

## Non-Retained Experts: Leveraging the Opinions of Specialized Eye-Witnesses and Participants

---

THURSDAY, MAY 20, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Escum L. (Trey) Moore, III, Attorney, **Moore & Moore**, Lexington, KY

Erwin J. Shustak, Managing Partner, **Shustak Reynolds & Partners, P.C.**, New York, NY

Caroline B. Smith, Attorney, **Butler Snow LLP**, Ridgeland, MS

---

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

*Sound Quality*

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail [sound@straffordpub.com](mailto:sound@straffordpub.com) immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press \*0 for assistance.

*Viewing Quality*

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

## *Continuing Education Credits*

FOR LIVE EVENT ONLY

---

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

# I. BENEFITS OF NON- RETAINED EXPERTS

# Credibility

- Not a “hired gun”
- Personal knowledge of matter
- Likely little or no testimonial experience

# Economical

- Likely much lower per hour cost
- Due to history, able to efficiently review file

# Available

- Likely local, allowing for productive pre-testimony preparation

# Relevant Rules Regarding Disclosure and Reports



Caroline Baker Smith  
Butler Snow LLP

# Fed. R. Civ. P. 26(a)

- ▶ (a)(2) Disclosure of Expert Testimony.
- ▶ (A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must **disclose** to the other parties the **identity of any witness** it may use at trial to present evidence under **Federal Rule of Evidence 702, 703, or 705**.

# Reports required for “retained” or “specially employed” experts

- ▶ (a)(2)(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a **written report**—prepared and signed by the witness—if the witness is one **retained** or **specially employed** to provide expert testimony in the case **or one whose duties as the party's employee regularly involve giving expert testimony.**

# The Requirements of a Report

The report must contain:

- ▶ (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- ▶ (ii) the facts or data considered by the witness in forming them;
- ▶ (iii) any exhibits that will be used to summarize or support them;
- ▶ (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- ▶ (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- ▶ (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B)

# Requirements for other testifying experts

- ▶ (a)(2)(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:
  - ▶ (i) **the subject matter** on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
  - ▶ (ii) **a summary of the facts and opinions** to which the witness is expected to testify.

# How to determine the requirements for your expert

- ▶ (a)(2)(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a **written report**—prepared and signed by the witness—if the witness is one **retained** or **specially employed** to provide expert testimony in the case **or one whose duties as the party's employee regularly involve giving expert testimony.**

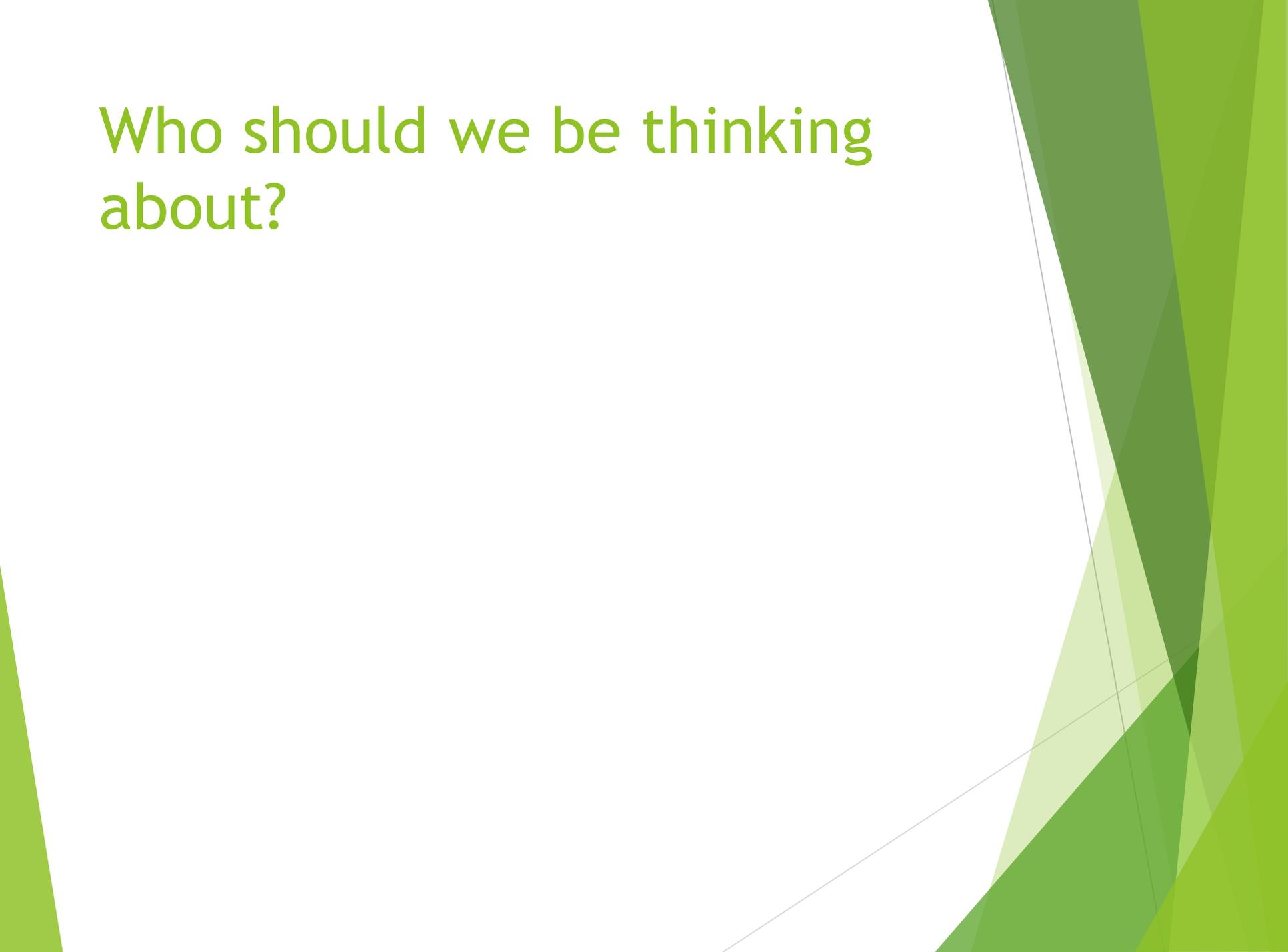
# Depositions may occur at any time

- ▶ (b)(4)(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

# Drafts of disclosures are protected

- ▶ (b)(4)(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report **or disclosure** required under **Rule 26(a)(2)**, regardless of the form in which the draft is recorded.

Who should we be thinking about?

The background of the slide is white with abstract green geometric shapes on the right and bottom edges. These shapes consist of overlapping triangles and polygons in various shades of green, from light lime to dark forest green. A thin, light gray line runs diagonally across the lower right portion of the slide, intersecting the green shapes.

# Fed. R. Evid. 702.

- ▶ A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise [if certain criteria are met].

- ▶ A witness who is not required to provide a report under Rule 26(a)(2)(B) may **both** testify as a **fact witness** and also provide **expert** testimony under Evidence Rule 702, 703, or 705.

# Advisory Committee Note Examples

- ▶ Frequent examples include **physicians** or other **health care professionals** and **employees of a party** who do not regularly provide expert testimony.

Daubert Challenges still apply

The background of the slide is white with abstract green geometric shapes on the right and bottom edges. These shapes consist of overlapping triangles and polygons in various shades of green, from light lime to dark forest green. A thin, light gray line runs diagonally across the lower right portion of the slide.

# Fed. R. Evid. 702.

- ▶ A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
  - ▶ (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
  - ▶ (b) the testimony is based on sufficient facts or data;
  - ▶ (c) the testimony is the product of reliable principles and methods; and
  - ▶ (d) the expert has reliably applied the principles and methods to the facts of the case.



***Non-Retained Experts: Leveraging the  
Opinions of Specialized Eye-Witnesses and  
Participants***

**III. Attorney-Client  
and Work  
Product Privilege  
Protection Issues**

*Erwin J. Shustak, Esq.*

# ***When Do Privilege Issues Arise?***

When the ***non-retained expert's*** communications with the ***client***, who is calling that non-retained expert to testify on his or her behalf, ***and*** the communications **between the client and the non-retained expert** otherwise would be protected by a statutory ***privilege.***

**The Attorney-Client (*or other*)  
Statutory Privilege and Non-  
Retained Experts-  
State Law**

# ***California evidentiary privileges:***

- “**Lawyer-Client** Privilege” (Evid. Code, §§ 950-962)
- “**Lawyer Referral Service-Client** Privilege” (Evid. Code, §§ 965-968)
- “Privilege Not to Testify Against **Spouse**” (Evid. Code, §§ 970-973)
- “Privilege for Confidential **Marital Communications**” (Evid. Code, §§ 980-987)
- “**Physician-Patient** Privilege” (Evid. Code, §§ 990-1007)
- “**Psychotherapist-Patient** Privilege” (Evid. Code, §§ 1010-1027)
- “**Clergy Penitent** Privileges” (Evid. Code, §§ 1030-1034)
- “**Sexual Assault Counselor-Victim** Privilege” (Evid. Code, §§ 1035-1036.2)
- “**Domestic Violence Counselor-Victim Privilege**” (Evid. Code, §§ 1037-1037.8)
- “**Human Trafficking Caseworker-Victim Privilege**” (Evid. Code, §§ 1038-1038.2)

# ***New York evidentiary privileges:***

- **Spouse** (NY CLS CPLR § § 4502)
- **Attorney** (NY CLS CPLR § 4503)
- **Physician, dentist, podiatrist, chiropractor and nurse** (NY CLS CPLR § 4504)
- Confidential communication to **clergy** privileged (NY CLS CPLR § 4505)
- **Psychologist** (NY CLS CPLR § 4507)
- **Social worker** (NY CLS CPLR § 4508)
- **Rape crisis counselor** (NY CLS CPLR § 4510)
-

# ***Why is the existence of a statutory privilege significant?***



**The “Sword  
and Shield”  
Doctrine!**



# ***What is the “Sword and Shield” Doctrine?***

**“The privilege which protects attorney-client communications *may not be used both as a sword and a shield.* Where a party raises a claim which in fairness requires disclosure of the protected communication, *the privilege may be implicitly waived.*”**

***United States v. Ortland* 109 F.3rd 539, 543, (9th Cir. 1997)**

“Every case involving this doctrine [the attorney-client privilege and attorneys testifying at trial] concerns documents that one party is withholding and thus does not intend to introduce. ***Waiver is justified precisely because of the unfairness resulting from a party submitting testimony while simultaneously withholding documents that its adversary might need to contest that testimony.***”

*Moeller v. Taco Bell Corp.* (N.D. Cal. Oct. 6, 2009) Case 4:02-cv-05849, Docket #457

# California:

**“When a party asserting a claim invokes privilege to withhold crucial evidence, the policy favoring full disclosure of relevant evidence conflicts with the policy underlying the privilege.** Courts have resolved this conflict by holding that the proponent of the claim must give up the privilege in order to pursue the claim. Where privileged information goes to the heart of the claim, **fundamental fairness requires that it be disclosed for the litigation to proceed.**”

*Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal. App. 4th 285, 292.

# Federal Rule Civ. Proc. 26

# ***Fed. R. Civ. Pro. 26 §(a)(2)(B)***

## **Witnesses Who Must Provide a Written Report.**

...If the witness is one **retained or specially employed to provide expert testimony** in the case or one whose duties as the party's employee **regularly involve giving expert testimony**....

# ***Fed. R. Civ. Pro. 26(b)(4)(C)***

**Rules 26(b)(3)(A and (B) protect communications between the party's attorney and any witness required to provide a report [Retained or reporting Expert]....except to the extent the communications:**

# ***Fed. R. Civ. Pro. 26(b)(4)(C)***

- i. Relate to **compensation** for the expert;
- ii. Identify **facts or data** that the party's attorney provided and **the expert considered**; or
- iii. Identify **assumptions** that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

***What about privileges relating to Non-Reporting (i.e. non-retained) Experts?***

*United States v. Sierra Pacific Industries*  
*2011 WL 2119078*

“...the newly amended Rule 26 [2010] explicitly protects communications between a party’s attorney and reporting experts...regardless of the form of the communication. ***But the rule is silent as to communications between a party’s attorney and non-reporting experts.***”

***United States v. Sierra Pacific Industries***  
***2011 WL 2119078***

“Thus, finding that there were certain circumstances under which broad discovery should be allowed into a party attorney’s communications with a non-reporting employee expert witness, the committee refused to protect such communications in all cases....”

***United States v. Sierra Pacific Industries***  
***2011 WL 2119078***

“....It is clear that the amended rule neither created a protection for communications between counsel and non-reporting expert witnesses, nor abrogated any existing protections for such communications.”

***United States v. Sierra Pacific Industries***  
***2011 WL 2119078***

“The court declines to hold that designating an individual as a non-reporting expert witness waives otherwise applicable privileges and protections in all cases....But in this particular factual scenario, the United States **waived its privilege and work product protection by disclosing [2 employees] as expert witnesses.**”

**The Attorney Work Product  
Privilege-**

***How is it different than the  
Attorney-Client Privilege?***

# California Rule-

Ca Code Civ Proc § 2018.030-

a) A **writing** that reflects an attorney's **impressions, conclusions, opinions, or legal research or theories** is not discoverable **under any circumstances.**

# *California Rule-*

Ca Code Civ Proc § 2018.030-

(b) The work product of an attorney, **other than a writing described in subdivision (a),** is not discoverable **unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.**

# ***New York Rule-***

***NY CPLR § 3101-***

**c) The work product of an attorney shall not be obtainable....**

**2.... [T]he court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation**

## ***FRCP 26(b)(3) Trial Preparation: Materials.***

“Ordinarily, ***a party may not discover*** documents and **tangible things** that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(ii) **the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.**

# ***Some examples of cases involving non-retained experts:***

## ***#1- No privilege issues-***

Doctor sues insurance broker for recommending, and selling to him a Sec. 79 “pension plan” funded by expensive insurance. IRS ***and*** state taxing authorities ***deny*** deduction and impose back taxes, penalties, and interest of over \$1 million.

## **#2- Substantial privilege issues-**

Law firm sues former client for substantial, unpaid legal fees and disbursements. Client counterclaims for breach of fiduciary duty and malpractice.

Client identifies **six** lawyers as trial witnesses but **refuses to:**

1. Allow attorneys to be deposed; and
2. Withholds various communications **on grounds of attorney client privilege.**

## ***The issue as framed by Arbitrator:***

“Plaintiff’s position is that by placing six attorneys on the witness list, Defendant waived its right to invoke the attorney-client privilege over the documents related to those attorneys and to asserting the privilege over those attorneys’ testimony. Their argument is Defendant cannot use the attorney-client privilege as a “sword and a shield”. ... Plaintiff argues that because the six attorneys testimony will be about the quantity and quality of the work performed for Defendant, it goes to the heart of the matter and Plaintiff would be at a disadvantage in preparing for trial and cross examination....”

## *The Arbitrator's decision:*

### **Order:**

By informing Counsel it would call six attorneys as witnesses, Defendant impliedly waived their attorney client privilege over the communications with the testifying attorneys and the protection over any documents authored by, received by, or copied to that attorney. This is a limited waiver that applies to testimony given in this Arbitration.

“Either delete those six attorneys, or any of them, as witnesses or produce all requested documents”.

**End (applaud!).**

# IV. NON-RETAINED EXPERTS BECOME RETAINED EXPERTS

# THE KEY: OPINIONS OUTSIDE NON-RETAINED ROLE

## CONSIDER AN EXAMPLE:

- Treating physician opinion regarding:
  - Causation
  - Future pain and suffering
  - Increased likelihood of complications

## Contact Information

Escum L. (Trey) Moore, III  
trey@moorepllc.com

Erwin J. Shustak  
shustak@shufirm.com

Caroline B. Smith  
caroline.smith@butlersnow.com