That Is Not All There Is: Enhancing Daubert Exclusion by Applying "Ordinary" Witness Principles to Experts

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I. INTRODUCTION

Those of us concerned about the ready availability of experts willing to testify to incorrect opinions greeted the Supreme Court’s opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* with much

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fanfare. Finally, it seemed, there would be an end to the easy access to the witness stand enjoyed by those claiming to be experts. After all, in no uncertain terms the Supreme Court told federal trial judges (and, by extension, state trial judges) that they had a “gatekeeping role” that required them to exclude proffered expert testimony when it was not “scientifically valid.”

In the decade since Daubert, the decision and its progeny have been analyzed, applauded, and criticized at great length. Both critics and supporters have reported, argued, or assumed that Daubert would substantially reduce the opportunity for experts to testify in civil trials. Implicitly or explicitly, Daubert has been seen as a solution to the problem of faulty expert testimony because it provides an opportunity for parties opposing such testimony to argue for its exclusion.

As is so often the case in the law and in life, as Daubert has aged, it seems that it is not quite the cure-all solution that we initially envi-

3. Id. at 597.
4. Id. at 592–93. Six years after Daubert, the Supreme Court held that “Daubert’s general holding—setting forth the trial judge’s general ‘gatekeeping’ obligation—applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).
5. Like any other important decision from the United States Supreme Court, Daubert has been cited and applied in numerous lower court decisions. In addition, it spawned two important decisions by the Supreme Court itself. The other two cases in what is sometimes referred to as the Daubert trilogy are Kumho Tire and General Electric Co. v. Joiner, 522 U.S. 136 (1997). See Catherine E. Brixen & Christine M. Meis, Codifying the “Daubert Trilogy”. The Amendment to Federal Rule of Evidence 702, 40 Jurimetrics J. 527 (2000).

The Joiner decision established abuse of discretion as the appropriate standard for appellate review of a federal district court’s decision to exclude expert testimony under Daubert. Joiner, 522 U.S. at 138–39. Applying this standard, it held that the district court’s exclusion of expert testimony due to the insufficiency of the studies relied upon by the experts did not constitute an abuse of discretion. Id. at 146–47.

In Kumho Tire, the Supreme Court clarified that the Daubert gatekeeping requirement applied not just to scientists but to all other experts, who by the provisions of Rule 702 of the Federal Rules of Evidence testify “based on ‘technical’ and ‘other specialized’ knowledge.” Kumho Tire, 526 U.S. at 141. It also reiterated that a court deciding whether to admit or reject an expert’s testimony could consider the factors listed in Daubert, but it was not required to do so because the Daubert “test of reliability is ‘flexible,’ and Daubert’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.” Id.

6. Commentators are not the only people interested in Daubert. Its primary holding has been codified into the Federal Rules of Evidence. Rule 702 now allows the admission of an expert’s testimony only “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Fed. R. Evid. 702.
7. A recent check of the “Journals and Law Reviews” database on Westlaw indicates that “Daubert” appears in the title of almost 500 articles.
sioned. With the benefit of more than a decade of experience in a post-
Daubert world, judges, trial lawyers, and evidence scholars can see
that Daubert gatekeeping, while helpful in excluding some faulty ex-
pert testimony, has not eliminated all such testimony from civil tri-
als.8 Exclusion of expert testimony remains a drastic and somewhat
unusual judicial response.9 As one trial attorney noted, "Daubert
changed things, all right. Before Daubert, when I filed a motion to
keep a rotten expert off the stand, the judge rejected it out of hand,
saying the problems that I had pointed out went to weight, not to ad-
missibility. When I file the same motion now, the judge considers it
very carefully, perhaps even holding a hearing on the motion and tak-
ing it under advisement so that she can weigh each party's arguments.
Then, after careful consideration of my motion, the judge lets the ex-
pert testify."10

Exclusion of expert testimony, even when no less an authority than
the United States Supreme Court has required judges to carefully con-
sider it, can never be more than a partial solution to the problem of
faulty expert testimony. In some portion, quite possibly the majority,
of the cases where parties offer faulty expert testimony, the judge will
be unwilling to tell an expert that her testimony is so flawed that it
does not merit admission into evidence.11

Therefore, despite the significance and the fanfare associated with
Daubert and the possibility of exclusion of expert testimony, the land-
scape of expert-dominated civil trials has, in some ways, not changed
all that much. In many cases, the jurors are still asked to determine
which of two impressively qualified experts, who have testified to dia-
metrically opposite opinions, is wrong.12 Whenever there has been a
rejected Daubert motion to exclude expert testimony, the jurors face
this task because the judge has not been able to determine which of
the experts is so obviously wrong that her testimony should be ex-

8. See David W. Peterson & John M. Conley, Of Cherries, Fudge, and Onions: Sci-
ence and Its Courtroom Perversion, 64 LAW & CONTEMP. PROBS., Autumn 2001, at
215 (noting that an expert may be able to avoid exclusion of her testimony if she
is able to make her testimony "look[ ] more scientific," even if it is not actually
scientific).
9. Lloyd Dixon & Brian Gill, Changes in the Standards for Admitting Expert Evi-
dence in Federal Civil Cases Since the Daubert Decision, 8 PSYCHOL. PUB. POL'Y
10. The trial attorney was one who attended a continuing legal education seminar
taught by the Author, who has long since forgotten the name of the attorney and
even the location of the seminar, but who remembers the basic thoughts ex-
pressed. The quote in the text, though, is almost certainly not a precisely correct
one. Rather, it is the Author's best recollection of this trial attorney's summary of
how Daubert affected expert admissibility issues in civil cases.
11. See infra section II.A.
12. See infra subsection II.A.2.
In other words, in most of the tough cases, it will be the jurors’ job, not the judge’s, to determine which expert is wrong.

In a system that is concerned enough about faulty expert testimony to adopt a procedure that attempts to weed it out, at least in some cases, jurors should be equipped with information that can help them make this difficult decision about which expert is wrong. Thus, it is time to turn some of our attention away from the rather atypical cases of exclusion of faulty expert testimony to the more typical cases of admission of that testimony.

This Article attempts to do just that. In Part II, it describes the context in which experts and non-experts testify (or, in cases where courts exclude proffered expert testimony, do not testify) in civil cases. Part III reviews the information provided to jurors who must decide which of two or more conflicting fact witnesses is wrong. Part IV compares fact witnesses to experts and argues that jurors should receive at least as much information about experts as they do about fact witnesses, due to the substantial influence some attorneys exercise over the formation of expert testimony. Part V notes the ways in which courts have, incorrectly, provided jurors with less information about experts and outlines the proper application of ordinary witness rules to expert witnesses. Part VI discusses the advantages of applying ordinary witness law to experts.

II. EXPERT TESTIMONY IN CONTEXT

To understand the dynamics of expert testimony, one must first understand the types of issues that experts address in civil litigation. As most law students and lawyers come to realize, there are three (or perhaps only two) basic types of issues that opposing parties dispute in litigation: issues of law (perhaps); issues of fact; and mixed issues. Arguably there is no such thing as a pure issue of law in a given case because the facts determine what law is applicable. To take an extreme example, the law applicable to a product liability suit may be in a state of flux in a given jurisdiction, so that the parties could conceivably dispute the legal issue of whether negligence or strict liability applied in that jurisdiction. See infra notes 18, 21. However, that dispute would arise only if there was a product liability claim at issue in the litigation. If the litigation was, for example, a contested divorce and

13. See infra subsection II.A.2.c.
15. Arguably there is no such thing as a pure issue of law in a given case because the facts determine what law is applicable. To take an extreme example, the law applicable to a product liability suit may be in a state of flux in a given jurisdiction, so that the parties could conceivably dispute the legal issue of whether negligence or strict liability applied in that jurisdiction. See infra notes 18, 21. However, that dispute would arise only if there was a product liability claim at issue in the litigation. If the litigation was, for example, a contested divorce and
of law and fact. To the extent that there are disputes that could be classified as pure issues of law, however, judges are responsible for determining the applicable law with the help of attorneys, so courts generally do not allow expert testimony about the law alone.16

A. Types of Disputes Between Experts

Therefore, experts testify about either mixed issues of law and fact or about pure factual issues. For purposes of analyzing these issues, it is helpful to think of a simple two-party case with the rather typical scenario where an expert for the plaintiff testifies to an opinion that is directly contradictory to the opinion testifed to by an expert for the defendant.17

1. Mixed Issues of Law and Fact

In a mixed issue of law and fact, the plaintiff's and defendant's experts may disagree about either the underlying facts, the application of the law to those facts, or both. All of these disagreements can be classified as mixed issues of law and fact.

neither the wife nor the husband had any pending or resolved product liability claims against any party, there would be no legal issue in the case about the proper product liability law. In this sense, every issue of law is at least partially an issue of fact because the facts, disputed or not, determine which legal issues are in play.


17. Often, of course, there are more than two parties to a particular case. In some multi-party cases, several parties settle prior to trial, so only one plaintiff and one defendant remain in the case when it is tried. However, there are other cases where there are more than two parties, even at trial. Sometimes each of the multiple parties retains an expert to testify about a disputed issue.

To make things easier for both Author and reader, however, this Article will assume a lawsuit and a trial with one plaintiff and one defendant. For the most part, it will also assume that the plaintiff has retained an expert witness who will testify in a manner that is largely inconsistent with the testimony of the defendant's retained expert witness. When there are more parties and more experts, things get a bit more complicated, to be sure, but the issues discussed in this Article remain largely the same.
Product liability suits present a fairly typical example. Under the widely followed section 402A of the Restatement (Second) of Torts, "One who sells any product in a defective condition unreasonably dangerous to the consumer or to his property is subject to liability . . . ." 18 Assume that the plaintiff's expert testifies that a widget's design has caused five deaths to users of the widgets and that, in the expert's opinion, that rate of death from the use of one million widgets renders the widget's design defective and unreasonably dangerous.

The defendant's expert might dispute that the widget's design caused five deaths. If so, the two experts would be disputing an issue of fact. 19 However, the factual dispute regarding the number of deaths caused by the product's design is a secondary issue that will guide the jury in its resolution of the primary issue of whether the product is unreasonably dangerous, which is a mixed issue of law and fact. 20

18. Restatement (Second) of Torts § 402A (1965). Of course, the American Law Institute ("ALI") has superseded this Restatement with a more recent version. See Restatement (Third) of Torts: Products Liability (1997). However, the example in the text remains relevant, because section 402A has been written into product liability jury instructions in many jurisdictions. See Clinton H. Scott, Note, Defective Condition or Unreasonably Dangerous Under the Tennessee Products Liability Act: Just What Does It Mean?, 33 U. Mem. L. Rev. 945, 950 (2003) ("Since the inception of Section 402A, the strict liability doctrine has been adopted and used in varying forms throughout the country."); cf. Andrew A. Bennington, Statutory Stalemate: Strict Products Liability and Comparative Negligence in South Carolina, 56 S.C. L. Rev. 815, 818–21 (2005) (noting the influence of section 402A strict products liability and the ALI's refinement of the standard in the Restatement (Third)). For a review of states that have adopted or rejected the newer standard, see Cami Perkins, The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Cases, 4 Nev. L.J. 609, 616–25 (2004).

19. Although the number of deaths caused by the widget's design is an issue of fact, the jury's verdict will not turn solely on its resolution of the dispute regarding how many persons were killed by the widget's design. Instead, the jury will be instructed that its verdict will depend upon whether it believes that the widget's design made the product "defective" because it was "unreasonably dangerous." Therefore, the experts' dispute about the number of deaths caused by widgets is an issue of fact that affects an issue of law, rather than an issue of fact upon which the jury's verdict may turn without reference to the law, see infra note 23 and accompanying text.

20. A dispute between experts about the death rate attributable to a product's design, like other factual disputes, might be characterized as a purely factual dispute if the experts agreed about all other matters. In other words, if both the plaintiff's expert and the defendant's expert agreed that five deaths per million widgets would render the product unreasonably dangerous and therefore defective, but disagreed about whether five deaths could be attributed to the product's design, some might characterize this as a purely factual dispute. However, in such a case, the two experts would presumably reach different conclusions about the product's level of dangerousness and, therefore, alleged defectiveness, so it is also appropriate to characterize such a dispute as a mixed question of law and fact. In actual trials, however, it is probably more common for two experts who
It is also possible that the plaintiff's and the defendant's experts would agree that the widget's design caused five deaths, but disagree about whether this rendered the widget "unreasonably dangerous" and, therefore, "defective." The plaintiff's expert would testify that five deaths per million is excessive, while the defense expert might testify that five deaths per million is an acceptable and reasonable death rate, because the product realistically cannot be designed to cause fewer deaths. Such a dispute would almost certainly focus, at least to some extent, on the level of danger to be expected from the type of product at issue. For example, if a million yo-yos produced five deaths, the yo-yo's design might be unreasonably dangerous in the view of an expert, even if the same or another expert would conclude that an automobile seat belt system that failed to prevent five deaths per million cars was not defective.

Of course, it is also possible, and perhaps common, for experts to disagree about both underlying facts and the legal conclusions to be drawn from these facts. In other words, the experts might disagree both about how many deaths are attributable to widgets and about whether the death rate rendered the product unreasonably dangerous.

Those of us who teach law and produce most of the scholarship about law (i.e., law professors), naturally tend to focus upon disputes that have at least some legal component. In our scholarship, we debate what the law should be. To the extent that we consider the role of experts in these scholarly disputes, we tend to think of mixed issues of fact and law. When we teach, we again tend to focus upon debates about the law. The reported appellate court decision that is the key component of most torts (and other law school) classes facili-

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21. For example, for many years torts scholars debated in print about whether strict liability should replace negligence in product liability cases. See, e.g., Bennington, supra note 18, at 816–21 (outlining the history of the negligence versus strict liability debate); Guido Calabresi & Jon T. Hirshoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055 (1972); Harry Kalven, Jr., Torts: The Quest for Appropriate Standards, 53 Cal. L. Rev. 189 (1965); Dustin R. Marlowe, A Dose of Reality for Section 6(C) of the Restatement (Third) of Torts: Products Liability, 39 Ga. L. Rev. 1445, 1450–51 (2005) (reviewing the history of this debate in a section entitled "Products Liability as an Evolving, Often Confused, Doctrine"); Marcus L. Plant, Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View, 24 Tenn. L. Rev. 938 (1957); William L. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966); Jacqueline S. Bollas, Note, Use of the Comparative Negligence Doctrine in Warranty Actions, 45 Ohio St. L.J. 763 (1984); John L. Diamond, Note, Eliminating the "Defect" in Design Strict Products Liability Theory, 34 Hastings L.J. 529 (1983). Though strict liability has now largely replaced negligence in product liability cases, we continue to dispute the nuances of the law of strict liability. See, e.g., Bennington, supra note 18; Marlowe, supra; Perkins, supra note 18, at 625; Scott, supra note 18.
tates and reinforces this focus on the law. Law students are trained to quickly identify "the facts of the case" when they brief and discuss these appellate opinions, so they can concentrate on the legal issues in dispute. Professors and students in law school classes tend to implicitly assume that these facts are largely undisputed.

2. Disputes About Historical Fact

Trial attorneys, trial court judges, and jurors have a different outlook. For those who function in trials and in the litigation process leading up to trials, disputes about facts are often paramount.

a. Recognizing Pure Disputes of Historical Fact

A purely factual dispute is a disagreement between the parties and, in the context of this Article, between their experts, about what happened on a particular occasion. It is a "pure" dispute of fact if it can be framed in terms of an inquiry into what happened on a particu-

22. Given the predominance of the appellate court opinion in torts and other law school classes, this is an understandable view. In appeals following trials, factual disputes have usually already been resolved at the trial court level. Though it is possible for an attorney to appeal a factual finding by the jury at trial, the deferential standard of review for factual issues makes them an unattractive basis for appeal. If the appeal comes before a trial is held, it will often be based upon the trial judge's granting of a summary judgment of dismissal. Under the law of summary judgment, the appellate court will be required to resolve all material factual disputes in favor of the party against whom summary judgment was granted—usually the plaintiff. Therefore, in such cases, there is no significant dispute about the facts in the appellate court, but there is a significant issue about the law applicable to those facts. Thus, in most of the appellate court cases used in law school pedagogy, there is no active dispute about the facts.

Professor Irving Younger, whose teachings about trial advocacy still influence many litigators, noted the gulf between the law school and the courtroom view of "facts":

The facts, we tend to think at the beginning [of law school], are like acorns on an oak tree. When they are ripe, they drop to the ground. If you want some, just bend down and pick them up. Observe how they are arranged. Should they fall into the pattern we designate "negligence," Brown wins his suit against Kendall. If the pattern is that of one of the bundle of rights we call "property," Armory prevails over Delamirie. Why, there's nothing to it but learning the patterns. That, I repeat, is what we tend to think at the beginning. It is what teachers of the law seem to have thought for a very long time.

With experience and reflection comes a deeper comprehension. Facts do not grow on trees, we learn. They must be investigated and proved. Cases are more often won before a jury than in the appellate courtroom. . . . The facts, in short, are just as obscure as the law, just as malleable, just as controversial, and in determining the outcome of a lawsuit or the elaboration of a rule, more important than paltry logic.

lar occasion, without any reference to the law. The resolution of that factual dispute by the jurors often has tremendous legal consequences, because the jury's verdict might turn on that resolution, but the issue itself is one of historical fact, not law.

For example, assume that the parties in a product liability case dispute the historical issue of whether the plaintiff was using the defendant's widget when she was hurt. To take a not uncommon and already referenced example, assume that the plaintiff claims that the seat belt system on her car was defectively designed and that these design defects caused her injuries. Assume further that the defendant, which manufactured the plaintiff's car and its seat belt system, asserts that the plaintiff was not using her seat belt at the time of the accident, so the seat belt system could not have contributed to her injuries. In such a case, the plaintiff's attorney would presumably present the testimony of an expert (presumably a mechanical engineer) who inspected the seat belt system after the accident for evidence of seat belt use, examined other available physical evidence, reviewed other available data, and concluded that the seat belt was used in the accident. The defendant would presumably call its own expert who reviewed the same information and concluded that the seat belt was not used. The critical dispute in such a case can be framed in a simple question of historical fact, without reference to the law of products liability, i.e., "Was the plaintiff wearing the seat belt at the time of the accident?" A special verdict form could address this question to the jury. The jury's resolution of this dispute will have tremendous legal consequences, because the plaintiff's suit will presumably be dismissed if the jury determines that she was not wearing her seat belt, but the issue itself is one of historical fact.

23. One judge's list of examples of disputes about historical facts that jurors are asked to resolve included "whether the light was red or green, whether the car was on the wrong side of the road, [and] how fast it was going." In re Application of the Comm. for the Pres. of the Constitutional Right to Trial by Jury, 151 N.Y.S.2d 1005, 1008 (N.Y. Sup. Ct. 1956) (quoting Justice Peck's radio address on station WMCA).

24. Engineers who attempt to determine whether a seat belt was used in an accident examine the belt webbing and hardware for signs that the belt was loaded during an accident. See Charles A. Moffatt et al., Diagnosis of Seat Belt Usage in Accidents 255, 257-58 (Soc'y of Auto. Eng'rs, Tech. Paper No. 840396, 1984).


25. A question in the special verdict form would presumably incorporate the burden of proof, so it would look something like: "Did the plaintiff prove by a preponderance of the evidence that she was wearing the seat belt at the time of the accident?"
b. **Presence of Pure Disputes of Historical Fact in Trials**

The oft-stated, but now sometimes disputed, proposition that a trial is a search for the truth is based upon the presence of at least some factual disputes between the parties. In jury trials, we ask the jury to resolve these factual disputes. The importance of factual disputes in jury trials is underscored by the commonplace standard jury instruction advising the jury that the jury, not the judge, is the determiner of facts and that the jury's primary job is to determine the facts.


28. In the absence of any factual disputes (i.e., if the parties stipulated to the facts), there would be no need for a jury, because the judge could resolve the disputed legal issues between the parties.


30. See, e.g., MO. SUP. CT. COMM. ON CIVIL JURY INSTRUCTIONS, MISSOURI APPROVED JURY INSTRUCTIONS § 2.02 (6th ed. 2002). Of course, some of the factual disputes that a jury must resolve would arise as portions of mixed issues of law and fact, but others would be pure issues of historical fact upon which the outcome of the trial would depend.

31. To be somewhat more precise, when two experts testify to opposing opinions about an issue of historical fact, at least one of them must be wrong, even though it is possible in some cases for neither of them to be correct. For example, assume that the issue of historical fact about which the experts present differing opinions is the origin and cause of a fire, in a suit by a homeowner against her insurer for its failure to pay for the homeowner's losses in a fire. If the homeowner–plaintiff's expert testifies that faulty wiring in a living room lamp started the fire and the insurer–defendant's expert testifies that the homeowner burned
ther the plaintiff was wearing the seat belt during the accident or she was not. It is not possible for the plaintiff, at the same critical moment, to be both wearing the seat belt and not wearing it.

Nonetheless, in every trial where the resolution of an issue of historical fact turns upon the jury’s resolution of a dispute between experts, there will be at least two experts who testify to opposing opinions about an issue that can have only one correct answer. If the plaintiff’s expert testifies that the plaintiff was wearing the seat belt and the defendant’s expert testifies that she was not wearing it, one of them is simply wrong.32

i. Varying Difficulty of Identifying Incorrect Expert Testimony

Although it is sometimes relatively easy for the jury to determine which expert is wrong, often it is very difficult. Any given dispute between experts with opposing views on an issue of historical fact will be somewhere on the following spectrum:

<table>
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<th>One</th>
<th>Clear</th>
<th>Answer</th>
<th>Question</th>
</tr>
</thead>
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To define terms, it is helpful to think of a scenario that would presumably never happen in an actual case. Assume that a panel of one hundred qualified, knowledgeable, and unbiased experts was assigned the task of determining the correct answer to the question of historical fact at issue in a particular case. Further assume that none of the experts was paid or otherwise influenced or even contacted by any of the parties, but each reviewed the available evidence. A “one clear answer” factual question is one where all one hundred experts would agree upon the same, presumably correct, answer. At the other end of the spectrum, a “one unclear answer” question is one where, though there is only one correct answer, fifty of the assembled experts would

32. In such a trial, the testimony of one of the experts is just as incorrect as the testimony of the expert whose opinion was excluded by a gatekeeping judge who correctly determined pursuant to *Daubert* that expert testimony was inadmissible. In a case where the jury hears the testimony of both the incorrect expert and the correct expert, however, it falls upon the jury, not the judge, to determine which of the experts is wrong.
reach the correct conclusion, but the other fifty would reach the incorrect conclusion.

For example, assume that the plaintiff was indeed wearing the seat belt at the time of the accident. In a "one clear answer" case, all one hundred experts who reviewed the available evidence would conclude that the plaintiff was wearing the seat belt.\(^3\) In a "one unclear answer" case, fifty experts would conclude (correctly) that the plaintiff was wearing her seat belt, but the other fifty experts would conclude (incorrectly) that she was not.\(^4\)

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\(^3\) As those experienced in dealing with retained and often well-paid experts can attest, the fact that all one hundred qualified experts would reach the same conclusion in the absence of litigation or other bias does not mean that a party presenting the opposite view in litigation could not hire an expert to testify in support of that view. As an astute judicial observer of expert witnesses said a century ago, "There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'" Keegan v. Minneapolis & St. Louis R.R. Co., 78 N.W. 965, 966 (Minn. 1899), quoted in Chaulk by Murphy v. Volkswagen of Am., Inc., 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J., dissenting); see also Berger, supra note 1, at 91 ("[E]xperts are readily available to present essentially frivolous theories . . . ."); Mickus, supra note 26, at 792 n.87 ("Certain experts are willing to advocate, in court, scientific conclusions that fly in the face of an entire body of scientific literature."); Weinstein, supra note 1, at 482 ("An expert can be found to testify to the truth of almost any factual theory, no matter how frivolous.").

\(^4\) There are various reasons why a particular question would stump half of the qualified, unbiased experts into giving an incorrect answer, but two of them are probably the most prominent.

First, perhaps the scientists have not yet reached a consensus about how to analyze available evidence. For example, half of the experts might believe that a particular type of indentation in the seat belt webbing indicates that the belt was used and, in the vernacular of such experts, "loaded" during an accident. The other half of the experts might believe that the same indentation indicates a past pattern of seat belt use, but does not indicate that the belt was loaded in the accident. In such an instance, the level of scientific knowledge and experimentation would presumably not have evolved to the point where either theory was eliminated or, in the case of a fifty–fifty split, even subordinated to the other theory. If this was the state of scientific knowledge at a particular time about the particular type of indentation on the seat belt webbing and if the seat belt webbing contained this type of indentation after the accident, half of the available, unbiased experts would conclude that the belt had been used in the accident and the other half would (or, at least, might) conclude that it was not.

The other primary reason for a dispute among the unbiased experts relates to the state of the evidence. To illustrate, let's change the state of the science. Assume that all unbiased experts would agree that an "XYZ indentation" on the seat belt webbing would document that the belt was worn and loaded during the accident. Assume further, however, that it is not clear whether the belt contained an XYZ indentation after the accident. Perhaps the belt is no longer available, because it was not preserved after the accident and witnesses disagree about the belt's post-accident (pre-destruction) condition. Perhaps it is available, but it is not entirely clear whether it contains an XYZ indentation, because it was exposed to the elements while the car sat in a junk yard for six months before the plaintiff retained an attorney to represent her. In such circumstances, experts
A given dispute between expert witnesses about an issue of historical fact is somewhere on the spectrum between a "one clear answer" question and "one unclear answer" question. Regardless of where the dispute lies on this spectrum, however, the jurors will be forced to decide which of the experts is wrong, even though both of them will presumably point to their credentials and their review of the available evidence in the case to try to convince the jurors that they are right. If the key question is one of historical fact and the two experts disagree about this historical fact, by definition, one of them must be wrong, regardless of where the issue lies along the spectrum from "one clear answer" cases to "one unclear answer" cases.

ii. Jurors' Need for Information About the Crafting of Expert Testimony

Once one understands that a particular dispute between experts about an issue of historical fact lies somewhere on the spectrum from "one clear answer" to "one unclear answer" questions, the limited reach of Daubert exclusion becomes rather apparent. Daubert exclusion ordinarily should occur only in cases at or near the "one clear answer" end of the spectrum. The further a particular dispute is who agree about the significance of an XYZ indentation might still reach opposite conclusions about whether the plaintiff was wearing the belt.

Often, of course, there is disagreement between opposing experts about both the state of the science and the state of the evidence. Again, however, it is important to remember that, if the question about which the experts disagree is one of historical fact, precisely framed, one of the experts must be wrong. This is just as true in a "one unclear answer" case as it is in a "one clear answer" case. By definition, it is easier to determine which expert is wrong in a "one clear answer" case, but this does not change the fact that one of the experts is wrong in the "one unclear answer" case also.

35. Of course, the jurors would not face this decision if the judge decided that one of the expert's opinions was so scientifically invalid that it must be excluded. See infra subsection II.A.2.c.ii.

36. Although this subsection focuses on pure disputes of historical fact that can have only one correct answer, see supra note 33 and accompanying text, its analysis applies to disputes between experts about the factual portions of mixed issues of fact and law. A mixed issue of fact and law, such as whether a product is unreasonably dangerous and therefore defective, might have more than one correct answer. For example, as noted previously, a plaintiff's expert might legitimately believe that a certain rate of death from a product renders that product unreasonably dangerous while a defense expert might legitimately believe that the same product is not dangerous. See supra subsection II.A.1. However, if there is an underlying factual dispute contained within the mixed issue of fact and law and that factual issue is defined in precise enough terms, there can be only one correct answer. To return to the previous example, if there is a dispute about whether a product's design caused five or less than five deaths, there can be only one correct answer.

37. Of course, this is a bit of an oversimplification, because it suggests that general acceptance is the only determiner of the validity of expert testimony. While this
from this end of the spectrum, the less likely that the opponent of the proffered incorrect testimony will be successful in convincing the court to exclude the expert testimony.

Nonetheless, in a one answer case anywhere along the spectrum, one of the experts is wrong. If the system is supposed to facilitate a search for the truth, i.e., an attempt to correctly determine matters of historical fact, this is troublesome. If the jury mistakenly decides that the incorrect expert is correct on a case-determinative issue of historical fact, it will return an incorrect verdict.

In addition, consider the more limited role of science (or other specialized knowledge) in helping the jurors identify the expert who is testifying incorrectly when the case is at or near the "one unclear answer" end of the spectrum. In a "one clear answer" case, the attorney who cross-examines the expert who has reached the incorrect conclusion will often be able to highlight the scientific flaws in that expert's analysis, so that the jury will understand those mistakes. As one moves toward the "one unclear answer" end of the spectrum, a science-based cross will do less to identify flaws in the incorrect expert's work.\(^3\)

Of course, when one reaches the "one unclear answer" end of the spectrum, there can be no absolute assurance that the jury will reach the correct decision, regardless of how much scientific and other information it receives. Nonetheless, a system that uses the jury to determine historical facts should provide the jurors with all reasonably available information about the expert's testimony, not just scientific information,\(^4\) to increase the likelihood that the jury will reach the

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38. The case may be near the unclear end of the spectrum due to the indefinite state of scientific knowledge about the disputed issue or due to limited physical and other evidence about the disputed occurrence. See supra note 34.

39. See Applegate, supra note 27, at 349 ("The more we accept the idea that scientific conclusions are not inevitable, the more important it is to know precisely how experts reach their conclusions . . . "); cf. Mfg. Admin. & Mgmt. Sys., Inc. v. ICT Group, Inc., 212 F.R.D. 110, 117 (E.D.N.Y. 2002) (quoting Mickus, supra note 26, at 793 n.89, regarding the importance of using cross-examination to "show[ ] that counsel manipulated the expert's analysis and ultimate findings" in order to "push[ ] the expert's testimony" to the realm of "biased science"); TV-3, Inc. v. Royal Ins. Co. of Am., 194 F.R.D. 585, 588 (S.D. Miss. 2000) (similar); Duke T. Oishi, Note, A Piece of Mind for Peace of Mind: Federal Discoverability of Opinion Work Product Provided to Expert Witnesses and Its Implications in Hawaii', 24 U. HAW. L. REV. 859, 879 (2002) (referencing Mickus's discussion of the "crucial importance of discovery of expert--attorney information in allowing the jury to come to a fair conclusion" about the attorney's influence on the expert).

correct result. In such cases, in particular, the jury can use information about an attorney's influence on the expert to help to identify incorrect expert testimony.41

B. Similar Disputes Between Fact Witnesses

Disputes between experts testifying to directly opposing opinions are not the only issues of historical fact jurors are asked to decide in our civil justice system. Very similar issues are presented when two or more fact witnesses testify to directly opposite observations.42

To illustrate, it is entirely possible for the jury to be presented with directly conflicting fact witness testimony about whether our hypothetical plaintiff was wearing her seat belt. The plaintiff might present the testimony of witnesses who saw her fasten her seat belt before she drove away from her last pre-accident stop or from passengers in the car who heard the seat belt buckle click into place.43 The defendant might present testimony from others who saw the plaintiff drive away without buckling up, from passengers who noticed that she was unbuckled, or from ambulance attendants who removed an unbuckled and unconscious plaintiff from the car after the accident.44

Fact witness disputes force jurors to decide which fact witnesses are wrong, just as expert disputes force jurors to decide which experts are wrong. In either type of dispute over an issue of historical fact, there can be only one correct answer, so some witnesses are wrong.

III. ORDINARY RULES APPLICABLE TO DISPUTES BETWEEN WITNESSES

Given the similarities in jurors' resolution of factual issues disputed by fact witnesses and experts, it is instructive to review the potentially extensive information provided to jurors about fact witnesses.

expert testimony, even when these backgrounds are short on technical knowledge or experience).


42. See Kim, supra note 40, at 247–48 (noting the similarities between jury evaluation of expert and eyewitness testimony).

43. If the plaintiff is alleging that a defect in the seat belt system caused her injuries, a fact witness's testimony about her observations indicating that the plaintiff was using the seat belt would be relevant under Rule 401 and, therefore, admissible under Rule 402. FED. R. EVID. 401, 402.

44. Fact witness testimony indicating that the plaintiff was not wearing her seat belt would also be relevant and admissible. See id.
A. Information Provided to Jurors About Fact Witnesses

Under Rule 402 of the Federal Rules of Evidence, all relevant evidence is admissible, absent some specific provision of law rendering the evidence inadmissible.\footnote{Fed. R. Evid. 402.} Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence."\footnote{Fed. R. Evid. 401.} Under these permissive rules, jurors may receive substantial and varied information about fact witnesses that can help them identify which of them are wrong.

1. Information About Problems with a Fact Witness's Observations

First, because a fact witness can testify only about matters she observed, jurors will receive information about problems with a fact witness's observations and recollections.\footnote{1 McCormick on Evidence §§ 10, 45 (John William Strong ed., 4th ed. 1992) [hereinafter 1 McCormick].} For example, evidence might establish visual obstructions or substantial distance between the witness and the matters being observed;\footnote{Thomas A. Mauet, Trials: Strategy, Skill, and the New Powers of Persuasion § 6.6(5) (2005); J. Alexander Tanford, The Trial Process: Law, Tactics and Ethics 300 (2d ed. 1993).} vision, hearing, or memory difficulties;\footnote{Mauet, supra note 48, § 6.6(5)-(6); Roger C. Park, Trial Objections Handbook § 7:20 (2d ed. 2002); Tanford, supra note 48, at 300; Edward J. Imwinkelried, Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony?, 84 Marq. L. Rev. 1, 14–15 (2000).} or the time gap between the witness's observation and testimony.\footnote{Thomas A. Mauet & Warren D. Wolfson, Trial Evidence § 12.3(1) (1997).} This data is the rough equivalent of information about problems with an expert's application of science or other specialized knowledge. For both the fact witness and the expert, there is little or no controversy about the relevance of this core data indicating possible problems with the witness's testimony. For both types of witnesses, we expect jurors to evaluate a witness's testimony in light of these problems, which are generally established during cross-examination.\footnote{D. Michael Risinger, Preliminary Thoughts on a Functional Taxonomy of Expertise for the Post-Kumho World, 31 Seton Hall L. Rev. 508, 510–11 (2000).}
2. Information About a Fact Witness's Relationships

Jurors also receive information that does not directly suggest observation or memory problems. Much of this data relates to relationships between the witness and one of the parties or attorneys. Evidence scholars, judges, and trial attorneys refer to this information as "bias" evidence.

a. Relationships Between a Fact Witness and a Party

If the witness has a significant relationship with one of the parties, evidence of that relationship is virtually certain to be introduced. Often the relationship between the witness is a positive one, such as brother–sister, employer–employee, or friend–friend. When this is the case, the cross-examining attorney usually will introduce evidence of that relationship. If the relationship is negative, i.e., if the witness is an enemy of a party, that party will introduce this evidence.

For example, assume that a fact witness who testifies about her observation of the plaintiff wearing, or not wearing, her seat belt is the brother of the plaintiff. Regardless of which party puts the brother on the stand, the defendant will almost certainly introduce evidence of this relationship. If the plaintiff calls her brother to the stand to testify that he saw her put on her seat belt, the defendant will introduce evidence of the brother–sister relationship in cross-examining.
nation. If the defendant calls the brother to the stand to testify that the plaintiff was not wearing her seat belt, the defendant will introduce evidence of the brother-sister relationship during direct examination.

Why do we provide jurors with data about the relationship between a witness and a party? Because we believe that jurors, using their common sense, will tend to view testimony that favors the party with whom the witness has a positive relationship with some skepticism and will tend to give additional weight to testimony that hurts the party with whom the witness has a positive relationship.

That is all that the jurors can possibly do with the testimony about a relationship between a witness and a party. Evidence of a relationship does not and cannot conclusively establish that the witness is right or wrong. After all, despite the fact that the witness is the plaintiff's brother, it may indeed be the case that he did in fact observe her wearing the seat belt. Therefore, in any particular case, evidence of the relationship between the witness and the party could possibly lead to an incorrect verdict, because it might cause the jurors to improperly discredit the correct testimony of the plaintiff's brother. Nonetheless, we believe the jurors who are faced with the rather difficult task of deciding whether to believe a witness deserve to know that the witness is the plaintiff's brother, because we believe that information will help the jurors evaluate the brother's testimony.

b. Relationships Between a Fact Witness and an Attorney

The system has the same belief in the value of evidence of a relationship between a fact witness and one of the attorneys representing the parties. To the extent that an attorney has spent considerable time contacting and, perhaps, trying to shape a fact witness's testimony, she can expect the jurors to learn about those efforts. In such circumstances, it will be in the opposing counsel's interest to suggest

59. Of course, the plaintiff's attorney would realize that the defense attorney will make this point. As a result, she might try to take some of the punch out of the anticipated cross-examination point by covering it during direct examination. See infra note 67.

60. See Christie v. Eager, 26 A.2d 352, 353 (Conn. 1942); see also, e.g., Lawrence v. State, 464 N.E.2d 923, 925 (Ind. 1984) ("It is essential to a trial of issues of fact that the trier of fact determine which witnesses are worthy of belief and which are not, and what testimony is the more reasonable and probable; that is, it must determine the credibility of the witnesses and the weight of the evidence."); In re Application of the Comm. for the Pres. of the Constitutional Right to Trial by Jury, 151 N.Y.S.2d 1005, 1008 (N.Y. Sup. Ct. 1956) (observing that one of the principal functions of the jury "is to evaluate the credibility of the witnesses who testify before it").

61. See Christie, 26 A.2d at 353 (detailing a party witness's cooperative approach to counsel and stating that the "conduct of the parties... was in no sense 'extraneous' but clearly of very material significance upon the issue of credibility").
that the attorney has had too much influence on the witness and that the jurors should therefore discount the witness's testimony, or ignore it entirely. Evidence about an attorney's interaction with a witness is relevant even when those efforts do not involve any violation of the rules of professional conduct or other law.

c. Bribes or Other Favors Bestowed Upon a Fact Witness

Of course, when a law or rule has been violated, evidence of that violation is also relevant. A party can introduce evidence that the opposing party or her attorney paid a fact witness or provided other favors for her because we expect jurors to consider discrediting the testimony of a witness who received financial or other benefits.

3. Changes in a Fact Witness's Statements

When a fact witness testifies in a manner inconsistent with a statement made by that witness on a previous occasion, the cross-examining attorney will make jurors aware of the previous statement. Under the Federal Rules of Evidence, such a statement is not admitted as proof that the previous statement was correct, except when it was made under oath. Instead, unsworn statements are introduced under the rubric of impeachment. As with bias evidence, we expect jurors to at least consider giving less credit to the witness's current testimony when it is inconsistent with a prior statement by that witness.

4. Testimony From (Almost) All Fact Witnesses, Regardless of Loyalty

Finally and perhaps obviously, jurors who face the task of determining which fact witnesses are wrong are entitled to hear from almost all available fact witnesses who observed the events in dispute. If the jurors are forced to decide between the testimony of witness A, who testifies that she saw the plaintiff put on her seat belt, and wit-

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62. 1 McCormick, supra note 47, § 39.
63. See Mauet, supra note 48, § 6.7(2).
64. Under the Federal Rules of Evidence, a testifying witness's prior inconsistent statement made under oath "at a trial, hearing, or other proceeding, or in a deposition" is not hearsay and, therefore, is admissible as proof of the matters asserted in the prior statement. Fed. R. Evid. 801(d)(1)(A). Therefore, under the Federal Rules, prior inconsistent statements not made under oath are not admitted as proof of the matters asserted in the prior statements, but only as impeachment of the current testimony. In several states, prior inconsistent statements are admitted as proof of the matters asserted in the prior statements, regardless of whether the prior statements were made under oath.
66. When a privilege applies, a witness may be prevented from testifying or allowed to abstain from testifying. See 1 McCormick, supra note 47, § 72.
ness B, who says she noticed that she was not belted, the plaintiff will also put on the testimony of witness C, who heard the belt click into place.

B. The Mechanism for Providing Damaging Fact Witness Information to Jurors

The jurors receive information suggesting that a fact witness might be wrong through the efforts of the attorney who hopes to convince the jurors that the fact witness is indeed wrong. The key tools that help the opposing attorney forward this information to the jury are cross-examination and pretrial disclosure, discovery, and other information gathering.

1. Cross-Examination

Cross-examination is the primary mechanism through which jurors receive information suggesting that a fact witness may be wrong. As many have noted, our system relies upon cross-examination to reveal potential problems with a witness's testimony. Indeed, because cross is designed to bring out information damaging to the witness when that information is available, cross is designed to be a key part of our justice system's search for the truth.

67. Sometimes, cross-examination serves a somewhat more indirect role. If the attorney conducting the direct examination of a witness knows that her opponent will bring forth harmful information in cross, she may choose to "front" this harmful information by covering it in her direct examination. Some trial attorneys believe that this approach removes some of the harmful information's sting and adds to their credibility. See Stephen D. Easton, How to Win Jury Trials: Building Credibility with Judges and Jurors § 1.04 (1998); Thomas A. Mauet, Trial Techniques 23–24 (5th ed. 2000); McElhaney, supra note 54, at 12; Tanford, supra note 48, at 257–58. Other trial attorneys dispute the wisdom of this tactic. See Michael H. Leonard, Book Review, Fed. Law., Nov.-Dec. 1998, at 54 (reviewing Easton, supra). Even when this strategy is followed, however, cross-examination plays a critical role, because it is the threat of cross-examination that leads to the decision to cover the material in direct examination. Also, even when the direct examiner "fronts" the harmful information, the cross-examiner may attempt to re-emphasize it by covering it in cross.

In addition, there are occasions when impeaching information is presented not in that witness's cross, but in the direct examination of another witness or the offering of an exhibit. Sometimes such proof comes after a witness fails to admit the harmful information during her cross-examination. See Mauet, supra note 48, § 6.12.


69. A recent case, though admittedly in the criminal justice context, added to the long litany of voices extolling the key role of cross-examination in the search for truth. See Crawford v. Washington, 541 U.S. 36, 45–51 (2004). In several previous cases, United States Supreme Court Justices, like many other judges, have quoted and referenced Wigmore's famous declaration that cross-examination is
Because cross-examination is crucial to juror access to damaging fact witness information, it is important to understand its limitations. These limitations stem primarily from a "commandment" regarding cross-examination that is well-known among trial attorneys: do not ask a question on cross-examination unless you know the answer to that question.  

Because most skilled and experienced trial attorneys usually will not ask a cross-examination question unless they know the answer, jurors will receive damaging fact witness information only if the cross-examiner becomes aware of that information before trial.

2. Pre-Trial Information Gathering Is the Key to Effective Cross-Examination

Therefore, another key to juror receipt of damaging fact witness information is pretrial attorney acquisition of this information. Trial attorneys receive this information in several ways.

a. Disclosure

Since the advent of the automatic disclosure provisions of the Federal Rules of Civil Procedure in 1993 and the adoption of similar disclosure provisions in some states, attorneys automatically receive...
some data that can help them locate damaging fact witness information. Under Rule 26(a)(1)(A), each party must disclose “the name and, if known, the address and telephone number” of potential witnesses “that the disclosing party may use to support its claims or defenses.” An attorney who receives this identifying information about a witness who might be called by the opposing party can use it to inform her discovery and other information-gathering efforts.

b. Discovery

Discovery is another method of acquiring potentially damaging fact witness information. Deposition questions directed to fact witnesses can result in the acquisition of information that might convince jurors that the witness’s testimony should be discounted or disbelieved. Attorneys also use other discovery devices, including interrogatories or requests for production of documents directed to opposing parties, to acquire such information.

In using deposition questions and other discovery devices, attorneys have wide latitude in their efforts to acquire potentially damaging fact witness information. Under the Federal Rules of Civil Procedure, “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.”

c. Self-Help Information Gathering

Some trial attorneys believe that the information that they acquire through their own efforts, as opposed to the information that they receive from their opponents, is potentially the most valuable. When an attorney acquires information about a witness through her own efforts, there is a possibility that her opponent is unaware of this information or of her acquisition of it.

Self-help gathering of information about potential witnesses takes many forms. An attorney may hire a private investigator to locate

74. FED. R. CIV. P. 26(a)(1)(A).
75. FED. R. CIV. P. 30–32 (outlining deposition procedures); see MALONE & HOFFMAN, supra note 70, § 2.1.1.
76. FED. R. CIV. P. 33.
77. FED. R. CIV. P. 34.
78. FED. R. CIV. P. 26(b)(1). Just in case the portion of the scope of discovery rule quoted in the text was not explicit enough to make it clear, the rule also explicitly states that parties may discover “the identity and location of persons having knowledge of any discoverable matter.” Id. Therefore, a party can use interrogatories, deposition questions, or other discovery devices to force the opposing party to identify potential witnesses.
79. TANFORD, supra note 48, at 48–49.
information about the witness.\textsuperscript{80} She may conduct research about her in electronic or other databases. She may even contact her directly to interview her.

The disclosure rules suggest that direct attorney contact with opposing witnesses is a treasured way for attorneys and, therefore, jurors to acquire potentially damaging information about witnesses, because they provide the attorney with the potential witness's address and telephone number.\textsuperscript{81} An attorney can use that phone number to contact the witness or to acquire information about her. Indeed, it is difficult to imagine another significant use of the potential witness's telephone number.

The professional responsibility rules further document the civil justice system's respect for the tradition of direct attorney contact with opposing witnesses. The \textit{Model Rules of Professional Conduct} allow such contact, without notice to the opposition, except when the witness is the opposing party or someone else who is represented by counsel.\textsuperscript{82} In addition, the \textit{Model Rules} prohibit an attorney who expects to call a witness from even asking that witness to avoid communicating with opposing counsel, except for parties and their relatives, employees, and other agents.\textsuperscript{83} These rules reflect a policy that generally favors attorney contact with witnesses as a means to aid the search for the truth.

IV. COMPARING FACT WITNESSES TO EXPERTS

Courts and other authorities have not always let attorneys use all of these mechanisms to gather information about expert witnesses. Because this difference in treatment appears to stem from differences between expert and fact witnesses, these differences deserve examination. After scrutiny of the differences in the development of expert and fact witness testimony, one should, I believe, conclude that courts and others should allow at least as much, if not more, information gathering for experts as they do for fact witnesses.

A. Differences in How Fact and Expert Witness Testimony Is Developed

Without a doubt, fact witness testimony ordinarily is developed in a somewhat different manner than expert witness testimony. Also, the law of evidence bestows certain benefits upon experts that are not

\textsuperscript{80} See Lee Stapleton Milford, \textit{From Streets to Suites: Private Investigators in Civil Cases}, \textit{Litig.}, Spring 2004, at 18.

\textsuperscript{81} \textit{Fed. R. Civ. P. 26(a)(1)(A)}.

\textsuperscript{82} \textit{Model Rules of Prof'l Conduct R. 4.2 (2004)}.

\textsuperscript{83} \textit{Model Rules of Prof'l Conduct R. 3.4(f) (2004)}; see infra subsection IV.B.2.
Due to both the more problematic manner in which attorneys influence the development of expert testimony and the special benefits bestowed upon experts, courts applying the law of procedure and professional responsibility arguably should let opposing attorneys acquire even more information about experts than fact witnesses, and certainly should not restrict them to acquiring less information.

1. Development of Fact Witness Testimony

As compared to expert testimony, fact witness testimony often is developed with relatively minimal involvement by attorneys. However, attorneys sometimes have a role in the development of fact witness testimony.

a. Direct Observation

A fact witness acquires her information by personally observing critical events. As a general rule, she is not allowed to testify about matters that she did not directly observe.86

Despite a relatively common misunderstanding, fact witnesses are not always prohibited from expressing opinions. However, a non-expert's opinions must be based on her own perceptions, not upon information provided to her by someone else.87 Therefore, the lay witness opinion rule reinforces the general rule that a fact witness can testify only about matters she personally observed.

b. Attorney Finding and "Coaching" of Fact Witnesses

For a fact witness, the attorney's role in the development of testimony lies primarily in locating the witness, not in providing information to her. After all, even if a person directly observed critical events, she cannot possibly become a witness unless one of the attorneys finds her.

Attorneys use a variety of means to locate witnesses, including reviewing accident reports, insurance adjuster files, newspaper articles,

85. Of course, a single witness may present both fact witness testimony (i.e., testimony based upon her own observations) and expert testimony (i.e., testimony based, at least in part, upon information provided to the expert).
86. Under Rule 602 of the Federal Rules of Evidence, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FED. R. EVID. 602.
87. FED. R. EVID. 701(a). Rule 701 also provides that a fact witness can testify to her opinions or inferences only when they are "(b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FED. R. EVID. 701(b)-(c).
and other documents, hiring private investigators, and even placing advertisements asking witnesses to contact them. Once witnesses are located, attorneys or their legal assistants, investigators, or insurance adjustors interview them and prepare them to testify. Some attorneys spend considerable time preparing witnesses, while others are more reticent about this somewhat controversial practice, which goes by such image-filled titles as "coaching," "sand papering," and the especially colorful "horse shedding" of witnesses.

2. Development of Expert Testimony

The fundamental distinction between fact and expert testimony stems from the information upon which each type of witness can base her testimony. Unlike fact witnesses, experts are allowed to base their opinions on information outside of their own observations. Under Rule 703 of the Federal Rules of Evidence, an expert is allowed to base her opinions on data "perceived by or made known to" her. That data can include information that is not admissible as evidence, including hearsay.


91. Hodes, supra note 27. In my early days as a trial attorney, more experienced hands explained the alleged origins of this term. As told to me, it derives from the days when attorneys like Abraham Lincoln would "ride the circuit" from courthouse to courthouse, drumming up business as they arrived in a new county seat and immediately preparing for trial. Given limited time, the attorney had to meet with his witnesses while he was stabling his horse after the ride into town. Thus, the meetings with witnesses were held in the town stable, which was also known as the "horse shed."

Frankly, I do not know whether this is an accurate history of this term, but I like the way the story was told to me, so I am not checking. But see Peter A. Joy & Kevin C. McMunigal, Witness Preparation: When Does It Cross the Line?, CRIM. JUST., Fall 2002, at 48, 48 (stating that James Fenimore Cooper popularized this term). Note, though, that this description of "horse shed" distinguishes the term from what sounds like, but is not, a synonym, "wood shed." See James M. McElhaney, Be Careful in the Woodshed, A.B.A. J., Aug. 2005, at 24, 24. A "wood shed," as I understand it, is a place where a father would take his children to discipline them corporally. Thus, the idea of an attorney "wood shedding" her witness brings to mind a somewhat different image than an attorney "horse shedding" her witness.

92. FED. R. EVID. 703.

93. Id. Technically, the expert can only rely on inadmissible data if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Id. In practice, this is not much of a restriction in
As discussed more fully below, when the expert is retained by one of the parties or a party's attorney, usually it is the attorney who decides which data she will "make known to the expert." In this respect and in several others, the attorney has a significantly larger role in the development of an expert's testimony than she usually has in the development of a fact witness's testimony.

a. Methods Used by Attorneys to Mold Expert Testimony

A full understanding of the extent of the attorney's role in the crafting of the testimony the jury will ultimately hear from an expert requires an understanding of the many ways in which an attorney can, and sometimes does, shape expert testimony. Most of these tools are unavailable or considerably less effective for an attorney who hopes to shape fact witness testimony.

i. Attorney Selection of Possible Expert Witnesses

An attorney who wants to present expert testimony on a critical disputed issue can present that testimony from anyone, subject to two important restrictions. First, the witness must have the "knowledge, skill, experience, training, or education" to qualify her as an expert. Second, she must be willing to work for the attorney at an hourly or other rate that the client is willing to pay.

Though these limitations occasionally present attorneys with challenges, usually an attorney has a far greater pool of potential experts than fact witnesses. Only those persons who actually observed the critical events at issue are eligible to testify as fact witnesses. By definition, this is a limited number of persons. Often, it is a rather small number. In contrast, an attorney can choose any available affordable expert and provide her with the background information she decides to provide.

Simply by choosing the "right" expert, an attorney can exercise significant influence over the expert testimony the jury will ultimately hear at trial. Sometimes an attorney who is looking for an expert will consider only those who not only carry the required credentials, but who are also likely to reach opinions that are helpful to her client's

the typical case, because the expert simply testifies that she and other experts in her field rely upon the information that she happens to be relying upon in the case at hand. The opposing party can challenge this bootstrapping declaration, of course, but doing so is an uphill and usually losing battle that will require substantial dedication of resources to determine what types of information experts in the field typically consider. See Easton, supra note 24, at 488 n.70.

94. See infra subsection IV.A.2.a.iii.
95. FED. R. EVID. 703.
96. FED. R. EVID. 702.
To identify a “dependable” expert, the attorney will often consult with other attorneys who have retained candidate experts in other cases.98

ii. Attorney Employment of Expert

After the attorney identifies an expert with qualifying credentials and rates (and, perhaps, outlook99), she hires that expert on behalf of her client.100 From this point until the expert’s services end,101 the attorney is the expert’s boss. Though a retained expert is usually an independent contractor rather than a full-time employee, the expert and the attorney are nonetheless in an employment relationship.102 As the employee, the expert must continue to please her employer, the attorney.

Furthermore, the expert–attorney relationship is an “at will” contract. The attorney reserves the right to fire the expert (i.e., discontinue using her services and paying her), at any point. Therefore, an attorney who wishes to do so (or believes it is in her client’s interest to do so) can exert tremendous influence over a retained expert, simply by virtue of the inherently coercive nature of their relationship. To put it bluntly, the expert will continue to earn fees from the case only as long as her employer, the retaining attorney, continues to believe that the expert’s analysis and opinions are helpful to the client.103 If

99. See supra subsection IV.A.2.a.i.
100. Sometimes the party, rather than the attorney, technically hires and pays the expert, but this does not change the reality that the attorney serves as the expert’s supervisor. See Easton, supra note 24, at 494 n.88.
101. If the expert reaches opinions that are helpful to the retaining attorney, the employment relationship between the expert and the attorney may not end until after the expert testifies at trial and the litigation is resolved. If, on the other hand, the attorney is no longer pleased with the expert’s services, she can fire the expert at any point. See infra subsection IV.A.2.a.ii.
103. See Mfg. Admin. & Mgmt. Sys., Inc. v. ICT Group, Inc., 212 F.R.D. 110, 116 (E.D.N.Y. 2002) (noting that “the financial incentives that inhere in a ‘sympathetic’ opinion are undeniable”); Brown et al., supra note 1, at 69 & n.88; Langbein, supra note 97, at 835 (observing that “the expert can run his meter only so long as his patron litigator likes the tune”); Mickus, supra note 26, at 789–90; Michael E. Plunkett, Discoverability of Attorney Work Product Reviewed
the expert reaches opinions that are helpful to the opposing party on significant matters, the attorney will presumably fire her.104

Also, at some point in most litigation, the expert becomes a de facto member of the client's trial team, along with others who are assisting the attorney like the second chair attorney, legal assistants, investigators, and the client or its representatives.105 Trial teams develop a fierce loyalty to the client and a bunker mentality that makes them see the other party and its trial team as enemies.106

Occasionally, non-party fact witnesses occupy a similar position as trial team members when they have a close positive relationship with a party because they are the party's spouse, sibling, child, parent, employee, and so on. Usually, however, a fact witness is not a member of a trial team.

There should not be any other substantial similarities between ordinary fact witnesses and experts as employees of the attorney, because it is illegal for an attorney to use money to influence fact witnesses. Under Rule 3.4(b) of the Model Rules of Professional Conduct, an attorney cannot "offer an inducement to a witness that is prohibited by law."107 Because every American jurisdiction presumably prohibits bribes to fact witnesses,108 an attorney cannot pay a fact witness to testify in a manner that is helpful to her client.109 In contrast, the Comment to Rule 3.4 of the Model Rules notes that "it is not improper to ... compensate an expert on witness on terms permitted


104. See Easton, supra note 41, at 1437–40.

105. Easton, supra note 24, at 497; Langbein, supra note 97, at 835; Mickus, supra note 26, at 779 (noting concerns about whether experts should "be allowed to play a role on the litigation team and participate as advocates"); M. Jared Marsh, Note, State ex rel. Tracy v. Dandurand: Missouri Supreme Court Deals a Blow to Opinion Work Product Protection, 70 UMKC L. REV. 197, 215 (2001).


107. MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2004); see George C. Harris, Testimony for Sale: The Law and Ethics of Snitches and Experts, 28 PEPP. L. REV. 1, 6 (2000).

108. See, e.g., 18 U.S.C. § 1512(b)(1) (2000); see also Harris, supra note 107, at 9 (discussing "criminal bribery statutes").

109. MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. 3 (2004) ("The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying . . . ."). In some jurisdictions, attorneys are allowed to pay fact witnesses a standard statutory witness fee, a low standard rate that often is tied to the low daily fees paid to jurors. However, an attorney cannot make payment of such a witness fee contingent upon the witness testifying in a manner helpful to the attorney's client.
by law." Though it may be indelicate to say so, fees paid to a retained expert are, to a significant extent, payments for testimony that is helpful to the retaining attorney's client because the continued payment of fees is contingent upon the expert reaching conclusions that are helpful to that client.

iii. Attorney Control Over the Flow of Information to the Expert

As previously noted, experts are allowed to base their testimony upon information "made known" to them. It is the attorney who employs and oversees a retained expert's work who makes information known to the expert, most commonly by sending selected documents to the expert.

Those considering the influence of an attorney over her retained expert should not be fooled by the seeming neutrality of the "made known to" provision of Rule 703. As computer professionals who popularized the phrase "garbage in, garbage out" can attest, a person who controls the flow of information to the processor of that informa-

110. Id.; see also Harris, supra note 107, at 1 (listing "fees to expert witnesses" as one of two exceptions to the general prohibition of "payments to witnesses in return for testimony").

111. A comment to the Model Rules notes, for example, that in most jurisdictions it is "improper to pay an expert witness a contingent fee." Model Rules of Prof'L Conduct R. 3.4 cmt. 3 (2004). Presumably this refers to a fee contingent upon a certain outcome in the case, because that is what attorneys generally have in mind when discussing contingent fees. To a certain extent, though, it may also suggest a ban on expert witness fees that are explicitly stated to be contingent upon the expert reaching certain opinions. In reality, it is difficult to imagine an attorney being foolish enough to enter into an agreement with an expert witness whereby the expert's right to fees was explicitly contingent upon the expert reaching opinions helpful to the attorney's client. If such an explicit agreement were reached and opposing counsel became aware of this agreement, it would become a highlight of that attorney's cross-examination of the expert. Instead, in the typical attorney-expert employment relationship, both parties realize that the expert's continued opportunity to earn fees from the case is contingent upon her reaching opinions helpful to the attorney's client, but this implicit arrangement is not explicitly memorialized, or even stated orally.

112. In the initial period just after the expert is selected and hired by the attorney, the fees that the expert receives are presumably not contingent upon her reaching an opinion helpful to the retaining attorney's client. It is presumably expected that the expert will be paid for her initial review of the materials forwarded to her by the attorney, regardless of what opinion she reaches. However, to the extent that the attorney selected a particular expert because she was expected to reach a conclusion helpful to the attorney's client, see supra subsection IV.A.2.a.i, even this portion of the expert's fees is related to the expert's (expected) opinions.

113. See supra subsection IV.A.2.


115. Tanford, supra note 48, at 342; Applegate, supra note 27, at 295–96; Easton, supra note 24, at 495–96.

116. See Applegate, supra note 27, at 296.
tion often can influence the outcome of the information processing simply by selecting what information to provide.\textsuperscript{117}

Attorneys vary widely in their approaches to selecting what information to provide to their retained experts.\textsuperscript{118} Some select information carefully in an effort to control the expert's ultimate testimony.\textsuperscript{119} Others believe that this approach provides their opponents with a relatively easy and effective way to cross-examine the expert to demonstrate the influence of the attorney over the expert, so they send all or almost all relevant information to their experts.\textsuperscript{120}

Some might argue that an attorney cannot completely control the flow of information to the expert, because the expert might choose to supplement attorney-provided information by conducting her own investigation or research. While this is theoretically possible, in practice the attorney often controls even this information acquisition by the expert, through the attorney's supervision of her expert. The expert, after all, will be paid only for those services that the attorney requests or approves. Therefore, before the savvy expert undertakes her own investigation or research, she will seek the attorney's permission to conduct these efforts.\textsuperscript{121}

The attorney's ability to censor the information considered by an expert stands in stark contrast to her inability to control the flow of information considered by a fact witness. A fact witness can testify only to those matters that she personally observes.\textsuperscript{122} In most instances, a fact witness's observation of critical events occurs before litigation commences. When the typical fact witness observes critical

\textsuperscript{117} Mfg. Admin. & Mgmt. Sys., Inc. v. ICT Group, Inc., 212 F.R.D. 110, 116 (E.D.N.Y. 2002) (recognizing that "an attorney controls the information flow to the expert and can, therefore, influence the expert's opinion through his decisions about what to disclose . . . and when to do so"); Lamonds v. Gen. Motors Corp., 180 F.R.D. 302, 306 (W.D. Va. 1998); Karn v. Ingersoll Rand, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (observing that "counsel can all too easily color the expert's opinion by simply controlling the expert's access to information"); Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 393–94 (N.D. Cal. 1991); In re McCrae, 295 B.R. 676, 679 (Bankr. N.D. Fla. 2003) (noting that once an attorney has forwarded documents to her retained expert "to be considered in forming their opinion, whether or not the expert relies on the documents, the communication will potentially color the expert's opinion"); see Tanford, supra note 48, at 342; Oishi, supra note 39, at 878.

\textsuperscript{118} See Tanford, supra note 48, at 342–43 (discussing, and criticizing, advice given by some attorneys to withhold some materials from the expert); Oishi, supra note 39, at 859–60 (discussing two different approaches used by attorneys to provide information to expert witnesses).

\textsuperscript{119} Tanford, supra note 48, at 342–43; Easton, supra note 24, at 499–500.

\textsuperscript{120} Easton, supra note 24, at 500.

\textsuperscript{121} Id. at 495.

\textsuperscript{122} Fed. R. Evid. 602, 701; Roger Haydock & John Sonsteng, Examining Witnesses: Direct, Cross, and Expert Examination § 6.03.2 (1994); see supra note 47 and accompanying text.
events, the attorney usually does not even know that she will someday become involved in litigation arising from those events, so she has no way of controlling or even monitoring the flow of information that affects the fact witness's testimony.

iv. Attorney Direction of the Expert's Analysis and Testimony

The retaining attorney might control more than just the flow of information to the expert. She also might directly or implicitly tell the expert how to analyze that information and what conclusions to reach.\(^1\) As an at will employee, the expert who receives orders or suggestions from the retaining attorney must choose to either conform to the attorney's wishes and thereby continue to earn fees from the case, or ignore those wishes and thereby risk being fired.\(^2\)

It is difficult, and perhaps impossible, to know the extent to which attorneys explicitly direct the work of retained experts because most direction takes place in sub rosa communications between attorneys and experts. Many attorneys refrain from communicating in writing with their experts, choosing instead to communicate orally, via telephone or private meetings, to lessen the chance that their opponents will become aware of these communications due to written documentation of them.\(^3\) Even in the presumably relatively rare case where opposing counsel becomes aware of the communications between an attorney and her retained expert, it is not likely to become the subject of a motion or other dispute requiring the court's ruling. Furthermore, even in those relatively rare cases where the court does make a ruling regarding attorney-expert communication, the ruling ordinarily will not find its way into an appellate or other published opinion. Therefore, reported decisions discussing the extent of attorney direction of expert analysis and testimony are relatively rare, even though some level of attorney instruction is presumably not unusual.

Nonetheless, even the relatively rare reported decisions suggest that, at least sometimes, some attorneys are quite explicit in their instructions to their experts. Examples include:

- In a medical malpractice case that started in typical fashion with both the doctors and the hospital as defendants, the plaintiff's expert witnesses originally criticized the doctors, but not the nurses, whose negligence presumably could lead to a verdict and

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124. See supra subsection IV.A.2.a.ii.

judgment against the hospital. However, after the plaintiff settled with the doctors, the plaintiff's attorney advised the experts of this partial settlement, which led to the experts criticizing the nurses, thereby salvaging the plaintiff's claim against the hospital, at least until the jury rejected it at trial.126

- A defense expert in another medical malpractice case initially placed blame upon a Dr. Stallworth for a critical miscommunication, but also testified that he was not qualified to present an opinion about the cause of death. The defense attorney apparently then engaged in an intensive effort to re-educate the expert. A day after the initial testimony described above, the expert wrote a new opinion letter fixing the cause of death and not mentioning Dr. Stallworth at all.127

- In another case, a plaintiff's attorney wrote a letter to psychologists outlining the legal standard that would have to be met in order for the plaintiff to present a cognizable claim. The letter then asked the psychologists "to take into consideration this law in connection with developing their opinions with regard to the causation of the plaintiff's claimed injuries."128

- Another attorney, perhaps fearful that such an approach would not be sufficiently direct, wrote the "expert's" report word-for-word, but apparently realized that it was in the client's interest to hide this bit of draftsmanship.129 To make it appear that the report was drafted by the expert rather than the attorney, the attorney sent the report to the expert with the following instruction at the top of the first page, in capital letters: "PLEASE HAVE RETYPED ON YOUR OWN STATIONERY. THANK YOU." Unfortunately

126. The appellate court summarized the events as follows:

Dr. Matthay testified at trial that he did not discover his initial oversights with respect to the negligence of the nursing staff until after Appellants' attorney advised him that Appellants had "resolved their differences" with Drs. Pratt and Stern. Likewise, Dr. Spielman testified at trial that he did not discover his oversight with respect to the "blood gases" until after learning that Appellants had settled their claims against the doctors. Dr. Spielman further admitted that it was Appellants' attorney who pointed out to him that the repeat blood gases had not been performed. Thus, Marymount was able to impeach the credibility of both Dr. Matthay and Dr. Spielman by showing that they changed their opinions with respect to the negligence of the hospital's employees only after being informed that Appellants had settled with the doctors—and that it was Appellants' attorney, not Dr. Spielman, who discovered Dr. Spielman's "oversight."


for the attorney and the expert, the expert’s typist apparently\textsuperscript{130} followed these instructions to the letter, because the version of the report submitted by the expert started with, that’s right, the phrase “PLEASE HAVE RETYPED ON YOUR OWN STATIONERY. THANK YOU.”\textsuperscript{131} This does not, of course, mean that all attorneys are so direct in their instructions to experts.\textsuperscript{132} Some attorneys believe that their clients are better served when experts conduct a less directed analysis that is, therefore, less easily cross-examined by an opposing attorney who wishes to demonstrate that the “expert’s” opinion actually originated with the attorney.\textsuperscript{133}

\textbf{v. Attorney Designation of the Expert as a Witness}

A final mechanism attorneys use to control the expert witness testimony that is introduced at trial arises out of the disclosure and discovery rules applicable to experts. Except in extraordinary cases, an attorney is allowed to consult with an expert without ever informing her opponent that she has engaged in this consultation and, therefore, without disclosing the identity of the consulted expert.\textsuperscript{134} As a result, an attorney will often initially employ an expert as a consultant, even when she expects to later call her as a witness at trial if the expert reaches the expected opinions. Only if and when the expert advises the attorney that she has reached those opinions and is prepared to testify in a manner that will assist the attorney will the attorney identify the expert as a possible witness.\textsuperscript{135}

After the attorney decides that she might call the expert as a witness, she must disclose her identity to her opponent.\textsuperscript{136} Before that time, she is under no obligation to identify her, so the opposing party and the jury will generally receive no information from an expert when the attorney who retained her decides, before disclosing her, that she will not use her to present testimony at trial.

The attorney’s opportunity to foreclose her opponent and the jury from receiving information from a person who might be in a position to provide it is quite different from an attorney’s inability to foreclose her opponent and the jury from hearing from a fact witness. Through dis-

\textsuperscript{130} It is also perhaps possible that the “expert’s” report never was retyped and that the expert merely adopted the report written by the attorney.

\textsuperscript{131} *Occulto*, 125 F.R.D. at 613. For another case where the attorney wrote the first draft of the “expert’s” report, see Mfg. Admin. & Mgmt. Sys., Inc. v. ICT Group, Inc., 212 F.R.D. 110, 112 (E.D.N.Y. 2002).

\textsuperscript{132} See *infra* subsection IV.A.2.b.

\textsuperscript{133} See *Easton*, *supra* note 24, at 500 n.114.


\textsuperscript{135} See *Easton*, *supra* note 24, at 499.

closure requirements and discovery requests, the attorney usually is required to disclose the identity of all potential fact witnesses to her opponent.137 Once a potential fact witness’s identity is disclosed, the opposing attorney usually can interview her and decide whether to call her as a witness at trial, even if the party who disclosed her identity would prefer that she not present trial testimony.

b. Variance Among Attorneys Regarding Molding of Expert Testimony

Although these tools and techniques for shaping expert testimony are available to all attorneys, one should not assume that all attorneys are equally heavy handed in their relationships with their experts.138 Though many (or perhaps almost all) attorneys presumably realize that they have the power to control their expert’s analysis and opinions, not all of them exercise that power.139

As noted previously, some attorneys are quite explicit in telling the experts how to work on a case and in outlining the opinions they want the experts to reach.140 Others, however, refrain from this direct approach because they believe their clients are best served by a more candid analysis by an expert. Still others are less direct because they are concerned that a more direct approach might result in expert testimony that is easily impeached through cross-examination questions designed to inform the jurors that the words they are hearing came not from the expert, but from the attorney.141

137. See supra subsections III.B.2.a-b; infra note 147 and accompanying text.
138. For a discussion of several different levels of attorney “direction” of testimony, see JAMES W. JEANS, SR., TRIAL ADVOCACY § 2.4 (2d ed. 1993).
139. See TANFORD, supra note 48, at 342–43 (noting that some attorneys instruct other attorneys to withhold some potentially relevant information from experts, then arguing that this “advice flies in the face of the ethical rules and amounts to nothing less than a recommendation that you deliberately manufacture false evidence”).
140. See supra subsection IV.A.2.a.iv.
141. As one federal magistrate judge noted, opening up the communications between the retaining attorney and the expert for review by opposing counsel and, therefore, the jury, will have a substantially greater impact on the retaining attorneys who aggressively shape expert testimony:

[When an attorney hires an expert both the expert’s compensation and his “marching orders” can be discovered and the expert cross-examined thereon. If the lawyer’s “marching orders” are reasonable and fair, the lawyer and his client have little to fear. If the orders are in the nature of telling the expert what he is being paid to conclude, appropriate discovery and cross-examination thereon should be the consequence. Such a ruling is most consistent with an effort to keep expert testimony fair, reliable and within the bounds of reason.]

B. Should Attorneys' Greater Potential Influence on Expert Testimony Result in Jurors Receiving Less or More Information From and About Experts than Fact Witnesses?

Courts, other authorities, and commentators recognize, at least to a significant extent, the differences in the attorney's role in forming expert, as opposed to fact, witness testimony. However, they differ widely in their response to this reality.

1. The Wrong (but All Too Common) Answer: Jurors Receive Less Information From and About Expert Witnesses and Retaining Attorneys' Influences on Their Testimony

One possible response to the attorney's substantial influence over expert testimony is to say that this large attorney role should result in less disclosure of the attorney's influence over experts than over fact witnesses. As noted in more detail below, this view can lead to decisions allowing attorneys to hide their influence over their retained experts from their opponents and, therefore, from jurors. In perhaps the most extreme application of this view, some courts have even allowed an attorney to prevent her opponent from calling some expert witnesses to the stand, for fear that allowing such testimony might be unfair to the party that originally hired and paid the expert.

Often those taking this position do so based upon their expansive view of attorney work product protection and of the extent to which the system should value a party's financial investment in an expert's work. Those who hold it believe that it is unfair to punish an attorney for her work in influencing an expert or to turn a party's investment in an expert's fees against that party by providing the jury with information from or about that expert that the investing party would prefer to hide from the jury. Admittedly, this desire to avoid punishment of a party or her attorney for investing money, time, and effort has some basic appeal.

142. See infra section V.A.
143. See infra subsection V.A.4.
144. See Marsh, supra note 105, at 211 (arguing that disclosure of opinion work product shared by a retaining attorney with the expert "ignores the important policies underlying the protection of opinion work product").
2. The Correct Answer:
Jurors Should Receive at Least as Much Information
From and About Expert Witnesses and
Retaining Attorneys’ Influences on Their Testimony

Upon further consideration, however, there are several problems with the idea that a party’s investment in an expert should not be used against that party.¹⁴⁶ In the first place, this view ignores the litigation reality that any investment made by a party and any effort undertaken by an attorney might possibly result in the jury receiving information that hurts that party. Among the plentiful examples:

- An attorney’s investigative search for fact witnesses, financed by her client, can result in the attorney locating a fact witness who, as it turns out, presents testimony that is more helpful to the opposing party. Nonetheless, the attorney ordinarily will be required to reveal the identity of the fact witness to opposing counsel when responding to a standard interrogatory,¹⁴⁷ and opposing counsel has the right to call her as a witness at trial.

- When an attorney asks a fact witness a question at a deposition that her opponent would never have thought to ask, the answer to that question might help her opponent.¹⁴⁸ Nonetheless, if the answer is relevant, the attorney cannot hope to be successful at trial by objecting on the grounds that she asked the question at the deposition and she therefore has the right to prevent the jury from hearing the answer.¹⁴⁹

¹⁴⁶. See Norfin, Inc. v. Int’l Bus. Machs. Corp., 74 F.R.D. 529, 533 (D. Colo. 1977) (labeling “the argument that it is ‘unfair’ for one party to” benefit from the other party’s expenditures for expert fees “unpersuasive”); Seven-Up Bottling Co. v. United States, 39 F.R.D. 1, 1 (D. Colo. 1966) (rejecting the argument that a party’s expenditures for expert fees gives him the right to prevent the expert from testifying because the argument “is inconsistent with our basic assumption that the trial is a search for truth and not a tactical contest which goes to either the richest or the most resourceful litigant”).

¹⁴⁷. See Fed. R. Civ. P. 33(c) (providing that an interrogatory “may relate to any matters which can be inquired into under Rule 26(b)(1)”). Rule 26(b)(1), in turn, allows parties to “obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including... the identity and location of persons having knowledge of any discoverable matter.” Fed. R. Civ. P. 26(b)(1). Thus, each party can, and presumably almost universally will, serve the opposing party with a standard interrogatory requiring the opposing party to reveal the identity of witnesses who know anything about the case, including those whose testimony will be harmful to the party being forced to disclose the witness.

¹⁴⁸. See MALONE & HOFFMAN, supra note 70, § 2.1.1 (noting that one of an attorney’s objectives in taking a deposition is to ask questions to find out what the attorney does not know); Edward G. Connette, How to Take Better Depositions and Perhaps Improve Your Marriage, Litig., Spring 2005, at 6, 6.

¹⁴⁹. See THOMAS A. MAUET, PRETRIAL § 6.11.2.a (3d ed. 1995) (noting that a party who takes a deposition may reveal and preserve, for the opponent’s use, unfavorable testimony); see also PAUL M. LISNEK & MICHEAL J. KAUFMAN, DEPOSITIONS: PR
Similarly, when an attorney asks a witness a question at trial, she might get an unexpected answer that hurts her client's case. Nonetheless, she cannot move to strike the answer as "unexpectedly harmful" to her case and, therefore, unfair to her client because her client is paying the fees of the attorney who asked the question.\textsuperscript{150}

In these and other instances, a party's initial investment in the securing of evidence is turned against that party, because the evidence developed through that investment ultimately hurts the party that made the investment when it is introduced at trial.

In addition, attorney work product concerns are overstated by those who would give jurors less information from and about retained experts.\textsuperscript{151} The attorney work product doctrine is designed to protect an attorney's unpublished thoughts, so that the attorney has the chance to consider how best to represent her client.\textsuperscript{152} This gives the attorney a chance to consider options and learn about the matters at issue without thereby creating evidence that could be used against her client. As long as the attorney keeps her thoughts to herself or shares them only with those who will not be witnesses, those thoughts should

\textsuperscript{150} Of course, the attorney might be able to prove that the witness's unexpectedly bad answer is inconsistent with the witness's previous statements, thereby suggesting that the current answer is incorrect. See supra text accompanying note 64. However, this course of action does not erase the witness's unexpected answer to the question at trial.

\textsuperscript{151} Important commentators have noted that work product concerns can be overstated, particularly by the attorneys who would benefit from them. Professor Waits warned that "work product justifications should be approached with great skepticism. Lawyers have powerful, self-serving reasons for wanting all forms of work product protected." Waits, supra note 125, at 433. Similarly, Professor Thornburg asserted that "work product immunity is not needed to protect the adversary system or the legal profession," that "it results in suppression of relevant data, that it leads to unnecessary costs for courts and litigants, and that it "works to benefit institutional litigants at the expense of individual litigants and to benefit frequent litigants at the expense of 'one-shot' litigants." Elizabeth Thornburg, Rethinking Work Product, 77 Va. L. Rev. 1515, 1517 (1991).

\textsuperscript{152} See Mfg. Admin. & Mgmt. Sys., Inc. v. ICT Group, Inc., 212 F.R.D. 110, 117 (E.D.N.Y. 2002); FDIC v. Gonzalez-Gorrondona, No. 91-2791-CIV-HURLEY, 1991 WL 836318, at *2 (S.D. Fla. 1991) (stating that allowing the retaining attorney to share work product with a testifying expert without disclosing the work product would "put opposing counsel at a serious disadvantage . . . without significantly bolstering the principal interests the work product doctrine is intended to advance"); Gall v. Jamison, 44 P.3d 233, 240 (Colo. 2002); Oishi, supra note 39, at 879.
be protected from disclosure to opposing counsel. Once those thoughts are disclosed to a witness who might testify at trial, however, the attorney is no longer affecting only her own work and is, instead, influencing those who might present testimony that the jurors will consider. Disclosure of the influence of an attorney upon a


154. Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 615 (S.D.N.Y. 1977) (finding evidence that an attorney’s notes, which were given to the expert witness, “had an impact upon the testimony of the witness”); Waits, supra note 125, at 440–41 (“The attorney’s opinions are irrelevant only as long as they remain in the attorney’s head or files. Once those thoughts are shared with an expert witness, they may well become part of the witness’s thoughts about the case, a highly relevant subject.”).

Some courts have held that an attorney’s sharing of an item otherwise protected by either the attorney-client privilege or the work product doctrine with any third party automatically waives the protection that previously attached to the item shared. See, e.g., In re Lindsey, 158 F.3d 1283, 1292 (D.C. Cir. 1998); Audiotext Communications Network, Inc. v. US Telecom, Inc., 164 F.R.D. 250, 253 (D. Kan. 1996); CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 367–68 (2d ed. 1994) (referencing such decisions but voicing disagreement with them). Other courts distinguish between the two types of protection by holding that disclosure of items protected by the attorney-client privilege to any third party automatically waives the privilege, but disclosure of items protected by the work product doctrine waives the privilege only if this sharing is inconsistent with the attorney’s maintenance of secrecy, because the sharing with that third party increases the possibility of the opposing party obtaining the information. See, e.g., Westinghouse Elec. Corp. v. Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991); Merrill Lynch & Co. v. Allegheny Energy, Inc., No. 02 Civ. 7689(HB), 2004 WL 2389822, at *4–*8 (S.D.N.Y. Oct 26, 2004); Lugosch v. Congel, 219 F.R.D. 220, 240–41 (N.D.N.Y. 2003); Cent. Green Co. v. United States, No. CV F 96-5541 REC SMS, 2003 U.S. Dist. LEXIS 26526, at *27–*36 (E.D. Cal. Feb. 24, 2003); WRIGHT ET AL., supra, at 369 (arguing that this is the preferable approach to waiver of work product protection); Amy L. Fischer, The Attorney-Client/Work Product Privileges and Surety Investigative Information: Applying Old Rules to Turn New Tricks, 34 TORT & INS. L.J. 1009, 1027–28 & nn.88–89 (1999).

In my view, under either doctrine regarding waiver of work product protection, an attorney’s sharing of a document with a person that the attorney lists as a person likely to testify at trial should be considered a waiver of work product protection. If sharing with any third person is a waiver, sharing with an expert witness is a waiver. Even if sharing with a third person is a waiver only if it increases the likelihood of a loss of secrecy, sharing with a person listed as an expert witness should qualify. Although there is room for disagreement, one could argue that sharing with almost any person who is reasonably likely to become a witness at trial, other than the client, is inconsistent with secrecy, because the witness might: communicate with the opposing counsel and, in doing so, reveal the existence of the item, see supra subsection III.B.2.c; be deposed and disclose the existence of the document in response to a deposition question, see supra subsection III.B.2.a; or be called to the stand at trial and disclose the existence of the document in response to a trial question, possibly due to the general evidence law rule requiring a witness to disclose items used to refresh her recollection, see FED. R. EVID. 612; Audiotext Communications Network, 164 F.R.D. at
witness does nothing to interfere with the right of an attorney to ruminate about a case and even to discuss it with an expert who is merely consulted and never identified as a potential trial witness. The attorney who wishes to preserve the privacy of her thoughts simply must preserve the privacy of her thoughts, by keeping those thoughts to herself or to her non-testifying consultant.

Finally, and most importantly, those who would provide the jurors with less information from and about experts than about fact witnesses have recognized the importance of money in the development of expert testimony, but have drawn the incorrect conclusion about how the civil justice system should react to the influence of money and the attorney who controls its flow. To be sure, parties pay experts with the hope, or even the expectation, that they will reach opinions helpful to them, and attorneys may guide them to those opinions. However, due to the powerful influence of money and the person who controls its flow, instead of providing less information about the expert and the retaining attorney’s influence on her opinion, courts should provide at least as much, if not more, information about the attorney-expert relationship as they do about the attorney-fact witness relationship.

Outside of the expert witness context, courts and other authorities are ordinarily very concerned about the potentially corrupting influence of money on the testimony of witnesses. That, indeed, is why legislatures and courts have prohibited the bribing of fact witnesses

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252 (granting motion to compel production, despite work product claims, of documents allegedly used by the witness “to prepare for his deposition, to refresh his memory, and to change previous testimony”); Berkey Photo, 74 F.R.D. at 615. Disclosure to an expert witness is even more inconsistent with continued expectations of privacy, particularly in federal cases and cases in states with rules patterned after Rule 26 of the Federal Rules of Civil Procedure, because Rule 26 and the official comments of those who wrote it provide that the expert must divulge all items she considered. See infra note 195.


156. Except in unusual circumstances, an opposing party is not entitled to discover information (including information about an attorney’s communications with the expert) relating to an expert who is never identified as a trial witness. See FED. R. CIV. P. 26(b)(4)(B).

157. See Oishi, supra note 39, at 878; cf. Mfg. Admin. & Mgmt. Sys., 212 F.R.D. at 117 (arguing that mitigating the advocacy of the expert by allowing discovery of, and therefore cross-examination based upon, the retaining attorney’s use of work product to influence the expert is “desirable”); TV-3, Inc. v. Royal Ins. Co. of Am., 194 F.R.D. 585, 588 (S.D. Miss. 2000).

158. See Harris, supra note 107, at 73 (“The potential for perjury or shaped testimony when witnesses are selected, prepared, and compensated by one party to litigation is self-evident and substantial. The ethical rules condemn such payments generally for this reason.”).
through the payment of fees beyond the minimal standard witness fees and travel expenses.159

The allowance of hourly or other fees to experts should be seen as a reluctant concession to the reality that jurors will not have the benefit of expert witness testimony unless experts are paid for their services. In the American system, where parties are primarily or exclusively responsible for finding, developing, and introducing evidence,160 experts typically will not testify unless the parties are allowed to pay them an hourly or other rate for their work on the case. In other words, while it would perhaps be nice in an ideal world to enforce the prohibition against hourly or other fees to all witnesses, including experts, realists recognize that jurors often need expert testimony to help them analyze difficult technical issues, so we have to tolerate parties paying experts.

Thus, expert witness fees should be grudgingly tolerated as a necessary evil that potentially taints the system, not celebrated as something that gives the party who pays them rights above and beyond those a party maintains with respect to fact witnesses. The part of us that recognizes that paying fees to fact witnesses could affect their testimony should recognize that paying fees to experts could affect their testimony. When this is coupled with recognition of the retaining attorney's power to control the flow of fees and therefore to mold the expert's testimony,161 we should see the need to provide jurors with as much information as possible regarding the attorney's molding efforts.162

As in many other situations, some will be tempted to respond with a version of, "Everybody does it, so what's the big deal?" In the retained expert witness context in civil litigation, this argument would be phrased as, "Because every attorney shapes expert testimony, why waste the jurors' time detailing the influence of the attorney?" There are, of course, several responses.

Most importantly, it is not clear that "everybody does it," at least to the same degree. As noted above, some attorneys are very direct and explicit in giving orders to their experts, while others exercise considerably less of their potential influence.163 Because we ordinarily value evidence about the extent of a particular attorney's influence over a witness as information jurors can use to evaluate the witness's

159. See supra subsection IV.A.2.a.ii.
160. Deason, supra note 106, at 61; Mickus, supra note 26, at 780 (noting the American belief "that the truth-finding process will best be served by presenting to the jury competing views of the litigated case").
161. See supra subsection IV.A.2.a.ii.
162. Cf. Harris, supra note 107, at 74 ("[A]ll reasonable measures should be taken to guard against biased testimony . . . ").
163. See supra subsections IV.A.2.a.iv, b.
testimony,\textsuperscript{164} we would expect and, indeed, desire that jurors treat the testimony of an expert who is merely mouthing the words written by the attorney with more skepticism than the testimony of an opposing expert who was not so substantially guided.\textsuperscript{165} As a frequently cited magistrate judge familiar with the potential of an attorney to control her expert acerbically stated, the jury "has a right to know who is [really] testifying."\textsuperscript{166}

In addition, there are cases where it is not correct to claim that "everybody does it," because every party does not call an expert to testify in every case. Though we paradigmatically think that every expert in a given field is matched by an opposing expert from the same field,\textsuperscript{167} a party might not call an expert to testify even though her opponent has called an expert (or will do so when she later presents her case in chief). Though there might be strategic concerns that can lead to this decision,\textsuperscript{168} perhaps the most common reason for not calling an expert to respond to the opposing party's expert is that a party simply cannot afford to pay the fees that an expert would charge. In any instance where only one of the parties calls an expert in a given field, the suggestion that the other party will somehow roughly balance out the influence of money and attorney control over the only expert called to the stand is fallacious. When a party who will not call

\textsuperscript{164}See supra section III.A.

\textsuperscript{165}Ariz. Indep. Redistricting Comm'n v. Fields, 75 P.3d 1088, 1101 (Ariz. Ct. App. 2003) (noting the value of "permitting a party to explore whether an opposing expert's opinion originated with an attorney"); cf. Waits, supra note 125, at 441 (noting that, whether an attorney's biased communication to an expert witness "is blatant or subtle, ... it raises important concerns about the expert witness's credibility").

\textsuperscript{166}Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 395-96 (N.D. Cal. 1991) ("[I]t would be fundamentally misleading, and could do great damage to the integrity of the truth finding process, if testimony that was being presented as the independent thinking of an 'expert' in fact was the product, in whole or significant part, of the suggestions of counsel."); see also Barna v. United States, No. 95 C 6552, 1997 WL 417847, at *2 (N.D. Ill. July 18, 1997); Karn v. Ingersoll Rand, 168 F.R.D. 633, 640 (N.D. Ind. 1996).

\textsuperscript{167}See supra section II.A.

\textsuperscript{168}See Edward J. Imwinkelried, A Minimalist Approach to the Presentation of Expert Testimony, 31 STETSON L. REV. 105, 109-12 (2001) (explaining that it is sometimes better for an attorney to refrain from calling an expert, perhaps even when the opposing party has done so).

In some circumstances, an attorney might plan to argue that a particular type of expert, such as an economist testifying about the net present value of damages in a personal injury case, has nothing of importance to add to the case. See Thomas R. Ireland, A Corrective Note on the Role of a Defense Economist in Personal Injury/Wrongful Death Litigation, J. LEGAL ECON., July 1993, at 95, 95; Lawrence M. Spizman, The Defense Economist's Role in Litigation Settlement Negotiations, J. LEGAL ECON., Fall 1995, at 57, 58. An attorney planning to make such an argument might decide not to call her own economist to the stand, because doing so implies that an economist's testimony is of some value in the case.
her own expert wishes to challenge the testimony of the only expert who testifies, she should be armed with as much reasonably available information as possible about the influence of the retaining attorney. Providing anything less further handicaps parties who cannot afford expert witness fees.

Finally, even in those cases where “everybody does it” about equally, evidence about the influence of both attorneys over their experts is potentially valuable to jurors. Recall that, when the experts take opposite positions on questions of fact that can have only one correct answer, one of the experts is testifying incorrectly.\textsuperscript{169} When jurors receive information about the influence of that expert’s employer, they may come to understand why the expert is testifying incorrectly.

Of course, the influence of money and the related attorney control over experts do not always lead to incorrect testimony. The expert opinion that an attorney uses her client’s funds to purchase may indeed be the correct opinion. However, the same can be said about all bias evidence about the relationship between a witness and one of the parties or attorneys.\textsuperscript{170} Nonetheless, we believe that bias evidence will help jurors evaluate fact witness testimony often enough to make it relevant and admissible. Given the power of attorneys to exercise more control over experts than fact witnesses, we should provide jurors with at least as much information about that influence.\textsuperscript{171} Jurors will get this information in cross or otherwise only if opposing attorneys are allowed to obtain it.\textsuperscript{172} Unfortunately, when push comes to shove, courts and other authorities sometimes prevent attorneys from obtaining or using information from and about experts that they allow with regard to fact witnesses.

V. THE SOLUTION: APPLYING ORDINARY WITNESS RULES TO EXPERT WITNESSES

In several respects, the language of discovery and disclosure rules seems to provide for equivalent revelation of information about fact witnesses and experts. For example, the Federal Rules of Civil Procedure require a party to disclose the identities of fact witnesses and experts. For example, the Federal Rules of Civil Procedure require a party to disclose the identities of fact witnesses\textsuperscript{173} and

\textsuperscript{169}. See supra subsection II.A.2.
\textsuperscript{170}. See supra subsection III.A.2.a.
\textsuperscript{171}. See Miller ex rel. Monticello Banking Co. v. Marymount Med. Ctr., 125 S.W.3d 274, 280 (Ky. 2004) (noting that bias evidence is relevant in affirming trial court's admission of such evidence regarding an expert).
\textsuperscript{172}. See supra section III.B.
\textsuperscript{173}. FED. R. CIV. P. 26(a)(1)(A). In states that do not have automatic disclosure provisions, a party could obtain similar information by addressing an interrogatory to the opposing party asking her to identify persons with information about a critical event. See supra subsection III.B.2.b.
of those experts who might testify at trial. Also, a litigant can de­pose both potential fact witnesses and disclosed expert witnesses.

In one respect, the disclosure rules provide for even more information about experts that an attorney has decided that she might call as trial witnesses. Perhaps in recognition of an attorney's close relationship with a retained expert, federal (and some state) disclosure rules require a retained expert to provide a report outlining the opinions she will express, her bases for these opinions, the “data or other information” she considered in forming her opinions, exhibits she will use, her qualifications, her compensation, and a list of cases where she recently testified. Other than the automatic disclosure nature of this report, however, these requirements are not drastically different for experts and fact witnesses, because attorneys could demand similar information through interrogatories to parties aligned with fact witnesses or through deposition questions to fact witnesses.

174. FED. R. CIV. P. 26(a)(2)(A). In a few states, a party is required to automatically disclose the identity of expert witnesses who might testify at trial. See Easton, supra note 24, at 530 n.185. In others, parties can issue interrogatories that require their opponents to list expert witnesses who might testify at trial. See id.

175. FED. R. CIV. P. 30(a)(1) (permitting the deposition “of any person”); FED. R. CIV. P. 31(a)(2) (similarly permitting the deposition upon written questions “of any person”).

In many, but not all, states, the discovery rules provide explicit authority for a party in a civil case to demand to depose expert and other witnesses. See Easton, supra note 24, at 530 n.185. In some jurisdictions where the rules do not explicitly provide the right to depose expert witnesses, parties traditionally agree to allow opposing counsel to depose expert witnesses. 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. 647, 694 & n.178 (2001).

176. See, e.g., UTAH R. CIV. P. 26(a)(3); W. VA. R. CIV. P. 26(b)(4)(A)(i); see also COLO. R. CIV. P. 26(a)(2)(B)(I) (requiring report to accompany automatic disclosure, but providing no explicit requirement that the expert, rather than counsel, write the report).

Many states do not require testifying experts to write expert witness reports, but provide information about expert witnesses through other mechanisms. See, e.g., ARIZ. R. CIV. P. 26.1(a)(6) (requiring automatic disclosure only of “[t]he name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert,” but not mandating preparation of such a report); CAL. CIV. PROC. CODE § 2034.410 (West 2005) (allowing depositions of experts listed by other parties); WASH. SUP. CT. R. 26(b)(5)(A) (allowing a party to issue an interrogatory asking for information like that outlined in the Arizona rule and allowing depositions of expert witnesses the opposing party expects to call at trial); MICH. R. CIV. P. 2.302(B)(4) (similar to Washington).


178. See FED. R. CIV. P. 33.
However, despite the roughly equivalent rules about fact witnesses and experts, when courts have resolved disclosure, discovery, information-gathering, and admissibility disputes about experts, they sometimes provide for significantly less information from and about experts than about fact witnesses. This deprives jurors of the types of information that they routinely receive regarding fact witnesses and, therefore, can potentially lead to incorrect decisions that might not occur if jurors received this information. Fortunately, courts can easily correct this problem by simply applying the rather firmly established rules for supplying fact witness information to expert witnesses.

A. Information that Should Be, but Sometimes Is Not, Provided to Jurors to Help Them Resolve Disputes Between Expert Witnesses

The narrower scope of expert information provided to opposing counsel and, therefore, to jurors, takes place in several contexts where similar information is routinely provided for fact witnesses. In my view, these distinctions cannot be justified by the language of the disclosure, discovery, or evidence rules or standard doctrines. Furthermore, because jurors need at least as much evidence about the influence of attorneys and parties on experts as they do about the influence of attorneys and parties on fact witnesses, these distinctions also cannot be justified on public policy grounds.

1. Information About Problems with an Expert’s Opinions

Information about problems with an expert’s scientific or other technical analysis is the rough equivalent of problems with a fact witness’s opportunity or ability to observe critical events and remember


180. See Oishi, supra note 39, at 878–79 (noting the importance of effective cross-examination and, therefore, widespread discovery and disclosure of the retaining attorney’s influence on the expert witness); see also Am. Fid. Assurance Co. v. Boyer, 225 F.R.D. 520, 522 (D.S.C. 2002); Gall v. Jamison, 44 P.3d 233, 240 (Colo. 2002).

181. Cf. Ariz. Indep. Redistricting Comm’n v. Fields, 75 P.3d 1088, 1101 (Ariz. Ct. App. 2003) (noting that “Arizona has a long-favored practice of allowing full cross-examination of expert witnesses, including inquiry about the expert’s sources, relations with the hiring party and counsel, possible bias, and prior opinions” and noting the link between open discovery and effective cross-examination about these matters); Miller ex rel. Monticello Banking Co. v. Marymount Med. Ctr., 125 S.W.3d 274, 282–84 (Ky. 2004) (noting the importance of providing the jurors with information about the relationship between parties and expert witnesses).
them. For both experts and fact witnesses, such information suggests problems with the witness’s testimony. For both types of witnesses, it is readily admitted.

The difference in treatment of experts and fact witnesses lies, as it so often does, not in the admissibility of this information if the opposing attorney somehow finds it, but in her opportunities to find it. For one means of acquiring this information, formal discovery, there is no distinction, because opposing attorneys can explore these matters in discovery, especially with deposition questions to the witness. For another means of acquiring it, self-help information gathering, several courts and other authorities distinguish between fact witnesses and experts.

Even though direct ex parte contact with opposing fact witnesses is routine and encouraged by the professional responsibility rules, some courts and other professional responsibility authorities have precluded direct ex parte contact with opposing retained experts. These decisions result from a failure to recognize that, except in a few states, nothing in either the civil procedure or professional responsibility rules prohibits ex parte contact between attorneys and opposing retained experts. They also suffer from a failure to recognize that, if an attorney is not allowed to contact any type of witness ex parte, the jurors will probably be deprived of any information that the attorney would have acquired through ex parte contact, because the attorney will not risk asking a cross-examination question with an

182. The official comment to the professional responsibility rule prohibiting an attorney from even asking most witnesses not to communicate with that attorney’s opposing counsel notes the importance of allowing both parties to access potential evidence, including the testimony of witnesses:

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like. MODEL RULES OF PROF’L CONDUCT R. 3.4 cmt. 1 (2004); see also Int’l Bus. Machs. Corp. v. Edelstein, 526 F.2d 37, 42 (2d Cir. 1975) (noting the “time-honored and decision-honored principles . . . that counsel for all parties have a right to interview an adverse party’s witnesses (the witness willing) in private, without the presence or consent of opposing counsel”), quoted in Bobele v. Superior Court, 199 Cal. App. 3d 708, 713 (1988).


184. Two states that prohibit ex parte contact by rule are Idaho, see IDAHO R. CIV. P. 26(b)(4); Easton, supra note 175, at 699, and Texas, see Cramer, 141 F. Supp. 2d at 731.
unknown answer. In the absence of a prohibition of ex parte contact in the rules, an attorney who believes that it is in her client's interest to make ex parte contact with an opposing retained expert should be allowed to make such contact.

2. Information About the Expert's Relationships with a Party or Attorney

Opposing parties and, therefore, jurors, receive roughly equivalent information about some aspects of some fact or expert witnesses' relationships with sponsoring parties and their attorneys. For both a fact witness and an expert called by the party that originally expected to call her, the opposing party can discover and therefore introduce information about the friendly, unfriendly, or familial relationship between a witness and a party or attorney. Similarly, for both a fact witness and an expert called by the party that initially expected to call her, the opposing party would be allowed to discover information about payments or other favors the party bestowed upon her.

185. The attorney ordinarily will not ask a cross-examination question if she does not know the answer to that question. See supra subsection III.B.1. If the attorney is not allowed to contact the opposing expert ex parte, she may not learn information that would have been acquired in that contact. With regard to this data that would have been learned by the attorney through ex parte contact, then, disallowing ex parte contact ordinarily will lead not just to the attorney not learning this information, but to the jurors not learning it.

186. For a more complete and nuanced discussion of the issue of attorney ex parte contact with opposing experts, see Easton, supra note 175.

187. MAUET & WOLFSON, supra note 50, § 12.3(b); 1 MCCORMICK, supra note 47, § 39.

188. Such relationships between experts and parties and attorneys might be somewhat less common than relationships between parties and fact witnesses, but they are not extraordinary. For example, a defendant manufacturer in a product liability case might retain an engineer who formerly worked for it, a hospital in a medical malpractice case might retain a physician who formerly worked for it, or a corporation in an employment discrimination case might retain its former human resources director.

189. Discovery about the relationship between a fact witness and a party and about any favors bestowed by a party upon a fact witness presumably would take place via interrogatories directed to the party, see FED. R. CIV. P. 33, and deposition questions directed to the witness, see FED. R. CIV. P. 30, 31. Such matters seem well within the broad scope of discovery in civil cases, which permits discovery about "any matter, not privileged, that is relevant to the claim or defense of any party." FED. R. CIV. P. 26(b)(1).

Discovery about the relationship between an expert and a party, including the extent of the payments made to the expert by the party, would be facilitated by the required expert report of "the compensation to be paid for [the expert's] study and testimony." FED. R. CIV. P. 26(a)(2)(B). Again, interrogatories to the party and deposition questions to the witness would be the primary discovery tools used to further explore these matters. Questions about such issues are within the allowable limits of discovery regarding all matters that must be disclosed about experts. See FED. R. CIV. P. 26(a)(5).
Again, however, some courts provide opposing parties with less information about an attorney's influences upon a retained expert, even when the party that initially expected to call her to the stand does call her to the stand. Under the rubric of protection of attorney work product, these courts incorrectly allow a retaining attorney to hide some or all of the communications between her and her expert, including the attorney's disclosure of her work product to the expert. As previously explained, such decisions overextend and misapply the doctrine of attorney work product. Once an attorney shares her work product with a witness whose testimony might be affected by that work product, the attorney can no longer claim that only her private thoughts are at issue. This is why courts routinely al-

190. The cases are not uniform. See Mfg. Admin. & Mgmt. Sys., Inc. v. ICT Group, Inc., 212 F.R.D. 110, 113-14 (E.D.N.Y. 2002); Pavlak v. Dyer, 59 Pa. D. & C.4th 353, 361 (C.P. Ct. of Fikes County 2003) (noting the "split" among federal courts about whether an attorney waives work product protection by showing her work product to a testifying expert); Marsh, supra note 105, at 201-11 (reviewing conflicting state and federal cases); Oishi, supra note 39, at 861, 865-66, 869-77 (reviewing the "split of authority" among federal courts); see also Waits, supra note 125, at 397-423 (discussing cases decided before the 1993 amendment to Rule 26 of the Federal Rules of Civil Procedure).


193. See supra text accompanying notes 151-56.

194. See Palmer v. Asarco, Inc., 225 F.R.D. 258, 261 (N.D. Okla. 2004) (noting that "[n]o type of work product or other privilege is lost when the material is disclosed to and considered by a testifying expert"); Chamberlain Group, Inc. v. Interlogix, Inc., No. 01 C 6157, 2002 WL 653893, at *3 (N.D. Ill. April 19, 2002) (stating that "[c]ommunications between a testifying expert and the party retaining that expert are not privileged!"); Mfg. Admin. & Mgmt. Sys., 212 F.R.D. at 115-16 (rejecting the contention that an attorney can share work product with an expert without waiving work product protection).

For a detailed discussion of the extent to which courts should provide parties with full access to work product that a retaining attorney forwards to an expert, see Easton, supra note 24.

195. Several courts have held that an attorney who shares her work product with an expert witness has waived the protection of the work product doctrine and must disclose the shared work product with opposing counsel. E.g., Am. Fid. Assurance Co. v. Boyer, 225 F.R.D. 520 (D.S.C. 2004); Zheng v. Liberty Apparel Co., No. 99 Civ. 9033 RCCBHP, 2004 WL 1746772 (S.D.N.Y. Aug. 3, 2004); Baum v. Vill. of Chittenango, 218 F.R.D. 36 (N.D.N.Y. 2003); S. Scrap Metal Co. v. Flem-
low cross-examining attorneys to explore the extent to which the direct examiner has coached a fact witness despite any readily discredited claims an attorney might assert that anything she said in coaching her fact witness was her work product.\footnote{See Minebea Co. v. Papst, 374 F. Supp. 2d 231, 237 (D.D.C. 2005) (noting that cross-examination can be used as "a powerful weapon" against a lawyer who "inappropriately 'coaches'" a witness); JEANS, supra note 138, § 2.4, at 21.}
It is even more important for a jury to learn about the extent of coaching and other influences an attorney has upon an expert for two reasons. First, the expert witness, unlike the fact witness, can base her testimony upon the information provided to her by the attorney. Second, because the retaining attorney employs the expert and controls the flow of fees to her, she often has substantially greater power to shape her testimony. If jurors deserve to hear about the often relatively insubstantial influences of attorneys over fact witness, they certainly deserve to hear about all of the efforts of a purse-string-holding retaining attorney's efforts to shape expert testimony, including those that could be classified as the retaining attorney's sharing of data with the expert that, until the time of the sharing, could be classified as attorney work product.

Similarly, any court or other authority that prohibits ex parte contact between attorneys and opposing experts potentially deprives opposing counsel and therefore the jurors who rely upon opposing counsel.

197. See Baum, 218 F.R.D. at 40 (observing that “experts have become a daily occurrence in federal courtrooms, and it is essential that a jury be able to evaluate their opinions on the basis of information supplied them as they formulated those opinions”).

198. See FDIC v. Gonzalez-Gorrondona, No. 91-2791-CIV-HURLEY, 1994 WL 836318, at *2 (S.D. Fla. Aug. 11, 1994) (noting that a rule permitting an attorney to share her work product with a testifying expert without disclosing it to opposing counsel “would in effect allow a party's lawyer to aid a witness with items of work product while at the same time prevent totally the access that might reveal and counteract the effects of such assistance”); Oishi, supra note 39, at 878; supra subsection IV.A.2.a.iii.

199. See supra subsections IV.A.2.a.ii, iv.

200. See Amster v. River Capital Int'l Group, No. 00 CIV.9708 DC DF, 2002 WL 1733644 (S.D.N.Y. July 26, 2002) (allowing opposing counsel to fully explore retaining counsel's suggestions to the expert witness about changes in the expert's report); Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 644, 647 (S.D. Ind. 2000) (agreeing with other courts that have held that “an attorney should not be permitted to give a testifying expert witness a detailed 'road-map' for the desired testimony without also giving the opposing party an opportunity to discover that 'map' and to cross-examine the expert about its effect on the expert's opinions in the case”); McCrae, 295 B.R. at 678 (noting that the sharing of the retaining attorney's work product with a testifying expert “will potentially color the expert's opinion”); Ariz. Indep. Redistricting Comm'n v. Fields, 75 P.3d 1088, 1101 (Ariz. Ct. App. 2003); Gall, 44 P.3d at 240; cf. Colindres v. Quietflex Mfg., 228 F.R.D. 567 (S.D. Tex. 2005) (requiring disclosure of document drafted by expert and sent by the expert to the retaining attorney); Douglas R. Richmond, Regulating Expert Testimony, 62 Mo. L. Rev. 485, 487 (1997) (arguing that “expert witnesses merit special attention because their testimony can be powerful and simultaneously very misleading because of the difficulty in evaluating it” (quoting Jack B. Weinstein, Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended, 138 F.R.D. 631, 632 (1991))).
counsel's cross-examination, of some information. To the extent that ex parte contact would have revealed information about the retaining attorney's influence upon the expert to the opposing counsel, prohibition of that contact might prevent the jurors from receiving this information.

Finally, courts routinely provide even less information about the relationship between witnesses and attorneys for a smaller class of witnesses, those who are called by parties opposing the ones that originally expected to call them. When a fact witness is called to the stand by a party other than the one originally expected to call her, either party is usually free to elicit any relevant information about the relationship between the witness and one of the parties. For example, if the defendant in our hypothetical seat belt case calls the plaintiff's brother to testify that she was not wearing the seat belt, the defendant will ask questions on direct examination about the brother-sister relationship. For expert witnesses, however, with only a few exceptions, courts have prevented parties who unexpectedly call witnesses to the stand to elicit information about the former relationship between the expert and the opposing party. In other words, even those courts that allow a party opposing the one who initially

202. See Ariz. Indep. Redistricting Comm'n, 75 P.3d at 1101 (noting the link between discovery and cross-examination).
203. See supra note 185 and accompanying text.
204. For an argument that courts should routinely allow a party that calls an expert originally retained by the opposing party to introduce evidence of that original retention, see Easton, supra note 41, at 1481-92, 1496.
206. Some judges might block evidence of the relationship between the witness and the opposing party during direct examination because they sometimes do not allow the bolstering of a witness's credibility before that witness's credibility is attacked on cross-examination. See Miller ex rel. Monticello Banking Co. v. Marymount Med. Ctr., 125 S.W.3d 274, 283 (Ky. 2004). However, this is a rule of courtroom efficiency that often is trumped by the importance of seeking the truth. Id. The evidence of a relationship between a witness and the party opposing the one calling the witness to the stand might be deemed important enough to justify pre-attack bolstering. See TANFORD, supra note 48, at 232 (noting that the common ban on pre-attack bolstering "does not prohibit general background information from the witness" or "enhancing a witness' credibility in ways that are directly relevant to the witness' testimony"). This is particularly likely with regard to an expert witness, because courts routinely allow pre-attack bolstering of expert witnesses via a direct examination review of the expert's credentials.

In any event, even if the courtroom efficiency rule is applied, any cross-examination attack on the witness's credibility, however slight, would open the door to introduction of the bias of the witness on redirect examination. Thus, in most cases, the rule against pre-attack bolstering only determines when, not whether, the bias evidence will be admitted.
ENHANCING DAUBERT EXCLUSION

retained an expert to present the expert's testimony at trial have almost universally not allowed the direct examiner to ask her to testify that she was initially hired by the opposition. Courts should end this trend by allowing any party who calls an expert to expose the prior or current relationship between any party and the expert. Jurors who face the difficult task of deciding whether an expert is correct deserve to know which party hired her to analyze the evidence.

3. Changes in an Expert's Statements

Information about statements made by a witness before testifying at trial represent still another area where, at first blush, the courts seem to treat fact and expert witnesses similarly, but, when push comes to shove, some courts foreclose opposing attorneys from an important source of information about retained experts.

Of course, opposing attorneys have the opportunity to force both fact and expert witnesses to make statements at depositions that later could be used at trial as prior inconsistent statements. In this respect, experts and fact witnesses are treated similarly.

However, an opposing attorney can make every effort to find any and all written statements or other recordings of a fact witness's prior recollections. It is, in fact, routine for attorneys to ask fact witnesses whether they wrote diaries, journals, memos, or otherwise recorded

207. Some courts go even further, by refusing to allow a party opposing the one that originally retained the expert witness from even calling this expert as a witness at trial. See infra subsection V.A.4.

208. For two recent exceptions where courts allowed the initially opposing party to call the expert and prove that she was initially retained by the other party, see Vandenbraak v. Alferi, Nos. Civ. A. 01-482 KAJ & Civ. A. 01-492 KAJ, 2005 WL 1242158, at *5 (D. Del. May 25, 2005); Miller, 125 S.W.3d at 282-84.


210. Judges who are committed to the concept that the bolstering of a witness's credibility should not precede an attack on that credibility could require a party offering the testimony of an expert originally hired by the other party to wait until redirect examination to introduce testimony of that party's initial hiring of the expert, but this will usually only delay the inevitable introduction of this evidence. See supra note 206.

211. Miller, 125 S.W.3d at 282-84; cf. E.S.I. Invs., 505 S.E.2d at 596 (holding that allowing evidence of the original retention is “within the sound discretion of the trial court”).

212. Miller, 125 S.W.3d at 284 (noting that in the “battle of experts” faced by the jury in that case, “the jury was entitled to know who retained and paid each expert witness . . . so as to be able to judge each witness's overall credibility”).

213. Prior inconsistent statements of both fact witnesses and experts can be used to impeach the witness's trial testimony. MAUET & WOLFSON, supra note 50, §12.4(2); Colleen Gale Treml, State v. Hunt: Rekindling Requirements for Impeaching One's Own Witness, 68 N.C. L. REV. 1236, 1239-40 (1990).

their recollections or discussed them with anyone, including opposing counsel. Attorneys can use the power of the subpoena duces tecum to acquire these previous recordings.215

With experts, however, some courts provide more limited access. An opposing attorney who wanted to see every prior statement by an expert would be interested in seeing every draft of an expert’s report on the case, including those drafts upon which the retaining attorney placed editing marks or other suggestions for changes. Any indication that the retaining attorney, rather than the expert, created any portion of a report that purports to be that of the expert would be a fertile area for the cross-examination of that expert. Nonetheless, some216 courts, again acting upon an overly expansive view of attorney work product, allow attorneys and retained experts to refrain from providing drafts of the expert’s reports that contain the retaining attorney’s written comments.217 In the future, courts facing this issue should require the production of all drafts of expert witness reports exchanged between the expert and the retaining attorney,218 including

216. In a recent case, the court faced a somewhat different issue, due to an interesting twist in the facts. Amster v. River Capital Int’l Group, No. 00 CIV.9708 DC DF, 2002 WL 1733844 (S.D.N.Y. July 26, 2002). In this case, the retaining attorney agreed to produce all drafts of the expert report that were marked up by the retaining attorney and returned to the expert. Id. at *2. The opposing party also sought to require the retaining attorney to produce drafts of the report upon which the attorney had placed notes, where the attorney had not returned the draft to the expert, but had used the copy of it with the markings to orally communicate the attorney’s suggested changes to the expert. Id. The court preliminarily denied this request, holding that it would “not require the production of any handwritten attorney notes not actually provided to the expert.” Id. at *3. However, the court further held:

At [the expert’s] deposition, defendant may test his recollection of his conversations with counsel. If Mr. Love is unable to testify as to how his report evolved, and, more specifically, as to which changes from draft to draft were suggested by counsel, then defendants may renew their application for production of the notes in question.

Id. This holding, in the main, is based upon the view that the opposing counsel is entitled to fully explore the retaining attorney’s influence on the expert’s testimony via receipt of all drafts containing the retaining counsel’s suggestions to the expert and via deposition questions and possibly even receipt of the attorney’s copies of drafts containing the attorney’s suggestions that were orally communicated to the expert.


any that contain the retaining attorney's writing or otherwise docu-
ment the retaining attorney's attempts to influence the expert to adopt changes in the report.\textsuperscript{219}

4. Testimony From (Almost) All Disclosed Expert Witnesses

In one sometimes significant area, some courts do more than limit the information about experts that opposing parties and jurors will receive. Some courts go even further, by not allowing the jurors to hear any testimony whatsoever from, or information about, some expert witnesses.

The experts who receive this rather unusual treatment\textsuperscript{221} are those who reach, or testify to, opinions that are helpful to the parties opposing their initial employers. When the attorney who initially retained the expert and disclosed her as someone who may present trial testimony learns (sometimes at the expert's deposition, but occasionally in private communications with the expert) that the expert has reached opinions that are helpful to her opponent, she may attempt to "de-disclose" the expert and thereby somehow render her ineligible to testify at trials.\textsuperscript{222} Unfortunately, despite the absence of any provision in the disclosure rules giving the attorney who initially discloses an expert as a possible trial witness the right to somehow negate that designation, several courts have given that attorney a veto power to prevent her opponent from calling the expert as a witness at trial.\textsuperscript{223}

\textsuperscript{219} Courts should also permit opposing parties to explore the extent to which other persons substantially affected the expert's opinions, as the United States District Court for the Western District of New York did in permitting the deposition of an associate of an expert witness who "provided substantial assistance to [the expert] in preparing the expert report." Herman v. Marine Midland Bank, 207 F.R.D. 26, 31 (W.D.N.Y. 2002).

\textsuperscript{220} See supra note 216.

\textsuperscript{221} Generally, a jury is entitled to receive the testimony of all available witnesses. See infra note 228 and accompanying text.


\textsuperscript{223} Pinal Creek Group v. Newmont Mining Corp., 312 F. Supp. 2d 1212, 1221–23 (D. Ariz. 2004), depublished by No. CIV 91-1764-PHX-DAE, 2004 WL 1921176 (D. Ariz. Aug. 25, 2004); State Farm Mutual Ins. Co., 100 S.W.3d at 340; cf. Elyashiv v. Elyashiv, 353 F. Supp. 2d 394, 397 (E.D.N.Y. 2005) (holding that the probative value of a letter written by an expert retained, but not disclosed as a testifying expert, by the party opposing the party offering the letter was outweighed by its potential for unfair prejudice); Callaway Golf Co., 2002 WL 1906628, at \*4 (foreclosing, for the most part, deposition of a de-disclosed expert); Zeidler v. A & W
These courts discount, ignore, or forget that the initial disclosure is, in part, the retaining attorney's declaration that the expert is a potentially valuable source of information for the jurors.\textsuperscript{224} These courts also discount, ignore, or forget that, if an expert who has been chosen, hired, coached, cajoled, and paid by one attorney nonetheless reaches an opinion on a critical issue that hurts that attorney, there is a fairly decent probability (though, of course, not an absolute certainty) that the disfavored opinion is correct\textsuperscript{225} and is therefore a potentially very valuable piece of information for the jurors. When jurors face the difficult task of resolving a dispute between the expert hired to replace the one fired by that attorney and the one hired by opposing counsel, they would presumably give serious consideration to the fact that another expert originally hired by one of the attorneys reached an opinion disfavored by that attorney, if they learned of these facts.\textsuperscript{226} Such evidence should be admitted.\textsuperscript{227}

The court's granting of veto power to an attorney to prevent a potential witness from testifying through her unilateral action stands in sharp contrast to the treatment courts give to fact witnesses. Regardless of whether a fact witness has an allegiance to (or enmity with) a party or whether one party invested the time and effort of an attorney, investigator, or legal assistant to locate that witness, either party is ordinarily entitled to call that witness to the stand at trial. As many

\textsuperscript{224} See Easton, supra note 41, at 1461–63.
\textsuperscript{226} See Vandenbraak v. Alfieri, Nos. Civ. A. 01-482 KAJ & Civ. A. 01-492 KAJ, 2005 WL 1242158, at *5 (D. Del. May 25, 2005) (permitting introduction of expert testimony offered by party opposing the party that initially retained the expert and permitting evidence of this initial retention, because "a fact finder must judge the weight and credibility of expert testimony, . . . which naturally should include an understanding of the influences brought to bear on the expert").
\textsuperscript{227} See id. at *1; Crawford, 75 S.W.3d at 245 (permitting deposition of a de-disclosed expert). For another analysis of the issues presented when a party seeks to introduce the statements of an expert originally retained by the opposing party, see Richmond, supra note 98, at 928–33.
have stated, ordinarily the jury "has a right to every man's evidence."228

B. Treating Experts Like Fact Witnesses: The Nuts and Bolts

As with fact witnesses, if jurors are to receive information about retained experts, opposing attorneys must first have access to it,229 because savvy attorneys usually will not ask a question on cross when they do not know the answer to the question.230 Therefore, courts should require and permit disclosure, discovery, and self-help information gathering about experts equivalent to that required and permitted for fact witnesses. In addition, courts should admit relevant testimony by and about experts regardless of which party offers it.

1. Ordinary Witness Rules that Are Readily Applicable to Experts

Put simply, courts should eliminate counterproductive distinctions between expert and fact witnesses and treat expert witnesses like other witnesses. Courts and other authorities should:

- Facilitate information gathering by allowing attorneys who will cross-examine disclosed retained experts to contact those witnesses ex parte.231
- Require disclosure and discovery regarding all communications between attorneys and their retained experts to provide opponents and jurors with full information about the influence of attorneys on expert testimony.232
- Provide for automatic disclosure of all drafts of expert witness reports, including those that have been marked up by retaining attorneys, to provide a total picture of all prior inconsistent statements of experts and the reasons for changes.233

228. JOHN H. WIGMORE, 8 WIGMORE ON EVIDENCE § 2192 (1961); see also Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983), cited in Domako v. Rowe, 475 N.W.2d 30, 36 (Mich. 1991) ("[N]o party to litigation has anything resembling a proprietary right to any witness's evidence."); JACK B. WEINSTEIN & MARGARET A. BERGER, 3 WEINSTEIN'S FEDERAL EVIDENCE § 501.03121[a] (Joseph M. McLaughlin ed., 2000) ("[T]here is a general duty to give testimony, because the public has a right to everyone's evidence.").


230. See supra subsection III.B.1.

231. See supra subsection IV.A.1.

232. See supra subsection IV.A.2.

233. See supra subsection IV.A.3.
• Allow any party to introduce the testimony of witnesses who have been disclosed as experts by any party.234
• Admit bias testimony regarding the original retention, payment, and influencing of an expert by an attorney, even when the party that initially opposed the expert calls her as a witness.235

All of these positions can be adopted by courts without changes in procedural or professional responsibility rules. They are either consistent with or required by the language of the current rules.

2. A Thornier Matter: The Anti-Quarantine Rule

To further facilitate information gathering from ex parte contact with opposing retained experts, courts and other ethics authorities should adopt a consistent interpretation of the term “agent” as it appears in professional responsibility and evidence rules. As previously noted, the information-gathering potential of direct ex parte contact between an attorney and witnesses aligned with the opposing party is so valued that attorneys are ordinarily forbidden from asking witnesses to avoid talking to their opponents.236 The relevant anti-quarantine provision of the Model Rules of Professional Conduct, however, contains an “agent” exception that has been applied to retained experts and has therefore facilitated the thwarting of information gathering through ex parte contact. At the same time, when interpreting the identical term “agent” in the Federal Rules of Evidence, some courts have adopted the opposite view of whether a retained expert is an agent.

Under Rule 3.4(f) of the Model Rules, an attorney cannot “request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client.”237 Because retained experts are ordinarily neither relatives nor employees of the attorney’s client, the attorney is allowed to ask or instruct238 a retained expert to not engage in ex parte communications with the attorney’s opponent only if the retained expert is the client’s “agent.” There is some justification

234. See supra subsection IV.A.4.
235. See supra text accompanying notes 204–12.
236. See supra subsection III.B.2.c.
237. MODEL RULES OF PROF’L CONDUCT R. 3.4(f) (2004). Subsection 2 of this rule prevents an attorney from asking even a relative, employee, or agent of her client to refrain from voluntarily providing information to opposing counsel if that person’s interests would be “adversely affected” by doing so. MODEL RULES OF PROF’L CONDUCT R. 3.4(f)(2) (2004). In a civil case, this is usually not a significant additional restriction.
238. Given the reality that the attorney is the supervisor of the retained expert and that the attorney can therefore fire the expert and cut off the flow of fees to her, see supra subsection IV.A.2.a.ii, when an attorney asks a retained expert to do something, she is, for all practical purposes, ordering her to do it.
for the view that the retained expert is the client’s agent, because the expert has been hired and paid by and on behalf of the client to analyze information, reach opinions, and testify to those opinions on behalf of the client.  

However, the word “agent” is the key term in another applicable rule. Rule 801(d)(2)(D) of the Federal Rules of Evidence provides that the statements of a party’s “agent” are the party’s admissions. Under this rule, a statement is not hearsay and is therefore admissible when it is offered by the opposing party and it is “a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.” When a retained expert makes statements while working on behalf of the party on whose behalf she was retained, she is arguably an agent of that party. If that is the case, those statements should be admissible against that party as non-hearsay admissions. However, even though the term “agent” is often interpreted expansively enough to cover retained expert witnesses in the context of the agent exception to the anti-quarantine rule, some courts applying the identical term in the context of the evidence rules hold that a retained expert is not the agent of the party.  


240. FED. R. EVID. 801(d)(2)(D). The immediately preceding subsection of this rule provides that a statement is not hearsay and is therefore admissible if it is offered by the opposing party and it is “a statement by a person authorized by the party to make a statement concerning the subject.” FED. R. EVID. 801(d)(2)(C). This provision might also render a statement by a retained expert admissible in some circumstances, but it is difficult to imagine a circumstance where the language of this subsection would apply, but the language of the next subsection regarding agents would not also apply and render the retained expert’s statement admissible. Therefore, this Article focuses on the agent subsection of the rule.  

Though the term agent is admittedly imprecise, it is illogical to give it two different meanings in the same context. Either a retained expert is an agent of the party on whose behalf she is retained, or she is not. There is some basis, of course, for either interpretation of "agent," because the retained expert has a dual role. She is to some extent a member of the trial team of the party who is paying her fees and is, in this sense, an agent. However, she is also a witness who is sworn to tell the truth, the whole truth, and nothing but the truth, unlike the attorney who represents the client, who is allowed to advance positions in court that she does not personally believe, as long as there is some non-frivolous basis for doing so. In other words, an expert witness's loyalty to the person paying her fees is supposed to be trumped by her duty to testify truthfully, so she is not as much of an agent of the client as the attorney who supervises her work.

As long as the term "agent" is the critical one and it is not further defined, however, it should not receive opposing interpretations in the context of the same basic factual circumstances (i.e., the retained expert witness). If a retained expert is considered the party's "agent" for purposes of allowing an attorney to quarantine her from ex parte contact with her opponent, she should also be considered the party's agent for purposes of making non-hearsay admissions that are admissible against the party. Under both rules, either the expert's role as a member of the trial team should be considered predominant over her duty to serve as a truth-telling witness, or her role as a truth-telling witness should be considered predominant over her membership on a trial team. Because a primary goal of the system is finding the truth, and because the represented party has an agent, the attorney, who has a greater duty of loyalty to her, I believe a retained expert should not be considered the party's agent in either context. Therefore, under the current Model Rules, I would prohibit an attorney from instructing a retained expert to refrain from ex parte contact with opposing counsel, but not hold that statements of retained experts are automatically non-hearsay admissions. However, I concede that there is merit to the opposite view and that the term agent is unfortunately imprecise.

242. See supra subsection IV.A.2.a.ii.
243. See, e.g., CONN. GEN. STAT. ANN. § 1-25 (West 2000); FLA. STAT. ANN. § 90.605(1) (West 1999); IDAHO CODE ANN. § 9-1402 (2005); OR. REV. STAT. § 40.320 (2003).
245. See Richmond, supra note 200, at 486–87 (contending that "[e]xperts should not be the litigation equivalent of hired guns" or advocates for parties and noting that this view "represents the prevailing federal perspective").
246. See Easton, supra note 175, at 745–46.
VI. ADVANTAGES

Treating experts like other witnesses will have several advantages. At least one of these advantages stems from a phenomenon that some might first see as a disadvantage.

A. Providing Jurors with Information to Assist Their Evaluation of Expert Testimony

Most importantly, treating experts like other witnesses will provide jurors with information about them and their relationships with the attorneys who employ them that they can use to evaluate expert testimony. Given the tremendous potential influence of retaining attorneys over their experts, providing this information is at least as important as providing similar information for fact witnesses.

247. In addition to the advantages discussed in the text, there is another possible advantage to treating expert and fact witnesses alike. Several of the proposals promoted here involve the earlier distribution of information about experts in the discovery phase of litigation. Some have suggested that, in some circumstances, the distribution of information among parties can lead to earlier settlement, because lack of information can make parties reluctant to settle. See In re Grand Jury Subpoena, 148 F.3d 487, 492 (5th Cir. 1998); Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1581 (Fed. Cir. 1995); State ex rel. State v. Riley, 992 S.W.2d 195, 197 (Mo. 1999) (en banc). If this is the case, the proposed distribution of expert information might lead to earlier settlement in some cases and, therefore, to the prevention of additional litigation expenses that otherwise would have been incurred by the parties and, sometimes, by the court. See Easton, supra note 24, at 572–76.

On the other hand, there is also a potentially significant disadvantage to my proposal. If communications between expert witnesses and the attorneys who retain them must be more fully disclosed, but communications between expert consultants and attorneys generally need not be disclosed, see FED. R. CIV. P. 26(b)(4)(B); supra text accompanying note 153, parties who are able to hire two experts (one to serve as a testifying witness and one to serve as a consultant) will have an edge over parties who are able to hire only one expert. Thus, my proposal can be seen as increasing the cost of litigation for those who decide to hire two experts and providing wealthier parties who can afford to do so an advantage over opposing parties who cannot afford to do so. In my opinion, the benefits to the truth-seeking function outweigh this disadvantage. It is also worth noting that many of the advantages of hiring two experts exist even under the less complete disclosure of expert–attorney relationships currently allowed by some courts.

248. In re McCrae, 295 B.R. 676, 678–79 (Bankr. N.D. Fla. 2003) (noting that disclosure of information about the attorney’s forwarding of materials to her retained expert will facilitate more effective cross-examination to “test” the expert’s opinion at trial); Waits, supra note 125, at 443–44 (arguing for an approach to expert witness testimony aimed at “preventing or exposing the adversarial molding, subtle and otherwise, of expert testimony”).

249. See supra subsection IV.A.2.a.

250. In a recent decision permitting discovery of work product materials an attorney shared with her expert, a federal court explained:
B. Establishing Clear Rules

By eliminating distinctions between experts and other witnesses, courts will universalize the already well-known rules applicable to fact witnesses. This should lessen the amount of time that courts spend resolving discovery and admissibility disputes that arise when some, but not all, courts distinguish between fact and expert witnesses.\(^{251}\)

In addition, clear rules that are universally applied make it easier for attorneys to act in their clients' best interests.\(^{252}\) When rules are unclear, even well-informed attorneys cannot be certain which conduct is in their clients' best interests.\(^{253}\) For example, given the uncertainty about whether an attorney can initiate ex parte contact with opposing retained experts,\(^{254}\) an attorney who believes that such contact would be in her client's best interests cannot be certain about what course of action to take. Because some courts and other professional responsibility authorities have sanctioned attorneys who engage in such ex parte contact, there is the possibility that undertaking this course will hurt the client. On the other hand, because some have allowed such contact, an attorney who refrains from it may be depriving her client of something that could benefit her.

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The most important justification for instituting mandatory disclosure . . . is to promote effective cross-examination. Without pre-trial access to attorney–expert communications, opposing counsel may not be able to uncover and reveal effectively the influence that counsel has achieved over the expert's testimony. . . . Given that attacking credibility through a full and fair cross-examination is a "vitaly important task in the usual, and increasingly frequent, "battle of experts," therefore, protecting communications between attorneys and experts significantly obstructs an important goal.


252. See Gall, 44 P.3d at 239.


254. See supra subsection IV.A.1.
C. Introducing Additional Risk into Expert–Attorney Relationships

Some argue that more complete revelation of information about an attorney's influencing of an expert witness would make the relationship between an attorney and her retained expert less comfortable. After all, if an attorney's coaching of an expert will become known to her opponent and if there is the possibility that an expert who is a friend today may later become a foe, the attorney should be at least a bit more cautious in her efforts to mold that expert's testimony.

There is no doubt that providing additional information about attorney–expert relationships and allowing any party to call disclosed experts as witnesses will, or at least should, make attorneys somewhat more restrained in their dealings with experts. For a system that is designed, at least in significant part, to be a search for the truth, that development is not to be dreaded, but applauded. Given the concerns about the ready ability of attorneys to purchase and mold expert testimony, we should welcome changes that make it even somewhat more likely that the jury will hear something closer to the expert's own views, even though at least some of the attorneys who are familiar and comfortable with their control over experts will dread losing any of that control, or of the opportunity to exercise it privately.

VII. CONCLUSION

Many have recognized the problems associated with the ready ability of attorneys to mold the testimony of retained expert witnesses for a system that wishes to find the truth. For many, the real issue is not
whether the ready availability of faulty expert testimony is a problem, but what can or should be done to address it.

Exclusion of scientifically invalid testimony is certainly a step in the right direction. Whenever an incorrect expert opinion is kept from the jury, a potential injustice might be averted. Despite the importance of Daubert exclusion, though, it is at most an impartial response to a widespread problem. Despite the Supreme Court's admonition to trial court judges to seriously consider exclusion, faulty expert testimony is commonplace, particularly in cases where jurors are presented with opposing opinions that cannot possibly both be correct.

Some have suggested the more drastic remedy of eliminating expert witness fees paid by the parties. These reformers often suggest that expert testimony should come primarily or only from those who are paid by the courts. Although this suggestion has some merit, it also has its share of problems. Regardless of this idea's merit, or the lack thereof, there does not appear to be any reasonable prospect that court experts will entirely forbid party-financed experts in the foreseeable future.

Like it or not, then, it appears that the party-paid, attorney-dominated expert witness will remain a fixture of American civil litigation for some time. Like it or not, despite Daubert, she will continue to testify in many cases, even when her conclusions on critical issues are incorrect. Like it or not, jurors will be forced to try to determine which

261. See, e.g., Deason, supra note 106, at 61 & n.3; Easton, supra note 24, at 492 n.82 (citing supporters of court-appointed experts).

262. See Easton, supra note 24, at 492 n.82; Robert L. Hess II, Note, Judges Cooperating with Scientists: A Proposal for More Effective Limits on the Federal Trial Judge's Inherent Power to Appoint Technical Advisors, 54 VAND. L. REV. 547, 549 (2001) (noting and discussing the "problems" even under the current limited system allowing judges to appoint experts in addition to those retained by the parties).

Relying solely or primarily upon court-appointed experts would require some mechanism for the financing of the often substantial fees that experts earn. Also, it would be a substantial departure from the American tradition that it is the parties, not the court, who are responsible for acquiring and presenting evidence. Some also see it as an encroachment upon the domain of the jury, because jurors would be hard pressed to reach verdicts inconsistent with the opinion of the only expert who testified.

263. The Federal Rules of Evidence allow courts to appoint experts. Fed. R. Evid. 706. Indeed, the ability of courts to appoint experts was widely recognized even before the adoption of the Federal Rules. See Fed. R. Evid. 706 advisory committee's notes; Deason, supra note 106, at 79. Under the current law, however, the appointment of an expert by the court does not preclude the parties from also retaining expert witnesses. American courts very rarely appoint experts under the current structure. Langbein, supra note 97, at 841. For the foreseeable future, it is difficult to imagine American courts adopting the overhaul of the current system that would be entailed in courts, and only courts, retaining experts.
expert is wrong, when the judge is not able to do the job for them in response to a Daubert motion to exclude faulty expert testimony.

If we are going to trust, and force, jurors to undertake the difficult task of identifying faulty expert testimony, we should at least provide them with information that can help them perform this difficult task. At a minimum, that information should include the types of information that we readily provide about fact witnesses, who cannot be paid by attorneys and who are therefore subject to far less control by attorneys. If we are going to allow attorneys to mold the expert testimony that jurors are expected to evaluate, we should not hide the full extent of that manipulation.

This, too, is only a partial solution, because giving jurors more information to help them identify incorrect expert testimony will neither eliminate such testimony nor guarantee that jurors will identify it. Nonetheless, it is both an important step and a rather easy one to implement, because it simply involves application of a set of already well-established principles.

264. Cf. In re Application of the Comm. for the Pres. of the Constitutional Right to Trial by Jury, 151 N.Y.S.2d 1005, 1009 (N.Y. Sup. Ct. 1956) ("[N]o judge or jury knows whether a 'light was red or green,' or whether 'a car was on the wrong side of the road, or how fast it was going.'... [T]hey can but listen to the testimony of witnesses and decide the case on the basis of credibility . . . .") (quoting Justice Peck's radio address on station WMCA).