

## Let's hear it from the expert

By Hillary Frommer

On a Thursday afternoon in April, I sat down with Dr. Gerald Goldhaber, President and CEO of Goldhaber Research Associates, who has offices both in Buffalo and New York City.

Goldhaber is an expert witness, nationally renowned, with more than 30 years experience in the fields of warning label research and political polling.<sup>1</sup> I asked him to describe some of the most challenging aspects of dealing with lawyers. He provided some very insightful and invaluable advice that all lawyers should follow when working with expert witnesses.

### Retain an expert as early on in the litigation as possible

Goldhaber described situations when he was retained as an expert at the tail end of the discovery process, or even after discovery has closed. In his view, a lawyer places both the expert and client at a disadvantage by retaining an expert witness late in the litigation. According to Goldhaber, there are several critical reasons why the lawyer should retain the expert as early as possible. First, the expert needs specific information in order to form the opinion about which he or she will testify at trial. That information comes from the documents and deposition testimony elicited during discovery. By engaging the expert before document discovery is complete and the critical depositions are taken (including the depositions of the parties and relevant fact witnesses), the expert can advise the lawyer what documents to request and what questions to pose at a deposition, which will contain the information needed to formulate the expert opinion. If the lawyer engages the expert after discovery has been completed, it may be too late to get the expert everything he or she needs. As a result, the expert could have an incomplete picture of the facts and ultimately render an incomplete or even inaccurate opinion.

Second, the expert needs sufficient time to formulate the opinion, and in federal cases, to prepare the FRCP Rule 26(a)(2)(B) report.<sup>2</sup> Experts are busy people; they do not just work on your case. Just ask Goldhaber, whose office

is inundated with four-foot high stacks of binders, documents, and transcripts relating to the multiple cases in which he is currently engaged. A conscientious and thorough expert, Goldhaber reads every document and deposition transcript. If placed in a time crunch however, it becomes very difficult for him, or any expert witness, to review all of the necessary materials.

This can lead to an incomplete report or, what is more embarrassing for the expert, lawyer, and client, sloppy work product.

The decision to retain an expert will ultimately be made by the client, and of course has an impact on the litigation costs. Lawyers should discuss as soon as possible with the client the value of retaining the expert at the outset of the case, because while more costly, this can only benefit the client in the end.<sup>3</sup>

### Give the expert everything he or she needs to do the job hired to do

When Goldhaber is retained as an expert witness, he does not want to review a lawyer-prepared summary of a deposition. He wants to read the entire deposition transcript. He does not want to see only those cherry-picked documents which the lawyer thinks are relevant. He wants to see every document produced in discovery by all parties. When Goldhaber has been retained as a rebuttal witness, he wants to review all of the materials his opposing expert reviewed in forming his or her opinion. In fact, Goldhaber told me that when he is retained as a rebuttal expert in federal cases, the first thing he reads is the list of the materials relied on by the opposing expert.<sup>4</sup>

Experts are retained because, well, they are experts. They know better than the lawyers which documents and testimony are important for the opinions they were hired to provide. Thus, one



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of the first questions the lawyer should ask the expert is "what information do you want?" The answer will likely be "everything," but if it is not, consider giving it all to him or her anyway.

### Do not deliberately keep "bad" information from the expert

Most disturbing to Goldhaber is when lawyers outright withhold documents from him which they think are harmful to the case. The only thing that accomplishes is upsetting the expert — who now is missing critical information, will formulate an opinion based on incomplete facts, and is poised to be blindsided during cross-examination at trial with that withheld information. Experts want to be known in the business and perceived by jurors as thorough and accurate. Withholding key information from the expert because it is not "good for the case" jeopardizes the expert's reputation inside and outside the courtroom. In fact, Dr. Goldhaber related to me an incident where an expert resigned from an engagement before trial because the lawyers withheld a critical document from him.

It is important for the lawyer to provide the expert with all of the tools he needs to give the most effective testimony at trial that will hopefully help win the case, no matter how damaging the lawyer thinks they are to the case. Let the expert decide how those "bad" facts impact his or her expert opinion, if at all.

### Allow adequate time to prepare for trial

When Goldhaber takes the witness stand in a courtroom, he wants to be confident that he is able to help the lawyer present the expert opinion in the best way possible. This can be accomplished only through adequate preparation with the lawyer. The expert should be well-prepared not only to present his or her opinion in the most effective way, but also to

answer the anticipated tough questions on cross-examination.

One interesting tidbit from Goldhaber: when preparing to testify, he likes to know the make-up of the jury (such the demographics and occupations of the jurors), which lawyers obtain during voir dire. In Goldhaber's experience, that information has helped him establish his credibility with the jury as an expert.

*Note: Hillary A. Frommer is counsel in the commercial litigation department of Farrell Fritz, P.C. She represents large and small businesses, financial institutions, construction companies, and individuals in federal and state trial and appellate courts and in arbitrations. Her practice areas include a variety of complex business disputes, including shareholder and partnership disputes, employment disputes, construction disputes, and other commercial matters. Ms. Frommer has extensive trial experience in both the federal and state courts. She is a frequent contributor to Farrell Fritz's New York Commercial Division Case Compendium blog. Ms. Frommer tried seven cases before juries in the United States District Court for the Southern and Eastern Districts of New York and in all of those cases, received verdicts in favor of her clients.*

1 Dr. Goldhaber's clients have included Fortune 500 companies, educational institutions, and governmental organizations. He has written and edited 10 books and is a frequent lecturer on the topics of warnings and communication. More information about Dr. Goldhaber and Goldhaber Research Associates is available at [www.Goldhaber.com](http://www.Goldhaber.com).

2 If expert is writing a report, tell him immediately when that report must be produced to the otherwise—not the week before it is due.

3 When deciding whether to retain an expert, the lawyer should have a candid discussion with the expert about his or her fees, and ask the expert to prepare a budget that includes how much time the expert anticipates reviewing the discovery materials, and the expected costs for such review.

4 These materials must be disclosed pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure.