Qualifying Out-of-State Experts on the Standard of Care in Medical Malpractice Cases: Virginia’s Sartorial Supreme Court and the Expert’s White Coat

R. Lee Livingston & Nathan J. D. Veldhuis

In medical malpractice cases, the expert witness’s white coat is being tailored by the Virginia Supreme Court. Recently, that white coat has been “let out” and then “taken in.” When the Court issued its opinion in Christian v. Surgical Specialists of Richmond, LTD., 268 Va. 60, 596 S.E.2d 522 (2004), in June last year, it got easier to qualify an out-of-state expert to testify on the standard of care in Virginia courts. On January 14, 2005, in Hinkley v. Koehler, 269 Va. 82, 606 S.E.2d. 803 (2005), the Court excluded an expert in a manner that made it somewhat more difficult to qualify an expert in a medical malpractice case. Attorneys representing clients in medical malpractice litigation should be aware of the Virginia Supreme Court’s ongoing “sartorial” efforts.

THE TAILOR SEWS A SNUG WHITE COAT

Virginia Code section 8.01-581.20 governs the qualification of expert witnesses in medical malpractice cases. Code section 8.01-581.20(A) states in relevant part: the standard of care by which the acts or omissions are to be judged shall be that degree of skill and
diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted …. Any physician who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified. This presumption shall also apply to any physician who is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia. An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this Commonwealth. A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant’s specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the

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Most trial lawyers of my acquaintance are funny. Perhaps they have to laugh to keep from crying. Conversely, litigators are almost never funny. They take motions for summary judgment seriously - too seriously. I think they do this because they are deathly afraid of trials - never having conducted one. I have never seen a litigator cry. I think they are born without tear ducts.

My observations of trial lawyer humor are not scientific. They would not pass the Daubert test for admissibility in federal court. (Indeed, I doubt many of my observations could pass scrupulous “peer review”.) My impressions are subject to a “fatally flawed” sampling bias.¹ I can’t socialize with the ponderous and self-important barristers among us, because I can’t understand their conversations. I have just enough brain cells left to appreciate Martin Clark novels, lite beer commercials and English football.

Let me be clear about the subject of this column. I am not talking here about the “seriously funny” lawyer. Bob Battle is a stand-up comedian-lawyer. Glenn Lewis missed his calling and should have been one. (Baddabing!) They don’t count. As the saying goes: “Life is easy. Comedy is hard.” Delivering humor, on demand, for pay, nightly, to jaded laugh junkies craving their next fix, is a deadly serious business. There is nothing funny about it. You have to work at it constantly – more than 1,800 hours a year! It has been known to kill people: John Belushi, John Candy, Doug Kenney (the co-screenwriter of Animal House and founding editor of National Lampoon magazine), and Richard Pryor (okay, he’s not dead yet, just “burnt out”). Stand-up comedy is not fit for lawyers, most of whom are squeamish about death and dying – especially on stage.²

The subject of this column is the trial lawyer or trial judge who deploys her funny bone as well as her legal knowledge to explain that bizarre and remarkable beast: modern man (modern woman being inexplicable). I have in mind someone like Jeannie Dahnk – except slightly more sane - maybe someone like her husband, Bill Glover.³

I first tried professional humor as an innocent young lawyer defending an equally young (but not so innocent looking) buxom blonde real estate agent charged in the Fairfax General District Court, Traffic Division, with “following too closely” behind a police cruiser. The charge itself was pretty funny. What kind of idiot tailgates a cop? Shouldn’t the punishment for such a moving violation include sterilization – to prevent the total corruption of the gene pool?

Other than reciting some stale blonde jokes, I was stumped for a defense. Finally, at the last minute, on the walk to the courthouse (which in those days involved a casual stroll along moss stained brick sidewalks beneath oaks and tulip poplars to an historic and intimate Fairfax County Courthouse – rather than today’s broken field run across a trampoline decked parking garage, to a pigeon crap infested stairwell, that discharges out into the steel reinforced, poured-in-place concrete, construction site of the future tomb of the Pharaohs of Fairfax) a defense suggested itself. Unfortunately, (or so I thought at the time) I drew as my trial judge former Assistant Commonwealth Attorney and newly-minted General District Court Judge Barbara Keenan rather than the jocular Honorable Robert M. Hurst (who, it is said perhaps apocryphally, once sentenced an obviously over-wound suburban soccer-mom to “death” for failing to come to a complete stop at a stop sign). Justice Keenan is not without a sense of humor – I just didn’t know she had one at the time.

Undaunted, I plunged stupidly forward. I began my cross-examination of the police officer thusly. (Beforewarned that great cross-examinations when recounted by the self-same cross-examiner tend to begin with words like “thusly” and to grow and mature greatly as they age – very much like fine red wine):

Q. Officer, do you find my client Ms. X attractive?

Assistant Commonwealths Attorney: Objection!

Judge Keenan: Sustained. Counsel, what does the officer’s opinion of your client’s attractiveness have to do with this case? [Probably thinking to herself– somewhere in Ireland a village is missing its idiot!]

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The witness must also have a working knowledge of applicable legal terminology, and an understanding of how depositions and trials are conducted in order to understand how his/her testimony works in a case. The goal is to reduce systematically the element of surprise on cross examination while presenting clear and believable, well thought out opinions to support the theories of the party offering the witness.

Expert evidence is defined as: "evidence about a scientific, technical, or professional issue given by a person qualified to testify because of familiarity with the subject or special training in the field." An expert is defined as: "a person, who through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder." Black’s Law Dictionary 600 (7th ed. 1999).

This discussion focuses on what is sometimes referred to as the “testifying expert”; that is, a witness who has been retained by a party in litigation, and whose opinions are disclosed by way of a pre-trial order and/or discovery answers requesting the identity and opinions of expert witnesses who will be testifying at trial. In contrast, an “independent expert” is one typically appointed by the court to serve a particular purpose, over whom neither party has control by way of a contractual arrangement. Work product privileges in theory do not apply with this type of witness. A consulting expert is someone retained by a party, with or without an eye toward having that person later serve as a testifying expert. The identity and opinions of non-testifying consulting experts are almost always protected from disclosure. As discussed herein, an expert should initially be retained and treated as a consultant who either remains a consultant, or later evolves into a testifying expert.

**SELECTION**

First and foremost is determining whether expert testimony is necessary, or for that matter, will even be permitted in a case. Just because a party intends to offer “expert testimony” does not necessarily mean it will be allowed. The witness might be an expert on a particular subject, but unless the subject matter is beyond the comprehension of the trier of fact, the testimony may not be allowed. This requires careful forethought and consideration. Having an expert witness excluded at trial because the expert’s opinions are unnecessary obviously creates huge trial strategy and case credibility problems, not to mention the associated expense.
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defendant’s specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

(emphasis added).

The Virginia Supreme Court frequently, and recently, has reviewed the decisions of trial courts concerning the qualification of expert witnesses in medical malpractice cases. In *Fairfax Hospital Systems v. Curtis*, 249 Va. 531. 457 S.E.2d 66 (1995), the Court held a physician was not qualified as an expert under Code section 8.01-581.20 because he had not had an active clinical practice in the relevant specialty within one year of the date of malpractice. In *Lawson v. Elkins*, 252 Va. 352, 477 S.E.2d 510 (1996), the issue was whether a neurosurgeon was qualified to testify as an expert on the standard of care of an orthopedic surgeon who performed a chemonucleolysis procedure. The Court found the trial court properly held that since the neurosurgeon had never performed this procedure and had nothing in his qualifications to state defendant deviated from the standard of care, his testimony was properly excluded. The excluded expert in *Lawson* had received a certificate for participating in an eight hour seminar on the relevant medical procedure, but this was not sufficient to qualify him as an expert when he had never performed the procedure and had never seen the procedure performed. See *Lawson*, 252 Va. at 355, 477 S.E.2d at 511-512.

As other trial courts have noted, “[t]he Supreme Court of Virginia has consistently applied a strict interpretation to the provisions of § 8.01-581.20 in determining whether medical practitioners in fact qualify as expert witnesses for medical malpractice litigation purposes.” *Whaling v. Joyce*, 56 Va. Cir. 544 (City of Fredericksburg, February 26, 1997 (Scott, J.). For example, the Court has construed the active clinical practice requirement in the statute broadly to exclude a doctor from offering expert testimony concerning a procedure that he has not performed within one year of the date of the alleged malpractice, although the statute merely requires an “active clinical practice.” The Supreme Court has stated, “[w]e have held that the purpose of the requirements in Code Section 8.01-581.20 is to prevent testimony by an individual who has not recently engaged in the actual performance of the procedures at issue in the case.” *Perdieu v. Blackstone Family Practice Center*, 264 Va. 408, 419, 568 S.E.2d 703, 710 (2002), citing *Samie v. Varn*, 260 Va. 280, 285, 535 S.E.2d 172, 175 (2000) (emphasis added).

The medical malpractice in *Perdieu* involved Defendant’s treatment of nursing home patients and the diagnosis of bone fractures. During the relevant period, two of the proffered experts had an active clinical practice, but neither’s was in a nursing home, and neither treated fractures within the statutory period. A third expert demonstrated some knowledge in working with nursing home patients in hospitals, but the entirety of her experience involved treatment in an acute care setting. None of the three experts had recently engaged in the actual performance of the procedures at issue in the case. The Virginia Supreme Court affirmed the trial court’s decision, holding that the experts were not qualified to offer expert testimony under Code section 8.01-581.20.

On January 14, 2005 the Virginia Supreme Court in *Hinkley v. Koehler*, 269 Va. 82, 606 S.E.2d. 803 (2005), reversed a trial court decision permitting the testimony of an obstetrician, holding that there was an insufficient showing that the doctor had an active clinical practice in the defendant’s field, or related field, within one year of the alleged malpractice, pursuant to Code section 8.01-581.20(A). Although the doctor remained active as a teacher and consultant, the Court held that determining whether the active clinical practice requirement was met required reference to the “relevant medical procedure” at issue in the case. To qualify to offer expert testimony, an expert must have performed the procedures at issue within one year of the alleged malpractice, and this test must be applied in the context of the actions by which the defendant is alleged to have deviated from the standard of care.

The Court noted the defendant’s alleged negligence arose out of direct patient care provided to plaintiff during her pregnancy – specifically, management, treatment and delivery decisions made when she sought medical attention for decreased fetal movements and contractions. The defendant’s expert obstetrician who offered standard of care testimony in the trial court did not directly care for or provide treatment or management to patients during the one-year statutory period. He also had not been in a position to make delivery decisions for patients within that period. The fact he was a teacher and consultant in the field of obstetrics, and had spoken directly to patients, did not offset his lack of direct patient care.

A NEW FITTING FOR OUT-OF-STATE EXPERTS

It is axiomatic that to testify as a medical expert concerning the standard of care for a Virginia physician, an out-of-state expert must demonstrate knowledge of the
Virginia standard of care. See Code § 8.01-581.20. The aforementioned cases stand for the proposition that the statute imposes this “knowledge requirement,” and the statute, by its own terms, gives physicians from other states a presumption of qualification if they are licensed in another state. However, the Virginia Supreme Court has observed, “[n]either the General Assembly nor this Court has ever recognized a nationwide standard of care.” Poliquin v. Daniels, 254 Va. 51, 55, 486 S.E.2d 530, 533 (1997) (citing Code § 8.01-581.20).

In what now appears to be a foreshadowing of liberal alterations in the restrictions on qualification of experts, earlier this year, the Virginia Supreme Court affirmed that both the knowledge requirement and the active clinical practice requirement must be determined by reference to the relevant medical procedure. Wright v. Kaye, 267 Va. 510, 593 S.E.2d 307 (2004). In Wright v. Kaye, Defendant had allegedly performed a laparoscopy to remove a cyst on Plaintiff’s urachus negligently stapling Plaintiff’s bladder. The trial court had excluded Plaintiff’s proffered experts who were licensed Virginia obstetrician/gynecologists who had performed laparoscopies to remove pelvic cysts, just never specifically on a patient’s urachus. Finding that the excluded experts were not required to have performed the procedure at the exact location in the Plaintiff’s pelvis as had Defendant, the Court analogized the facts to those of a physician who had treated right hip fractures as being qualified to testify as an expert about treatment of a left hip fracture. The Court noted “a physician licensed in Virginia is presumed to know the standard of care in that physician’s specialty or field of medicine.” 267 Va. at 518, 593 S.E.2d at 311 (emphasis added). The Court went on to point out, even though the issue was not before it, “[t]he presumption also attaches to out-of-state physicians who meet the educational and examination requirements of the statute.” Id.

Three months later, the Court would address the extent of the statutory presumption for out-of-state experts and broaden its acceptance of out-of-state expert witnesses in medical malpractice cases. In Christian v. Surgical Specialists of Richmond, LTD., 268 Va. 60, 596 S.E.2d 522 (2004), the Virginia Supreme Court expressly expanded the rule articulated in Poliquin v. Daniels with respect to acceptance of and reliance on a “nationwide standard of care.” In Christian, plaintiff’s colon was perforated during a laparoscopic gynecological procedure performed by defendant during the attempt to remove a large pelvic cyst. Plaintiff called Dr. Gonzalez as her only expert witness to testify as to the standard of care. Defendant moved to exclude the testimony of Dr. Gonzalez on the ground that he was not familiar with the standard of care applicable in the Commonwealth of Virginia with respect to the procedure performed by defendant and was therefore prohibited from testifying under the statute.

Dr. Gonzalez was, at the time of trial, an obstetrician/gynecologist licensed to practice medicine in the states of New York and California, but not in the Commonwealth of Virginia. Dr. Gonzalez maintained an active clinical practice in gynecological surgery in New York, and had performed “hundreds of exploratory laparotomies and hysterectomies and numerous cystectomies.” 268 Va. at 63, 596 S.E.2d at 523.

Dr. Gonzalez testified that he was familiar with the standard of care in Virginia for “basic surgical procedures … because he had discussed laparoscopic and abdominal surgical procedures ‘with other surgeons in Virginia’ while attending seminars in Virginia.” Id. He testified, there are ‘no great differences between one state or another as to the basic surgical principles. The treatment across the country is fairly uniform and especially when it comes to basic principles. We’re not talking about controversies here or advanced surgical issues … [these are] just basic surgical principles … [that have] been taught a certain way for decades … [Medical schools and facilities in Virginia] adhere to the oldest standards across the United States. 268 Va. at 63-64, 596 S.E.2d at 523-524.

The trial court found Dr. Gonzalez was not qualified to testify as an expert witness under Code section § 8.01-581.20 because he had not demonstrated that he was “familiar with the statewide standard of care’ in Virginia.”

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268 Va. at 64, 596 S.E.2d at 524.

Referring to Code section 8.01-581.20(A), the Supreme Court observed plaintiff had not attempted “to produce evidence that would establish that [Dr. Gonzales] meets the educational and examination requirements for licensure in Virginia.” 268 Va. at 65, 596 S.E.2d at 524. Therefore, the Court continued, “Dr. Gonzales was not entitled to the presumption of the admissibility of his testimony as an expert witness.” Id. Absent the presumption provided for in Code section 8.01-281.20(A), the Court proceeded to frame the issue: “[w]ithout the presumption, the question becomes whether Dr. Gonzales was entitled to qualify as an expert witness under the alternative provision of this statute.” Id. The Court quoted Henning v. Thomas, 235 Va. 181, 186, 366 S.E.2d 109, 112 (1988): “[t]here is no rigid formula to determine the knowledge or familiarity of a proffered expert concerning the Virginia standard of care. Instead, that knowledge may derive from study, experience, or both.” Id.

Defendant objected to Dr. Gonzales’ testimony because plaintiff failed to establish her expert was familiar with the standard of care in Virginia, and Dr. Gonzales was strictly relying on his familiarity with the nationwide standard of care as a basis for his testimony. The Court disagreed, citing some of the cases previously noted:

Initially we observe, as we have in prior decisions, that ‘neither the General Assembly nor this Court has ever recognized a nationwide standard of care.’ Poliquin v. Daniels, 254 Va. at 55, 486 S.E.2d at 533. And ‘[w]e have no intention of retreating from that position … that is for the General Assembly to say whether a national standard of care should apply in Virginia.’ Black v. Bladergroen, 258 Va. 438, 443, 521 S.E.2d 168, 170 (1999). We further observe, however, that ‘[n/o provision of law prohibits Virginia physicians from practicing according to a national standard of care if one exists for a particular specialty, even though neither the General Assembly nor this Court has adopted such a standard.’ Id. 268 Va. at 65-66, 596 S.E.2d at 525 (emphasis added).

The Court stated:

Dr. Gonzales did not testify that he would base his opinion on a national standard of care. Rather, he testified that he was familiar with the standard of care applicable to basic gynecological surgical pro-
cedures in Virginia. Although he amplified this testimony by stating that ‘surgery is surgery … Virginia is another state just like any other state,’ Dr. Gonzales affirmatively testified that he had gained his knowledge of the Virginia standard of care through discussions with physicians in Virginia, and while attending seminars and meetings in Virginia concerning laparoscopic surgery. The clear implication of his testimony as a whole was that he was familiar with the Virginia standard of care applicable to the surgical procedure performed by [Defendant], which coincidentally was the national standard of care. 268 Va. at 66, 596 S.E.2d at 525.

Analogizing the facts with those in Sami the Court noted that Dr. Gonzales’ testimony was uncontroverted with respect to how he acquired his knowledge of the Virginia standard of care applicable to the procedure performed by Defendant. In qualifying Dr. Gonzales as an expert witness in this case, and reversing the trial court, the Court concluded that he had satisfied the active clinical practice requirement and that he had established he was familiar with Defendant’s specialty or a related field of medicine.

In expanding its previous holdings, the Court expressly highlighted an alternative method for qualifying experts in medical malpractice cases. In Christian, Plaintiff did not proffer evidence that Dr. Gonzales met the standard for licensure in Virginia. The Court held that the test in Code section 8.01-581.20 did not limit expert qualification only to those experts for whom it is established meet the educational and examination requirements for licensure in Virginia. Rather, the Court focused on the nature of the expert’s knowledge of the standard of care, considering its extent and how he came to possess it.

Furthermore, the Court expounded on its conception of a nationwide standard of care in medical malpractice cases. While refusing to adopt such a standard, the Court did not refuse to acknowledge such a standard may indeed exist. In fact, the Court identified such a standard when it observed Dr. Gonzales’s independent knowledge of the Virginia standard of care was adequate even when he testified the Virginia standard was the same as the national standard of care.

In sum, the qualification of out-of-state experts in medical malpractice cases gets easier. A party need not show the expert meets the standards for licensure in Virginia. Even without the presumption that would be created by such a showing, she just needs to establish that
the proffered expert is sufficiently familiar with the standard of care in Virginia with respect to the procedure at issue and demonstrate satisfactorily to the Court how he came to possess that knowledge. Under the Court’s holding in Christian, attending meetings and seminars in Virginia and speaking with doctors who practice in Virginia should be adequate. A stronger case for an expert is made with evidence that the expert meets the standards for licensure in Virginia, because the expert is rebuttably presumed to know the standard of care in Virginia.2

In “letting out” the width of the expert’s white coat in regards to the knowledge requirement, perhaps the Court is tipping its hat to the fact, that in the 21st Century, medicine in the Commonwealth is practiced in conformity with national, not state, standards.

CONCLUSION

The Virginia Supreme Court has broadened applicable standards to permit the testimony of out-of-state experts while at the same time defining “relevant medical procedure” in a manner that may pose challenges to qualifying some experts who may practice in a related field of medicine, but do not perform the procedures at issue in the case. Plainly, the qualification of experts in medical malpractice cases will turn on the facts at bar, and we can expect the Virginia Supreme Court’s “sartorial” efforts to continue.

Note: An earlier version of this article first appeared in the Virginia Trial Lawyers Association Journal.

1. In relevant part, “Any physician who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified. This presumption shall also apply to any physician who is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia. An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this Commonwealth.” Code § 8.01-281.20(A) (emphasis added)

2. The Virginia Board of Medicine routinely issues certifications indicating that an out-of-state physician qualifies for licensure in Virginia. This avenue of establishing the proffered expert’s qualification remains advisable because it secures the statutory presumption that the physician is familiar with the standard of care.
What You Don’t Know About Electric Data Preservation, Retention and Destruction Can Harm Your Case

Karen S. Elliott

It is a brave new world for lawyers and clients in the digital age. Lawyers and clients alike must now become familiar with electronic document retention policies, preservation letters, backup tapes, ghost copies, forensically correct copies, metadata, spoliation, and native file formats, to name a few of the critical terms that can make or break a business involved in any level of litigation. Also new is the timing of when lawyers and clients should be thinking about these issues. It is too late to think about these issues after litigation has begun and the discovery served. Businesses now must have systems and policies in place to activate the moment they knew or should have known that the electronic information may be relevant to future litigation.

Until a more unified system of rules can be adopted, lawyers and business have only a few legal decisions upon which to rely to determine how to address the dual issues of maintaining and obtaining electronic documents. Lawyers who do not understand the process will find themselves facing potential malpractice claims for failing to properly instruct their clients on proper preservation policies, and clients may be facing spoliation instructions that effectively end the litigation against their interest.

In spite of the fact that most businesses in this country rely upon computers at some level, businesses and lawyers alike have been slow to adopt uniform policies aimed at electronic preservation policies. In the days before computers, it was common sense for the client to know that destroying the critical correspondence and internal memos related to the case was “wrong.”

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Certainly document destruction occurred, and certainly clients got away with it without their counsel or opposing parties ever knowing about the destruction unless a copy turned up elsewhere or the typist remembered typing the document. However, hard copy document searches are limited to determining what documents were generated, who the recipients were, and then searching all possible physical file locations. Searching for these documents is not difficult because the evidence trail is visible and tangible. The drifter of the documents was not expected to retain all drafts and versions of every document generated; drafts routinely went immediately into the circular file with each new version. Neither did lawyers instruct their clients to keep every version of a document existing on a Dictaphone tape. Usually, by the time a client knew or should have known about litigation, the original drafts of relevant documents were long destroyed.

The difference with electronic data is that because of the technology, when businesses now know or should have known about litigation, drafts continue to exist in the form of backup tapes, in metadata, and in different versions on individual hard drives. Courts require clients to preserve that information, because it exists at the relevant time, i.e., when they knew or should have known about the litigation, and preservation is consistent with rules of civil procedure.1 Preserving that data is easier said than done because the data resides in a form that we can’t easily discern, and there will be internal costs to the preservation. However, what lawyers and their business clients now need to understand, is that all businesses, not just the Enron’s of the world, are expected to know when to keep and preserve relevant digital data.

DOCUMENT RETENTION, DESTRUCTION AND PRESERVATION POLICIES

The first requirement is for businesses to work with counsel to establish a comprehensive data policy relating to retention, destruction and preservation of electronic data. Critical aspects of the policies include:

RETENTION

Before a business even considers what documents it will be retaining, it needs to train its employees in the proper use of e-mails. This would include instructing employees not to put into e-mails any information that
could later be used against the company in litigation. For example, in the case by Laura Zubulake against UBS Warburg for sex discrimination, one of the critical e-mails that occurred after she complained to the EEOC, stated: “I spoke to Brad. He's looking to exit her asap.” Internal training should also include instructing employees to use appropriate business language in e-mails. In United States v. Microsoft Corp., Bill Gates’ management team spent a lot of time explaining e-mails discussing “choking off the air supply” of the competition.

Employees should further be instructed to limit the number of other employees included in the “cc” and “bc” trail. All of the computers for those listed on the “cc/bc” trails are potentially exposed to examination, and all of the named individuals become possible witnesses.

Companies need to actively consider how much data will be stored, how it is stored and whether the data can be stored in a way that allows for easy retrieval of information. Data management is now not just about disaster recovery, it is also about litigation response.

Part of the “retention” policy should be for executives in the company, not just members of the IT department, to understand how the electronic data system in the company is structured. This means other executives, not just IT, should understand how information is retrieved, stored, and communicated though the system. For example many businesses have complex server and backup systems that do not have a “one-to-one” relationship. Information stored on backup tapes is not like taking your VCR tape and putting it in the machine on rewind. The information is stored in a complicated manner that is expensive to restore. Thus, information that may be inexpensively retrieved from someone’s laptop hard drive may cost much more to retrieve if the hard drive is compromised and the court charges the company with the cost of retrieving the same information from the backup tape.

Information that members of the management team need to know, and what opposing parties are going to seek include information of the following type:

- Can specific files contained on network backups be selectively restored?
- As a matter of company policy, do you overwrite, reformat, erase, or otherwise destroy the content of the backups on your network servers on a periodic basis?
- What is your backup tape rotation period? Has it changed lately?
- What type of e-mail servers do you have? Do you have previously stored discoverable electronic internal or external peer-to-peer messages, including e-mail, other third-party e-mail sources and instant messages?
- What is the system (client and server-side applications) used for e-mail and the time period for the use of each such system?
- Are end-user e-mails that appear in any of the following folders stored on (i) the end-user's hard drive, (ii) an e-mail server, or (iii) a server of a third-party application service provider: In Box; Sent Mail; Delete or trash folder and end-user stored mail folders?
- Do you have a backup for each of your e-mail servers, and for what time period?
- Does each complete e-mail backup contain all messages sent or received?
- As a matter of company policy are employee’s desktop and laptop hard drives backed up?
- As a matter of company policy, are employees permitted to save files, e-mails or other data to their desktop or laptop hard drives?
- Do you implement technical impediments to minimize the opportunity for employees to save files, e-mails or other data?
- As a matter of company policy, are employee’s desktop and laptop hard drives erased, “wiped,” “scrubbed,” or reformatted before such hard drives are, for whatever reason, abandoned, transferred or decommissioned?
- How does the company deal with employees’ home computers?

These are just a few examples of the type of information that management should know and understand about their company’s computer systems. This information is no longer just in the realm of the IT department, and now forms part of litigation strategy.

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Suggestions cont’d from page 3

The importance of a careful and thoughtful selection, development and preparation of expert witness for a deposition or trial testimony cannot be overstated. The poor presentation of expert testimony can be untold damage, and is often worse than having no expert testimony at all.

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of witness is commonplace, and some believe necessary, where others are unwilling to be involved in litigation. In any event, the background of the witness must be examined to determine whether it should at least be considered a caveat. There are a number of resources available that maintain reasonably accurate data on an expert’s history. There are also companies and services that provide similar information. An internet search may also reveal information about the witness, such as websites (that may not be disclosed in a curriculum vitae) or information independently posted about the witness. For example, an internet search on a physician who has been busy as an expert witness sometimes turns up information such as court orders, information on licensure and disciplinary matters, or court rulings regarding that expert. In addition, the plaintiff and defense bars, independently of each other, often keep information about witnesses, which is either free or available at a reasonable charge. This information may assist in determining several things, including education and background qualifications, whether the witness has been qualified to testify in court on the same or similar issues in the past, whether the witness has been disqualified by a court, whether the witness has in the past been required to disclose financial information to determine how much income the witness is earning as an expert, whether the witness has been sanctioned in any fashion, the existence of any trial testimony and deposition transcripts on the witness, whether the witness advertises his/her availability to serve as an expert, and various other information that should be considered in the selection process.

Expert testimony is expensive and represents a major investment in a case. Most experts charge by the hour for their services and typically have a per hour or per diem charge for deposition or courtroom testimony. This is in addition to associated costs and expenses. The initial contact with a prospective expert is the time to find out basic information about whether there is appropriate experience and background for the case. Asking the correct questions will normally give a good indication of whether the person is the appropriate type of expert, and will legally qualify in court, and will assist in identifying potential problem areas. This also is the opportunity to get detailed information

The background of the expert is extremely important and should be fully investigated from the beginning. Credibility issues may arise for witnesses who have extensive histories of having served as an expert, particularly when the witness has appeared in numerous jurisdictions, has been retained repeatedly by the same client or law firm in multiple cases, or has a history of having appeared as a witness either primarily or exclusively for either the plaintiff or the defendant in civil litigation. On the other hand, this type

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about fees for services and availability for trial or deposition. Most prospective witnesses will provide a curriculum vitae and schedule of fees, and will discuss a case in enough detail for both counsel and the witness to determine whether or not that witness is appropriate for the case, without a charge. A red flag should go up for any prospective expert who demands payment in advance of discussing a case in reasonably sufficient detail for both the witness and counsel to make an informed decision about whether that witness should be retained. Also, without going into a detailed discussion regarding creating and maintaining the attorney work product privilege, one has to exercise caution in how much proprietary and confidential information is disclosed to the prospective expert before that person is actually retained.

Expert witnesses, on cross-examination or in discovery depositions, are usually asked in one form or another what they considered their assignment to be, or more to the point, what they were asked to do. The adverse examiner is typically looking for an unwitting response, suggesting that the witness reached an opinion prematurely in the case, in an effort to help the party who retained that expert, and then later backfilled the opinion with discovery and records provided at some point afterwards. It is important, therefore, to begin any relationship with an expert by making sure the witness understands that the attorney is, from the outset, looking for objectivity and candor in the expert’s opinions. Experts are sometimes caught in the trap of making statements such as, “I was asked to testify for the defense,” or “I was asked to review the case to help the plaintiff.” Instead, if the relationship between the attorney and the expert has been developed properly from the beginning, the expert should be able to state that he or she was asked to look at the case or to look at certain issues in his or her professional capacity and provide an opinion without considering the stakes in the underlying litigation.

It is also very helpful to have the expert understand the distinction between a consulting and a testifying expert, and to understand that the consultant’s opinions are almost universally protected from discovery. This tends to encourage the expert to be more at ease and open in discussions with counsel and with general involvement in the case. Experts very often do not understand that their opinions are protected from discovery unless and until they are disclosed as a testifying expert. There is often fear on the part of the expert that an adverse opinion makes them “free game” to the opposition if they get involved to any extent in a case. Explaining this distinction to a potential witness will often be the key factor that convinces a reluctant expert to agree to review a case. In that same vein, it is also important to explain this distinction in order that there is no misunderstanding about whether the witness may later be called upon to testify. Instances where an expert balks at testifying and backs out of a case altogether because of a misunderstanding about his/her willingness to be involved as a testifying expert, as opposed to reviewing records and providing an opinion, are not uncommon, and are easily preventable.

DEVELOPMENT AND PREPARATION

Expert witnesses should have a working familiarity with the applicable legal terminology and mechanics of how a case works. Having the expert prepared on the subject matter is not enough. The witness needs to be familiar with the legal issues in the case including, for example, the nature of the plaintiff’s claim, the elements of the plaintiff’s prima facie case and the burden of proof, regardless of whether the expert is offered by the plaintiff or defendant. Likewise, the witness needs to have an understanding of the theories of defense, including affirmative defenses, and how those theories are to be developed at trial. Having the witness understand the critical difference between a “possibility” and “probability,” and terms such as “reasonable degree of medical certainty,” “reasonable degree of scientific certainty” and other such familiar terms, is important not only to the expert’s understanding of the case and later performance in deposition or trial, but may also be critical to matters of sufficiency of proof. In some cases, defenses such as the statute of limitations may well turn on facts developed during discovery or at trial. In certain medical malpractice cases, for example, evidence to support a statute of limitations defense may turn solely on expert testimony, and the witness, therefore, has to understand not only how the defense is developed, but what evidence is necessary to present it and to support it. Likewise, other defenses such as contributory negligence, assumption of the risk, and even mitigation of damages sometimes depend upon expert evidence to support such claims.

Professionals with experience as an expert normally have some working knowledge of the attorney work product rule and issues of confidentiality. However, once an expert is retained and the disclosure of information begins, there must be a clear understanding between counsel and the expert about the specific nature of the assignment, sources of information, and matters of confidentiality. Maintaining appropriate control over the flow of information to the witness is critical throughout the life span of the relationship with the witness. A typical problem is the witness who has taken it upon himself/herself to “speak with colleagues” about the assignment, or to conduct undirected investigations outside of the relationship. It is important for the attorney to maintain control over the flow of information to the witness in order that there is no misunderstanding about whether the witness may later be called upon to testify. Instances where an expert balks at testifying and backs out of a case altogether because of a misunderstanding about his/her willingness to be involved as a testifying expert, as opposed to reviewing records and providing an opinion, are not uncommon, and are easily preventable.
research, or obtain other information without the direction of counsel. While these may well be appropriate tasks for the expert, they must be directed, or at least approved by counsel, in order that work product issues can be protected. An expert’s communications with a colleague are in all likelihood not going to be protected from discovery, nor are the expert’s research efforts or other extraneous work, unless appropriate steps and guidance are provided to the witness by counsel.

Ideally, an expert should initially be treated as a consulting expert, unless and until that person is disclosed as an expert in response to an interrogatory propounded under Rule 4:1 or Federal Rule of Civil Procedure 26, or otherwise under a pretrial order. Under both the federal and state rules, expert witnesses who are not going to testify are not required to be disclosed absent exceptional circumstances.

Rule 4:1 (4)(B) states in part:
“A party may discover facts known, or opinions held by an expert who has been retained, or specially employed by another party in anticipation of litigation or preparation of trial, and who is not expected to be called as a witness at trial, only upon a showing of exceptional circumstances, under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(emphasis added).

Federal Rule of Civil Procedure 26 (b)(4)(B) likewise states in part:
“A party may, through interrogatories or by deposition, discover facts known, or opinions held by an expert who has been retained, or specially employed by another party in anticipation of litigation or preparation for trial, and who is not expected to be called as a witness at trial, only as provided in Rule 35 (b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(emphasis added).

The term “consulting” expert, and an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial, and who is not expected to be called as a witness at trial, are one and the same. It is not uncommon to receive an unfavorable review of a matter, which obviously has to be protected from disclosure. Sometimes an expert’s initial unfavorable review changes to the favorable, or vice versa, as discovery progresses, and more or different information for review becomes available. It is also frequently helpful to keep an unfavorable consulting expert as a “devil’s advocate” even when the party may have other experts who are favorable. The unfavorable consulting expert is used as a sounding board to test the strength of the favorable expert’s opinions, especially before the identity and opinions of the witness are disclosed.

It is important to treat the expert as a non-testifying consultant until the point in time, if any, that that person is identified as a testifying witness. The requirement that a non-testifying consultant be disclosed is rare, but can occur in circumstances where for example, the consulting expert does testing or experiments on tangible evidence, which could give rise to a charge of spoliation. An accident reconstruction witness who changes, alters, or destroys the integrity of a vehicle involved in an accident is a typical example. A witness, such as a pathologist, in a medical malpractice case who uses up critical specimens from a pathology wax paraffin block, or who conducts an autopsy in anticipation of litigation might create this situation. If the opposing party can make a good argument that a consultant’s experiments have deprived them of the opportunity to conduct the same or similar testing, the court may order the disclosure of the identity, opinions, and work product of the consulting expert. There may also be problems with waiver if a non-disclosed consulting expert interviews witnesses or talks with any person without some mechanism in place to protect work product. This can even include instances where the consulting expert has communications with the client whose attorney has retained the expert. Any such communications have to be done in a manner to ensure protection by one or more forms of privilege. Sometime, an attorney anxious to settle a case before filing, or during the infancy of the case, will provide an expert’s report (even though under Rule 4 expert reports may not be
discoverable). At that point, the expert has not had the benefit of reviewing discovery that might affect the opinion adversely. Arguably, if that witness is later disclosed as a testifying expert, anything the witness previously relied upon in preparing the earlier report, including communications with counsel or other things that might ordinarily constitute work product, may be discoverable because of the earlier waiver in providing the report.

Most experts will require some sort of qualification process before being allowed to testify in court. Where statutory requirements apply, these must be reviewed well ahead of time with the witness, since qualifying the witness will require questions under oath that may track statutory language. Counsel must review with the witness the specific questioning used to qualify the witness. If there are statutes that create rebuttable presumptions that a witness is qualified, this likewise has to be reviewed as well as preparing the witness for voir dire or cross examination to challenge the presumption. The witness should also be prepared to go through a line of questioning designed to qualify the witness factually, as well as a line of possible questioning that may be used to challenge the qualifications of the witness based upon lack of familiarity or experience in the particular subject matter. It is often also helpful to review jury instructions with an expert to aide in understanding the context in which the testimony is being offered, as well as issues of burden of proof, defenses and issues of damages. An expert witness who has a working understanding of how his or her testimony fits into the context in which the testimony is being offered, as well as issues of burden of proof, defenses and issues of damages. An expert witness who has a working understanding of how his or her testimony fits into the mechanics of the case is almost always more comfortable and performs better.

An expert’s opinions and testimony are only as good as the information provided for the witness to review. Witnesses being offered for testimony need to understand that the materials and information specifically relied upon in forming opinions are probably discoverable and will be a source of inquiry at the time of depositions. Experts must understand the distinction between materials and documents specifically relied upon in forming their opinions, and those that do not fit that definition, and particularly, what documents are privileged. Experts are frequently caught flat footed on this issue, not appreciating this legal distinction and possibly assuming that any note or paper or other material in the expert’s file meets that definition. It is difficult after the fact to protect the documents from discovery if the witness is taken by surprise with the question for the first time under oath, and is unable to make this distinction. It is essential to review the expert file materials in advance of the deposition or court appearance, especially when there is a subpoena or document request, directing the expert to produce documents at a deposition or trial.

Counsel may also need to take steps to protect privileged documents in the possession of the expert, including filing a formal motion or response to a document request if necessary. It is best to avoid dealing with this issue for the first time at the expert’s deposition or trial testimony.

Providing the witness with complete and orderly records, including relevant discovery, is essential and has to be considered carefully by counsel. The witness ideally needs to be able to state that he or she has reviewed, or had the opportunity to review, all materials necessary in forming opinions. A typical ploy of the adverse examiner is to question the witness about records or depositions that the witness has not reviewed and may not know exist. It is advisable to make sure the witness at least knows about the existence of documents that may not be important to the case, to avoid this trap. In preparation for deposition or trial testimony, the witness needs to know the important and relevant documents to the case, as well as what discovery is relevant or potentially relevant, including having the witness review all depositions that have been taken, or at least providing a list of all persons deposed, in order that the witness knows who has been deposed and can decide which depositions are important. Providing factual summaries prepared by counsel for the witness to review is not encouraged, since the document is probably work product and any privilege attached to that document, and perhaps beyond, is likely waived if the witness relies upon the document in reaching opinions.

A witness who appears at a deposition with a bundle of records held together with a rubber band with no indexing system, and who does not have a command of the records, and does not know whether there may be other relevant documents over and above what has been reviewed, is an easy target for the adverse examining attorney.

In addition to making sure the witness has adequate records and discovery for review, the expert witness designation, or interrogatory answer disclosing the identity and opinions of the expert, and Rule 26 report for cases in federal court, need to be carefully reviewed with the witness prior to testimony. An adverse examiner will often attempt to attribute the authorship of the expert designation or interrogatory answer to the expert. Witnesses are often asked if they played any part in drafting the disclosure, and whether the disclosure was sent for the review before being formally disclosed. Ideally, the witness needs to be able to fend off this type of questioning by testifying that the disclosure fairly represents the sum and substance of the opinions the expert is expected to give at trial. The witness also needs to be able to respond that the disclosure is not the expert’s written product, but something prepared by the

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Suggestions cont'd from page 13

It is also part of human nature for the witness to take his/her role as an expert more seriously if counsel has gone through the time and trouble to make personal visits to the witness prior to testimony.

Expert witnesses need to understand the maxim that trial attorneys know well and are fond of quoting; that is, how a witness testifies is as equally important as the substance of what the witness says. Seasoned expert witnesses, accustomed to testifying in the courtroom and having experienced a variety of examiners, understand that the true “venue” in what they are doing lies in the subject matter and not in the fact that they are out of their professional element in being in a courtroom, or in being examined by an adverse attorney. This type of witness understands that if he/she can maintain this mindset, then the witness gains the maximum control over their testimony because the witness, and not the attorneys, or the court, are the masters of the subject matter. An expert witness, or any witness for that matter, unaccustomed to the process may feel intimidated and not in control of the subject matter. The experienced expert witness understands this distinction and knows how to use it. Testifying is not a natural comfort for anyone, and a good adverse examiner understands this and knows that many witnesses, particularly inexperienced ones, will take the path of least resistance as a defense in order to attempt to terminate the examination more quickly.

Helping the expert prepare for the specific type of adverse examiner goes a long way. Having the witness review depositions previously taken in the case may not only be essential to the expert’s review of the case, but it also gives an idea of how the questioning will proceed. Adverse examiners are generally of two types; the gatherer, whose basic goal is to find out all of the expert’s opinions, and the basis for the opinions, including getting the witness committed and limited to certain positions in the case. Preparation of the expert should include sensitizing the witness to the importance of this issue. For example, if the witness is being deposed before the completion of discovery, the witness may be asked whether he/she has reviewed all materials necessary to reach opinions, and whether the witness anticipates reviewing additional information. If the expert’s opinions are in any way contingent upon the review

attorney who hired that expert, and is a summary of the opinions in legal form. It is advisable to have the witness review and approve the expert disclosure well ahead of the time of the deposition or trial testimony.

Rule 26 reports are prepared by the expert, and experts are frequently asked to what extent, if any, the attorney played in preparing the report. Good preparation should include making sure that the witness knows the required materials and information that must be included in the Rule 26 report in order to aid the expert in preparation. Counsel should also review the expert’s Rule 26 list of prior service as an expert, if applicable, for correct form.

Expert witnesses need to feel as though they are an important part of a case. As practitioners, we know that cases, particularly complex cases, can sometimes take years to resolve. This concept is alien to other professionals, and so it is no surprise that an expert who has not heard from counsel in months, or longer, may assume that the matter has been resolved or otherwise gone away. Experts need to be kept abreast of the status of the case and told whether or not to retain records, as well as what they may expect in the future regarding additional discovery and a trial date. Frequently not having heard from counsel, the witness discards records, only to hear about the matter again when counsel is calling and asking for deposition dates, or a trial appearance, on short notice. Keeping the witness up-to-date on the case and checking periodically to make sure the witness has retained all records and materials for review is helpful and keeps the witness involved.

If economically and geographically feasible, face-to-face pre-deposition and pretrial testimony meetings well in advance of the day of the testimony with the witness are essential. A face-to-face meeting aids in the preparation of the witness, and also gives counsel the opportunity to make sure the witness has had the opportunity to review the records. If the witness has been asked to produce records at a deposition pursuant to a subpoena or document request, this gives counsel the opportunity to make sure the documents are organized and complete, and that any work product or any other privileged documents have been addressed.

Is it proper for a witness to testify to what others told him out of court, where that otherwise inadmissible testimony is offered solely for the purpose of explaining or throwing light on the conduct of the witness?

It all depends on who the witness is.
of any additional materials, this should be discussed with the witness in order to prepare for the appropriate response at the time of testimony.

The other type of examiner is the one who cross-examines the witness in a deposition in an attempt to back the witness off, or commit the witness to a position of indecision or uncertainty. Experienced experts have normally dealt with both types of examiners, but it is helpful to give the witness some advanced warning about what is expected. The witness should be prepared to respond to questions dealing with financial issues, including the expert’s rates for reviewing records and testifying. Experts with extensive backgrounds and involvement in legal matters may also face aggressive questioning about the earning history in the capacity of an expert witness. Experts need to be sensitized to this line of question to reduce the element of surprise and to have the witness prepared for the appropriate responses. As a part of preparing the witness for cross-examination, the witness should also be prepared for dealing with examiners who ask the same question(s) repeatedly in the face of not getting the desired answer. Preparing the witness to deal with hypothetical questions where the witness is asked to assume facts unknown to the witness or perhaps even nonexistent is commonplace. Witnesses faced with hypothetical questions are sometimes confused, and may assume that information exists that was not previously disclosed for review. The adverse examiner, especially in a deposition, may typically ask the witness to “state all of your opinions that you expect to give at trial,” or may ask the witness, “have you told us all of your opinions;,” or similar questioning. This question usually draws an objection because it is too broad and it is virtually impossible for the witness to provide a complete and accurate response. The expert should be sensitized to this type of questioning and to the importance of giving an appropriate response, to avoid being unfairly boxed into a corner.

Adverse examiners will frequently attempt to cross-examine an expert by using literature or other written materials. The examiner may ask if the witness is familiar with an article, text, or other writing, and whether the expert agrees or disagrees with it. The examiner may typically attempt to read excerpts from the writing while pursuing this line of questioning. Barring an objection that would preclude the witness from answering the question altogether, the witness and counsel need to have a plan for dealing with this type of cross examination. A seasoned and candid expert for example knows that fairness allows time to be able to review the writing in its entirety, and to reflect upon it while putting it in proper context. This takes time. The expert will also be allowed a lot of latitude in commenting on the literature. Faced with this response, the examining attorney will often drop the issue and move on to something else.

Having some form of rehearsal of the testimony of the expert witness on direct examination prior to trial is essential. The witness needs to understand the evidentiary and procedural steps necessary for the introduction of the expert’s testimony and documents or other tangible evidence that will be offered during the expert’s direct examination. Counsel should also discuss with the witness possible objections, and a line of questioning counsel for the expert may have to pursue in order to overcome any objections. Demonstrative evidence such as drawings, photographs, and schematics also have to be reviewed with the expert to make sure that the proper line of questioning is pursued in order for the expert’s testimony about the exhibits to be permitted. It is imperative that the witness understand that direct examination has to be conducted without the benefit of leading questions, or hearing the witness testify in a conversational narrative manner. As part of preparation, the witness needs a sampling of appropriate, non-leading direct examination. The witness should also understand the nature of some of the objections that may be raised during the course of direct examination. A witness who has a working knowledge of how questions must be presented, is less likely to be surprised and is going to be able to recover and resume testimony more smoothly after ruling on an objection.

Expert witnesses will sometimes comment in reflecting on their prior experience in cases about not having a clear “global” understanding of cases in which they have participated, beyond their limited involvement. An expert who understands the relative positions of the parties in the overall case, and who understands what the case is about in lay terms, and who can convey his/her expertise to a jury in a clear and believable manner, is obviously going to make the better witness and be less likely to be included as part of the cynical observation about expert witnesses mentioned at the beginning of this discussion. Expert witnesses are frequently the centerpiece of a case, and in many ways, either fortunately or unfortunately, a reflection of the professionalism and ethics of the practitioner on whose behalf the expert appears. Fortunately for our profession, we have the exclusive ability to control that perception.
Converting Criminal Restitution Orders to Cash

Mary C. Zinsner and Jonathan P. Lienhard

Criminal restitution orders surface in many different contexts. A crafty bookkeeper steals $20,000 from company coffers and is indicted, convicted, and ordered to pay full restitution to the company. A CFO treats corporate books as his own private pocketbook, is convicted of embezzlement, and ordered to pay restitution to the company of the millions stolen. The scoundrel then heads off to jail or defaults on the restitution payment plan reached with the victim who is left without the cash needed to make payroll and keep the business going. Time to close the doors of the business? No!

Did you know that federal and state restitution orders can be docketed as state court civil judgments and executed upon? Once a restitution order is docketed as a civil judgment, the victim has new leverage as a judgment creditor and can take debtor interrogatories, garnish the crafty bookkeeper’s bank account, or secure the lien against real property owned by the convicted CFO. Docking a restitution order as a civil judgment is also extremely beneficial in cases where there is ongoing litigation between the wrongdoer and the victim, such as a dispute regarding compensation, benefits, or buyout of the wrongdoer’s interest in the corporation or partnership. Here are the tips on how to.

Federal law provides that, at the request of a victim named in a federal court’s restitution order, “the clerk of court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order.” 18 U.S.C. § 3664(m)(1)(B)(2004). This abstract of judgment “shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.” Id. This statute “gives the . . . victim named in the restitution judgment the power to enforce a restitution judgment.” United States v. James, 312 F. Supp. 2d 802, 807 (E.D. Va. 2004). Furthermore, the language of the statute means that “restitution orders may be converted into enforceable civil judgments.” United States v. Gall, 1998 U.S. Dist. Lexis 13489 (D. Conn. July 7, 1998).

Virginia law provides that a foreign judgment filed with the clerk of the Circuit Court shall be treated “in the same manner as a judgment of the circuit court of any city or county of this Commonwealth.” Va. Code Ann. § 8.01-465.2 (Michie 2004). Furthermore, “[a] judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a circuit court of any city or county of this Commonwealth and may be enforced or satisfied in like manner.” Id.

Similarly, state law provides that a restitution order in favor of a victim in a criminal case “may be docketed as provided in § 8.01-446 when so ordered by the court or upon written request of the victim and may be enforced . . . in the same manner as a judgment in a civil action.” Code § 19.2-305.2. Such a restitution order “shall have the same force and effect as a specific judgment for money . . .” Code § 8.01-446.

So, now you know the law. Restitution orders from courts of the Commonwealth, federal court, or other state courts may be converted into enforceable civil judgments. What steps must be taken to docket the restitution order as a judgment? First, request an abstract of judgment from the federal or state court which rendered the conviction and restitution award. Review the abstract of judgment carefully to make sure that the abstract correctly identifies the entity entitled to receive the restitution award. Next, take the abstract of judgment to the Circuit Court of the county in which you want to enforce the judgment. You may record the judgment in more than one county. Upon payment of the required fee, the abstract will be recorded as a judgment and you will be given a judgment case number. There will be a fee for service and the judgment will be served on the debtor, who will have 21 days from service within which to move to have the judgment set aside or vacated. Once the 21 days have passed, the victim can execute on the judgment by issuing garnishment summons, taking debtor interrogatories, or attaching personal property owned by the judgment debtor.

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Q. And was it an unpleasant experience for you officer, being able to see more and more of Ms. X, and to see it more and more clearly, as her car came up behind yours?

A. Tailgating is not funny sir! She was right up on my tail. It was dangerous!

Q. Indeed, so dangerous that you had to pull her over and ask her to get out of her car so you could give her a ticket while she was standing fully statuesque? [I probably said “standing up” — but I like this version better.]

A. I engaged my emergency equipment and lights, and directed her to pull over after which I cited for her the moving violation.

Q. After you pulled her over, you did ask her to get out of her car before giving her the ticket, correct?

A. No, I don’t recall ever asking her to get of the car, no. I asked her for her license and registration, wrote the ticket in my cruiser and then returned and gave it to her while she was still seated in the automobile.

Q. Did you ask her for her phone number?

Assistant Commonwealth Attorney: Objection!

Judge Keenan (finally smiling broadly): Sustained. That’s enough. Counsel, you’ve made your point.

The judgment of the court was that my client was guilty as charged. However, no fine was imposed and she was ordered merely to pay costs. Of course, the client was furious that she had gotten points on her license and stormed out of the courthouse. I was glad to be rid of her so I could celebrate my first great traffic court victory.

Admittedly, much of what we do is not funny. As we get older the subject matter of our cases becomes darker. Murders, catastrophic injuries, will contests and securities fraud suits are not funny subjects. A tongue in cheek cross examination is inappropriate in a serious case. But humor is important around the edges of such cases. Gallows humor is often the only way to bring up difficult subjects like a plea bargain or payment of a large settlement. Most of us have had to explain to clients that our jocular conversations with opposing counsel during breaks in depositions or at trial do not constitute “fraternizing with the enemy.” They are an important way of keeping the communication lines open, so we can take the temperature of the opponent. Humor can be “disarming,” and in the armed camp that is a major trial it is essential to the maintenance of sanity on all sides.

The great light verse poet Ogden Nash offered the best defense of professional humor I have ever read:

It is not brash, it is not cheap, it is not heartless. Among other things I think humor is a shield, a weapon, a survival kit ….

So here we are several billion of us crowded into our global concentration camp for the duration. How are we to survive? Solemnity is not the answer, anymore than witless and irresponsible frivolity is. I think our best chance lies in humor, which in this case means a wry acceptance of our predicament. We don’t have to like it, but we can at least recognize its ridiculous aspects, one of which is ourselves.

Amen to that.
DESTRUCTION

Companies need to determine and know how long e-mails and backup files will be stored, and then they need to follow the established policy. In some instances, the technology departments keep the backup copies for a longer period of time than the internal policy requires. For example, in Murphy Oil USA, Inc. v. Fluor Daniel, Inc.,² although the policy was to destroy e-mail backup tapes after 45 days, the IT department kept them for a much longer time, subjecting them to discovery.

PRESERVATION

The rule set by Zubulake IV³ which seems to be setting the general standard, is that the time for preservation of “relevant” electronic evidence is “when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”⁴ That is, once there are sufficient facts to put the business on notice that litigation is “reasonably anticipated,” the duty arises.⁵

Thus, a business must have in place a system that will preserve the relevant electronic data at the correct time. That is, the business must stop any automatic data destruction policy that is in place and take affirmative steps to preserve relevant electronic data. If the business does not affirmatively preserve the relevant data, then the court may impose sanctions for the failure to preserve. Sanctions may include, as it did in Zubulake V, an adverse inference instruction to be read to the jury instructing the jury to assume that the missing e-mails would have been detrimental to the party who destroyed them.⁶ Examples of routine business practices that need to be stopped include server backup tape rotation, reimaging of hard drives, exchanging of drives, gifts, sale or other destruction of computers, disk defragmentation and other maintenance routines that may destroy data.

WHAT DATA MUST BE PRESERVED?

Simply preserving relevant backup tapes of e-mails and documents is not going to be a sufficient measure of preservation. In order to understand the complexity of preserving electronic data, one must understand that opening a document in Microsoft Word or copying the document to a CD will forever change the metadata in the document that in itself may be relevant evidence. Metadata is defined as data about the data, such as last access dates, creation and editing dates and editors. Simply using the Windows operating system to copy a hard drive to a CD will not only not copy the file’s metadata, it may also change the data. The CD physically is not able to store a file’s Windows metadata.

Digital data is recorded as a stream of ones and zeros. To interpret this data, an application must be utilized. Preserving the data thus also means that the correct application must also be preserved. Additionally, a hard drive may be overwriting data, and in doing so, destroying the very draft that is highly relevant to the litigation.

Thus, the question becomes, how are you going to preserve the data on an individual employee’s hard drive that may be relevant to the litigation? Do you replace the hard drive? Can you find an expert who can make a forensically correct “ghost” copy? (A forensic copy copies every sector on the drive, including those sectors containing deleted data. When the bitstream (the stream of data containing each bit on the media) is copied to another drive, the new copy is called a “clone.” The bitstream stored in the file is called a “drive image.” Forensic computer tools are used to analyze and produce information/data from the images and clones.) Other questions to ask include:

- Which employees are important to the potential litigation?
- Who should make the determination as to what information is preserved and when?

In Zubulake V, the court held both the business and counsel to an extremely high standard:
- Did defendant and “counsel [take] all necessary steps to guarantee that relevant data was both preserved and produced.”⁷
- Counsel was admonished to monitor compliance so that all sources of discoverable information were identified and searched.⁸
- The court held that counsel had a duty to effectively communicate to the client its discovery obligation so that all relevant information is discovered, retained, and produced.⁹
- Counsel must identify sources of discoverable information.¹⁰
- Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents.¹¹
- Counsel must interview employees to determine
whether all potential sources of information have been inspected.12

Thus, the *Zubulake* court placed an extremely high burden on counsel to undertake the continuing process of determining what digital evidence should be preserved by the businesses.

**PRESERVATION LETTER**

Electronic document preservation letters are becoming a routine device and should be considered in two situations. First, when litigation first comes to counsel, it is recommended that counsel send a written preservation of evidence letter to the client outlining the need to preserve the information discussed above. Most clients still do not understand the need to preserve digital data. As seen in the series of five *Zubulake* cases, a high burden is placed upon counsel, so counsel needs to take control of the situation quickly.

In addition to the data preservation letter to the client, counsel should consider sending a data preservation letter to opposing counsel. The difficulty here is to craft the request in a reasonable manner that will be held reasonable discovery by a court and will not cripple the opposing company’s operation. You will need to determine from your client who at the opposing party may have the relevant information and seek preservation of specific streams of data, such as e-mail generated by a particular individual. While the preservation letter does “educate” the other side early in the game, because spoliation is frequently defended on the basis of ignorance, the benefit may outweigh any detriment, although as in all litigation matters, strategy is individual to each case.

The series of five decisions in *Zubulake* is critical initial reading to understand the potential scope of the attorney’s and client’s obligations. *Zubulake I* addresses and provides a formula for cost allocation for production of e-mails contained on backup tapes;13 *Zubulake II* addresses *Zubulake’s* reporting obligations;14 *Zubulake III* allocates backup tape restoration costs;15 *Zubulake IV* orders sanctions against the defendant for violating its duty to preserve the evidence;16 and in *Zubulake V*, the court granted an adverse inference instruction to be read to the jury regarding the missing e-mails.17

**DATA PRESERVATION ORDER**

Once litigation has ensued, counsel should consider obtaining a data preservation order that establishes the protocol for preserving the electronic data. If hard drives are requested and produced in the litigation, counsel then needs to have an order entered protecting the inspection process. Key elements should include: (1) That the court appoint an independent computer forensics expert to act as an officer of the court to search the hard drive and extract data relevant to the complaint; (2) That the expert be directed to provide the court with a search protocol that will protect data that is privileged and confidential data belonging to the individual/company, and any other data that is irrelevant to the litigation. Further, that the expert be directed to remove any data that is relevant to litigation and if the expert is uncertain, that he be directed to the court for in camera review, without revelation to the requesting counsel; (3) That the expert be directed to execute an agreement to keep confidential any information he learns about the privileged and confidential data belonging to the named parties or, in the alternative, to sign the protective order; (4) That the expert determine if a sound forensic copy (i.e., mirror image) of the hard drive may be made to use for the search so that the search may be conducted on the copy, and the hard drive returned to the owner’s possession; (5) That the parties, by their counsel, be directed to work with the expert to determine the strategy for examining the hard drive and determining best practices for achieving all the parties’ goals; (6) That the expert be directed to preserve a proper chain of custody regarding the data extracted; (7) That the cost of this search be borne by the requesting party; and (8) That the owner of the hard drive be granted leave as part of the action to file a claim for damages should the hard drive be damaged or should data on the hard drive be damaged.

The above protocol is taken from the following rulings which also address additional protective issues: *Simon Property Group v. mySimon, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000); *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999) 60 F. Supp. 2d 1050 (S.D. Cal. 1999).

As counsel, if you have requested the electronic data, you need to know in what type of format you would like to obtain the data. Do you want to maintain the electronic files in their “native format” or do you want them converted to tiff images (tagged image file format). Keeping the files in native format allows the viewer to review the document in the state it was in when it was created. Thus, metadata, tracked changes, spreadsheet...
formulas and embedded data are preserved. It may also be cheaper to produce the files in the native format. However, if native file format is produced, it is difficult to add Bates numbers and redact privileged portions. There are also associated difficulties with searching the files, and with possibly “changing” the files from their original format. “Raw” native file review also requires each of the original software applications for each document reviewed. This can increase costs as well. New technology is emerging, however, that reduces some of the problems with native file review, so counsel may want to consider having both a tiff file and native file production. The bottom line is, before you request a massive set of documents, know the resulting cost of what you are seeking, and what you will need to be looking for within the documents.

EXPERT ADVICE

Finally, expert advice is critical support for this ever changing area. Forensic programs are getting better and better everyday. However, the number of qualified experts who can conduct the forensic technology without compromising the original data are still few in number, so counsel needs to thoroughly investigate the expert’s protocols before engaging them to extract the data.

4. Id. at 216.
5. Id. at 217.
7. Id. at *7.
8. Id. at *7.
9. Id. at *7.
10. Id. at *8.
11. Id. at *8.
12. Id. at *8 - *10.
16. Zubulake IV.
17. Zubulake V.
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