witness has testified in the past 4 years, at trial or by deposition. Practitioners should provide complete citations for these disclosures in sufficient detail to allow others to seek and obtain the information, if desired.

Practitioners often satisfy these requirements by including an attachment to the expert report, such as an exhibit or appendix. Practitioners may choose, however, to also include a section in the report that summarizes this information.

Practitioners should be aware that once they are disclosed as an expert witness, opposing legal counsel or other interested parties will likely scrutinize his or her reputation, published works, and prior testimony and opinions, as well as any other factor that might be relevant to the current case. Practitioners should also be aware that there are reporting services that specialize in providing subscribers with intelligence from publicly available sources about the qualifications, challenges, exclusions, and opinions of experts.[37] Practitioners should expect that opposing parties will seek such information to find inaccuracies or inconsistencies in reported qualifications. In turn, opposing parties may use any issues discovered to challenge qualifications or to discredit, exclude, or limit the practitioner's expert testimony.

For further guidance on the "Qualifications" section of the expert witness report, practitioners should refer to the exhibits in this chapter.

Opinions

FRCP 26 requires an expert witness to disclose a "complete" statement of all opinions to be expressed at trial. It is critical that the expert witness identify and report "all" opinions to be tendered in order to prevent the exclusion of an opinion during trial by the court. This includes primary opinions, summarized opinions, and any underlying or supporting opinions. As it relates to the term *complete*, practitioners should be aware that judges in certain unusual situations, particularly bench trials or arbitrations, may replace the expert witness's direct testimony with the written expert witness report. In this situation, the examination of the expert on the stand will be limited to cross-examination, re-direct, and re-cross examination. This underscores the need for all expert opinions to be completely expressed in the report. In connection with the requirement that "all" opinions be disclosed, this means if practitioners intend to offer six opinions at trial, all six opinions must be fully disclosed in the written report. Otherwise, the expert witness may be barred from offering any previously undisclosed opinions at trial.

To comply with FRE 702, a practitioner's opinions must be helpful to the trier of fact to determine the resolution of a fact or issue in dispute. Although helpfulness is subjective, practitioners should consider

[37] Among the companies offering products and services for researching expert witnesses are Expert Witness Profiler, LLC, LexisNexus, and Thomson Reuters. A leading source of information on experts and the admissibility of expert witness testimony is Daubert Tracker™ available through the AICPA, Westlaw, and LexisNexus. For further information on researching expert witnesses, see the whitepaper, *Finding and Researching Experts and Their Testimony*.

avoiding the following actions and testimony that may be perceived as unhelpful to the trier of fact (not all inclusive):

- Speculating or guessing
- Bragging, puffing, exaggerating, or selling
- Making statements that appear biased (toward the client)
- Acting or speaking as an advocate (for the client)
- Performing computations or calculations that are easily determined from the evidence or that do not require expert testimony for the trier of fact to understand
- Repeating or reading facts from evidence not related to expert witness's assignment and opinions
- Adding irrelevant commentary;
- Characterizing conduct as, without limitation, "irresponsible," "unethical," "unscrupulous," or "dishonorable"
- Opining on any party's motives, intent, or state of mind
- Saying that a party, without limitation, "must have known," "should have known," or "clearly understood" a fact or conclusion to be drawn from the evidence

A court might consider any or all of these kinds of testimony to be personal and subjective, which are deemed unreliable under FRE 702 and irrelevant, prejudicial, and misleading under FRE 403. And practitioners must not express opinions outside the scope of their expertise. Accordingly, practitioners must also not express a legal opinion or conclusion, unless appropriately qualified as licensed attorneys to offer such an opinion. In all cases, practitioners should confirm with client legal counsel that opinions to be offered in the expert witness report are within the scope of the expert witness's professional qualifications and expertise.

Supplementing or Amending an Expert Report

FRCP 26(e)(1) requires an expert witness to supplement or amend a written report if (1) "in some material respect the disclosure or response is incomplete or incorrect"; (2) "the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing"; or (3) "ordered by the court." The federal rules envision that the parties will agree to a schedule to supplement written reports of experts. Without agreement of the parties, FRCP 26 states that supplemental disclosures will occur at least 30 days before trial.

In most cases, discovery is in process on the expert witness report disclosure date. Therefore, practitioners should acknowledge that reported opinions, analyses, and findings may be affected by the future discovery and production of relevant documentary and testimonial evidence or the performance of additional procedures. To make this fact clear to readers of the expert witness report, practitioners may want to include a statement in the report describing these conditions and limitations. When significant work is performed by practitioners after the issuance of the expert witness report, or material evidence is produced relevant to opinions expressed, practitioners, in consultation with client legal counsel, should prepare and disclose these matters in an updated supplemental report.

Despite robust quality control, it is possible for an expert report to be issued with errors, mistakes, omissions, or unwanted content. For insignificant issues, such as minor typographical errors, incorrect citations, omissions from lists of materials considered, page number problems, and the like, practitioners should discuss the matters with client legal counsel and jointly agree on the severity of the issues and a course of corrective action to be taken, if any. In most cases, immaterial issues will remain uncorrected (or perhaps undetected), but practitioners must be prepared to explain to an opposing party the cause of the issues and any impact on the reliability of the work and conclusions. Significant matters should prompt an immediate response from practitioners, to include, without limitation, a discussion with client

legal counsel, correction of the issues, and reissuance of the report in an amended or supplemental disclosure.

Undisclosed Opinions Offered During Deposition

Given the FRCP 26 requirement to present a "complete statement of all opinions" in the expert witness report, it is ill-advised to provide testimony during a deposition that adds to, or materially modifies, opinions previously reported. During a deposition, an expert witness is permitted to clarify and elaborate upon the opinions expressed in the expert witness report in response to a relevant inquiry, and an expert witness may expand upon his or her report statements in response to an opposing expert's report. However, if an expert provides deposition testimony that offers new or significantly different opinions from those documented in a timely disclosed written expert report, there is a risk that the court may later exclude that testimony and those opinions as improper and inadmissible.

During an expert witness's deposition, practitioners should expect opposing legal counsel to attempt to elicit testimony that will result in a narrowing, restriction, or limitation of the relevance, scope, or applicability of opinions to be offered by the expert witness in trial. These types of questions are usually used to prepare motions to prevent or limit the expert from testifying in trial. This underscores the need for practitioners to ensure that all opinions expected to be communicated at trial are complete and clearly stated in the expert witness report.

Materials Considered and Exhibits

FRCP 26 requires practitioners to include in the expert report the materials considered or "the facts or data considered" by the expert "in forming" "opinions" and "any exhibits that will be used to summarize or support them." The facts of a case are the foundation for opinions. Sometimes facts are not disputed, and opposing experts draw different conclusions from them. In other instances, disputed facts exist, and practitioners accept a certain version as true. In either situation, practitioners should make clear the facts relied upon in the report.

Practitioners generally satisfy the "facts or data considered" disclosure requirements by preparing a separate attachment to the expert witness report that identifies the materials considered referenced to Bates numbers or some other unique identifier. However, practitioners may also choose to include a section in the expert witness report that summarizes to disclose materials considered. Likewise, exhibits expected to be used at trial can be inserted into the text of the expert witness report or separately attached.

FRCP Committee notes reflect that any evidence given to an expert witness by client legal counsel is potentially discoverable and that work-product or attorney-client privilege would not apply. Therefore, practitioners should employ a rigorous process to inventory, index, and appropriately disclose facts, data, or other information produced by client legal counsel and received by the expert witness, regardless of whether the expert witness believes the materials are relevant.

The requirement to disclose facts or data "considered" can be interpreted broadly and, as such, practitioners must be careful to preserve or document anything prepared or researched while completing an expert witness assignment. This concept may be more expansive than just materials "relied upon" to form opinions, such as information the expert witness obtains by performing internet searches. Therefore, practitioners should consult with client legal counsel to get instructions on what is to be preserved and ultimately disclosed under the federal rules.

The admissibility of evidence relied upon to prepare an expert witness report may become an issue during the dispute resolution proceedings. Accordingly, practitioners should consult with client legal counsel to confirm the admissibility of evidence to be relied upon by the expert witness and the actions to be taken by client legal counsel to have the court allow admission, such as the authentication of key evidence. For example, practitioners may prepare an analysis of a company's internal cash flow

schedules, but another witness may be required to establish a foundation for reliance by testifying about how and when the subject documents were prepared.

Practitioners should think carefully about how opinion testimony might be better explained or clarified using exhibits at trial. This can be challenging because discovery has not concluded and, often, final trial presentation strategies have not been decided by client legal counsel. For these reasons, it is recommended that practitioners consult with client legal counsel on exhibits to be potentially used at trial so that they can be prepared and incorporated into the expert witness report. Exhibits might include the following types of items, without limitation:

- Summarized depictions of opinions (such as a summary of damages schedule)
- Schedules, spreadsheets, or tables
- Charts, graphs, scatter diagrams, or flow documents
- Photos, pictures, or drawings (such as blueprints)
- Timelines, critical paths, or project management key milestones
- Copies of documents or excerpts of deposition testimony
- Excerpts of treatises, generally accepted guidance, or standards

The level of detail included in exhibits should be confirmed with client legal counsel. At a minimum, each exhibit should be properly labeled, source evidence cited, pages sequentially numbered, and any footnotes integral to a full understanding included.

Work Performed and Bases for Opinions

In addition to disclosure of all opinions and the facts and data considered, together with any exhibits to be used in trial, FRCP 26 requires that an expert witness describe the work performed to reach opinions and reveal the bases for such opinions. A description of work performed may vary in details, but each opinion should clearly be able to be linked to why the work was done, how the work was done (see "Applicability of the Daubert Standard" in the following paragraph), and the results of the work performed. The results of the work performed, together with the evidence relied upon, form the bases for opinions offered. In essence, practitioners are required to disclose the work performed and to ensure that the evidence used is adequately explained and is sufficient to support any opinions expressed in the expert witness report.

Applicability of the Daubert Standard

As discussed in chapter 2, practitioners must ensure that the work performed complies with the *Daubert* standard, as conveyed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This standard is contained in FRE 702 and is applied by the trial judge to make a preliminary assessment of whether an expert witness's scientific or technical testimony is based on reasoning or methodologies that are valid and can properly be applied to the facts at issue in the case. State courts and other venues often employ similar gate-keeping rules. Under the *Daubert* standard, a court may consider the following factors to determine whether a methodology used is valid and, therefore, admissible:

- Whether the theory or technique in question can be and has been tested
- Whether it has been subjected to peer review and publication
- Its known or potential error rate
- The existence and maintenance of standards controlling its operation
- Whether it has attracted widespread acceptance within a relevant scientific community

Practitioners should be aware that courts may exclude or limit an expert witness's testimony due to a failure to sufficiently demonstrate that the work performed, evidence used, and methodologies employed were relevant and reliable to adequately support the expert opinions intended to be expressed at trial. Reasons given by the courts for excluding or limiting an expert witness's testimony include the following, without limitation:

- The opinions to be expressed at trial were not based on sufficient facts or data.
- The underlying assumptions used to form the opinions were unreliable.
- The methodology employed was unreliable, novel, or inappropriate based on the facts.
- An insufficient explanation for how opinions were reached.

To avoid potential exclusion or limitation of expert witness testimony, practitioners should carefully consider the work to be performed, evidence to be relied upon, and assumptions to be used to reach opinions. This may lead practitioners to do more work to be able to rely upon materials and assumptions provided by client legal counsel or the underlying client.[38] This does not necessarily mean that doing more work or reporting additional details in the expert report produces a better disclosure. On the contrary, the concept of "less is more" often applies, and practitioners should carefully balance the sufficiency of work performed and disclosures applicable to FRCP 26 requirements and the *Daubert* standard.

Expert Compensation and Fees

FRCP 26 requires the expert witness to disclose the expert witness's compensation. This is typically accomplished with a disclosure in the written expert witness report. FRCP 26 does not specify how compensation is to be disclosed or the details of such compensation. As such, there is disparity in practice regarding whether this disclosure means the total amounts incurred, amounts invoiced, estimates to complete, billing rates of the expert witness, or billing rates for anyone who charged time to the engagement. If practitioners have concerns about this disclosure, client legal counsel should be consulted. Practitioners may choose to comply with this rule by reporting just the billing rates included in the litigation and dispute services engagement letter or invoices. However, practitioners should remember that an opposing party is likely to be entitled to have access to billing information produced through discovery.

Expert Signature and Date

The expert witness report containing the opinions intended to be expressed at trial must be signed by the expert witness under FRCP 26. Practitioners must also provide a date on the expert report, which is usually the date of issuance to client legal counsel. Practitioners should be advised, however, that client legal counsel may not produce the expert report immediately, depending on the facts and circumstances of the case and applicable disclosure date agreements. It is unusual for practitioners to have the organization they work for sign an expert report because individuals are required to testify and may be subjected to cross-examination. Therefore, if a practitioner is a partner, director, or in some other position authorized to sign reports, the individual expert witness must sign the expert witness report, not the firm or organization. Practitioners who sign an expert witness report ultimately take full responsibility for the opinions expressed and the other contents of the expert report.[39]

Although, as a practical matter, only one individual is normally engaged as a testifying expert witness to take full responsibility for an expert report, courts have permitted experts to co-author and co-sign a single, jointly prepared expert report under certain circumstances.[40] This is rare, and practitioners asked to prepare and deliver a jointly signed expert witness report should be clear and conspicuous about what work and opinions belong to each individual expert witness if they differ at all. In one case, a court excluded a joint report because the two signing experts alternated between "I" and "we" when referring to

[38] FVS Practice Aid, *Attaining Reasonable Certainty*, chapter 2, "Client-Supplied Information."

[39] For this reason, practitioners refer to "my work," "my analyses and findings," and "my expert opinions" in the expert witness report, rather than to "our work," "our analyses and findings," and "our expert opinions," even though assistants may have helped to prepare the report.

[40] For example, *Barker v. Valley Plaza*, No. 12-4147 (10th Cir., Sept. 17, 2013).

the expert opinions in the report, a practice that made it "difficult, if not impossible, to determine which witness is offering an opinion on what subject."[41]

Distribution of Written Expert Reports

Expert witness reports may be produced to a number of parties involved in a case. Practitioners should only issue an expert witness report directly to client legal counsel and no other party, unless specifically instructed to do so by client legal counsel. Client legal counsel will then decide who will receive a report and the timing for production. In addition to practitioners' client legal counsel, other potential recipients may include client legal counsel's client and advisers, opposing legal counsel and advisers, and the trier of fact. To avoid the risk that the expert witness report can be used for any other purpose than the dispute at hand, practitioners should consider adding restrictive distribution and use language to the expert witness report, either in the body of the report or in the header or footer sections.

FRE 702 does not prescribe an exact date during discovery when an expert witness report must be produced. Absent a court order or stipulation by the parties, expert reports are due 90 days before trial. Practitioners engaged to rebut the testimony of an opposing expert witness have 30 days after disclosure of an opposing expert's report to submit a rebuttal report, unless otherwise agreed to by the parties. Practitioners retained to offer both affirmative opinions and rebuttal opinions may draft two reports. The report containing the affirmative opinions will be disclosed first, then the rebuttal report will be disclosed within 30 days of the disclosure of an opposing expert's affirmative report. Rebuttal reports are required to follow the same FRCP requirements as other expert reports. In some circumstances, an expert may have the opportunity to issue a rebuttal report to an opposing expert's rebuttal report, which is called a surrebuttal report.

[41] *Dan v. United States*, 2002 WL 34371519 (D.N.M. Feb. 6, 2002).

Chapter 7: Consulting Expert Communications and Reports

Role of the Consulting Expert

A practitioner may be hired as a consulting expert in a litigation and dispute services engagement. Although the practitioner's role may change over time from a consulting expert to an expert witness, the defining characteristic of serving as a consulting expert is that the practitioner is not engaged to provide testimony or reports as an expert witness in trial (as discussed in chapter 6). The scope of duties for a consulting expert is not defined in detail by the federal rules like those applicable for an expert witness.

A consulting expert performing work in a litigation and dispute services engagement may be asked by client legal counsel to do any work suited for an adviser to client legal counsel and the underlying client. Consulting experts are often asked to provide insights to client legal counsel about the facts, issues, and strategy of the case and to provide subject matter expertise. The consulting expert usually works with client legal counsel to analyze documents produced as well as the arguments and support of any opposing experts in the matter, provide insight into the strengths and weaknesses of the case, and help strategize how key facts and issues should be presented at trial.[42] The consulting expert may also be asked to assist with fact and expert witness deposition preparation. A consulting expert does not issue a report to the court or provide deposition or trial testimony. As discussed later in this chapter, the consulting expert's engagement letter should memorialize the type and manner of work to be performed and related communications.

By design, a consulting expert may never be named or disclosed to an opposing party or the trier of fact. Under such circumstances, the consulting expert's work product, discussions, and correspondence with client legal counsel are generally shielded from discovery under the attorney work product doctrine. However, if the consulting expert is later designated as an expert witness, such information will likely become discoverable.[43] Accordingly, if there is uncertainty concerning the possibility that practitioners' roles will evolve from consulting to testifying expert, practitioners should approach the engagement as if they will be designated as an expert witness. This helps ensure that communications, drafts, reports, and discussions are handled in an appropriate manner.[44]

Applicable Standards

Practitioners engaged as consulting experts in litigation and dispute services engagements are subject to CS section 100, as discussed in chapter 2.[45] During the performance of work as a consulting expert, practitioners are also subject to the code, including the "General Standards Rule."

Engagement Considerations

Practitioners should keep the "Understanding with client*"* general standard, found in CS section 100, top of mind during engagement acceptance and engagement. Practitioners pursuing an engagement as a consulting expert should inform client legal counsel that scope expansion is possible (and usually expected) and that the engagement can be significantly affected if such an expansion occurs. Such conduct demonstrates practitioners' efforts to establish an understanding with the client and readiness to modify that understanding if circumstances warrant.

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[42] *Litigation and Dispute Services Handbook: The Role of the Financial Expert*, Third Edition at 1.17.

[43] *Ibid*.

[44] *Litigation and Dispute Services Handbook: The Role of the Financial Expert*, Third Edition at 1.17.

[45] CS section 100 at paragraph .05(d), "Transaction services, in which the practitioner's function is to provide services related to a specific client transaction, generally with a third party. Examples of transaction services are insolvency services, valuation services, preparation of information for obtaining financing, analysis of a potential merger or acquisition, and *litigation and dispute services*." [*Emphasis* added.]

Roles for the Consulting Expert

A practitioner engaged as a consulting expert may serve many roles. General litigation support and serving as a technical adviser are two examples of typical roles a practitioner may fill as consulting experts.

General Litigation Support Role

Practitioners may also be hired to provide general guidance and insight on a variety of issues that fall into the bucket of "general litigation support." This role contemplates that practitioners have a solid command of how matters are handled in litigated proceedings, including discovery, case strategy, witness preparation and handling, legal privilege, evidence and testimony admissibility, damages, convincing and compelling presentations, and courtroom exhibits, among other matters. In this role, client legal counsel also demands domain expertise, typically in the areas of accounting, auditing, finance, financial forensics, financial reporting, economic damages, data analytics, technology, contractual compliance, electronic discovery, and industry, without limitation.

Technical Advisory Role

Litigation and dispute services engagements commonly involve complex accounting and financial issues, fraud, waste and abuse, complicated business organizations and ownership structures, enterprise or asset valuations, industry nuances, or other matters requiring consultation with a subject matter expert. Practitioners serving as consulting experts may be engaged by client legal counsel to provide subject matter expertise on one, or many, discrete issues during the dispute resolution proceedings.

Assignments for the Consulting Expert

Practitioners may be asked to undertake a number of different assignments to assist client legal counsel, depending on the roles they are engaged to play in the case. Some common assignments include preparing a complaint, conducting discovery, preparing witnesses expected to testify in the legal proceedings, and preparing for and assisting client legal counsel at trial. Each of these assignments is discussed more fully as follows.

Assisting With the Complaint

On occasion, consulting experts can be engaged prior to the commencement of formal litigation to assist client legal counsel with the preparation of the complaint or demand. A complaint must have a reasonable basis for claims made. Client legal counsel may press the consulting expert into service to identify and validate statements and facts used as the basis for such claims. In addition, client legal counsel may ask the consulting expert to perform the following tasks, among others:

- Drafting the complaint or demand and any subsequent amendments
- Preparing an early case assessment to estimate timing, resource needs, costs, and potential case outcomes
- Computing estimated damage ranges
- Researching persons, facts, and other matters
- Assisting with case strategies
- Locating potential expert witnesses
- Assessing strengths and weaknesses of the case
- Identifying applicable standards, laws, rules, and regulations relevant to the case

- Drafting orders, motions, interrogatories, admissions, stipulations, discovery requests, and other filings

At this stage in the litigation proceedings, discovery has not yet started. Therefore, practitioners should appropriately qualify any findings as preliminary and based on the limited information reviewed.

Communications with client legal counsel during the pre-complaint phase should be objective and unbiased as practitioners may later be designated as an expert witness and subject to discovery. Practitioners should avoid accusatory language regarding alleged conduct because this may later impeach the expert witness's credibility.

Discovery

During the discovery phase of formal litigation, the consulting expert may have significant opportunity to provide service and insight to client legal counsel. Discovery allows the disputing parties to learn information from the opposing party so that each party is prepared to present the case at trial. Pre-trial discovery activities include admissions, interrogatories, depositions, requests for production, and petitions and motions to compel discovery.[46] Practitioners may be asked by client legal counsel to assist with all of these activities.

Admissions and Interrogatories

Admissions are written agreements between the disputing parties on undisputed facts. *Interrogatories* are written inquiries provided from one disputing party to another. A practitioner serving as a consulting expert may be asked by client legal counsel to assist with the preparation of admission or interrogatories, particularly if these discovery mechanisms require specialized skills resident with the expert.

As discovery in the case continues, the production of documents and information may overlap with scheduled depositions or witness interviews. Practitioners may need to respond quickly and succinctly to new productions as soon as possible. As always, practitioners should provide realistic expectations to the client regarding the amount of time it will take to review a production and provide feedback.

Like document requests, consulting experts are often asked to assist with drafting or responding to interrogatories. Interrogatories are written questions exchanged between parties to gain further understanding concerning the facts of the case, discovery requests, or other information. Often, document productions made during discovery will require additional clarification concerning their context, ordering, or interpretation. Interrogatories can be used to gain an understanding of the information and documents received in discovery. This will assist with the review and use of the information as well as provide insight into other documents or information that should be requested.

Depositions

During discovery, opposing parties are generally given the opportunity to question witnesses under oath using a deposition. A deposition is the process in which opposing counsel asks a witness questions to be answered orally under oath and recorded verbatim by a court reporter. Depositions generally take between four and eight hours to complete and are often limited by jurisdictional rules or agreements between the disputing parties. Practitioners serving as a consulting expert may be asked by client legal counsel to assist with the preparation, participation, and post-deposition analysis of testimony related to depositions.

A practitioner serving as a consulting expert can facilitate depositions being taken by the client in the following ways, among many others:

[46] Refer to Black's Law Dictionary for definitions.

- *Identifying key witnesses*. Based on the relevant qualifications of the consulting expert, they are often well-suited to identify key witnesses to assist with discovery. For example, practitioners familiar with financial reporting roles may be able to identify a person critical to a process associated with the matters in dispute. This may also relate to organizational witnesses subject to deposition under FRCP Rule 30, FRCP 30. The consulting expert may be helpful in identifying the appropriate designated offer, director, or managing agent to depose.
- *Preparation for deposition*. As depositions are scheduled, the consulting expert may be asked to work with client legal counsel to prepare for a deposition. The consulting expert may be asked to educate client legal counsel on technical concepts; interpret the relevance, value, and weight of evidence; or research areas for exploration. The consulting expert may also be asked to draft deposition questions for witnesses (both fact and expert) for consideration.
- Attendance at the deposition. In some cases, the consulting expert may be asked by client legal counsel to attend the deposition of a witness. This is usually requested when a witness is expected to testify to technical topics that require responsive inquiries during the deposition and for which the consulting expert has the expertise to interpret such answers and consult with client legal counsel on appropriate responses in real-time.
- Analysis of deposition testimony. Practitioners are frequently asked to read and analyze transcripts of witness deposition testimony, especially for technical or expert witnesses sharing the same professional qualifications as the consulting expert. Any errors, mistakes, or inaccuracies are then brought to the attention of client legal counsel for an appropriate response.

Depositions are an important part of the discovery process, and the consulting expert can be a valuable resource for client legal counsel.

Requests for Production

Requests for production are demands sent to an opposing party for the production of information prior to trial. Practitioners are often asked to assist drafting certain requests related to the consulting experts' subject matter expertise. When assisting with requests for production, practitioners should consider the following evaluation elements, without limitation:

- *Relevance*. The information requested should be relevant to the issues identified in the complaint.
- *Time period*. The scope should be limited to the relevant time period for the issues in dispute and associated events.
- *Undue burden*. Production should be limited to information that does not cause an undue burden to the producing party.
- *Overly broad*. Requests should be sufficiently specific and narrow to allow the producing party to clearly understand precisely what is to be produced.

Practitioners may also be asked to analyze certain materials produced to ensure they are relevant, complete, and responsive.

Trial Assistance

If a consulting expert is not designated as an expert witness, he or she may continue in a supporting role as the case progresses to trial. Without limitation, a consulting expert may provide client legal counsel with support in the following areas:

- *Trial preparation*. The consulting expert may be asked by client legal counsel to assist with preparation for trial. This may include, among other things, the finalization of strategy, the identification of key evidence to be presented, and the preparation of witnesses.
- *Opening and closing statements*. When the facts at issue in the case are heavily focused on technical topics familiar to the consulting expert, practitioners may assist client legal counsel on how to best present these matters in the opening and closing statements.
- *Demonstratives and exhibits*. The consulting expert may be asked to develop and create courtroom demonstratives and exhibits to summarize and present the case.
- *Direct and cross-examination*. Similar to preparation assistance provided to client legal counsel for depositions, the consulting expert may be asked to draft direct and cross-examination questions.

The consulting expert should continue to support client legal counsel and the client with professionalism and candor during trial because the trial may be the phase of the matter at which their expertise is most valued.

Appendix A: Communications for Serving as a Neutral in Litigation and Dispute Services

Practitioners can be engaged to serve as a neutral decision maker or a jointly retained or court-appointed expert witness in connection with dispute resolution proceedings. Practitioners may be asked to undertake the following roles:

- Arbitrator[47]
- Mediator[48]
- Expert witness jointly retained by disputing parties
- Court- or arbitration-appointed expert

An *arbitrator* is a neutral party who "resolves disputes between parties, especially by means of formal arbitration."[49] Formal arbitration is an alternative dispute resolution (ADR) "method…involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."[50] A binding decision is one that is deemed to have "legal force."[51]

In contrast to an arbitrator, a *mediator* is a neutral party who facilitates communications between disputing parties in an effort to resolve a dispute using mediation as a form of ADR. Mediation is "a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution."[52]

Practitioners retained by disputing parties to be a jointly retained expert witness, with or without court intervention, are engaged to serve the disputing parties as a shared expert witness. This can be a tricky proposition because the neutral expert witness is obligated to understand each opposing party's beliefs about the claims, remedies, and facts in the case, and the weight and value of evidence in order to reach an objective opinion.

A *court-appointed expert* is a neutral party appointed by a judge to serve as an expert witness in dispute resolution proceedings. Under the Federal Rules of Evidence, "[t]he court may appoint any expert that the parties agree on and any of its own choosing" as long as the neutral Practitioner consents to act as a court appointed expert witness.[53] Similarly, an arbitration appointed expert is a practitioner appointed by an arbitrator or arbitration panel to serve as a neutral expert witness in an alternative dispute resolution proceeding. In many cases, the arbitration-appointed expert is identified, vetted, approved, and engaged jointly by the disputing parties. In both situations, the expert witness is employed to assist the judge or arbitrator(s) in understanding the issues in dispute using the witness' relevant professional expertise.

Neutral Arbitrator Services

Practitioners can be engaged to serve as neutral arbitrators in different situations. First, the practitioner may serve as a neutral arbitrator in a civil commercial arbitration proceeding. As a variation, practitioners

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[47] For purposes of this practice aid, *neutral arbitrator* refers to the use of a practitioner to resolve an accounting dispute. A neutral arbitrator may also be referred to as a *neutral accounting arbitrator*, *neutral accounting expert*, *accounting expert*, *independent expert* or *independent accounting expert*, among other labels.

[48] Mediation proceedings are usually presided over by legal counsel due to commonly encountered legal considerations.

[49] *Black's Law Dictionary*, Third Pocket Edition, Bryan A, Garner, Editor in Chief, Thomson/West, 2006.

[50] *Ibid*.

[51] *Ibid*.

[52] *Ibid*.

[53] FRE, Article VII, Opinions and Expert Testimony, Rule 706 (a).

may participate as part of an arbitration panel.[54] Alternatively, practitioners may be retained to serve as neutral arbitrators in a post-acquisition dispute.[55] It is important to understand the objective of the neutral arbitrator for communications to be useful and relevant. Once understood, the responsibilities of the neutral arbitrator can be agreed upon by the neutral arbitrator and the disputing parties. The responsibilities of the neutral arbitrator are the basis for the scope of the neutral arbitrator's services and the attendant form and substance of communications.

Objective of the Neutral Arbitrator

The objective of a neutral arbitrator, regardless of whether the arbitration is presided over by a single neutral arbitrator or an arbitration panel, is to handle the arbitration proceedings in an impartial and fair manner to reach a binding final decision.

The objective of the neutral arbitrator in a post-acquisition dispute is to resolve a disagreement by making an impartial final determination on issues agreed upon by the disputing parties.

The final deliverable in a civil commercial arbitration is the communication of the neutral arbitrator's final decision. Normally, this takes the form of a written decision statement that can resemble a court judgment and order. In a post-acquisition dispute, the neutral arbitrator's final determination is typically communicated to the disputing parties in a written report. The final determination report can either include the reasons supporting the neutral arbitrator's decision (in other words, a "reasoned report"), or it can simply be a summarized disclosure of the final determination. The form and substance of final deliverables may be defined by contract, agreement, the joint approval of the disputing parties, or a court.

Responsibilities of the Neutral Arbitrator[56]

A neutral arbitrator for a civil commercial dispute should hear, read, analyze, and consider the positions, arguments, and supporting evidence provided by each of the disputing parties and render a final binding decision to resolve a dispute. This requires skills, knowledge, education, experience, and training in the technical areas to be examined and the ability to assess the quality, weight, and value of any evidence ultimately relied upon by the neutral arbitrator.

It is common to be engaged as a neutral arbitrator in a post-acquisition dispute under the terms of a contract between the disputing parties (such as a sale and purchase agreement). For example, the disputing parties may enter into an agreement for the sale and acquisition of a business and that agreement will include a dispute resolution process mutually agreed upon by the disputing parties. The dispute resolution process will be memorialized in a dispute resolution clause. Within that clause will be provisions for the retention of a neutral arbitrator to decide disputed matters such as the closing working capital, final purchase price, or an earnout liability.

In these cases, the applicability of the dispute resolution language is intentionally and appropriately limited to accounting issues in dispute. Engagement of the practitioner for the resolution of legal issues, such as claims related to alleged false or inaccurate representations and breached warranties, is likely improper unless the neutral expert is qualified and properly licensed to reach legal conclusions or provide opinions on matters of law. This is not the case for most practitioners and, as such, these assignments should be refused.

[54] An arbitration panel convened to resolve a civil commercial dispute will usually have three or five members.

[55] AICPA Forensic and Valuation Services Practice Aid, *Mergers and Acquisitions Disputes*.

[56] In addition to these responsibilities, the practitioner also is expected to comply with applicable professional standards, dispute resolution rules, engagement letter terms and conditions, and other matters of importance.

The neutral expert arbitrator is obligated to read, assess, and agree to abide by the terms of a dispute resolution clause, unless otherwise negotiated and agreed to by all contracting parties. To provide clarity, the neutral expert should consider the inclusion of, or specific reference to, applicable dispute resolution contractual language in the engagement letter and final written determination report. Any exceptions taken by the neutral expert to the disputing parties' dispute resolution terms should be communicated to the disputing parties and formally documented in writing, with all parties signing off as a record of agreement.

Neutral Arbitrator Communications

From the inception of the neutral arbitration engagement through the final determination decision, the neutral arbitrator will communicate with the disputing parties, and possibly third parties. Practitioners should be careful to avoid ex parte[57] communications before, during, and after the performance of neutral arbitration services. *Ex parte communications* are those made in the absence of one of the disputing parties, in other words, an exchange between the neutral arbitrator and only one of the disputing parties.

Some of the most common communication exchanges for the neutral arbitrator include the following:

- The resume or curriculum vitae (CV) of the practitioner
- Disclosure of conflicts of interest search results
- Execution of an engagement letter, including dispute resolution protocols and timetables
- Discovery
- Exchange of the disputing parties' submissions
- Inquiries and evidence requests made by the neutral arbitrator of the disputing and third parties
- Hearings
- Use of legal counsel to assist the neutral arbitrator
- Disclosure of the final determination by the neutral arbitrator

Professionally handling each of these types of communication is important to the success of the engagement.

Resume or CV of the Neutral Arbitrator

Initially, the disputing parties will conduct a search to find potential candidates to serve as a neutral arbitrator. Through a variety of sources, the disputing parties may identify the practitioner as a candidate and request qualifying information for the parties to consider. The information requested will certainly include a resume or CV of the practitioner's qualifications as well as confirmation that the practitioner is conflict-free. Conflict-of-interest disclosures to the parties is detailed more fully as follows.

The resume or the CV provided to the disputing parties for consideration should demonstrate qualifications pertinent to the engagement and should be professional, accurate, clear, and compelling. Unlike the requirements for the disclosure of qualifications under the Federal Rules of Civil Procedure,[58]

[57] An ex parte communication is "a communication between counsel [one disputing party] and the court [neutral arbitrator] when opposing counsel [the other disputing party] is not present." *Black's Law Dictionary*, Third Pocket Edition, Bryan A, Garner, Editor in Chief, Thomson/West, 2006.

[58] FRCP, FRCP 26(a)(2).

there are no specific requirements for this document. Regardless, practical considerations to enhance the usefulness of disclosure include the following:

- Full name
- Contact information (including, without limitation, address, phone numbers and email address)
- Current job title
- Employer name and address
- Relevant skills, knowledge, education, experience, and training (including, without limitation, certifications, credentials, and degrees)
- List of relevant prior matters handled (being careful not to threaten confidentiality)
- Relevant publications and speaking engagements

Depending on personal preferences and the specific needs of the matter at hand, it may also be helpful to include previous engagement references (once again, being sensitive to client confidentiality). It is usually a good idea to exclude marketing material from this document, especially things that appear to be puffing.

Conflicts of Interest Search Disclosure

As required by professional standards and state regulations, practitioners are required to perform a search for conflicts of interest before accepting an assignment to act as a neutral arbitrator. Practitioners may only accept an engagement when there are no conflicts or if the threat of a conflict of interest is satisfactorily mitigated by allowable actions (such as the use of available safe harbors). A conflict check includes an assessment of audit and attestation independence considerations for other clients served by the practitioner. After the conflict check is complete, practitioners should communicate the results of the search to the interested parties.[59]

Practitioners should exercise caution when making such communications to avoid violating client confidentiality requirements. If a conflict of interest exists that cannot be cleared or sufficiently mitigated, practitioners should promptly inform the interested parties as a professional courtesy. Although this does not have to be a written communication, it is a good practice to memorialize this disclosure in writing. It is generally best to limit the disclosure to the fact that a conflict exists, which will then prevent the practitioner from accepting the assignment. Any further description of the facts and circumstances could jeopardize confidentiality. For engagements acceptable from a conflicts standpoint, practitioners should report the clearance to the interested parties in a timely matter. Depending on the circumstances, other client acceptance procedures may still be in process when conflicts have been cleared; therefore, to avoid confusion, practitioners should be clear about the difference between conflict clearance and client/engagement acceptance.

Engagement Letter

The neutral arbitrator should obtain an executed retention agreement, referred to as an *engagement letter*, from the disputing parties prior to starting the provision of services.[60] In addition to the business

[59] Interested parties, at this stage of the engagement process, typically include the disputing parties and their retained outside advisers (for example, attorneys, brokers, and sale/purchase representatives).

[60] AICPA Forensic and Valuation Services Practice Aid, *Engagement Letters for Litigation Services*.

and legal terms and conditions deemed appropriate by a practitioner in consultation with the practitioner's legal counsel, the engagement letter should include the following:

- The scope of the assignment, including incorporation by reference to applicable governing dispute resolution terms and conditions that may be embedded in contracts between the disputing parties (like the purchase and sale agreements referred to earlier).
- Disclosure by the neutral arbitrator, and waiver by the disputing parties as appropriate, of any known past, present, or future services that the disputing parties may perceive as a potential conflict of interest or source of potential bias in connection with the neutral arbitrator's work.
- A description of the specific items in dispute requiring a final determination (ideally, the amount and nature of the items agreed upon and jointly submitted to the neutral arbitrator by the disputing parties).
- A form for the determination notice (meaning a summary report or reasoned determination — see further explanation as follows).
- The timetable, deadlines, process, procedure, and protocols to be used for the arbitration proceedings may be defined by the dispute resolution clause included in the agreement between the disputing parties. If not, the neutral arbitrator should reach a clear understanding of these matters before launching into arbitration. Matters to be considered include the nature and mode of communication; ex parte communication restrictions; requirements to copy an opposing party on any disclosures or communications with the neutral arbitrator, barring administrative exchanges; and the form and details of the final determination decision. For convenience, this information is often attached to the engagement letter.[61]
- An estimate of fees and expenses and the expected payment terms. Usually, the neutral arbitrator asks for each party to pay one-half of the estimated fees and expenses as a prepayment before the assignment is started. If actual fees and expenses exceed original

[61] AICPA Forensic and Valuation Services Practice Aid, *Engagement Letters for Litigation Services*.

estimates, the balance should be billed and collected from the disputing parties before issuance of the final determination.

Administrative areas to be considered, agreed upon, and memorialized between the neutral arbitrator and the disputing parties include the following:

- Communications between the parties:
    - Agreement on the prohibition of ex parte contact
    - Form and content for submissions and responses to the neutral arbitrator and the sharing of these materials between the disputing parties
- Timing, due dates, and deadlines:
    - Expectations and obligations of the disputing parties and the neutral arbitrator, including the anticipated issuance date for the final determination
    - Allowances for expansion of time and repercussions for delinquent filings or failed obligations
- Discovery procedures, including requests for production of information, oral testimony, and hearings
- Form and substance of the final determination report
- Other matters, such as the allocation of the neutral arbitrator's fees between the disputing parties

An orderly and reasonable process for the arbitration proceedings might look like this, although each engagement letter should be tailored to the agreement between the disputing parties and the practitioner:

- On a date certain in the future, each disputing party shall prepare and submit an initial submission (Initial Submission) to the neutral arbitrator that puts forth each dispute, together with each party's position, arguments, and supporting evidence. The Initial Submission shall be limited to 25 pages, single spaced, 12 sized font. Supporting evidence is to be limited (or unlimited). Each disputing party shall have the choice to prepare and submit a response to the Initial Submission (Response Submission). The Response Submission is due 30 business days after the due date for the Initial Submission. The Response Submission is limited to 15 pages, single spaced, 12 sized font. Supporting evidence is to be limited (or unlimited).
- Each disputing party shall have the choice to prepare and submit a final reply to the Initial Submission and Response Submission (Final Reply Submission). The Final Reply Submission is due 15 business days after the due date for the Response Submission. The Final Reply Submission is limited to five pages, single spaced, 12 sized font. Supporting evidence is to be limited (or unlimited).
- There shall be no *ex parte* communications with the neutral arbitrator. Any written communications between a disputing party and the neutral arbitrator shall be simultaneously sent to the neutral arbitrator and the other disputing party, except for the Initial Submission, Response Submission, Final Reply Submission, or other formal submissions of information or evidence to the neutral arbitrator. In these cases, the Initial Submission, Response Submission, Final Reply Submission, or other formal submissions of information or evidence shall initially be sent on the date due to the neutral arbitrator *without* copying the other side, and the next business day the neutral arbitrator shall distribute the materials from each disputing party to the respective other disputing party.

- The neutral arbitrator shall be entitled to request evidence or make written or oral inquiries of either disputing party. The disputing parties shall respond to such requests and questions within five working days, unless otherwise agreed to by all parties. The form and content of the responses shall be written, unless otherwise approved in advance by the neutral arbitrator.
- If requested by either disputing party, there will be an oral hearing in front of the neutral arbitrator at a date and time agreed to by all parties.
- The neutral arbitrator will issue a final decision on the disputed items within 30 days after any such hearing, or if there is no hearing, within 30 days after the Final Reply due date, or the last response date for satisfying any request for documents or other information, whichever is later.
- The neutral arbitrator's final determination of each disputed item shall include the rationale and calculations used to make any such determination.
- The neutral arbitrator shall also determine and include in the final determination report the calculation of the allocation of the cost of the arbitration pursuant to the disputing parties' agreement.

Although the arbitration timing and process may be prescribed in an existing contract between the disputing parties, it is important for the neutral arbitrator to carefully evaluate the requirements and negotiate any changes deemed necessary to deal with professional standards concerns, scope of services matters, and practical limitations.

Discovery

A neutral arbitration proceeding is an alternative form of dispute resolution and, accordingly, decisions about the dispute require the disputing parties to put forth evidence and arguments to support opposing positions. The process of producing evidence, obtaining oral testimonial evidence, and arguing positions is similar to discovery in formal litigation — with a few big differences. For one, the neutral arbitrator usually has no formal standing to issue legally enforceable orders (including those to compel production), subpoenas (to require witnesses to appear), or levy sanctions or fines for nonconformance or uncooperativeness. The absence of these powers may significantly hamstring efforts to get the disputing parties to cooperate with discovery activities. This is especially tricky when one of the disputing parties transfers substantially all the books and records and personnel to a successor entity, which often happens when one company or business unit is sold to another party.

As a result, the neutral arbitrator may be forced to act as a discovery mediator to encourage cooperation in the discovery process. The goal is a fair and expeditious arbitration, wherein each disputing party believes they have been heard and understood by the neutral arbitrator. With that in mind, the neutral arbitrator may use a variety of tactics with the disputing parties ranging from politeness to forcefulness to ensure discovery is appropriate and reasonable.

Practitioners should prepare and retain work product with the expectation that it may become available to others through discovery in subsequent litigation or other means. As such, work product should sufficiently support reported findings, determinations, and conclusions, and be defensible, accurate, and complete.

Disputing Party Submissions

As mentioned, the neutral arbitrator should seek to document the timetable, deadlines, process, procedure, and protocols to be used for the arbitration. In large part, this information relates to the written submissions to be provided by the disputing parties to the neutral arbitrator. These submissions represent

each party's positions, facts, arguments, and associated evidential support. As such, they are an important part of the communication between the neutral arbitrator and the disputing parties.

The submission may include the disclosure of disputed items that have been amended or conceded by one or both of the disputing parties. Amended disputed items may or may not be allowable under the terms of the neutral arbitration engagement letter or the dispute resolution language contained in an agreement between the disputing parties. Therefore, the neutral arbitrator should carefully analyze each amended claim to determine if it is within the scope of the contracted neutral arbitration services and, if so, whether the change will be allowed. This is heavily dependent on the facts and circumstances of each engagement and amended item. In general, conceded disputed items are acknowledged by the disputing parties, accepted by the neutral arbitrator, and excluded from the final determination.

Rarely, one of the disputing parties may fail to deliver an agreed upon submission by a due date, with or without notice. This may cause a number of issues for the neutral arbitrator. The most clear and present danger is that one of the disputing parties may get a look at the other sides' submission before issuing their own and use that information to prepare a more effective submission at the expense of the other party. To prevent this risk, the neutral arbitrator should consider a procedure to receive and distribute the disputing parties' submissions and other critical communications and share them only after both disputing parties have complied with the agreed upon protocols. Alternatively, the neutral arbitrator can convene the disputing parties and reach a collective agreement to use an extended deadline, without prejudice to either party. In extreme cases, the neutral arbitrator can elect to ignore an untimely submission all together.

Inquiries and Evidence Requests

As one may imagine, a neutral arbitrator often has questions, requires clarification, or needs evidence to better understand each of the disputing parties' submissions. It is incumbent upon the neutral arbitrator to ask questions and seek proof to make an informed and appropriate final determination about the dispute subjected to arbitration. To meet this obligation, the neutral arbitrator has a number of avenues to use. The neutral arbitrator can arrange a phone call with the disputing parties and ask questions or request documents. It is often a good practice, however, for the neutral arbitrator to write down inquiries and evidence needs and have the disputing parties respond with a written response or by producing materials. In this way, the neutral arbitrator has a record to include in the working papers to support final determinations.

A word of caution: The neutral arbitrator should avoid asking questions or soliciting the production of evidence that goes beyond clarification of the disputing parties' positions and arguments because this may create an inappropriate advantage for one of the parties. The disputing parties have prepared their best cases possible using the facts and evidence they believe are most compelling. The neutral arbitrator may change the game when specific arguments and support are demanded by the neutral arbitrator that the disputing parties have not proffered. The neutral arbitrator does not want to be in a position of agreeing that a decision would be made in one party's favor if they can produce something only the neutral arbitrator finds convincing.

Hearings

As discussed, it is common for the neutral arbitrator to have disputing parties explain positions, or ask questions and produce evidence, during teleconferences, video conferences, or face-to-face meetings. Loosely speaking, these are all hearings of the parties. Most of these encounters are informal. They are not recorded verbatim, procedural execution is dynamic, and written arguments and briefs are not used. In these situations, the neutral arbitrator should take notes on any evidence that may potentially be used

to support final determinations, and the accuracy and attribution of any such notes should be confirmed in writing by the disputing parties.

In connection with live oral hearings, the neutral arbitrator will likely experience a higher degree of formality. Typically, such hearings are orchestrated in advance using timed agendas and procedural discipline. In some disputes, a court reporter is hired to record the session. The parties may choose to bring along legal counsel, financial advisers, key employees, and administrative personnel, which requires the neutral arbitrator to limit participants for a variety of reasons.

A prototypical live hearing will include

- opening remarks and overview of the proceedings led by the neutral arbitrator,
- opening statements by each of the disputing parties, starting with the party that initially raised the dispute and followed by the respondent party,
- presentation of positions in chief, using the same order as the opening statements,
- closing arguments, once again in the same order, and
- closing questions and comments by the neutral arbitrator.

It is common for the neutral arbitrator to ask questions at any time during the hearing. Unlike a hearing in formal litigation, there are no objections during the hearing because these are matters of law.

Use of Legal Counsel to Assist the Neutral Arbitrator

As described already, it is improper for practitioners to practice law without adequate qualifications and a valid license. Setting that aside, practitioners in the role of a neutral arbitrator may find it necessary to seek the counsel of a lawyer about legal matters that may arise during the pendency of an arbitration. For example, one of the disputing parties may make an argument advocating a position and support that argument with a legal case citation as precedent. However, practitioners in the neutral arbitrator role may not understand how to interpret the referenced law as a layperson. In that instance, practitioners may want to seek advice from legal counsel. That advice should be limited to the practitioner or the practitioner's employer and be restricted to the provision of services. In other words, it is legal advice strictly for the use of the neutral arbitrator or the employer, or both, and not for the use of the disputing parties in connection with the resolution of a disputed item.

Final Decision Communication

The outcome of a civil commercial arbitration proceeding is the neutral arbitrator's, or panels', final decision communication. Unless otherwise agreed to by the neutral arbitrator and the disputing parties,[62] the decision is communicated in writing by a statement of the final decision and the amount of award, if applicable. If an arbitration panel is used, it is possible that a minority position is communicated.

The permanent official record of the post-acquisition dispute arbitration is a final determination report. This report informs the disputing parties about the binding resolution of their disputes. It is the basis for the disputing parties to make adjustments and resolve claims. In addition, it may be used to file a record

[62] The parties can agree to the disclosure of the reasoning behind the final decision.

of the decisions to be affirmed by the court. The details of the written final determination report are discussed further as follows.

The Written Report of the Neutral Arbitrator in a Post-Acquisition Dispute

At the conclusion of the engagement, the neutral arbitrator is required to communicate a final determination to the disputing parties on each of the disputed items, unless the neutral arbitrator concludes that a final determination cannot be reached.[63] In most cases by agreement or contract, the final determination takes the form of a written report to the disputing parties. Although it is not prohibited to communicate final determinations orally, it is a best practice to prepare and issue a written final determination to the disputing parties. The written final determination report can be in summary form or expanded to include the reasoning for each decision made by the neutral arbitrator, based on an agreement with the disputing parties typically memorialized in the engagement letter.

The Summarized Final Determination Report

A written final determination report should clearly and concisely communicate the neutral arbitrator's binding decisions on each disputed item submitted by the disputing parties for resolution. For easy reference of the reader, final determinations should be set out in a table or schedule with a brief description of each disputed item and the amount determined in favor of, or against, each disputing party.

To give the user of the written report proper context, the neutral arbitrator should also consider disclosing the following matters in the summarized neutral arbitration written report:

- *Scope of services*. The scope of the services, including a reference to the contractual dispute resolution clause language applicable to the assignment.[64]
- *Key engagement terms and conditions*. A reference to the engagement letter executed by the parties with the neutral arbitrator, including key engagement terms, conditions of the engagement, caveats, limitations, and restrictions.
- *Materials considered*. Materials considered by the neutral arbitrator to reach a final determination of the disputed items, including the disputing party's written submissions and supporting materials, written communications (such as email responses to the neutral arbitrator's inquiries or requests for production), and oral testimony (such as interviews, telephonic or video-enabled conversations, or oral testimony given during hearings).
- *Relevant contractual definitions*. Consistently cite or include relevant contractually defined terms and amounts (such as the *purchase price*, *working capital*, *EBITDA* or *GAAP*) in the written report, being careful to refer to and use such defined terms correctly and consistently in the written report.

After the issuance of the final determination report, it is unusual for the neutral expert to have any contact with the disputing parties about the report. If this happens, the neutral arbitrator should exercise extreme caution to avoid impropriety and must avoid ex parte (single party) communications. The best practice may be to decline such overtures. It is possible that the disputing parties may have post-issuance communications with the neutral arbitrator about billing and administrative matters, which is usually uncontroversial.

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[63] In certain circumstances, the neutral arbitrator may conclude that a final determination cannot be reached for specific disputed items. In such cases, the neutral arbitrator should disclose this decision to the disputing parties, and it may be prudent to also communicate the reasons therefor.

[64] The practitioner should also consider emphasizing the legally binding nature of the final determinations.

The Reasoned Final Determination Report

A reasoned written final determination report communicates the disputed issue or issues subject to binding arbitration and the neutral arbitrator's decisions, as well as the reasons supporting the arbitrator's decisions. In this report, the neutral arbitrator makes an unequivocal statement of the final decision (for example, *"For this disputed item, my final determination is for ABC Company in the amount of $100,000"* or "*I find in favor of the Seller for Disputed Item No. 1 totaling $100,000*"), together with the reasoning for each final determination. In some cases, the neutral arbitrator may provide a brief summary of each of the disputing parties' arguments, positions, and the supporting evidence produced.[65]

In addition to the summary report considerations described previously, the neutral arbitrator may include the following items in a reasoned report:

- Summary Introduction of Disputed Items. A summary of the transaction giving rise to the dispute or disputes and a list of the disputed items subjected to final determination, including a short name for each disputed item that can be easily referenced in the report and brief descriptions of the nature of each dispute and the amounts in question.
- Universal Arguments. It may be convenient to address repeating arguments or themes proffered by the disputing parties (for example, that the accounting conforms to the contract or past practice) in a single section of the written report.

The form, details, and content of each reasoned report may vary widely based on the facts and circumstances.

Allocation of the Neutral Arbitrator's Fee

In addition to opposing parties voluntarily agreeing to share the neutral arbitrator's fee, there may be contractual requirements for the disputing parties to pay the fees of the neutral arbitrator in proportion to the amounts finally determined by the neutral arbitrator. In some cases, the disputing parties agree to have the neutral arbitrator calculate the final fee sharing. Just like a dispute resolution clause, the neutral arbitrator should agree to accept responsibility for this allocation computation. This should be reflected in the engagement letter.

The calculation of the disputing parties' fee allocation is normally not a particularly complex matter. It can be performed and reported in the body of the final written determination report or in a separate table or schedule accompanying the report. Regardless, the neutral arbitrator should avoid handling the actual true-up of monies between the disputing parties. Instead, the neutral arbitrator should report the final allocation of fees and request that the disputing parties voluntarily exchange funds to satisfy each of the disputing parties' fee obligations. It is not a good idea for the neutral arbitrator to be the middleman for the disputing parties' cash settlement.

Mediator Services

It is relatively common for practitioners to participate in a mediation as an adviser to one of the disputing parties. Conversely, it is unusual for practitioners to act as a mediator for a dispute.[66] However, the courts have the authority to appoint a practitioner as a neutral mediator if the following conditions are met:

[65] When the practitioner elects to disclose this information, the written report should refer the reader to source documents (such as the disputing parties submissions) for a complete record of the disputing parties' actual statements, positions, and evidence produced.

[66] Practitioners are not typically engaged as neutral mediators given mediation proceedings are often tied to the application of law to arrive at an enforceable agreement.

> The court's ADR staff appoints a mediator who is available and has no apparent conflicts of interest. The parties may object to the mediator if they perceive a conflict of interest. Mediators on the court's panel have the following qualifications:
>
> - They have been admitted to the practice of law for at least seven years (if a lawyer).
> - They are experienced in communication and negotiation techniques.
> - They are knowledgeable about civil litigation in federal court.
> - They have been trained by the court.
>
> The court's panel also includes non-lawyer mediators if they meet the preceding qualifications and they have the appropriate professional credentials in another discipline. Non-lawyer mediators are appointed only with the consent of the parties.[67]

If a practitioner is engaged to serve as a neutral mediator, it is critical to understand that mediation is a voluntary nonbinding alternative dispute resolution process designed to resolve civil commercial disputes confidentially, quickly, and effectively.

> Mediation is a flexible, non-binding, confidential process in which a neutral mediator facilitates settlement negotiations. The informal session typically begins with presentations of each side's view of the case, through counsel or clients. The mediator, who may meet with the parties in joint and separate sessions, works to
>
> - improve communication across party lines;
> - help the parties clarify and communicate their interests and understand those of their opponent;
> - probe the strengths and weaknesses of each party's legal positions;
> - identify areas of agreement;
> - help generate options for a mutually agreeable resolution.
>
> The mediator generally does not give an overall evaluation of the case. Mediation can extend beyond traditional settlement discussion to broaden the range of resolution options, often by exploring litigants' needs and interests that may be independent of the legal issues in controversy.[68]
>
> Mediation may be particularly appropriate for “[a]ll civil cases…with the following characteristics…:
>
> - the parties desire a business-driven or other creative solution;
> - the parties may benefit from a continuing business or personal relationship;
> - multiple parties are involved;

[67] United States District Court, Northern District of California, ADR Local Rule (LR) 2-5 and 6-3, www.cand.uscourts.gov/mediation.

[68] United States District Court, Northern District of California, ADR LR 6-1 and 6-10, www.cand.uscourts.gov/mediation.

- equitable relief is sought — if parties, with the aid of a neutral, might agree on the terms of an injunction or consent decree;
- communication appears to be a major barrier to resolving or advancing the case.[69]

Procedurally, a mediation is more informal than arbitration or litigation, with the disputing parties providing the neutral mediator with briefing packages and key documents to prepare for an in-person mediation session that can last a few minutes or several days, depending on the parties and the disputes. Many mediations extend beyond live proceedings as the opposing parties work with the neutral mediator to reach a definitive agreement for resolution.

The outcome of a mediation is an agreement on dispute settlement terms and conditions. Initially, basic tenets are hammered out, followed by the drafting of a settlement agreement. Ideally, the drafts are finalized and signed to evidence the resolution of the disputes and claims.

Similar to neutral arbitration, the fees and expenses of the neutral mediator are split by the opposing parties. However, practitioners should be clear on payment for services because many courts require voluntary services from the neutral mediator, as follows:

> Mediators shall volunteer up to two hours of preparation time and the first four hours in a Mediation. After four hours of Mediation, the mediator may (1) continue to volunteer his or her time or (2) give the parties the option of either concluding the proceeding or paying the mediator. The proceeding will continue only if all parties and the mediator agree. If all parties agree to continue, the mediator may then charge his or her hourly rate or such other rate that all parties agree to pay.[70]

Objective of the Mediator

"The goal of mediation is to reach a mutually satisfactory agreement resolving all or part of the dispute by carefully exploring not only the relevant evidence and law, but also the parties' underlying interests, needs and priorities."[71] The objective of the neutral mediator is to get the disputing parties to communicate with each other and to recognize the realities of their positions and claims so that compromise can occur and a resolution can be crafted. Communication between the parties is facilitated in a mediation by confidentiality and limited work product use protections provided by law or agreement. "Communications made in connection with a mediation ordinarily may not be disclosed to the assigned judge or to anyone else not involved in the litigation, unless otherwise agreed."[72] The skill and the art of the neutral mediator is to move the parties from entrenched positions to settlement using negotiation, influence, aggression, and charm.

Responsibilities of the Mediator[73]

The neutral mediator will likely be retained using an engagement letter executed jointly by the disputing parties through their respective legal counsel. The engagement letter should be clear on the scope of the work, administrative procedures, and protocols. Unlike neutral arbitration, it is necessary for the neutral mediator to have ex parte communications with each party. In fact, that is where much of the real work

[69] United States District Court, Northern District of California, ADR LR 6-2, www.cand.uscourts.gov/mediation.

[70] United States District Court, Northern District of California, ADR LR 6-3(c), www.cand.uscourts.gov/mediation

[71] United States District Court, Northern District of California, ADR LR 6-1, www.cand.uscourts.gov/mediation.

[72] United States District Court, Northern District of California, ADR LR 6-11, www.cand.uscourts.gov/mediation.

[73] In addition to these responsibilities, the practitioner also is expected to comply with applicable professional standards, dispute resolution rules, engagement letter terms and conditions, and other matters of importance.

gets done – through one-on-one conversations. At the end of the day, the neutral mediator's job is to get the opposing parties together to voluntarily agree to resolve their dispute through a negotiated settlement.

Mediator Communications[74]

To understand the type, form, and frequency of communications expected from a neutral mediator, it is helpful to understand a typical mediation process. Initially, the parties jointly agree to participate in a mediation as it is a prudent step toward resolution or because the court has ordered one.

"A mediation may be requested at any time. The time for conducting the mediation session is presumptively 90 days after the order of referral, unless another deadline is fixed by the court. The mediator contacts counsel to schedule an initial telephone conference to set the date, time, and location of the mediation session and to discuss how to maximize the utility of mediation."[75] The disputing parties then will agree to the procedure for the mediation. If the mediation is convened in connection with a lawsuit, there are likely court rules that will apply.

After the procedures have been adopted by the disputing parties, a search is performed to locate potential mediator candidates. This is likely to be the first contact and communication practitioners have with the court or the opposing parties. In connection with the vetting process, it is likely that the practitioner will be asked to provide a resume or CV of qualifications to serve and initiate a conflict check. Communication considerations for a neutral mediator parallel those for a neutral arbitrator. As such, refer to the preceding discussion for the considerations related to the resume, CV, and conflicts of interest disclosures.

Mediation Arrangements and Proceedings

Remembering that the role of practitioners as a mediator is likely to be more informal and collaborative than litigation or arbitration proceedings, practitioners should undertake such services with a clear and complete understanding of the role, responsibility of each party, scope, deliverables, deadlines, communication protocols, and fees, among other things. It is recommended that this understanding be memorialized in writing and executed in the form of an engagement letter. Of particular importance are the following matters:

- The preparation, confidentiality,[76] submission, handling, form, and content of disputing party submissions and evidence
- The discovery process, including mediator inquiries and evidentiary requests
- The use of independent legal counsel to assist the mediator
- Settlement negotiation and offers

It is rare for practitioners to serve in an exclusive role as a neutral mediator because of the obvious legal issues and matters required to be handled by legal counsel. As such, the acceptance of an assignment

[74] It is unusual for a mediator to issue a formal written report; however, it is possible for the mediator to participate in the drafting of settlement agreements. Practitioners must use caution in these situations to avoid improperly practicing law. For this reason and the largely fact-and-circumstances-based nature of mediation proceedings, settlement agreements are not covered this practice aid.

[75] United States District Court, Northern District of California, ADR LR 6-4, 6-5 and 6-6, www.cand.uscourts.gov/mediation.

[76] In many cases, it is prohibited to disclose or use anything prepared for, presented, or learned in mediation outside of the proceedings. See FRE, Article IV, Relevance and Its Limits, Rule 408, Compromise Offers.

as a mediator by a practitioner who is not qualified and properly licensed to perform legal services or assisted by legal counsel should be carefully considered.

Court- or Arbitration-Appointed Neutral Expert Services

Triers of fact understand the value of an expert witness to assist them with the resolution of complex disputes. For a number of reasons, a court, arbitrator, or arbitration panel may be compelled to appoint their own neutral expert witness, or in agreement with the opposing parties, jointly retain an expert witness. In these cases, the disputing parties typically split the cost of the neutral expert witness, and the designated trier of fact becomes the anticipated beneficiary of the services, although not necessarily a party to the engagement letter between the neutral expert witness and the disputing parties.

Court-appointed expert witnesses are addressed in the Federal Rule of Evidence:[77]

> (a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.
>
> (b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:
>
> (1) must advise the parties of any findings the expert makes;
>
> (2) may be deposed by any party;
>
> (3) may be called to testify by the court or any party; and
>
> (4) may be cross-examined by any party, including the party that called the expert.
>
> (c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:
>
> (1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and
>
> (2) in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.
>
> (d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.
>
> (e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.[78]

For other types of proceedings, including arbitration, the rules of engagement for a neutral expert witness must be defined by the trier(s) of fact, with input from the disputing parties. This is necessary because

[77] It is important to note that each jurisdiction may have differing rules for court-appointed expert witnesses, and such rules may vary significantly. It is recommended that the practitioner understand applicable rules before accepting any such assignment.
[78] FRE Rule 706.

there is no court to issue an order of appointment that defines the nature, timing, scope, and economic terms for the use of the neutral expert witness.[79]

Objective of the Appointed Neutral Expert Witness

The objective of the neutral expert witness is to use relevant expertise to assist the trier or triers of fact to resolve contested issues in the dispute.

Responsibilities of the Appointed Neutral Expert Witness[80]

The primary responsibility of any expert witness, including the appointed neutral expert witness, is to use his or her expertise to assist the trier of fact in understanding evidence and issues in a dispute that may assist with a final decision. Federal litigation proceedings are typically the most prescriptive about the responsibilities of the expert witness. Under the Federal Rules of Evidence, an expert witness must be qualified, from an expertise perspective, and present expert testimony in accordance with rules. Following are the rules for expert witnesses involved in a federal litigation case:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.[81]
>
> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.[82]

"Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination."[83]

Appointed Neutral Expert Witness Communications

Depending on the agreement of the parties and the rules applicable to the arbitration proceedings, neutral expert communications fall into these categories:

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[79] In certain situations, the practitioner may attach an engagement letter executed with the disputing parties to a court's order of appointment.

[80] In addition to these responsibilities, the practitioner also is expected to comply with applicable professional standards, dispute resolution rules, engagement letter terms and conditions, and other matters of importance.

[81] FRE Rule 702.

[82] FRE Rule 703.

[83] FRE Rule 705.

- Retention and contracting
- Interactions with the trier or triers of fact
- Dialog with the disputing parties
- Correspondence with third parties
- Disclosure of neutral expert witness work and opinions

Each of these categories is further explored as follows.

Retention and Contracting

One area of communications that needs immediate initial attention is the engagement of the neutral expert witness. The neutral expert is retained to serve the needs of the trier of fact in a disputed matter. As such, the trier of fact is a permitted user of the neutral expert witness' services and work product. In this situation, the neutral expert is jointly retained and paid for by the opposing parties. Therefore, the parties must agree to the terms of the engagement.

Contracting can be accomplished using an engagement letter between the disputing parties and the neutral expert or by a court or arbitration order, or a combination of both. Regardless of the form, it is recommended that the neutral expert witness memorialize an appointment with a court or arbitration order to preserve any expert witness immunity rights available.

Practitioners are to identify the client for purposes of complying with the standard of communication with the client required in CS section 100. In "Definitions" (ET sec. 0.400.07) in the code, a *client* is defined as any person or entity, other than the member's employer, that engages a member or a member's firm to perform professional services and, if different, the person or entity with respect to which professional services are performed. The client can be one or more of the parties, triers of fact, or other interested entities involved in the litigation and dispute resolution process.

The scoping of the work to be performed is crucial to the contracting process. The neutral expert witness must be clear on the opinions desired from the parties before beginning any work. Although this may sound easy, if the opposing parties have dramatically different views of the facts, this can be a challenge. In fact, the trier of fact may compel the neutral expert witness to prepare two sets of work product and opinions — one for each side of the dispute.[84]

Expectations about the timing of work and deadlines for the delivery of work product are also key matters to be discussed with the parties. In formal litigation and in some arbitrations, these matters are likely to be addressed by a scheduling order that lays out the timeline for the proceedings. In the absence of such an order, the parties should agree on a timetable and the due dates for important deliverables or disclosures. The neutral expert witness should be cognizant that expansions of time can be harmful to one side of a dispute and, therefore, timely communication regarding unforeseen delays affecting the neutral expert's work and deliverables is imperative. It is also prudent to agree upon a process to keep things moving and encourage cooperation between the disputing parties to facilitate the neutral expert's work.

In addition to varying views on expert opinions and timing, the disputing parties and the trier of fact may have very different perspectives on the amount of work to be done by the neutral expert witness. All

[84] If the neutral expert witness is directed to prepare a separate set of work product and opinions for each of the disputing parties, it is prudent to agree in advance to the discovery process available to the disputing parties. Of concern will be access to an opposing party's supporting work product, interview notes, and drafts of neutral expert witness reports.

parties will have valid concerns about cost and speed of resolution, however, the decision about the level of effort required to reach a valid, supported, and admissible opinion rightfully belongs to the neutral expert witness because the expert is ultimately responsible for their work.

During the contracting process, it is also advisable for the neutral expert witness to anticipate assignment scope modifications, which are likely to occur as discovery progresses and new facts and evidence are exposed. Should this happen, it is helpful to have protocols in place to change the work requirements and needed opinions. Protocols should include instructions on which party (meaning the disputing parties, the trier of fact, or both) may officially alter the scope of work and direct the efforts of the neutral expert witness.

By the nature of the engagement, the disputing parties believe they have the right to direct the neutral expert witness because they are paying the bills. In contrast, the trier of fact may have concerns about impartiality and bias when disputing parties have this level of control over the expert witness.[85] Therefore, in order to avoid a war over who controls the neutral expert's work and work product, a clear understanding should be reached among all parties on how these situations are to be handled.

It is also possible that one, or both, of the disputing parties may ask the neutral expert witness to perform work based on a request outside the direct scope of the contracted assignment. For example, one of the disputing parties may request that alternative analyses be performed using differing interpretations of the facts, circumstances, or assumptions. If the disputing parties and court, or arbitrator, mutually agree that the neutral expert can accept and perform the special work request, the neutral expert should take extra care to ensure the scope, nature, and terms, including payment arrangements, are certain and that such work will not impair impartiality. In addition, the neutral expert witness should prepare timekeeping and billing records that evidence any work performed to accommodate a special request.

Finally, the neutral expert witness should reach an agreement with the disputing parties and the trier of fact about the preferred communication protocol. The neutral expert witness is expected to communicate with the trier of fact, each of the disputing parties, and, in certain instances, third parties. The neutral expert witness is free to bring any important matter directly to the trier of fact. Of course, discretion should be exercised to avoid unnecessarily troubling the trier of fact with immaterial concerns.

If there is a bar on ex parte communications involving the opposing parties, the implications on cost and timing should be discussed. In many cases, an ex parte communication prohibition is impractical due to inconvenience and the need to preserve rights to confidentiality and privilege. However, the neutral expert witness should be aware that spending an inordinate or disproportional amount of time with one side in a dispute may fuel claims of partiality by the other side. Candid, transparent, and timely communication with the parties is the best way to avoid this risk.

Interaction With the Triers of Fact

Neutral expert witness communications with the court or arbitrators can be written or oral. As can be appreciated, any interaction with the triers of fact must be honest, candid, and truthful. The neutral expert witness may be required to respond to inquiries, requests for information, or to provide counsel on matters like discovery, deadlines, or confidentiality. These communications can happen over the phone, in email exchanges, through formal written exchanges, or in a live hearing. It is never appropriate to

[85] In formal litigation, the presiding judge has the final say on these types of controversial matters.

speculate, guess wildly, exaggerate, over-promise, or speak in jest. Communicating with any trier of fact during the pendency of a dispute proceeding is serious business.

Dialogue With the Disputing Parties

Communication between the neutral expert witness and the opposing parties may vary greatly depending on the facts and circumstances presented. In some cases, communication may be limited to requests for the production of materials. In others, the neutral may interview disputing party witnesses, arrange and make site visits, obtain explanations of materials produced, or ask for written responses to requested stipulations and admissions. Regardless of the extent of contact, the neutral expert witness should remain impartial and unbiased. Communications should be thoughtful, relevant, accurate, and useful to the assignment at hand.

Another point to consider is the improper sharing of potentially privileged or confidential information. As with any dispute resolution process, each of the disputing parties will have information they prefer to keep confidential or legally protected with privilege. Confidential information might include proprietary work product, client names, know-how, or irrelevant facts. Information commonly protected by privilege includes case strategy, legal advice, and legal theories.

Just by the nature of the work performed, it is possible that the neutral expert may learn confidential or privileged information that should be reasonably protected from disclosure. All parties should agree on the handling and disclosure of sensitive information and the ground rules for discovery. Conversely, a disputing party may desire to share sensitive information with the hope that the neutral expert witness will be better able to articulate a position to the trier of fact using that information. Regardless of the point of view, careful consideration is needed to protect the disputing parties and the neutral expert witness from unwarranted exposure to harm from an undesired disclosure of sensitive information.

Related to this matter is the representation of persons interviewed by the neutral expert witness. It is common for the neutral expert witness to interview knowledgeable persons or witnesses for either side of a dispute as part of the procedures deemed necessary to form a professional opinion. It will be important to reach an upfront agreement with the parties regarding whether an opposing party can attend an interview or whether the person interviewed must be represented by personal or a disputing party's legal counsel, or both.

Correspondence With Third Parties

The neutral expert witness may also find it necessary to communicate with third parties. This can include third parties believed to have relevant information or evidence helpful to the neutral expert's assignment. This can include, for example, a financial institution that handled business records, a trade association that compiled industry data, or a sector specialist. Extreme caution should be used in these situations to preserve confidentiality. In most cases, interactions between the neutral expert witness and third parties will be arranged by court-issued subpoena or an equivalent instrument issued by an arbitrator.

Disclosure of Neutral Expert Witness Work and Opinions

Of course, the reporting of the neutral expert witness's work and opinions is the main communication deliverable of the neutral expert. In many cases, the neutral expert witness is asked to prepare and deliver an expert report, together with opinions thereon, to the trier of fact and disputing parties before the close of a designated discovery period. However, there are a few substantive differences between expert reporting as an expert witness retained by one side in a dispute and an appointed neutral expert witness jointly engaged by the disputing parties. As a joint expert witness, there is no opposing expert witness

typically encountered in dispute resolution proceedings. As such, the jointly retained expert witness should testify to both parties' interests, fact beliefs, and assumptions by doing the following things:

- Disclose the parties who retained the neutral expert witness.
- Describe any facts in dispute relevant to the neutral expert witness work and opinions, the neutral expert's interpretation of the facts in dispute, and the effect on the work and opinions.
- Report any key assumptions used and any disparate assumptions adopted by the disputing parties and not used (and, if desired, the reasons why any assumptions were not used).
- If requested to do the work needed to separately present opinions for each of the disputing parties, the neutral expert witness should provide complete disclosures for each opposing party.

It is possible that the disputing parties will be allowed to depose the neutral expert witness to discover the facts surrounding the work and opinions.

It is expected that the neutral expert witness will disclose the work performed, materials relied upon, assumptions made, and other information, together with any opinions formed, orally and in person at a live trial or arbitration session. In response, the trier of fact and opposing parties may be allowed to examine the neutral expert witness. Depending on the agreement of the parties or the preference of the trier of fact, each disputing party may only be allowed to cross-examine the neutral expert witness, foregoing direct examination. Once examination is complete, the obligation of the neutral expert witness is complete, and subsequent communications is unusually limited to those that are administrative in nature.

Appendix B: Communications for Family Law in Litigation and Dispute Services

This appendix provides supplemental information to practitioners providing litigation and dispute services in family law matters.[86] State legislatures determine the legal process and are responsible for establishing statutes related to divorce, and state courts have developed related case law. Significant legal differences exist on a state-by-state basis. The objective of this appendix is not to provide a comprehensive identification, analysis, or discussion of the various state-by-state differences but, rather, to discuss common themes that practitioners should be aware of when communicating in these types of engagements.[87]

We expect the list of potential stakeholders to the communications involved in family law litigation to be more limited than the comprehensive list presented in the practice aid. Generally, the list of relevant potential stakeholders includes, without limitation, the following:

- Client legal counsel and law firm
- Underlying client
- Testifying expert
- Other consultants or experts retained by client legal counsel or client
- Adverse legal counsel
- Adverse client
- Opposing experts or consultants
- Mediator
- Triers of fact

Practitioners should identify possible stakeholders before agreeing to accept a litigation and dispute services engagement for family law matters.

Relevant Standards and Guidance

The professional standards and guidance discussed in chapter 2 of the practice aid apply to practitioners engaged to perform litigation and dispute services in a family law setting. It is particularly important for practitioners to be aware of potential conflicts of interest or perceived bias in instances in which a client relationship may already exist with one or both parties to a divorce action, for example, when a practitioner has been previously engaged to perform tax services for the married couple or entities owned by the married couple. Although there is no specific prohibition, a careful review of chapter 3 of this practice aid, the code, and the practice aid *Serving as an Expert Witness or Consultant*.

The Divorce Process

The divorce process is described by the process and venue, areas of dispute, the practitioner, expert disclosure, the written report, deposition, and mediation. Each of these steps in the process is described as follows.

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[86] The terms *family law*, *marital dissolution*, and *divorce* are considered to be interchangeable and carry the same meaning.

[87] Additional resources: The American Bar Association's Family Law Section and The American Academy of Matrimonial Lawyers.

Process and Venue

Generally, the legal process to obtain a divorce begins with one party filing a *complaint* or *petition* for divorce. Terms used to denote this initial filing vary by state. Depending on whether the divorce is *contested* or *uncontested*, the amount of time between the initial filing and the ultimate trial decision (or settlement agreement) can vary widely. Prior to the parties going to trial to litigate the divorce, it is typical for one or more settlement conferences or mediations to be held. In fact, some states have adopted a mandatory settlement conference or mediation prior to trial in contested divorce cases. If the matter proceeds to trial, the venue varies by state and may include

- chancery courts,
- circuit courts, or
- other courts of general jurisdictions.

In many states, family courts hear cases involving custody and child support issues but are less likely to handle divorce proceedings. It is important for practitioners to become familiar with the court system in the state or states where work is to be performed. Practitioners should consult with client legal counsel regarding the venue and rules specific to the matter at issue.

Areas of Dispute

In a divorce, the parties may work together to achieve agreement in all significant areas, requiring only a court order to be granted for a divorce. Alternatively, the parties may agree to certain terms and litigate others. In general, the major areas of dispute include

- custody of minor children;
- grounds for divorce (fault);
- income for purposes of child support and alimony; and
- identification, valuation, and division of property.

Practitioners are commonly involved in determining income for purposes of assessing the ability to pay alimony and in valuing businesses or business interests to assist in the equitable division of property. Practitioners may also be engaged to perform forensic accounting procedures to assist in calculating child support, analyzing the need for alimony, calculating the income tax impact related to the proposed division of property or award of assets, tracing marital property, or many other related services. To facilitate the analyses described previously, practitioners may participate in the process by providing an information request to be incorporated into discovery, suggesting deposition questions for the opposing party and his or her expert, or attending those depositions.

Several factors will affect the practitioner's level of involvement, including client legal counsel's familiarity with the financial issues at hand, fee sensitivity of the underlying client, and even the possibility of successful mediation. It is essential to maintain an ongoing, open level of communication throughout the engagement.

The Practitioner

Practitioners may be engaged prior, or subsequent, to the initial filing. As part of engagement acceptance, practitioners must be aware of rules in effect within the jurisdiction of the matter that would affect whether the requested services are practical and possible considering the timing of the case. State court requirements may affect the timing and nature of the practitioners' communication and services.

Expert Disclosure

Some state courts require a formal disclosure of an expert witness and the substance of the expert witness's expected testimony. In practice, the amount of detail required in the disclosure varies widely but generally includes a curriculum vitae along with a description of the areas in which the expert witness is expected to provide an opinion. It is critical to communicate with client legal counsel to ascertain the deadline for filing the expert disclosure and to discuss what areas of expert witness testimony should be included.

Written Report

Although the court may not require a written expert witness report, written reports are widely used. Practitioners should clearly communicate with client legal counsel about whether a written report is needed, the desired format, and any related due dates.

Deposition

The decision to take an expert witness's deposition is made by opposing legal counsel. Practitioners should be aware of any scheduling requirements as well as state requirements regarding the timing of the production of the information requested in the deposition subpoena. The requirement to submit a written report or undergo a deposition, or both, prior to trial should be considered before accepting an engagement.

Mediation

Mediation, described in chapter 2, is often part of the divorce process. Practitioners may be asked to assist in preparation for the mediation or attend the mediation. In situations in which the divorce involves a valuation of a business or business interest, practitioners should be aware of the requirements of VS section 100. In conjunction with the mediation, practitioners may be asked to communicate with an opposing expert witness. This should be discussed and approved by client legal counsel prior to having any conversations with an opposing expert witness.

Documents, including materials, notes, and analyses prepared for purposes of and during mediation, may be protected by strict confidentiality requirements limiting their use for trial or other purposes. It is important to have a firm understanding of the requirements in the jurisdiction of the specific matter.

The Practitioner's Role

A practitioner may be engaged as a consulting expert or expert witness, as those terms are used within the practice aid.

Engagement Acceptance

Engagement acceptance requires a conflict check, engagement letter, and consideration of jointly retained or court-appointed expert witness retention.

Conflict Check

When running a conflict check for a potential divorce engagement, it is important to identify all the business entities owned by the parties. The personal tax returns of the parties can be helpful to identify pass-through entities in which one or both parties own an interest. It may be necessary or helpful to use the relevant state's secretary of state business search function to assist in identifying entities owned by the parties.

Engagement Letter and Fees

Depending on state law and local rules, as well as the stage of the divorce process and issues specific to the case, the court may freeze the assets of a party. Practitioners may be required to submit an affidavit

or testify regarding the fee estimate or need for a retainer, or both. Therefore, it is advisable to design and implement policies and procedures related to estimating fees and requiring retainers.

Jointly Retained and Court-Appointed Experts

The use of jointly retained and court-appointed experts has gained popularity due to the potential to reduce expert fees to the combined marital estate. As explained in appendix A, being *jointly retained* means that both parties are the practitioner's clients. Being a *court-appointed* expert means that the court is the practitioner's client. In either case, practitioners are to provide testimony to the court. When jointly retained or court-appointed, it is important to understand communication guidelines and expectations. Although not a required component of the engagement letter, it may be helpful to obtain consensus in writing on whether both parties should be included in all communications and what communication forms are acceptable. It may also be helpful to specifically state how invoicing is to be handled, especially in cases in which one party controls most of the marital estate.

Client Invoices and Time Records

When providing family law litigation and dispute services, it is common to be asked to provide copies of invoices or detailed time records, or both, related to the case as discussed in chapter 4.

Expert Opinions and Reports

See chapter 6 for a detailed discussion regarding reports. Divorce matters follow state and local rules and procedures, so it is important for practitioners to communicate with client legal counsel concerning whether a written report is desired or necessary. If the case is expected to be settled through mediation, a written report may not be requested. Expert reports are not allowed to be admitted as evidence at trial without the testimony of the expert.

Testimony

Expert witness testimony is typical related to hearings and trial. Each of these areas are detailed further as follows.

Hearings

Depending on the facts and circumstances of the case, practitioners may be requested to testify at a hearing on a motion filed in the case. The following are two such examples:

- The underlying client is asking for temporary support while the divorce is pending.
- The opposing party is refusing to comply with requests for discovery.

Attendance and testimony at a hearing should be agreed upon by practitioners and client legal counsel.

Trial

Trial is the practitioners' opportunity to inform the court of expert opinions reached and the methods used to reach them. It is critical to communicate with client legal counsel about how to use the time in court most effectively. Depending on facts and circumstances, it may be best to be brief and let the report represent the primary testimony or to elaborate on the procedures followed. Although uncommon, some states (for example, Georgia and Texas) have divorce trials in front of a jury. It may be appropriate to consider a different testimony strategy for a jury trial than for a bench trial. Typically, the expert for the plaintiff/petitioner will present his or her testimony before the opposing expert. Practitioners in this role will want to consider whether to preempt the opposing expert's testimony by presenting a comparison of the

opinions. The use of visual aids for testimony should be planned and rehearsed ahead of time, and any requirement to provide such to opposing legal counsel must be considered to avoid surprises during the trial. Lastly, practitioners must remember they are not advocates for their clients but advocates for their opinions and underlying work.