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Experts -Use and Abuse (Part II): Commentary

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COMMENTARY

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Let me make a couple of comments on these excellent presentations.

First, with respect to the point that Emmet makes, I am totally in agreement that it is the expert's job—for that matter, it is the lawyer's job—to be a good teacher. A good trial lawyer is a good teacher. That is the essential quality. The problem, however, is that there are not very many lawyers, let alone experts, who look at their job that way. My experience is that lawyers let their conception of advocacy get in the way of being good teachers. Those ought not to be irreconcilable concepts, but the way they are practiced in the courts they frequently are. Lawyers are so preoccupied with arguing that they forget that their job is to teach.

That gets us to the fact that the kinds of rules that we are getting more and more are made not because judges necessarily want those rules, but, to a large extent, they are intended to deal with what you might call abuses. But they are not really generally abuses—they are just failures on the part of lawyers.

I am sure that all of you have had occasion to complain or to hear complaints about what the appellate courts are doing about oral argument. Oral argument is becoming a lost art. I think, in the Ninth Circuit, sixty percent of the cases, or close to it, are decided without oral argument—don't hold me to that. But the numbers are growing. Why is that? It is because judges have found that, in most cases, oral arguments are of little or no assistance. It is because of the way lawyers approach oral argument.

I suppose the fact is that there are simply far more people in the profession than there are people with the kind of intelligence, skills, and interests to do a good job as lawyers. There are a lot of people who are practicing law who ought not to be lawyers. That has lowered the level

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of performance. The rules that courts are adopting are a matter of self-defense.

I agree completely that you ought to have the opportunity to put your expert on to tell a story in direct examination. But if you have sat through as many direct examinations as I have, you would understand why you grasp at the opportunity to have it presented in writing, in the hope that it will make a little bit of sense. It is sad, but it is true. The rules that have been adopted in the last twenty or so years—discovery control rules, this amended Rule 43 that is likely to go through, and other rules—are, in part, prophylactic, but they certainly are protective on the part of the courts.

The time limit rules are being imposed because lawyers, partly because they are poor advocates, partly because of pressures from clients, fear of malpractice liability, lack of experience, and other considerations, take too much time and present too many witnesses. So we find actually that lawyers are often appreciative of these kinds of limitations because it gets them off the hook and it makes them prepare more disciplined presentations.

What is the answer to all that? The answer is that you have to know your judge. And, one would hope, if your judge knows you, you will be permitted to go through the process which involves teaching, you will be permitted to ask questions on direct examination, because the judge has confidence in you. But that isn't always going to be true.

With respect to the damage claim in this case, it presents a classic dilemma that plaintiffs confront in these kinds of cases, whether to be greedy or conservative. If you are conservative, you are going to put in a capitalized valuation approach, which will not give you a whole lot of money for Newco but has a good chance of succeeding. If you are a gambler, you are going to put in a projection of what this company would have earned, basically putting Newco in something like its competitor's, American's, position and transfer the profits from one to the other. I have seen both approaches. It puts the judge on the spot.

Of course, the lawyer in making that decision has to decide first what kind of a judge he or she is before. Some judges will allow—or have at least in the past allowed—any damage theory to go to the jury and have left it to the jury. Others, including myself, have been much more critical. So you have to make a decision, as a plaintiff's lawyer, whether to go for broke.

But there is another consideration, and that is whether you are going for a theory that is going to succeed at trial and be admissible, or whether

you are going for a theory that will be useful in settlement. If your approach as a plaintiff's lawyer is to get this case settled, then you are likely to come in with the theory that produces the largest amount of dollars so long as it has at least a modicum of credibility so that the defense will believe there is a chance that it will be admitted at trial.

It is a difficult decision for plaintiffs' lawyers to make, and it depends a great deal on the assessment of the judge. In this area, although there is circuit law, such as *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*,[1] which would preclude you from coming in with "blue sky" kind of calculations, the trial judge nevertheless has a great deal of discretion and much of what you would do in that case would turn on your assessment of the judge.

With respect to Alan's comments, I agree completely that you ought not to take any deposition, certainly not an expert's deposition, as a knee-jerk reflex. Again, the restrictions in these rules on discovery are a response to the kind of knee-jerk discovery reflexes that are very common in the profession.

Let me say something about court-appointed experts. I also agree with Alan that I think court-appointed experts are not really experts; they are going to be advocates for some position. There is no such thing as a neutral expert, no matter how much they protest. That is not to denigrate the expert, but it is to say that every expert starts out with certain tacit assumptions, and it is the choice between tacit assumptions that determines where experts come out.

It has always seemed to me that the best way to deal with experts is to get them in chambers or in the conference room, seat them at opposite sides of the table, and get them to explain to each other why they disagree. I think that would bring a lot of cases to an end. I have tried to do some of that. It is a little difficult to get that across. But it is a procedure that you might keep in mind when you are in a strong position, to get the experts to confront each other and explain to each other why they disagree. Then, I think, you get to the heart of the controversy, which often will then just be a value judgment.

Nevertheless, there is growing pressure in favor of greater use of court-appointed experts. There is even one authority in this field who has been advocating a change in Rule 706 that would almost compel judges to appoint an expert in these kinds of cases, or at least make the judge explain why an expert is not being appointed. That certainly is a bit of foolishness, but it is a reflection of the frustration among many people,

[1] 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

not only judges but people out in the field who are affected by the kind of litigation that goes on now, especially in the product field as well as other areas, and by the kinds of flaky experts and flaky theories that are being pushed on the courts. There is certainly a lot of sentiment among industry that something ought to be done to put some control on the kind of expert testimony that is now going before juries. Court-appointed experts are one way, in the eyes of some, to deal with this problem.

At the Federal Judicial Center, we had made a survey and found out that very few judges have used court-appointed experts. Some people are now digging into the reasons why they have not used them. It is perceived to be a solution to this problem by some, but it is hoped that it will not get very far.

There are various alternative approaches being discussed. One is to have established bodies in areas of scientific knowledge appoint panels of experts, people who are distinguished in the profession, whether they are chemists, physicists, or what have you, who would be available as resources, or who would review theories and then give their opinions, or would point to resources that might be available to the judge to help out in those cases. I don't see much hope for that. But there is a lot going on and it is something that bears watching.