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# Damages: Expert Witnesses

Stephen D. Easton\*

In the language of the Federal Rules of Evidence, an expert is one who possesses “scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.”<sup>1</sup> When the jury is sorting through evidence and conflicting party claims on disputed issues, such persons are potentially useful sources of information.

At the same time, attorneys’ widespread use of expert witnesses has troublesome aspects. To the chagrin of some, expert witnesses have come to dominate civil trials, particularly those involving technical issues where large amounts of money are at risk. The *Sabia* case is just such a case.<sup>2</sup> As would be expected, experts dominate the litigation. This portion of the symposium will discuss the role of experts and their interaction with the attorneys who hire them, as well as the attorneys who prepare to cross-examine them.

## I. CHARACTERISTICS OF EXPERTS

Like any other human being, an expert witness is a bundle of both positive and negative characteristics. Many of those characteristics are relevant to the expert’s effectiveness as a witness, including some characteristics that might seem to be irrelevant.

An attorney looking for an expert witness should first determine whether she will require an expert to have certain characteristics.<sup>3</sup> She will then try to find an expert who has these required characteristics, plus as many as possible of the other characteristics that will make the potential expert more effective. After the expert is listed as a possible trial witness, the opposing attorney will try to identify negative characteristics and exploit those negative characteristics, to reduce the expert’s effectiveness as a witness. Opposing counsel will also try to exploit the characteristics that retaining counsel found attractive, when possible. Therefore, the following discussion will briefly review both the negative and positive aspects of each of the following characteristics.

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1. FED. R. EVID. 702.

2. The *Sabia* case is a medical malpractice case resulting from severe birth defects suffered by Little Tony Sabia. BARRY WERTH, *DAMAGES: ONE FAMILY’S LEGAL STRUGGLES IN THE WORLD OF MEDICINE* (1998).

3. See STEPHEN D. EASTON, *HOW TO WIN JURY TRIALS: BUILDING CREDIBILITY WITH JUDGES AND JURORS* § 11.01(a), at 163 (1998) (“To be effective, your expert must have three essential attributes: integrity, communication skills, and qualifications. Do not settle for an expert if any of the three is missing.”).

### A. Qualifications

To testify to opinions as an expert, a witness must have sufficient “knowledge, skill, experience, training, or education” to qualify him to provide “scientific, technical, or other specialized knowledge” to assist the jury.<sup>4</sup> In a case with substantial potential damages conducted by well-financed attorneys like those in *Damages*, it would be almost unprecedented<sup>5</sup> for an attorney to choose an expert who could not qualify under one or more of these five alternative methods.<sup>6</sup>

As in *Damages*, often the issue is not so much whether a witness will meet the rather minimal evidence law qualification test, but whether an expert has a particularly impressive resume (or, correctly stated, “curriculum vitae,” because no high paid expert would have a mere resume!). When the stakes are high and the attorneys well-financed, world class experts like those in *Damages* start to appear.<sup>7</sup> Although meeting the relatively low qualification standard to testify as an expert is usually not a problem for experts in mega-damages cases, the extent of a particular expert’s qualifications is often a matter of significant controversy. Even in these cases, attorneys sometimes turn to experts who may not be as qualified as other experts to discuss the narrow areas in dispute in such a case.<sup>8</sup>

All characteristics might possibly be used against an expert by opposing counsel, however, and qualifications are no exception. If the expert has written and published extensively,<sup>9</sup> he can expect opposing counsel (in the person of an associate, in most instances) to comb through his publications looking for statements that are arguably inconsistent with his testimony in the case at hand.<sup>10</sup>

### B. Communication Skills

Even if an expert is the smartest person on the planet with regard to the particular issue in dispute, a wise attorney will not hire him if he cannot communicate that knowledge to the lay persons who will make the critical decisions about a case, including lawyers, insurance adjusters, hospital risk managers, judges, and jurors.

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4. FED. R. EVID. 702.

5. It is not absolutely unprecedented for an attorney to retain and later attempt to introduce the opinion testimony of an unqualified witness in a medical malpractice case. Sometimes an attorney attempts to call a physician with a specialty other than that being litigated, or even a chiropractor or other non-physician. When the stakes are as high as they were in the *Sabia* case, though, it is difficult to imagine any attorney seriously considering retaining an arguably unqualified expert.

6. In this case and others, however, there are persons who are sometimes mistakenly thought of only as fact witnesses because they are primarily asked to testify to their recollections of events. Sometimes these non-retained witnesses are called upon to give opinions based on their expertise. For example, note that Michael Koskoff’s list of experts suggested that he might ask several “fact witnesses,” including Dr. Maryellen Humes, midwife Barbara McManamy, and nurse Mollie Fortuna, to address the standard of care, which is ordinarily considered a matter of expert opinion. WERTH, *supra* note 2, at 268.

7. For example, Werth describes plaintiffs’ expert Dr. Kurt Benirschke as “perhaps the one true giant in his field.” *Id.* at 214. He also says that Dr. Charles Lockwood’s “credentials were exhaustive.” *Id.* at 273. See also *id.* at 274 (detailing Lockwood’s exhaustive credentials.).

8. See *id.* at 345.

9. See *id.* at 216, 272.

10. See *id.* at 218.

Experts who are retained as witnesses frequently complain about the difficulty of communicating their expertise to the uneducated (which include all of those listed above) and sometimes about the inanity, in their view, of a system that leaves critical determinations in the hands of the unenlightened. The experts in *Damages* appear to be no exception.

Attorneys would be wise to avoid experts who believe that it is impossible to communicate critical concepts to jurors. Such experts will want jurors to simply trust them, without understanding them, due to their vast knowledge and experience. This is an ineffective approach. When opposing experts testify to directly opposite opinions, jurors will have to decide which expert to believe. They do not tend to make this determination based on a comparative weighing of the two experts' resumes. Instead, they tend to believe the expert they understood. Therefore, a wise attorney looks for an expert who is, either by trade or by nature, a teacher.<sup>11</sup>

Even this is not without risk, of course. When opposing counsel is deposing an expert who enjoys explaining his reasoning, she should give him every opportunity to do so.<sup>12</sup> The expert's answers educate the deposing counsel and create potential cross-examination material that is generally more effective than a "you are too dumb to understand this" expert's droning non-explanations.

### C. Integrity

Despite the obvious costs of expert integrity discussed below, many attorneys consider integrity a positive, if not essential, characteristic. In other words, these attorneys do not want the expert to take positions he does not believe. These attorneys believe that they are better served by hearing about problems with a case from their own expert than hearing them from a jury in the form of an adverse verdict.

*Damages* is filled with instances of experts reaching conclusions opposed to those desired by the attorneys who retained them.<sup>13</sup> While the cause of this repeating phenomenon is not clear, there are several possibilities. Perhaps the experienced and skilled attorneys in the book have learned the value of hiring experts with integrity and the sometimes hidden costs of hiring those without integrity. Perhaps medical malpractice cases attract more honest experts than other types of cases. After all, the physicians who appear as experts in *Damages* have their own medical practices, so they are not dependent upon litigation as their primary source of income, like some of the engineers who regularly testify in products liability cases.<sup>14</sup>

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11. In admiration, Christopher Bernard indicated that Dr. Barry Schiffrin had essentially taught the jury in one case "how to read fetal monitoring strips." *Id.* at 205. Also, note that Werth says Dr. Kurt Benirschke "lectured" during his videotaped trial testimony. *Id.* at 302.

12. For example, Norwalk Hospital attorney Beverly Hunt asked Dr. Kurt Benirschke to explain his opinion that Michael "had a velamentous of the umbilical cord," and he "responded as if giving a short paper." *Id.* at 218. Christopher Bernard pursued a similar line of questioning during Dr. Charles Lockwood's deposition. *See id.* at 275.

13. *See id.* at 77-78, 145, 147, 148-49, 150, 173, 179-80.

14. There is another possibility that is only partially related to integrity. Perhaps medical malpractice cases, unlike products liability and some other cases, present less of a repeating pattern, so an

Expert integrity has obvious costs. First, as already noted, an expert with integrity will sometimes refuse to testify to the opinions desired by the attorney who retained him. If the case cannot be settled, the attorney will then have to retain a different expert, at considerable extra expense. Also, an expert with integrity will presumably answer opposing counsel's deposition and trial questions honestly, even when those answers detract from the case propounded by the attorney who employs him.

#### D. Dependability

Whether or not she is willing to admit it, every attorney who retains an expert is hoping that the expert will reach opinions helpful to that attorney's case, for the reasons outlined above.<sup>15</sup> That hope sometimes leads an attorney, perhaps unconsciously, to choose an expert who is likely to reach that opinion.

This type of expert "dependability" can be in tension with integrity. If a witness is dependable because he is willing to reach whatever opinions the attorney desires, he has no integrity.<sup>16</sup>

Dependability is not necessarily incompatible with integrity, however. Perhaps an attorney can count on an expert to reach the conclusion she desires because she knows that the expert has consistently reached that well-reasoned opinion in prior cases or in published articles.<sup>17</sup>

If dependability does come without integrity, though, the opposing counsel will often have many avenues to explore fruitfully on cross-examination. For example, if an expert is willing to reach the opinion desired by his employer without regard to the facts, he may have testified to an inconsistent opinion in a previous case. When used properly, such inconsistent statements are powerful impeachment tools. In a case involving substantial damages, attorneys will spend considerable time and energy perusing transcripts of prior deposition and trial testimony looking for these cross-examination gems.<sup>18</sup>

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attorney is not as likely to be able to guess what the expert's opinion will be when she retains that expert. See *infra* Part I.D.

15. Note, for example, that Michael Koskoff was pleased to have retained the world-renown expert Dr. Kurt Benirschke. However, he was concerned that he might not reach the opinions Koskoff needed because he was so "headstrong" and "independent." WERTH, *supra* note 2, at 215. "'As a lawyer,' Koskoff says, 'you take a certain risk when you hire someone like that. He could kill you.'" *Id.* In contrast, Koskoff "had no worries about what else Schiffrin might have to say. In his experience, Schiffrin always said just enough. He was a lock." *Id.* at 230.

16. For example, plaintiffs' attorney Christopher Bernard worried when Dr. Leslie Iffy was "instantly supportive" when they first met, even though he had not reviewed any medical records. *Id.* at 180.

17. This may be less likely in medical malpractice than in other mega-damages cases like products liability. See *supra* note 14 and accompanying text. In any event, this did not appear to be the case in *Damages* because several critical issues, including the possible transfusion of blood from a stronger twin to a weaker twin, appear to have been relatively unprecedented, so the attorneys could not predict the experts' opinions based upon their conclusions in prior cases.

18. WERTH, *supra* note 2, at 330.

### E. Knowledge

Although basic knowledge is an element of qualifications, knowledge deserves separate discussion. If an expert has significant knowledge about the precise subject matter in dispute, he can be a particularly powerful witness. For example, although all of the physicians (and even some of the non-physicians) who appear in *Damages* presumably have some knowledge about the birth process, Dr. Benirschke has studied the placenta extensively. He appears to be the world's most knowledgeable person in the highly specialized field of using the placenta as a critical piece of evidence to determine historical facts about what happened during labor.<sup>19</sup> Similarly, Dr. Barry Schifrin was one of the "founding fathers" of electronic fetal monitoring.<sup>20</sup>

Even this dramatically positive characteristic might be used against an expert by opposing counsel. At the deposition of a highly knowledgeable expert, a wise attorney uses the expert's knowledge to improve her own knowledge. In addition, if the expert's advanced knowledge was acquired through work he has summarized in published articles or texts, the cross-examining attorney will review these items for statements that are inconsistent with the doctor's testimony.

Of course, if a witness does not have the requisite knowledge of the subject matter of his testimony, or has less knowledge than other testifying experts, he can expect opposing counsel to use this knowledge deficit to discredit his testimony.<sup>21</sup>

### F. Work Habits

If she can acquire information about them, an attorney might consider an expert's work habits when deciding whether to retain him. Does the expert return a retaining attorney's phone calls and respond to her inquiries? Does he complete assigned tasks in a timely fashion? Will he review all of the material forwarded by the attorney? Is he willing to help the attorney learn the technical aspects of the case? Is he pleasant?<sup>22</sup>

An expert's work habits will also affect his cross-examiner. If the expert does not undertake expected tasks like reviewing the file and all available physical evidence, the cross-examiner will portray him as sloppy and his opinion as, therefore, uninformed and unreliable.<sup>23</sup> On the other hand, if the expert keeps meticulous notes and records, his cross-examiner may be able to use them to impeach him, particularly if the notes contain preliminary, later discarded, opinions or incorrect calculations.

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19. See *id.* at 214-16.

20. See *id.* at 168-72.

21. See *id.* at 348-50.

22. Note that Michael Koskoff "loved going out to dinner" with Schifrin to get his "'bead' on things." *Id.* at 168. On the other hand, Dr. Charles Lockwood "had been willing to do independent research to support his testimony." *Id.* at 273. Plaintiffs' expert Dr. John Goldkrand was also willing to do his own research into the standard of care. *Id.* at 293.

23. See *id.* at 286, 336-39.

### G. Appearance

One attribute that many attorneys fail to consider is the appearance that the expert will make if called as a witness at trial. Like it or not, attractive people get better treatment in our appearance-based society. Beyond simple attractiveness, an attorney should consider whether an expert's appearance detracts from his authoritativeness. The jury might be less likely to believe an expert who does not look the part. In *Damages*, Norwalk Hospital attorney Bill Doyle was concerned about his standard of care expert, Dr. Charles Lockwood, because he looked so young.<sup>24</sup>

An expert's temperament will also affect his appearance at trial. It is no secret among trial attorneys that a cross-examiner who can get under the skin of a witness will often cause that witness to behave in ways that do not enamor him to the jury. On the other hand, the jury usually will like a charming or even a calm witness.

### H. Likeability

Jurors and other human beings tend to be more willing to listen to and believe people who they like.<sup>25</sup> They tend to not like those who have over-inflated egos. This can be a problem with experts, who more than occasionally possess rather favorable opinions of themselves.<sup>26</sup> Opposing attorneys will give experts with outsized egos the chance to display those egos at trial.

### I. Testifying Experience

Although attorneys sometimes look for experts who have never before testified, often they consider testifying experience a desirable characteristic.<sup>27</sup> An expert who has previously worked in litigation is often more comfortable, and usually more knowledgeable about mistakes to avoid in the pretrial process, like creating an excessive paper trail.<sup>28</sup> In addition, many attorneys seem to believe that jurors will find a witness more authoritative if that witness can advise them that he has been recognized by the court as an expert in dozens (or even hundreds) of previous cases.

On the other hand, some attorneys believe that too much experience as a witness might lead jurors to conclude that the witness is not a "real" expert who is practicing in a particular field, but rather a sham expert who merely evaluates the work of those who are really doing it.<sup>29</sup> If possible, an attorney will also establish that an expert always or almost always testifies on the same side (i.e., always testi-

24. *Id.* at 273.

25. Note that Norwalk Hospital attorney Bill Doyle "liked Dr. John Goldkrand in spite of himself" and also concluded that he was credible. *Id.* at 291.

26. For example, Dr. Barry Schifrin believed that certain "tests were most reliable when conducted by experienced hands such as his own." *Id.* at 228.

27. For example, Michael Koskoff retained Dr. Barry Schifrin because he knew he was an excellent trial witness. *See id.* at 168.

28. *See infra* notes 40-41 and accompanying text.

29. *See WERTH, supra* note 2, at 281-82, 330, 333-36.

fies for doctors or always testifies against them).<sup>30</sup> Of course, if the expert is testifying against the side he usually supports, his attorney will use this circumstance to boost his credibility.<sup>31</sup>

A witness who has testified often has also left a well-marked trail. Attorneys opposing these witnesses will obtain copies of transcripts of their prior testimony and pore over them to try to find statements inconsistent with the testimony being given in the case at hand.<sup>32</sup>

### *J. Credibility*

As with knowledge, one might first think that this attribute is a repeat of the previously explored attribute of integrity. In fact, while integrity is, at least in most instances, a necessary component of credibility, it is not a sufficient one. Instead, credibility is affected by a combination of each of the factors already discussed.<sup>33</sup>

In particular, a willingness to exhaustively review the available evidence before reaching an opinion is a particularly important, and sometimes overlooked, component of credibility. Regardless of how honest a person is, that person will not be considered a reliable source of information if he does not have an adequate background in the subject he is discussing. If opposing counsel can catch an expert in a factual error, she will be well on her way to destroying the expert's credibility.

### *K. Hourly (or Other) Rate*

While an expert's hourly or other rate is perhaps not, strictly speaking, a personal characteristic, it is a factor that an attorney must consider in deciding whether to retain an expert. If the expert's hourly rate is too high, the attorney will have to limit the expert's exposure to the case. As the previous paragraph suggests, this is a strategy fraught with potential disaster, because it significantly increases the risk that the expert will make a factual error.

In *Damages*, there is no indication that the experts' hourly rates were particularly important. Given the large sums at risk in the case, this is perhaps not surprising.

Experts' hourly rates are often used by cross-examiners who are eager to point out high rates, assuming that jurors will conclude that an expert who charges exorbitant rates may be willing to lie to obtain those rates.<sup>34</sup> It is not clear that jurors will reach such a conclusion, however. Perhaps an attorney who goes to

30. *See id.* at 273, 281.

31. *See id.* at 291, 335.

32. *See id.* at 333.

33. For example, note that Norwalk Hospital attorney Bill Doyle believed that plaintiffs' expert Dr. John Goldkrand, "with his solid expertise, pro-defense record, and altruistic fees, was nothing if not credible." *Id.* at 291.

34. Norwalk Hospital attorney Beverly Hunt prepared for such trial questioning by covering Dr. Schifrin's fees at his deposition. *See id.* at 229-30. Later, her new supervisor on the case, Bill Doyle, pursued a similar line of questions with Dr. Iffy. *See id.* at 282-83. Plaintiffs' attorney Christopher Bernard turned the tables on the defense attorneys with a similar deposition examination of defense damages expert Herbert Grossman. *See id.* at 335-36.



great lengths to establish that an opposing expert charges a higher rate than her own runs the risk that a juror or jurors will conclude that the higher priced expert is the better qualified expert.

### L. Absence of Skeletons

As discussed below, in a large exposure case, an opposing attorney is likely to thoroughly search for items that will help her discredit an expert witness. Thus, an attorney might shy away from an expert who has himself been the subject of a successful malpractice suit,<sup>35</sup> who has been subject to numerous peer reviews, who failed his medical boards, or who was not allowed to testify as an expert in a previous case.

With the exception of one physician who was himself a subject of a malpractice suit,<sup>36</sup> *Damages* does not contain any suggestion that the retained experts (as opposed to Humes) are storing significant skeletons in their closets.<sup>37</sup> This does not necessarily mean that this was not the case. A trial attorney who discovers damaging information is best served by not telling anyone (least of all the author of a book) about it. Instead, that attorney is likely to retain that information in a relatively private part of her office, just in case she (or someone in her firm) is ever called upon to cross-examine that expert in a future case.

## II. RELATIONSHIP BETWEEN RETAINING ATTORNEYS AND EXPERTS

An attorney's relationship with a particular expert often predates a particular case. Given all of the possible pitfalls of any given expert, an attorney is often most comfortable working with an expert she has used in a previous case, even though this opens up an obvious line of cross-examination for her opponent. Several of the physicians retained as experts by the attorneys in *Damages* previously had been retained by those attorneys in previous cases.<sup>38</sup>

Whether the expert has or has not worked for the attorney previously, the first contact for a particular case will usually occur when an attorney places a phone call to the expert.<sup>39</sup> From that first contact forward, the attorney probably will attempt to communicate with the expert by telephone or direct face-to-face contact whenever possible, to limit the creation of documents or e-mails that might be discovered by their opponents.<sup>40</sup> Attorneys generally attempt to limit the paper trail documenting their communications with experts.<sup>41</sup>

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35. *Id.* at 348.

36. *Id.*

37. There is one hint of an attempt to find a skeleton, when plaintiffs' attorney Christopher Bernard asked Norwalk Hospital's life expectancy expert, Dr. Susan Farrell, if she had failed to pass her pediatric boards on her first attempt. *Id.* at 286. She admitted having failed to do so, but explained that it was because she went into labor while taking the test. If the case had gone to trial, this question at the deposition presumably would have prevented the plaintiffs' attorneys from stubbing their toe by asking about the "failed" boards.

38. *Id.* at 147, 168.

39. *Id.* at 162.

40. *See id.* at 77, 144, 173.

41. *See* Stephen D. Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465, 546-48 (2000) (advocating a

Sometimes the attorney decides not to retain an expert after speaking with him. At other times, she does retain the expert. Experienced attorneys and experienced witnesses are careful to outline their expectations during the initial retention conversation.

Occasionally an attorney contacts an expert who has previously been contacted by another attorney in the same case. Those who have not worked on highly technical litigation might be surprised at how often this occurs. If the case involves a highly technical area, as the *Sabia* case did, there may be a very limited number of people who truly have enough knowledge and experience about that field to serve as well-qualified witnesses.<sup>42</sup> The number of truly qualified persons who are willing to even consider serving as expert witnesses is usually even smaller because many physicians and other qualified experts do not relish interaction with lawyers. The number of truly qualified, willing experts who would actually make good, or at least passable, trial witnesses is lower still.

Thus, it is not uncommon for an attorney to contact a potential expert witness who has previously been contacted by another attorney. In *Damages*, this occurred several times.<sup>43</sup> The outcome of these conversations often depends on whether the expert was retained (or, at least, thought he was retained) by the attorney who previously contacted him,<sup>44</sup> because experts who are currently working for an attorney are often unwilling to talk with the opposing attorney.<sup>45</sup>

*Damages* also includes accounts of situations where the expert was not retained by the first attorney who contacted him.<sup>46</sup> Should the first attorney's consultation with an expert render that expert "off limits" to other attorneys in the same case? If we want lawyers to be able to consult with experts in order to educate themselves, and, therefore, better educate the jurors, we should perhaps prohibit any contact once an attorney learns that another attorney has consulted a particular witness about the same case. However, if the number of potential wit-

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change to the discovery rules to counter the tendency of attorneys to communicate verbally) [hereinafter Easton, *Ammunition*].

42. Usually the number of pseudo-qualified experts is significantly larger, but trial attorneys are not anxious to retain experts who have not studied or worked in a highly specialized field to talk about that field.

43. WERTH, *supra* note 2, at 156, 186, 188; *see also id.* at 168 (noting Humes' personal attempt to consult Dr. Kurt Benirschke).

44. Werth has oversimplified the rather uneven state of the law by saying that Norwalk Hospital could not have used plaintiffs' expert Dr. Kurt Benirschke as a trial witness if his deposition testimony was helpful to the hospital. *Id.* at 217. Although there are several courts that have ruled in this manner, *see* Stephen D. Easton, *Damages: The Litigation Environment*, 2004 J. DISP. RESOL. 57, 68 n.74 [hereinafter Easton, *The Litigation Environment*], other courts have allowed parties to introduce the testimony of experts who were originally retained by their opponents. *See* Peterson v. Willie, 81 F.3d 1033, 1035 (11th Cir. 1996); Agron v. Trustees of Columbia Univ., 176 F.R.D. 445 (S.D.N.Y. 1997); House v. Combined Ins. Co., 168 F.R.D. 236, 249 (N.D. Iowa 1996); Onti, Inc. v. Integra Bank, 1998 WL 671263 (Del. Ch. 1998); Broward County v. Cento, 611 So. 2d 1339 (Fla. Ct. App. 1993); Powell v. Superior Court, 259 Cal. Rptr. 390, 391-92 (Ct. App. 1989); Lunghi v. Clark Equip. Co., 200 Cal. Rptr. 387, 388 (Ct. App. 1984). For a lengthier discussion of these issues, *see* Stephen D. Easton, "Red Rover, Red Rover, Send That Expert Right Over": *Clearing the Way for Parties to Introduce the Testimony of Their Opponent's Expert Witnesses*, 55 SMU L. REV. 1427 (2002).

45. *See infra* note 75 and accompanying text for a brief discussion of ex parte communications between experts and opposing attorneys.

46. WERTH, *supra* note 2, at 156, 186.

nesses is indeed limited, we may not want to let an attorney “sequester” a potential expert through the simple expedient of a brief consultation with that expert.

In *Damages*, though, the plaintiffs’ attorneys and the attorneys representing Norwalk Hospital eventually retain some experts with the expectation that they will probably testify at trial, if the case goes to trial. Even when an attorney has this expectation, however, she will generally initially retain the expert as a consultant and reserve her decision about whether to name the expert as a possible trial witness until after the expert communicates his preliminary opinions to the attorney.<sup>47</sup> Under Federal Rules of Evidence 26(b)(4)(B), an attorney who initially retains an expert as a consultant and later decides not to identify her as a possible trial witness usually will not even be required to disclose the expert’s identity to her opponent.<sup>48</sup>

If the attorney is considering calling the expert as a witness at trial, she may attempt to shape his testimony in a variety of ways. The attorney seeking to shape her retained expert’s testimony has a variety of tools at her disposal, though these tools may be less effective for well-known physicians than they would be for other expert witnesses.<sup>49</sup> First, the attorney employs the expert, and an employment relationship is an inherently coercive one. The attorney then directs the flow of information to the expert, including the flow of inadmissible data that can constitute the basis of expert testimony under Rule 703 of the Federal Rules of Evidence and similar state provisions.<sup>50</sup> Throughout the expert-attorney relationship, the attorney decides whether the expert will continue to earn fees from the case. If the expert reaches opinions that harm the attorney’s case more than they help it, the attorney will stop the flow of fees to the expert. Also, the attorney makes the expert a member of the trial team and thereby socializes the expert into the “us against them” bunker mentality of litigation. In many instances, the attorney directs<sup>51</sup> or alters the expert’s analysis of the case.<sup>52</sup> Finally, if the case goes to trial, the attorney decides whether to call the expert to the stand.<sup>53</sup> Although attorneys differ in the extent to which they use these tools to shape expert testimony, all or

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47. The option of initially retaining the expert as a consultant, pending the expert’s communication of his preliminary opinions to the retaining attorney, is available only when there is sufficient time before the expert witness disclosure deadline for the expert to review relevant information and communicate his preliminary opinions. Thus, the attorney who wishes to follow this procedure has an incentive to contact and retain the expert well before the expert witness disclosure deadline.

48. FED. R. EVID. 26 (b)(4)(B). For example, the attorneys representing Humes presumably did not have to disclose the fact that they had consulted Dr. Alan Pinshaw, whose conclusions were not helpful to Humes’ case. See WERTH, *supra* note 2, at 77.

49. For an expanded discussion of these efforts by attorneys to shape expert testimony, see Easton, *Ammunition*, *supra* note 41, at 494-99.

50. See WERTH, *supra* note 2, at 144.

51. For example, plaintiffs’ attorney Christopher Bernard’s letter to Dr. Marcus Hermansen stated, “I am most interested . . . in your impressions regarding the following questions: (1) What was the mechanism of the injury to Baby A (Little Tony); (2) At what point in time was the damage to Baby A reversible?” *Id.* at 147. Similarly, Norwalk Hospital’s attorneys “were very, very specific” about which issues Dr. Charles Lockwood was to address. *Id.* at 275-76.

52. For example, plaintiffs’ attorney Michael Koskoff made two trips to California in an apparently unsuccessful attempt to coach Dr. Kurt Benirschke into “blam[ing] Humes and the hospital for Little Tony’s injuries.” *Id.* at 214.

53. After Dr. Iffy’s testimony that growth retardation killed Michael, plaintiffs’ attorney Christopher Bernard decided that he “would not have to come to court.” *Id.* at 285.

substantially all attorneys use at least some of them to acquire the opinion testimony needed by the client.

After the attorney discloses the retained expert as a possible trial witness under Federal Rules of Evidence 26(a)(2)(A) or a state counterpart to this rule, the opposing attorney will obtain additional information about the expert.<sup>54</sup> Most of the information received by the opposing attorney will be filtered through the attorney retaining the expert, however. For example, the retaining attorney will almost certainly participate in the drafting or revision of the expert's report.<sup>55</sup> Second, the retaining attorney will help the expert prepare for his deposition. She will also attend the deposition and, to the extent possible, attempt to interfere with her opponent's acquisition of potentially damaging information.<sup>56</sup>

The expert-attorney relationship will continue until the case is resolved or until the attorney fires the expert. Throughout this relationship, the attorney may shape the expert's opinions in the ways suggested above.

### III. PURPOSES FOR RETAINING EXPERTS

The paradigmatic purpose for retaining an expert is to have that expert present testimony at trial. This is the paradigmatic purpose only because trial is the paradigmatic dispute resolution mechanism. In reality, very few cases go to trial, so clients are wasting their money and attorneys are wasting their time if their sole purpose in retaining experts is the preparation of trial testimony. Instead, attorneys retain experts for a variety of purposes, including, but not limited to, the following:

- Having the expert evaluate the case.<sup>57</sup>
- Using the expert to learn about the technical aspects of the case.<sup>58</sup>
- Exploring the viability of possible theories (of recovery or defense).<sup>59</sup>
- Preventing an opponent from hiring the expert.
- Scaring the opponent with the expert's reputation.<sup>60</sup>
- Identifying information that should be sought through discovery or independent investigation.
- Conducting independent research regarding the issues in dispute.<sup>61</sup>
- Evaluating the opposing experts' opinions and testimony and identifying their weaknesses.<sup>62</sup>
- Preparing reports or exhibits for trial or other use.<sup>63</sup>
- Deciding which other experts should be retained.
- Raising the costs and risks of litigation for the opponent.<sup>64</sup>

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54. FED. R. EVID. 26(a)(2)(A).

55. See FED. R. CIV. P. 26(a)(2) advisory committee's note ("Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports . . .").

56. See Easton, *The Litigation Environment*, *supra* note 44, at 72.

57. See WERTH, *supra* note 2, at 52, 77, 143.

58. See *id.* at 119, 149.

59. See *id.* at 126-28, 143-47.

60. See *id.* at 177-78, 221, 349.

61. *Id.* at 273-75, 293.

62. *Id.* at 279, 333.

63. *Id.* at 300.

- Preparing for settlement conferences and other pretrial proceedings.
- Evaluating the progress of the trial.
- Presenting trial testimony.<sup>65</sup>

In deciding which expert to retain, an attorney should be mindful of her purposes in retaining an expert. Some of the characteristics discussed in Part I, are irrelevant to some of the purposes outlined here. To take a relatively obvious example, an expert's likely trial appearance should not affect his work on pretrial matters.

#### IV. EXPERT WITNESS EXPENSES

In many cases, and certainly in most medical malpractice cases, expert witnesses charge hourly rates that substantially exceed the hourly rates of the attorneys who retain them. As a result, it is not uncommon for expert witness fees to be the single largest component of litigation expenses, even for defendants who are paying their attorneys on an hourly basis.

While it might seem that expert witness fees are inconsequential in a mega-damages case like *Sabia*,<sup>66</sup> this is far from correct. The expenses associated with preparing a case for trial or another resolution often prevent plaintiffs with meritorious cases from suing in the first instance.<sup>67</sup> Because plaintiffs with otherwise economically viable meritorious claims would ordinarily be able to find competent counsel to take their cases on a contingent fee basis, the anticipated expert witness fees constitute the major component of the litigation expenses that prevent many plaintiffs from pursuing their claims.

As previously noted, expert witness fees can affect attorneys' decisions in another way. If an expert reaches an opinion contrary to the one desired by the attorney who retained him, he still expects to be paid. When this occurs, the fees paid to this expert will do nothing to advance the client's case, and the attorney or client will have to retain and pay a new expert. Thus, expert witness fees create a sometimes strong economic incentive to hire a "dependable" expert who is likely to form helpful opinions.<sup>68</sup> To the extent that dependability and integrity are in tension in a particular case,<sup>69</sup> this is disquieting.

Also, the payment of substantial expert witness fees can create conflicts between the interests of the client and the attorney. If a plaintiffs' attorney has paid substantial witness fees on behalf of a client, she realistically expects to recover these sunk costs only if the client receives a settlement or a judgment sufficient to cover these expenses. When a defendant makes an offer that is large enough to cover expert witness fees and leave room for a substantial contingent attorney's

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64. See *id.* at 177-78, 222, 260, 267-68.

65. *Id.* at 301.

66. See Easton, *The Litigation Environment*, *supra* note 44, at 63.

67. See *id.* at 59.

68. Expert witness fees might explain, at least in part, why, in Dr. Alan Pinshaw's words, "Lawyers don't look for truth . . . . They look to put their opinion in as favorable a light as possible." WERTH, *supra* note 2, at 77.

69. See *supra* Parts I.C., I.D.

fee, it is difficult for the plaintiffs' attorney to recommend refusal of this offer, even if it would be in the client's best interest to take the case to trial.

## V. EFFORTS OF OPPOSING ATTORNEYS TO LIMIT EFFECTIVENESS OF EXPERTS

While it perhaps should go without saying that the attorney opposing the one who retained the expert will attempt to limit the impact of his opinions, there are several subtleties to this process that deserve brief review.

First, although the rules of almost every jurisdiction provide for written expert discovery in the form of interrogatory answers or expert witness reports, trial attorneys generally realize that these documents provide nothing more than a starting place in their efforts. Because retaining attorneys will participate in the drafting of expert witness interrogatory responses and reports, they usually will contain as little information as possible. The critical formal discovery event in a highly technical case is the deposition of the expert witness, where the inquiring attorney will attempt to identify the key components of the expert's analysis.<sup>70</sup> *Damages* contains accounts of several of these depositions.<sup>71</sup> An attorney deposing an expert has several goals: exploring the expert's theories against her client in sufficient depth to acquire an understanding of those theories; forcing an expert to commit to positions that will limit his ability, and the ability of his employer, to switch theories without turning these commitments into prior inconsistent statements;<sup>72</sup> identifying areas of disagreement with the deposing attorney's experts;<sup>73</sup> and locating areas where the opposing expert agrees with the deposing attorney's experts.<sup>74</sup>

In a mega-damages case, the wise attorney will not stop at a deposition, even if it was particularly effective at identifying the opposing expert's analysis. Instead, she will conduct her own investigation of the expert to acquire information that might help her limit the impact of the expert's trial testimony. The wise attorney realizes that the information that she obtains on her own is often more valuable than the information that she receives through her opponent, because the opponent does not know that she has obtained it.

An attorney's independent "backgrounding" of the expert might include: obtaining and reviewing the expert's previous trial and deposition testimony and published articles; ex parte contact with the expert;<sup>75</sup> internet and computerized

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70. Just as a defense attorney has to be careful in not overwhelming a weak plaintiff's liability theory, see Easton, *The Litigation Environment*, *supra* note 44, at 68-69, an attorney must be careful not to overdo her examination of an expert during a deposition. If an attorney makes it clear that the expert being deposed cannot stand up to a searing cross-examination, she can be confident that she will never get the chance to conduct one at trial, because her opponent will fire the expert after the deposition. See WERTH, *supra* note 2, at 332, 345, 355.

71. WERTH, *supra* note 2, at 214-23, 227-30 (recounting the depositions of several expert witnesses).

72. *Id.* at 330-31.

73. *Id.* at 279.

74. *See id.* at 277, 280.

75. Some believe that attorneys cannot contact their opponents' expert witnesses without their opponents' permission. For a discussion of this issue and an argument that ex parte contact is and should be permitted, see Stephen D. Easton, *Can We Talk? Removing Counterproductive Ethical Restraints upon Ex Parte Communication between Attorneys and Adverse Expert Witnesses*, 76 IND. L.J. 674 (2001).

legal database searches using the expert's name; credentials checks of the expert's claimed degrees, licenses, publications, and honors; and conversations with other attorneys who have retained or opposed the expert.

The relationships between the various attorneys and experts in *Damages* raise an interesting question. Given the unsuccessful efforts of several of the attorneys to retain experts who had already been retained by other attorneys, it seems likely that some of the attorneys would like to preserve the option of retaining the experts in future medical malpractice cases. These potential future relationships might color the attorneys' cross-examination of an expert at trial (if there had been a trial), their willingness to use potentially damaging information about the experts in settlement negotiations, or even their willingness to look for damaging information. For example, assume that defense attorney Bill Doyle's background investigation regarding plaintiffs' expert Dr. Thomas Murray revealed that his license to practice medicine had been revoked by the state of New Hampshire in 1992. [This is an entirely fictional assumption made for purposes of making a point. There is nothing to indicate that Dr. Murray actually has any licensing problems in any jurisdiction.] Because this was not his home state, few persons would be aware of this fact. Would attorney Doyle be willing to use this information in his trial cross-examination of Dr. Murray, if he hoped to use him in a future case? Even if there was no information this powerful, would he be willing to conduct a tough, thorough cross of Dr. Murray?<sup>76</sup> If not, would he be compromising his representation of his current client, Norwalk Hospital?

## VI. CONCLUSION: IS THIS ANY WAY TO RUN A JUSTICE SYSTEM?

If you are troubled by the affect retained experts have on the civil justice system, you are not alone. However, finding fault with the current system for finding, paying, and preparing experts is relatively easy. The next step is harder. What changes or alternatives should be adopted?

It is difficult to imagine a system that relies upon jurors to resolve scientific and other highly technical disputes operating without some form of expert testimony. Nonetheless, the system would not have to be structured as it is, with experts paid by well-financed parties squaring off in what is literally a "swearing match" of opposite opinions. Some have advocated greater use of court experts, but funding problems and an American mistrust of court-initiated fact-finding have rendered the court expert a relatively rare, though not quite extinct, bird. The typical case proceeds like the one in *Damages*, with attorneys finding, retaining, and paying (or, sometimes, directing payment to) expert witnesses.

Are there better alternatives? Can we tweak the current system to lessen or eliminate some of its flaws? Is the current system the best we can realistically expect? Are we too quick to dismiss the benefits of having parties finance and control the presentation of expert testimony?

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76. In a similar vein, note Michael Koskoff's delight in listing a doctor from Yale, a repeat client of Norwalk Hospital attorney Bill Doyle, as a witness. Koskoff "knew that Doyle, because of his own relationship with Yale, would be hard-pressed to attack Saywitz head-on." WERTH, *supra* note 2, at 267.

## VII. STUDY EXERCISE

For each of the characteristics listed below, rank each expert against the others. Give the “best” expert (for the item categorized) a score of one, the next best a score of two, etc., up to thirteen. When you are finished, calculate each expert’s average ranking. Place this in the last column, left of the slash (/).

Then, based upon the average rankings, determine which expert was your highest rated, which was second, etc. Insert this ranking number to the right of the slash (/) in the last column.

Of course, the fact that you do not have much information about some of these matters will make this exercise more difficult. This replicates the “real world,” at least to some extent, because attorneys almost always have incomplete information when they make decisions about which experts to hire. However, lack of information might occasionally force you to group several experts and give them identical scores on some characteristics.

Dozens of potential experts made appearances in Werth’s account of this lawsuit, and you will not remember all of them. Therefore, I have limited the ranking exercise to ten liability experts and three damages experts. So that you will not be required to reread the entire book, I will briefly summarize each of these experts below, and list the pages where that expert appears prominently.

*Liability Experts*

**Dr. Alan Pinshaw**, the Harvard-trained “burly South African” staff ob-gyn at Harvard Community Health Plan who was hired by Bob Monstream (the attorney hired by St. Paul to defend Humes) to review the medical records.<sup>77</sup> He indicated that Humes had failed to meet the standard of care and thereby worsened Little Tony’s condition.<sup>78</sup>

**Dr. Kurt Benirschke**, the widely published German-born reproductive physiologist who pioneered the microscopic study of the placenta as a method to determine the cause of injury in birth trauma cases.<sup>79</sup> Werth describes him as “sixty-seven, . . . large, tanned, [and] impressively fit.”<sup>80</sup> For his videotaped trial testimony, “[h]e wore a blue oxford shirt and no jacket, and his burgundy tie hung limply askew.”<sup>81</sup> Karen Koskoff retained Dr. Benirschke on behalf of the plaintiffs. At first, he “believed that a sudden, acute incident in which Little Tony lost a significant amount of blood was” a more likely cause of his brain damage than twin-to-twin transfusion, “but he said he couldn’t be sure without more data.”<sup>82</sup> He ultimately concluded that Michael died from “progressively . . . increasing . . . embarrassment, . . . as it were, because of reduced [blood] flow through the circulation” due to pressure on the velamentous cord resulting from Michael’s increas-

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77. *See id.* at 77-78.

78. *Id.* at 148.

79. *See id.* at 143-44.

80. *Id.* at 214.

81. *Id.* at 300.

82. *Id.* at 144.



ing size, not a sudden umbilical cord accident.<sup>83</sup> In Dr. Benirschke's opinion, this caused Little Tony to bleed into Michael, thereby reducing the oxygen supply in his brain.<sup>84</sup> He also believed that the gradual onset of Michael's problems meant that it was beyond detection or treatment, so Michael could not be saved and, therefore, Little Tony's injuries were not preventable, but he did not so testify because he was never asked a question during his videotaped deposition about whether the hospital could have prevented Little Tony's injuries.<sup>85</sup>

**Dr. Marcus Hermansen**, the "not widely published" Pittsburgh neonatologist who "was highly experienced in resuscitation of asphyxiated newborns and in teaching the techniques to others."<sup>86</sup> Christopher Bernard retained Dr. Hermansen on behalf of the plaintiffs.<sup>87</sup> He "didn't think the hospital was at fault," but he "added that in cases of fetal asphyxia, it was believed that the greatest damage occurs toward the end, just prior to death."<sup>88</sup> "Years later [he] would qualify his opinion, noting that the mechanism of hypoxia is not nearly so well understood as Bernard came to believe from their discussion."<sup>89</sup>

**Dr. Thomas Murray**, the "drop-dead," good looking obstetrician-gynecologist who began his expert witness career by testifying only for defendants in medical malpractice cases.<sup>90</sup> When Michael Koskoff served with him on a medical malpractice panel for a Hartford seminar, he got Murray to agree to take a case where a mother or baby was "egregiously wronged."<sup>91</sup> Before retaining him on the *Sabia* case, Koskoff had retained him on several other medical malpractice cases, the only ones where he testified for plaintiffs. In his first consultation with Koskoff in the *Sabia* case, he stated that the Norwalk Hospital clinic's failure to perform ultrasounds prevented it from realizing that it should have performed a cesarean section once the twins reached maturity, due to the significant size difference between the twins.<sup>92</sup>

**Dr. Barry Schifrin**, "perhaps the best-known—and most controversial—perinatologist in the country," considered "one of the fathers of electronic fetal monitoring," and "who in recent years had turned almost entirely to testifying in obstetrical cases, normally for the plaintiffs."<sup>93</sup> According to Werth, Michael Koskoff, who had used Dr. Schifrin as an expert in several cases and considered him the best possible medical malpractice expert, "had seen Schifrin before breakfast, an hour before court, fail to remember the basic details of a case, then deliver brilliant, flawless testimony on cross-examination."<sup>94</sup> According to Werth:

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83. *Id.* at 302-04. See also *id.* at 305-08 (Benirschke testified that he "knew of no such evidence" when asked if there was any evidence of a sudden cord accident).

84. *Id.* at 302.

85. *Id.* at 309. For a description of his deposition, see *id.* at 214-23. For his videotaped trial testimony, see *id.* at 300-09.

86. *Id.* at 145.

87. See *id.* at 145-47.

88. *Id.* at 145.

89. *Id.* at 146.

90. *Id.* at 161-63.

91. *Id.* at 162.

92. *Id.*

93. *Id.* at 167.

94. *Id.* at 168.

[T]hough his tone was usually more sorrowful than angry, he seemed to relish testifying against doctors who ignored or abused EFM [electronic fetal monitoring]. Obstetricians routinely dismissed him as a publicity seeker, a mercenary, an apostate, an egoist, a whore, but they couldn't deny that he knew perhaps as much as anyone about diagnosing and treating fetal distress during childbirth.<sup>95</sup>

He is described as a “bearish, intimidating man in his early fifties” who is “unambiguously Jewish.”<sup>96</sup> He received \$400 per hour from plaintiffs' attorneys.<sup>97</sup> Dr. Schifrin had studied (and published materials on) the relationship between fetal heartbeat patterns and oxygen starvation that could cause permanent brain damage.<sup>98</sup>

**Dr. Leslie Iffy**, the exaggeratedly friendly Hungarian immigrant who coauthored *Principles and Practices of Obstetrics and Perinatology*<sup>99</sup> and earned an “enormous percentage” of his income from testifying in medical malpractice cases.<sup>100</sup> Even though he had not yet had the chance to review medical records, Dr. Iffy was “instantly supportive” of the plaintiffs' position, based upon Koskoff's recitation of the relevant facts.<sup>101</sup>

**Dr. Charles Lockwood**, the youngish-looking thirty-eight-year-old, half-Puerto Rican 5' 7" Mount Sinai perinatologist who was the primary standard of care expert for Norwalk Hospital. He conducted extensive research regarding the 1983/1984 standard of care, and then testified that serial ultrasounds were not the standard of care in twin pregnancies at that time.<sup>102</sup>

**Dr. John Goldkrand**, the plaintiffs' “backup obstetrical expert[.]” from Savannah, Georgia, who usually testified for defendants, charged only \$120 per hour, and derived only about five percent of his income from testifying.<sup>103</sup> Even defense attorney Bill Doyle liked him “in spite of himself” and believed he was credible.<sup>104</sup> In his deposition, he testified that the standard of care at the time of Donna's pregnancy required serial ultrasounds in the third trimester.<sup>105</sup>

**Dr. Richard Jones III**, the Yale- and Harvard-educated, retired, six foot tall, “patrician good look[ing],”<sup>106</sup> immediate past president of the American College of Obstetricians and Gynecologists who testified for Norwalk Hospital regarding

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95. *Id.*

96. *Id.* at 169.

97. *Id.*

98. *Id.* at 170-73. For Michael Koskoff's consultations with Dr. Schifrin, see *id.* at 174-76. For an account of Shifrin's deposition, see *id.* at 227-30.

99. LESLIE IFFY & HAROLD A. KAMINETZKY, *PRINCIPLES AND PRACTICES OF OBSTETRICS AND PERINATOLOGY* (1981).

100. WERTH, *supra* note 2, at 181.

101. *Id.* at 180. For an excerpt of his deposition, which included his testimony that Michael died from growth retardation, see *id.* at 281-85.

102. *Id.* at 274-75. For a review of his deposition, see *id.* at 272-80.

103. *Id.* at 291.

104. *Id.*

105. *Id.* at 292. For a review of his deposition, see *id.* at 291-94.

106. *Id.* at 347.

the standard of care.<sup>107</sup> He was an ob-gyn who did not specialize in high risk births.<sup>108</sup>

**Dr. Maryellen Humes**, who was not a retained expert, because she was a defendant in the case. However, as a party to the suit who had considerable expertise in delivering children, she would almost certainly have testified to opinions at her own trial. Even if she had been dismissed before trial, one or more of the parties might have called her as a witness.<sup>109</sup> Although her testimony (like that of any other fact witness) would then undoubtedly cover her recollection of her observations and actions, a party calling her might also solicit her opinions.<sup>110</sup>

### Damages Experts

**Larry Foreman**, the Miami damages consultant who surveyed those who treated Little Tony and estimated the net present value of his treatment expenses at \$6.8 to \$10.5 million.<sup>111</sup>

**Dr. Susan Farrell**, the Moses Cone Hospital (Greensboro, North Carolina) developmental pediatrician who testified for Norwalk Hospital about Little Tony's life expectancy.<sup>112</sup> She testified that there was a better than ninety-five percent chance that Little Tony would die in adolescence,<sup>113</sup> probably of respiratory illness.<sup>114</sup> She also testified that he had an IQ of twenty-five and did not "enjoy anything."<sup>115</sup>

**Dr. Herbert Grossman**, the University of Michigan pediatric neurologist who authored a *New England Journal of Medicine* article entitled "The Life Expectancy of Profoundly Handicapped People with Mental Retardation."<sup>116</sup> The article generated considerable demand for his testimony from defendants in personal injury cases.<sup>117</sup> He testified that it was statistically probable that Little Tony would die soon, probably of respiratory problems.<sup>118</sup>

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107. *Id.* at 345.

108. *Id.* at 345, 348. For an excerpt of his deposition, see *id.* at 348-55.

109. See *id.* at 268.

110. *Id.* (noting that Michael Koskoff's listing of expert witnesses suggested that Humes might be asked to address the standard of care). For April Haskell's assessment of Humes as a witness, see *id.* at 183-84, 186, 201, 209.

111. *Id.* at 159-60.

112. See *id.* at 285-91.

113. *Id.* at 287.

114. *Id.* at 289.

115. *Id.* at 288.

116. *Id.* at 332.

117. *Id.* at 333-35.

118. *Id.* at 340. For relatively lengthy excerpts from his deposition, see *id.* at 333-40.

	Qualifications	Communication Skills	Integrity	Dependability	Knowledge	Work Habits	Appearance	Likeability	Testifying Experience	Credibility	Hourly Rate	Absence of Skeletons	Average / Overall Ranking
Dr. Alan Pinshaw													/
Dr. Kurt Benirschke													/
Dr. Marcus Hermansen													/
Dr. Thomas Murray													/
Dr. Barry Shifrin													/
Dr. Leslie Iffy													/
Dr. Charles Lockwood													/
Dr. John Goldkrand													/
Dr. Richard Jones III													/
Dr. Maryellen Humes													/
Larry Foreman													/
Dr. Susan Farrell													/
Dr. Herbert Grossman													/
													/

Now assume that you are an attorney who is representing one of the parties in a case with facts almost identical to those in the *Sabia* case, but with totally different plaintiffs and defendants. You can decide which party you want to represent—i.e., the plaintiffs, the doctor, or the hospital. Assuming that you can only hire three experts, which three experts will you hire? These do *not* have to be the experts who had the best average ranking on your chart, because you might believe that some characteristics are more important than others.

1. Which experts will you retain?
2. Briefly explain the reasons for your decision.

