

HEADNOTES

EXPERTS

Political Cover and Consulting Experts

MARIA E. RODRIGUEZ

The author is a partner at Venable LLP, Baltimore, and a senior editor of *LITIGATION*.

The Rules of Evidence tell us that the testimony of an expert is admissible to provide “scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue.” FED. R. EVID. 702(a). Even before you think about what you want to present as evidence to a fact finder, though, you need to understand your case—what the facts mean, where your client is strongest or most vulnerable,

and how much the case is worth. That’s where the non-testifying, consulting expert comes in.

Using a consulting expert is a politically safe and non-discoverable way to get the information you need in order to give your client sound advice. Your client will then get the information it needs, unvarnished by corporate political issues, to safely evaluate its risk. The key difference between an expert witness and a consulting expert is that you have to identify your testifying expert to the other side and then the other side gets to depose that expert.

Consulting experts, by contrast, are just what the words suggest—they are yours to consult, and no one needs to know anything about it. You can ask your consulting expert every question you have—no matter how simple or stupid or how much it might suggest a good strategy for your opponent—without fear that the consulting expert will have to disclose your questions and his or her answers. Federal Rule of Civil Procedure 26(b)(4)(D) protects against another party’s discovery of the facts and opinions of consulting experts who are retained in anticipation of litigation and

not expected to testify at trial. Material reviewed or generated by such non-testifying experts is generally protected by the work-product privilege, absent a showing of exceptional circumstances.

What I like most about being a commercial litigator without a specialty is that I get to learn all about a new substantive area with almost every new case. Litigation is my specialty, and that means I sometimes need help understanding and evaluating a dispute. A few years ago, I could have told you everything you ever wanted to know (and a lot more) about automobile air bags. When that case ended, I forgot almost everything I had learned about air bags, but then I got to know all about chicken poop—including that I should call it “poultry manure.”

The downside to being a general litigator, of course, is the same as its upside—you have to learn a whole new substantive area almost every time you take on a new case. The best source for that information is usually the client. But sometimes the client will have political or other concerns that make it hard to educate counsel. In one case I worked on recently, for example, the issue was whether an employee of the

Illustration by Sean Kane

client had performed a technical task correctly. Another employee would have been able to help figure that out, but the client opted to bring in an outside expert rather than have one employee passing judgment on another. In a situation like that, a consulting expert is invaluable. An in-house consultant might have seen what he or she wanted to see. Or an in-house consultant might have been worried about how his or her division's boss would view criticisms of another division's employee. Or he or she simply may have pulled punches for the sake of good corporate manners.

Instead, my client and I got the objective and critical view of an outsider. And that unjaundiced view—free of concerns

about internal politics and good graces—was crucial. Based on that outside analysis, I was able to assess the case from a litigator's perspective and provide my client with the advice it needed. The client decided to settle the case before any discovery could take place. It paid a hefty amount in settlement but probably would have had to pay more—and almost certainly would have had to deal with some very negative publicity—had our consulting expert not uncovered the problems with the case at an early stage.

How can you identify a good consulting expert? The usual sources for finding a testifying expert won't necessarily help. A good consulting expert need not have

testified in other cases, may not have developed a reputation, might not be widely published or cited, and may not be known to your colleagues. The best source of potential consulting experts is your client. People tend to know their counterparts and competitors at other organizations. Remember how my client did not want one employee evaluating the work of another and so went outside the business for a consulting expert? We got the name of the consulting expert we ultimately hired from the employee accused of wrongdoing; he was very happy not to have a colleague involved in the litigation. ■

State Courts Are Not Second Class

HON. MICHAEL B. HYMAN

The author is a circuit judge on the First District of the Illinois Appellate Court, Chicago.

Ken Nolan’s “The Appearance of Impropriety” (*LITIGATION*, Summer 2014) not only expresses a bias favoring federal courts, but also in the process maligns state court judges. His statements should not go unchallenged.

After calling the federal system “special,” Nolan writes, “I realize that favors, often granted in state courts, occur in those majestic [federal] courtrooms as well. . . . Yet, there’s a belief that in federal court you’ll litigate before a judge who will listen and rule equitably.”

Does he really mean to imply that state court judges plug their ears and rule indiscriminately, while their federal counterparts sit in “majestic courtrooms” and render real justice?

His broad characterization of state court judges raises a larger concern. What is the public to think if lawyers consider state court judges as second-class judges?

Surely Mr. Nolan meant no disrespect. But, the perception he relates—all too common among lawyers—originates in an implicit bias about the quality and performance of federal versus state court judges.

The public’s sense of justice depends on trusting the integrity, fairness, and competency of our judiciary. Whenever lawyers disparage judges generally or a class of judges specifically, the public’s sense of justice suffers. And, so too, a distinctive strength of our legal systems. ■