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How Designation of Expert Witnesses Can Make or Break Privilege

Daniel Barsky – May 1, 2017

Expert witnesses play an essential role in most complex commercial litigation, providing critical testimony to link the testimony of “lay” fact witnesses with causation or liability. For that reason, expert witnesses are a critical part of your trial team necessary to make your case. However, if you use or designate experts improperly, you may accidentally waive privilege and be compelled to disclose critical trial strategy to your opponent.

In cases with complex, lengthy, or detailed factual scenarios, the trier of fact—whether judge or jury—will be bombarded with hours of testimony from numerous fact witnesses testifying about what they witnessed. A lay witness may testify that, while operating a product, she smelled smoke and that the product later erupted in flames. However, because Federal Rule of Evidence 701 generally limits fact witness testimony to what the witness saw, heard, or otherwise directly perceived, that same witness cannot testify why (or why she thinks) the product ignited. A voice—or voices—are needed to link the testimony of the various fact witnesses with the admitted exhibits and thus create a cohesive story of not just *what* happened but *why* it happened (causation) and what to do about it (damages).

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