"HYBRID" WITNESSES: PROPER DISCLOSURE OF THE IN-HOUSE EXPERT WITNESS

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Litigators commonly encounter two general types of witnesses: fact witnesses and expert witnesses. Fact witnesses rely upon personal knowledge and testify regarding facts or events they have personally observed or experienced. Expert witnesses, on the other hand, use their scientific, technical, or other specialized knowledge, skill, experience, training, or education to offer opinions related to their areas of expertise.

Corporate defendants often rely on a third category of witness: the "hybrid witness." As the name suggests, hybrid witnesses provide both fact and expert testimony. Hybrid witnesses can testify regarding their factual knowledge and observations and can also offer opinions related to their respective fields. In most instances, hybrid witnesses are either treating physicians or are in-house company specialists who testify in litigation. The question of whether a witness is truly a hybrid will depend on the specific facts of the case and the knowledge of the witness.

Hybrid witnesses can have certain benefits over run-of-the-mill retained experts. Because of their factual background, hybrid witnesses are often more knowledgeable about the subject matter of the litigation than a third-party expert witness. Hybrid witnesses may be less costly and reduce litigation expenses, as they will require less time to learn the facts and issues of the case and will not need to be specially retained and paid in most instances. Additionally, the witness disclosure requirements placed on hybrid witnesses are less strenuous than those placed on expert witnesses. Hybrid witnesses generally do not have to prepare a detailed report of their opinions in federal court proceedings.

Despite these advantages, a party's decision to utilize a witness as a hybrid witness carries certain risks. Failure to properly identify and disclose a hybrid witness can result in a host of problems, including discovery disputes, unnecessary expense, stress, and, in the worst case, exclusion of the hybrid witness from the litigation.

TYPES OF HYBRID WITNESSES

The Federal Rules of Civil Procedure recognize two examples of witnesses who might be considered hybrid witnesses:

"physicians or other health care professionals and employees of a party who do not regularly provide expert testimony." See Fed. R. Civ. P. 26 Advisory Committee's Notes (2010 Amendments). Physicians who treat patients involved in litigation are often called as experts to discuss both facts and opinions related to the patient's condition or treatment. Similarly, in-house employees with specialized knowledge may be identified as hybrid witnesses, depending on their knowledge regarding facts and information relevant to the litigation.

A number of examples of in-house hybrid witnesses exist:

- In the retail sector, a store's loss prevention manager who is familiar with both the company's policies and procedures and with the facts of the case;
- In the trucking industry, an instructor who leads seminars on road safety and responsibilities and who also investigates a particular accident;
- In products liability litigation, an engineer who designs or tests products and who also investigates alleged failures or defects with the product at issue;
- In the construction industry, a supervisor who ensures compliance with safety regulations and who is on-site at the time of an accident; and
- In the tech industry, a software developer with specialized knowledge about his company's product.

DISCLOSURE REQUIREMENTS FOR EXPERT WITNESSES UNDER RULE 26

Litigants in federal court must disclose information regarding witnesses who will offer expert opinions. Rule 26(a)(2) of the Federal Rules of Civil Procedure divides expert witnesses into two categories: those who must provide a detailed, written "report" under the guidelines of Rule 26(a)(2)(B), and those who need only provide a less thorough "disclosure" pursuant to Rule 26(a)(2)(C). Witnesses who are "retained or specially employed to provide expert testimony in the case or one whose duties as to the party's employee regularly involve giving expert testimony" must provide a Rule 26(a)(2)(B) report. Alternatively, hybrid witnesses generally fall under Rule 26(a)(2)(C) and do not require a full report.

The reasons for which a party might prefer a Rule 26(a)(2)(C) "disclosure" to a Rule 26(a)(2)(B) "report" are plentiful. The ever-increasing costs of litigation, and rising expert witness expenses in particular, make the less-detailed disclosure an attractive option. But a party may also wish to disclose less information for tactical purposes. A party may prefer that an expert be classified as a hybrid witness to avoid the rigors associated with a Rule 26(a)(2)(B) report.

EMPLOYEES AS HYBRID WITNESSES

In-house specialists who provide expert opinions based upon information learned in the normal course of business (such as design of a product, safety regulations on a construction site, or safety standards in a retail store) need not provide expert reports. However, if the employee witness forms any opinions specifically in anticipation of the litigation (new opinions about a product or safety after being put on notice of a potential lawsuit), the party must submit an expert report for that employee.

The source of the expert employee's knowledge may become a point of contention that leads to discovery disputes. The heart of the dispute will likely be whether the employee obtained the information in the normal course of business or whether the information was obtained in anticipation of litigation, but in certain circumstances, the witness may have obtained information from both sources.

EMPLOYEE WITNESSES WHO REGULARLY PROVIDE EXPERT TESTIMONY

Rule 26(a)(2)(B) requires expert reports from employee witnesses whose duties "regularly involve giving expert testimony." But case-specific questions will arise as to what circumstances would cause an employee to be classified as one who "regularly" gives testimony. If an employee has only testified on several occasions, or has discussed general topics as a corporate representative as opposed to a technical expert, a court may rule that a full report is not necessary from the employee witness, and that a Rule 26(a)(2)(C) disclosure will suffice. At the same time, if the court concludes that the witness is going to give any opinions "specifically formed in anticipation of the litigation, or otherwise outside the normal course of a duty," a Rule 26(a)(2)(B) report will likely be required.

POTENTIAL CONSEQUENCES OF FAILURE TO PROPERLY DISCLOSE EXPERT

If a party fails to properly disclose an expert witness, that failure can have dire consequences on the party's case. For example, if a company designates an employee expert as a hybrid witness and produces a Rule 26(a)(2)(C) "disclosure," but the court later determines that the witness formed his opinions "in anticipation of litigation," the court may find the party's disclosure inadequate. Alternatively, if a party identifies an employee expert who has given testimony in other matters, and the court concludes that the employee is one whose duties "regularly involve giving expert testimony," the court may demand that the company produce a full report for the employee witness. In both situations, the court could potentially issue discovery sanctions against the corporate party for its failure to comply with the disclosure requirements. In extreme situations, the court could decide to exclude the employee expert altogether, which can irreparably damage a party's case.

Attorneys and corporations who hope to take advantage of the hybrid witness rule must be aware of these considerations when preparing their expert witness disclosures. When parties are in doubt as to whether a hybrid witness must provide a report, or when the risk of having an expert excluded is too great to accept, a party may wish to err on the side of caution and prepare a full expert report.

CONCLUSION

The issues that determine whether a party can properly be classified as an expert are heavily dependent on the specific facts of a case. When deciding between a witness "disclosure" and a full "expert report," a company and its counsel must carefully consider the roles each witness has played within the company, with the underlying facts of the litigation, and with the litigation itself.

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