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Experts for Everything: Arizona Legislature Reforms Admissibility Standards for Expert Opinion Testimony

By Heather E. Barrios

On July 29, 2010, a new piece of legislation becomes effective that changes the standard for admission of expert testimony in both civil and criminal cases filed in Arizona state courts. The Arizona Legislature has enacted A.R.S. § 12-2203, which expressly defines the qualifications required to admit expert testimony. The statute codifies Rule 702 of the Federal Rules of Evidence and the test for reliability laid out in *Daubert v. Merrell Dow Pharmaceuticals*. While this change brings Arizona state court cases in line with established federal law, it drastically departs from Arizona state courts' previous reliance on *Frye*.

A Brief Look Backward

In 1923, the decision by the District of Columbia Circuit Court of Appeals in *Frye v. U.S.*, outlined the first standard for the admissibility of expert testimony. The *Frye* test required that an expert's opinion be based on whether it has "gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

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Extensive Research on Background of Opposing Party's Expert Witnesses Can Yield Significant Results

By Jay P. Rosenthal

The classic way to prepare for the deposition and anticipated cross-examination of an opposing expert witness is to attempt to locate prior testimony where the expert has testified inconsistently with the opinions currently being provided. Although this can be an effective tool for discrediting an expert, often times an experienced expert can differentiate the prior opinions or otherwise mollify the impact of prior testimony that seemingly contradicts opinions in the current litigation.

In today's "virtual" world, conducting a background investigation on an expert witness is a much easier task. A wealth of information is readily available on the Internet, some of which may involve activities of the expert that are non-litigation related. Below are several examples where non-traditional background research produced highly effective cross-examination materials that discredited the opposing party's expert.

1. The Fire Investigator and the Branch Davidians

In a matter involving issues surrounding the origin and cause of a fire, a well-known fire expert was retained

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Discovering Social Networking Sites: Tools to Guide Discovery of Social Media

By Michael R. Fletcher

Social networking sites ("SNS") have taken off in recent years due to the meteoric rise in popularity of two SNS: Facebook and Myspace Inc. SNS are valuable investigative tools for parties and non-parties alike. Individuals on SNS often display personal information on their webpages through: wall posts, comment sections, blogs, or photos. Although this information is available however, it can be cumbersome to gather. And, because the law has not kept pace with issues presented by SNS, discovery of the subject matter can essentially become a "crapshoot." Nevertheless, such information can be extremely beneficial in defending or settling a claim. This article addresses some options to consider when gathering information from SNS.

"Public" Means You Too!

At the beginning of any investigation into an individual's webpage, one must determine if the webpage is "public." A webpage is public if the individual sets the privacy settings to allow *all* other users on that particular SNS to view the webpage. Thus, a public account on an SNS can be viewed by any member of that SNS. A public webpage may give you access to: messages, photos, blogs, wall posts, and an individual's "friends."[1] All these resources could lead to significant evidence regarding an individual's legal claims. Further, no ethical or legal rule prohibits accessing a public webpage's contents. So remember, "public" means you too can access this information. Always begin your SNS investigation by attempting to discover information through public avenues, as it is the most efficient, effective method.

Discovering Information On An Individual's Webpage.

Many people using SNS or other social media are tech-savvy. They are smart enough to set privacy limitations on their webpages, which block access by outside parties seeking to utilize webpages for investigative purposes. Often, privacy settings will restrict an individual's webpage content so that only the individual's friends may view it. If you are thinking of asking your attorney to sidestep that issue by "friending"[2] or having a third party "friend" a claimant -- think again. Gaining access to another party's webpage through dishonest means is an ethical violation.[3] This unfortunately means that to develop worthwhile, useable information from a webpage, counsel must often rely on traditional discovery methods.

1. *Subpoena Duces Tecum*[4]

Recently, a federal court weighed in on what communications may be disclosed pursuant to a Subpoena Duces Tecum. In *Crispin v. Audinger*, 2010 WL2293238 (C.D.Cal.), defendants sent Facebook, Myspace Inc. and Temple (a web based email service) a subpoena requesting any and all communications relating to a copyright issue in their case. Plaintiff sought to keep his private messages, e-mails, wall posts, and comments on his webpage from being disclosed. The Court applied the Stored Communications Act, 18 U.S.C.A. § 2701, to the subpoena request. Under this Act, providers of communication services cannot divulge private communications to certain individuals or entities. All three networking sites were considered providers of communication under the Act.

The Act defines two types of protected communication: 1) Electronic Communication Services -- facilitators of messages between parties; or 2) Remote Communication Services -- storage facilities for

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[1] "Friends" are persons who have requested the webpage holder to accept them as friends, which normally gives them complete access to the individual's webpage.

[2] Verb used to illustrate asking another member of Facebook to be your friend.

[3] Under Ethical Rule 4.1(a), a lawyer may not knowingly make a false statement of material fact or law to a third person. Under E.R. 5.3(c)(1), (2), lawyers are responsible for the conduct of non-lawyers if the lawyer orders the conduct, ratifies the conduct, or has managerial or direct supervisory authority over the person and knows of the conduct but fails to take remedial action. Under E.R. 8.4(c), an attorney may not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. These rules prohibit "friending" a claimant under false pretenses.

[4] Facebook and Myspace Inc. have their own policies regarding subpoenas, which are restrictive and only allow for disclosure of basic information, *i.e.* how many times a party logs into an account. These individual policies should be considered when determining whether to serve a subpoena on Facebook or Myspace Inc.

Avoiding Waiver of One's Right to Appeal from Arbitration Award

By Shana Bereche

In Arizona, cases with a value of up to $65,000 may be certified for arbitration. Clearly this is subject to the limits set by the various counties (with some counties only mandating arbitrations for cases with a value of $1,000 or less). *See generally* A.R.S . § 12-133. Once a case is arbitrated, the final arbitration award must be put in writing, signed by the arbitrator and filed with the court. A.R.S . § 12-133(E). The award is equal to a judgment upon the parties unless reversed upon appeal. A.R.S . § 12-133(E). The filing of the award triggers a party's time to appeal. *Decola v. Freyer*,198 Ariz. 28, 6 P.3d 333 (App. 2000).

Any party who appears and actively participates in good faith at the arbitration hearing may appeal from the arbitration award within 20 days after the filing of the award or 20 days after the date upon which the notice of decision becomes an award under Rule 76(b), whichever occurs first. A.R.S. § 12-133(H); Rule 77(a). As a condition of the appeal, the party seeking the appeal must deposit with the county money equal to the total compensation of the arbitrator, but not exceeding ten percent of the amount in controversy. A.R.S. § 12-133(I); Ariz. R. Civ. P. 77(b). This deposit must be refunded to the appellant only if the judgment at trial is at least twenty-three percent greater than the relief granted by the arbitrator. A.R.S. § 12-133(I). Mere filing of a notice of appeal does not automatically annul or vacate an arbitration award. *Suppeland v. Nilz*,128 Ariz. 43, 623 P.2d 832 (App. 1980). This is especially true if a party has waived the right to appeal.

One can waive the right to appeal in three ways: (1) upon prior stipulation among the parties; (2) failure to personally appear and actively participate in the arbitration hearing; or (3) failure to timely file a notice of appeal. Whether a party need appear personally at an arbitration hearing in order to preserve right to appeal, or may leave appearance and participation entirely to counsel, depends on the pertinence of that party's testimony. *Sabori v. Kuhn*, 199 Ariz. 330, 18 P.3d 124 (App. 2001). If there is no liability dispute, a party

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Speaking Engagements

David Cohen will present, "In Your Defense...Ask An Attorney," at Arizona Health Care Association's (AHCA) Annual Conference on August 25, 2010 in Scottsdale, AZ.

Ed Hochuli will present, "How to Sell Your Point of View," at CNA's ALADN Conference on October 13-15, 2010 in Denver, CO.

Eileen GilBride presented at the State Bar of Arizona's 20th Annual CLE By The Sea on July 16-17, 2010 in California. Eileen's presentations were in the areas of expert witnesses and punitive damages as well as new cases/new legislation.

Russell Yurk presented at two State Bar of Arizona CLE seminars. Russell presented, "The Ethics Cafe: A Quarterly Ethics Update," on June 16, 2010 and "Ethical Trends Today!" on June 28, 2010.

Don Myles presented, "Avoidance of Bad Faith and Defense Strategies," at Emory University's 16th Annual Litigation Management College on June 13-17, 2010 in Atlanta, GA.

Mark Zukowski presented, "Mediation: An Insider's Guide to Better Mediation Results," at the Arizona Association of Defense Counsel's (AADC) Annual Meeting on May 14, 2010 in Scottsdale, AZ.

Kathy Wieneke presented, "Litigation Holds - To Preserve Or Not To Preserve, That Is The Question," at the Thirteenth Annual Public Practice Legal Seminar on May 6, 2010 in Prescott, AZ.

Steve Leach presented the following: "The Mediation Process," for Sentry Insurance on May 3, 2010 in Stevens Point, WI; "Recent Developments in Employment Law Impacting EPLI Carriers and Their Insureds," at the Professional Lines Attorneys Network (PLAN) seminar on April 29, 2010 in Hartford, CT; "10 Basic Tools for Avoiding Employment Practices Liability," at the Risk and Insurance Management Society's (RIMS) national conference on April 28, 2010 in Boston, MA.

Employment Law Update

By Barry H. Uhrman

Supreme Court Tackles Employment Arbitration Agreements

The United States Supreme Court has issued an important decision for employers that use employment arbitration agreements. In *Rent-A-Center, West, Inc. v. Jackson*, No. 09-497 (June 21, 2010), the Court clarified whether an arbitrator or court should address challenges to the enforceability of an arbitration agreement included as part of an employment contract. Where the employment contract as a whole is challenged, the dispute should be resolved by the arbitrator. Where there has been a challenge directed specifically to the validity of the agreement to arbitrate, however, it is for a court to address, not an arbitrator. Because the employee in *Rent-A-Center* challenged the entire arbitration agreement as unconscionable, the question of enforceability of the agreement to arbitrate needed to be decided by an arbitrator, not the district court.

The opinion, authored by Justice Scalia, referenced the fundamental principles that: (1) "arbitration is a matter of contract" and (2) courts should enforce contracts according to their terms. Based on this ruling, delegation clauses are likely to be attacked by employees seeking to avoid arbitration. Employers should therefore consider revising their arbitration provisions, highlighting the delegation provisions, and ensuring that employees execute proper waiver and acknowledgement forms.

DOL Clarifies FMLA Definition of "In Loco Parentis"

The U.S. Department of Labor ("DOL") recently issued Administrator's Interpretation No. 2010-3, which discusses "*in loco parentis*" as part of the Family and Medical Leave Act's ("FMLA") definition of "son or daughter." The DOL clarified that under the FMLA, an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship.

The FMLA entitles an eligible employee to take up to 12 work weeks of job-protected leave, in relevant part, because of the birth of a son or daughter of the employee and in order to care for such son or daughter; because of the placement of a son or daughter with the employee for adoption or foster care; and to care for a son or daughter with a serious health condition. The FMLA defines a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability."

In loco parentis embodies the two ideas of assuming the parental status and discharging the parental duties. Employees who have no biological or legal relationship with a child may still stand *in loco parentis* to the child and be entitled to FMLA leave. Section 825.122(c)(3) of the FMLA Regulations defines "*in loco parentis*" as including "those with day-to-day responsibilities to care for and financially support a child." According to Administrator's Interpretation No. 2010-3, however, the word "and" should be interpreted to mean "or" in Section 825.122(c)(3). In other words, either day-to-day care or financial support may establish an *in loco parentis* relationship where the employee intends to assume the responsibilities of a parent with regard to a child.

The DOL also acknowledged that an eligible employee who will share equally in parenting responsibilities with a same-sex partner is entitled to leave under the *in loco parentis* regulation. The new interpretation does not apply to the military FMLA leave provisions, however, as they have their own definitions of "son or daughter."

The new federal guidance confirms that employers should make a determination of whether someone stands *in loco parentis* on a case-by-case basis. Employees do not need to establish that they will provide *both* day-to-day care and financial support to be found to stand *in loco parentis* to a child. Rather, employers must look to the specific, day-to-day responsibilities of the person requesting the leave with respect to the child in question.

Public Employer Search is Not Unreasonable Under the Fourth Amendment [*City of Ontario v. Quon*, No. 08-1332 (June 17, 2010)]

In a unanimous decision, the United States Supreme Court recently held that the City of Ontario, California, did not violate the privacy rights of one of its SWAT team officers when it read some of the text messages he sent on City-owned equipment during work hours.

The City of Ontario had provided alphanumeric pagers for employees on its SWAT team and purchased a service contract that allowed a set number of text characters per month. There was no pager policy, but the

City had a general computer usage, internet, and e-mail policy that limited employee use to City business. It also reserved the right to monitor and log all network activity including e-mail and internet use, and the City announced that it intended to treat text messages the same as e-mail. An audit revealed that many of the text messages sent and received on the officer's pager during work hours were not work-related and some were sexually explicit.

In light of "[r]apid changes in the dynamics of communication and information transmission," the Court was reluctant to tackle the issue of whether public employees have a reasonable expectation of privacy in text messages sent on employer-owned equipment under the Fourth Amendment and the standard that applies in making that determination. The Court assumed, without deciding, that the officer did have a reasonable expectation of privacy in his text messages and decided the case on narrower grounds - whether the search was reasonable under the Fourth Amendment.

The Court found that the search was motivated by a legitimate work-related purpose and was not excessively intrusive. In making this determination, the Court pointed to several factors, including:

- The City's warrantless search was conducted for a non-investigatory, work-related purpose or for the investigation of work-related misconduct.
- The City limited its review to two months of transcripts (despite many months of overages) and only reviewed messages sent or received while the officer was on duty.
- The City reviewed text messages sent by using employer-provided equipment, not the employee's personal device.

Even if the officer could assume some level of privacy would inhere in his messages, the Court held that it would not have been reasonable for him to conclude that his messages were immune from scrutiny. The officer was informed his messages were subject to auditing. The Court held that as a law enforcement officer, he should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communication. Under the circumstances, a reasonable employee would be aware that "sound management principles might require the audit of messages to determine whether the pager was being appropriately used."

Announcements

JS&H is pleased to announce that **Tara B. Zoellner** and **Erik J. Stone** have joined the firm as associates.

Josh Snell was elected to the Phoenix Advisory Board of Directors for the Salvation Army.

Jenny Holsman has been appointed President of the Sandra Day O'Connor Inn of Court for 2010-2011. Jenny was also appointed to the Fresh Start Foundation Auxiliary Board.

FLSA Requires Break Time for Nursing Mothers

The Fair Labor Standards Act ("FLSA") now requires employers with 50 or more employees to give nursing mothers break time to express milk. Under the FLSA, employers are required to allow nursing mothers break time to express milk each time the mother has a need to do so. The law does not address timing; the employee is entitled to breaks as needed. Of note, the federal law only extends to the child's first birthday.

The law also now requires employers to provide nursing mothers with a private place, other than a bathroom, to express milk. The place must be shielded from view and free from intrusion by co-workers and the public.

Employers should examine how often they allow nursing mothers to break, the timing of those breaks, and the facilities they provide for nursing mothers to express milk. ◆

Jones, Skelton and Hochuli's Employment Law Practice Group will continue to keep you apprised of all future developments concerning employment law. Please feel free to contact Barry H. Uhrman [(602) 263-7328, buhrman@jshfirm.com] with any questions you may have regarding these important developments.

Initial Response to a Construction Site Accident

By Gary Linder

Our firm handles a large number of lawsuits stemming from construction site accidents each year. Unfortunately, accidents happen, which often result in serious injury or death. Typically, the firm hired to defend the general contactor or subcontractor does not become involved in the investigation of the accident until after a lawsuit is filed, which can be as long as two years following the accident. By that time, memories of the witnesses have faded and other evidence may have been lost. The purpose of this article is to provide some helpful tips regarding steps contractors should take when they are notified of a construction site accident.

As a preliminary note, general contractors and developers should always keep in mind Arizona's non-delegable duty doctrine. Arizona law holds that the general contractor and/or developer have a non-delegable duty to maintain a safe work site. *Lewis v. N.J. Riebe Enter.*, 170 Ariz. 384, 825 P.2d 5 (1992). In other words, if someone is injured on a job site, the developer and/or general contractor may be sued regardless of who or what caused the accident. This non-delegable duty has resulted in most subcontract agreements containing indemnity provisions that obligate subcontractors to defend and indemnify the general contactor in the event an accident occurs that is related to the work of the subcontractor. The bottom line is that construction site accidents often result in a claim being made against the general contractor and any subcontractors remotely involved in events leading up to the accident.

In the event of a catastrophic accident, it would be wise to retain counsel as soon as possible. In smaller accidents, it may not be economical to retain counsel. In large exposure incidents, however, the early retention of counsel serves two major purposes. First, the investigation conducted by your attorney is protected by the attorney-client privilege and the attorney work product privilege. If the investigation is conducted without the involvement of counsel, the investigation is completely discoverable during litigation. The second benefit of retaining counsel to assist in the investigation of an accident is the quality of the investigation. Your attorney will have litigated numerous construction site accidents in the past and will know what information needs to be gathered in order to sufficiently defend your interests in the event a lawsuit is filed.

In situations where counsel is not retained after an accident, you should appoint one person to be in charge of investigating the accident. The assigned individual should be knowledgeable about OSHA regulations. Furthermore, the person investigating the accident needs to have the authority to direct other employees to cooperate with the investigation.

The two most important tasks to be completed after an accident are: (1) photographing the scene, and (2) taking statements from the witnesses. Once an accident has occurred, construction activities must be suspended in order for photographs to be taken. Often, safety experts are retained after a lawsuit is filed. Because the safety experts are rarely able to inspect the accident scene directly after the accident, the experts must rely on the photographs taken by the people investigating the accident. The person investigating the accident needs to be equipped with a good digital camera and needs to know how to properly use that camera so the photographs can actually be used at a later date.

A proper construction accident investigation can result in information being gathered that will help to defend the case. Unfortunately, however, the investigation may also yield documentation and other information that is very damaging. Witness statements are a good example of potentially detrimental evidence. Moreover, all witness statements taken after the accident must be disclosed under Arizona's discovery rules. As a general rule, witness statements are more accurate and honest when they are taken directly after the accident. Witnesses have been known to change their stories as they become aware that a lawsuit has been filed and that claims are being made. It is also important to note that OSHA investigators will often take statements from witnesses at the time of the accident. The statements taken by OSHA are geared toward determining whether OSHA regulations have be violated and if monetary penalties should be assessed. The statements taken by OSHA may focus on what was done wrong as opposed to what was done right.

It is also crucial to preserve any physical evidence involved with the accident. For example, if the event involves someone or something falling through an OSB board (oriented strand board), you will need to save the broken board for later analysis by structural engineers.

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Appellate Highlights

Precision Heavy Haul v. Trail King Industries
AZ Court of Appeals
A party with a liquidated damage claim is entitled to prejudgment interest even where a defendant denies liability or argues the plaintiff was comparatively negligent, so long as the damage amount is undisputed.

Lips v. Scottsdale Healthcare Corporation
AZ Supreme Court
Where a party alleges only economic injury resulting from a third-party's negligent spoliation (damage/loss) of evidence, the court will not recognize a third-party negligent spoliation claim, as tort law does not recognize a duty to another for the purely economic well-being of others.

DeSela v. Prescott Unified School Dist.
AZ Court of Appeals
Notwithstanding Arizona's prohibition on assignment of personal injury claims, a parent may assign to a minor the right to recover medical expenses for the child's injury and thereby toll the statute of limitations for filing suit, so long as the assignment occurs within the limitations period.

Young v. Beck
AZ Court of Appeals
Where parents give a child implied consent to use a vehicle, the "family purpose" doctrine will be construed broadly to hold them liable for their child's negligence, even where the child drives the vehicle in contravention of specific restrictions placed on its use by the parents.

Carol Salica v. Tucson Heart Hospital-Carondelet, L.L.C.
AZ Court of Appeals
Where multiple actors contribute to an injury, a plaintiff must prove only that each defendant's conduct increased the risk of injury or death and was a substantial factor in causing the injury.

Diaz v. Jiffy Lube
AZ Court of Appeals
During a routine oil change, Jiffy Lube had no duty to inspect the customer's tires and warn of dangerous tread wear because it was not within the scope of the contract between the parties and no public policy required it to do so.

Johnson v. State of Arizona
AZ Supreme Court
Arizona Rule of Evidence 407 excludes evidence of "measures" taken "after an event" to prove a party's negligence or culpability "in connection with the event," even where the party took such measures without knowledge of, or for reasons unrelated to, the prior event.

EXPERT OPINION ADMISSIBILITY

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In the 1970's the Arizona Supreme Court adopted Rule 702 of the Arizona Rules of Evidence, which broadly governed the admissibility of expert testimony. Rule 702 states that a witness will qualify as an expert through "knowledge, skill, experience, training, or education." Despite the fact that Rule 702 does not mention "general acceptance," Arizona state courts have continuously held that Rule 702 did not supersede *Frye* and have continued to use the *Frye* test to determine whether an expert can provide opinion testimony.

In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the United States Supreme Court expressly rejected *Frye* as the standard to measure an expert's qualifications. The *Daubert* standard is based on Rule 702 of the Federal Rules of Evidence, which states that a qualified expert witness can testify if: (1) the testimony is based on sufficient facts; (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. In essence, *Daubert* interpreted Rule 702 to require reliability. Until now, the Arizona Supreme Court has expressly refused to apply the *Daubert* standard. *See Logerquist v. McVey*, 196 Ariz. 470, 489, 1 P.3d 113, 132 (2000).

The Future: A.R.S. § 12-2203 and Its Practical Implications

A.R.S. § 12-2203 codifies Rule 702 of the Federal Rules of Evidence and the reliability factors from *Daubert*.[1] There is an argument that the Arizona Legislature has violated the separation of powers doctrine set forth in Article 3 of the Arizona Constitution by enacting a law that is procedural rather than substantive in nature. Quite simply, the legislature can not enact a statute that contradicts the rules of evidence. *Seisinger v. Siebel*, 220 Ariz. 85, 203 P.3d 483, (2009). Because A.R.S. § 12-2203 essentially redefines Rule 702 of the Arizona Rules of Evidence, there is a possibility that it could be overturned as unconstitutional. Of course, there is an equally compelling argument that A.R.S. § 12-2203 merely supplements, rather than completely contradicts, Rule 702. In any event, a constitutional challenge is likely to be made in the near future.

If upheld, A.R.S. § 12-2203 will bring Arizona state court expert qualifications in line with the federal standards. What this means is that in order for a witness to provide expert testimony on a subject, the expert must first qualify as an expert; and second, the basis of his or her opinions must meet heighted requirements of reliability. A party must make this threshold showing to a judge before the expert can testify in front of a jury. Whether a party's expert can satisfy the requirements under the statute will likely be challenged by an opposing party's motion prior to any trial. This will undoubtedly increase the cost of litigation on the front end. In addition to extensive motion practice and "*Daubert*" hearings, practitioners will spend more time researching experts, investigating their qualifications and opinions, preparing for and defending expert depositions, consulting with their own experts, and reviewing materials experts rely upon.

On the other hand, because A.R.S. § 12-2203 subjects an expert's qualifications to heightened evidentiary scrutiny, it will make it more difficult for a party to use an expert to offer opinions that are based on "junk science." This may help to deter the filing of questionable cases and will certainly aid in negotiation and settlement if a party succeeds in disqualifying an opposing expert's testimony. In the end, it is a positive move forward to ensure that any evidence presented to a jury is based on sound principles and fact-based opinions. ◆

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[1] The full text of A.R.S. § 12-2203 reads as follows:

A. In a civil or criminal action, only a qualified witness may offer expert opinion testimony concerning scientific, technical or other specialized knowledge and the testimony is admissible if the Court determines that all of the following apply:

1. The witness is qualified to offer an opinion as an expert on the subject matter based on knowledge, skill, experience, training or education.

2. The opinion will assist the trier of fact in understanding the evidence or determining a fact in issue.

3. The opinion is based on sufficient facts and data.

4. The opinion is the product of reliable principles and methods.

5. The witness reliably applies the principles and methods to the facts of the case.

B. The Court shall consider the following factors, if applicable, in determining whether the expert testimony is admissible pursuant to subsection A:

1. Whether the expert opinion and its basis have been or can be tested.

2. Whether the expert opinion and its basis have been subjected to peer reviewed publications.

3. The known or potential rate of error of the expert opinion and its basis.

4. The degree to which the expert opinion and its basis are generally accepted in the scientific community.

EXPERT WITNESSES continued from Page 1

by the Plaintiffs. His opinions relating to the cause of the fire were diametrically opposed to the Defendants' expert, so the case was going to come down to a "battle of the experts" concerning the cause of this fire.

In conducting their background research, Defendants discovered that the Plaintiffs' expert had acted as an expert witness on behalf of two surviving members of the Branch Davidians sect that was involved in the conflict with the United States government in Waco, Texas in the early 1990s. This conflict resulted in a "standoff" between members of the Branch Davidians and agents of the Bureau of Alcohol, Tobacco and Firearms, who had come to their compound to arrest their leader, David Koresh, on charges of illegal firearms and explosives possession. The well-televised standoff lasted six weeks, after which the compound was raided by federal agents. Several fires broke out at the compound during the raid, and a total of 76 people, including Mr. Koresh, died in the fires. A $675 million wrongful death lawsuit was filed against the United States government claiming that the fires were started by federal agents. The government alleged that the Branch Davidians intentionally set the fires.

The Plaintiffs' expert had been retained by the Branch Davidians in the litigation against the United States. There, the expert testified that no scientific evidence showed the fire was started by members of the Branch Davidians sect. A jury found in favor of the government.

The fact that the Plaintiffs' expert had supported the claims of such a well-publicized insurgent group against the United States government, whose actions allegedly resulted in multiple deaths, including 21 children, presented a daunting hurdle that the expert could not overcome. Counsel for Plaintiffs was not aware of this aspect of the expert's background. The matter was favorably resolved shortly after the expert's deposition.

2. The Webster Hubbell Connection

In this jail suicide litigation, the Plaintiffs claimed that conditions in the jail were substandard and in continuous violation of a court order, contributing to the death of an individual who hanged himself. Plaintiffs utilized an expert witness from a Washington, D.C. "think tank" who opined about the jail conditions, lack of supervision, and alleged non-compliance with the court order. This expert was only involved in these types of cases on behalf of plaintiffs. He compiled statistics about jail conditions and how violations of court orders occur.

In conducting background research on the Plaintiffs' expert, it came to light that his organization had Webster Hubbell as a member of its board of directors. Mr. Hubbell was an Arkansas attorney who worked in the Rose Law Firm in Little Rock with Hillary Clinton. He then joined the Justice Department in Washington, D.C. as Associate Attorney General, the number 3 position, after Bill Clinton was elected President.

Background research on Mr. Hubbell revealed that in December 1994, he pled guilty to federal mail fraud and tax evasion charges in connection with defrauding former clients and law firm partners while at the Rose Law Firm, in excess of $400,000. He served 18 months in federal prison for this crime.

Having someone with Mr. Hubbell's background on the Board of Directors of the expert's employer did not aide in bolstering his credibility. Even through the improper actions were not undertaken by the expert himself, Mr. Hubbell's conduct, especially since it involved cheating the United States government and his own law partners, cast a shadow over the expert's entire organization and made it appear to be out of touch with reality.

The trial resulted in a defense verdict. So much was made of this information that the Judge interceded during cross-examination and stated, "counsel, we understand that this gentleman is affiliated with Mr. Hubbell, please move on." However, it clearly discredited the expert in front of the jury and rendered his opinions ineffective.

3. The Ambien Expert

In a wrongful death litigation involving a truck driver who allegedly took Ambien in a quantity exceeding the prescribed amount or within too few hours of waking, Plaintiffs retained as an expert a forensic laboratory supervisor for police in a Midwestern state. The expert, who did not have any medical training, testified regarding the manner for calculating the peak plasma concentration and half-life of the drug in a person's blood based upon various studies. The expert had been cited in a *New York Times* article about the abuse of Ambien. She had also appeared on several television shows discussing this subject matter.

Post accident testing revealed that the truck driver had a quantity of the drug in his system in a range of nanograms in the teens. Research conducted about the

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messages. The *Crispin* Court held that e-mail and private messages are protected by the Act because they qualified as Electronic Communication Services, and therefore, could not be disclosed pursuant to a subpoena.

The *Crispin* Court could not determine whether the particular wall posts or comments were protected under the Act because the evidentiary record from the magistrate was inadequate. The Court's dicta gives some insight, however, into its view of the issue. It first looked to *Viacom v. YouTube*, 253 F.R.D. 256 (S.D.N.Y.2008), which held that YouTube[5] videos marked "private" are not subject to disclosure because they are considered Remote Communication Services under the Act. It then analogized the videos in *Viacom* to the wall posts and comments on SNS where webpages have established privacy settings, and found they were not distinguishable. Thus, while the Court did not rule on the issue, its stance is clear: Any posts or comments on a webpage with even a minimal privacy setting will be protected under the Act as Remote Communication Services.

A subpoena is the only tool available for non-parties who will not be subject to deposition. In such cases, assuming Arizona state or federal courts follow *Crispin*, you will not likely receive any valuable information from a SNS. If the information sought is critical, attempt to depose the individual. If the value of the information sought is unknown, a subpoena may be helpful if the court agrees with your position. Remember, no case on the issue has been published, and all of the existing case law on the subject has been adjudicated at the federal level. Even those cases provide some insight, however, into how Arizona courts *might* decide these issues. Serving a well-crafted subpoena might be a well-calculated risk under these circumstances.

2. *Requests for Production*

If counsel raises a relevance objection to a request for production of a party's private content on a SNS, it will likely be difficult to refute because it is unlikely that someone would have access to her adversary's private webpage for purposes of establishing the relevance of its contents. *See Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*, 2007 WL 119149 (D.Nev.). In *Mackelprang*, a former employee sued her employer for sexual harassment and emotional distress. Defendants sent an authorization for production to plaintiff, requesting access to *all* of her Myspace content. Plaintiff objected, claiming the information was irrelevant and an invasion of privacy.

Defendants were not aware of the actual content of plaintiff's webpage. They simply argued that the webpage's content was relevant because it may contain discussions illustrating that: 1) plaintiff invited the conduct from her bosses; 2) her emotional state was not troubled during the relevant time period; and 3) she was not suicidal. The Court held that ordering plaintiff to release *all* private messages on her webpage would cast too wide of a net, allowing discovery of irrelevant information. The Court noted, for example, that content of sexual relations outside the workplace might be discovered if defendants' Request for Production was granted, which it said was clearly irrelevant. The Court did find, however, that defendants were entitled to discover information relevant to the alleged emotional distress and mental conditions claimed by plaintiff because she placed them at issue. And it indicated that the proper means of obtaining such information was to serve plaintiff with a properly limited request for production.

Mackelprang suggests that a request for production can be an effective discovery tool if counsel has an indication of what a party's webpage contains and can make the argument that such content is relevant to the case. Any request for production based on such knowledge must be narrowly drawn, however, to cover only relevant content. Casting too wide of a net could leave counsel with nothing. Moreover, the ultimate decision on whether the information is discoverable is left to the judge's discretion, making reliance on requests for production of such information a somewhat risky proposition.

3. *Deposition*

The most effective means to discover an individual's webpage content is to request access to his or her webpage during a deposition. Depositions have the advantage of applying to both parties and non-parties, allowing counsel to cast a wider net with one form of discovery. Counsel is also more likely to receive a candid response during a deposition, as the webpage author won't have 40 days to develop a response, is under oath, and is being recorded.

[5] YouTube is a website that allows users to show their videos to a large audience. Users may also choose to make their videos private for a specific group of people.

Counsel may request the username and password of the deponent and view the deponent's webpage later. Counsel may also ask to view the webpage during the deposition and discuss its contents on the record. The latter allows counsel to question the deponent regarding the documents on his or her webpage, which allows for simultaneous authentication on the record. Counsel may also print the contents of the pages, including photos, and have those materials marked as exhibits to the deposition. Regardless of the method employed, counsel should act fast and be as thorough as possible. Otherwise, one risks that any "negative" evidence will be quickly deleted from the website following the deposition.

During a deposition, the deponent may refuse to answer, or opposing counsel may object to, questions about his or her webpage. Under Arizona law, however, the deponent is likely obligated to answer the question. The information on a deponent's webpage is not attorney-client privileged where the webpage is published to third parties on a daily basis. Further, no other privilege applies. As such, a privilege objection is not valid and will not protect the deponent from having to give a response.

Under Arizona law, questions reasonably calculated to lead to the discovery of admissible evidence are relevant. Questions regarding what is on a deponent's webpage are, therefore, relevant. Inquiring about photos, blogs, messages, wall posts or comments, may lead to evidence directly contradicting a plaintiff's claim, or destroying a witness's credibility. Questions regarding the pages' contents, then, are reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the deponent should respond to questions regarding her webpage.

As the above illustrates, deponents must generally respond to questions eliciting information regarding their webpage. When combined with the fact that the deposition method ensures credibility more aptly than other discovery devices, this makes depositions the most valuable tool in counsel's SNS discovery arsenal. ◆

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generally does not need to be present at the arbitration. *See Lane v. City of Tempe*, 199 Ariz. 370, 18 P.3d 164 (App. 2001), *vacated on different grounds by* 202 Ariz. 306, 44 P.3d 986 (2002). If there is a liability dispute, however, and the party has relevant first-hand testimony to offer on the subject, the party *must* be present for the arbitration hearing (in person, or telephonically with prior approval from the parties and arbitrator), even if the party has previously provided deposition testimony and/or discovery responses regarding the issue. *See Lane, Sabori*, *supra*. If a party does not waive the right to appeal by failure to appear, the party must still timely appeal the arbitrator's award.

A party may only seek a delayed appeal from compulsory arbitration on grounds of excusable neglect. *Decola, supra*. The superior court has discretion to grant an extension of time for a party's appeal from an arbitration award where the party failed to receive notice of the filing of the arbitration award and acted diligently, and so long as there is no showing of prejudice to the opposing party.

Alternatively, a party's premature appeal to superior court from an unfiled arbitration award is not jurisdictionally defective. Rather, the appeal takes effect when the arbitration award is actually filed. *Riendeau v. Wal-Mart Stores, Inc.*, 225 P.3d 597 (App. 2010); *Guinn v. Schweitzer*, 945 P.2d 837 (App. 1997). Similarly, one does not waive the right to appeal by untimely depositing the required bond with the Court. *See Riendeau*.

Failure to timely file a bond was previously considered a jurisdictional defect. *See Varga v. Heburn*, 116 Ariz. 539, 570 P.2d 226 (App. 1977). However, the court in *Riendeau* declined to follow *Varga*, holding that an untimely filing of a bond is not a jurisdictional defect because parties are allowed to perfect an appeal within the time limited by rule of court, and the court is authorized to extend times for all filings.

In sum, once a case is certified for arbitration, it is in a party's best interest to personally appear for and actively participate in the arbitration. Even if liability is admitted, this abundance of caution preserves the party's right to appeal. Further, one must pay close attention to the filing of the notice of decision in order to avoid inexcusable error and waiver. Although the court now has discretion to allow the late deposit of a bond, a party should always make every effort to file the bond simultaneously with the appeal. This will avoid any potential waiver and assure a party's right to appeal. ◆

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Although not always possible, it is important to preserve such evidence whenever practical.

In sum, it is best to find out everything -- good and bad -- directly after the accident occurs, so that a proper evaluation of the exposure created by the accident can be determined. Furthermore, it is important to promptly report claims to your insurance carrier. Depending on the circumstances, your insurance carrier may decide to retain counsel to defend you and retain experts to investigate the accident.

Clearly, the goal should be to avoid construction site accidents. Unfortunately, accidents happen at even the safest construction sites. The quality of the investigation that takes place directly after the accident can have a significant impact on the outcome of claims made against your company. ◆

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Plaintiffs' expert revealed that she had given a presentation at an association of persons in her occupational field setting forth examples of persons arrested in her state with various levels of Ambien in their bloodstream. The information was set forth in a PowerPoint presentation, which was downloaded on the Internet, and showed that persons arrested in the state where she was employed were found to have Ambien levels measuring in the hundreds and even thousands of nanograms of the drug in their bloodstream. Several of these PowerPoint slides were used to question the Plaintiffs' expert witness at deposition.

It was obviously very difficult for the expert to claim Ambien abuse by our client in light of the fact that the blood content of those persons previously analyzed by the expert had levels of the drug far exceeding that of the Defendant driver in this litigation. The litigation ultimately resolved in the range where it had been evaluated.

4. Lessons

It is clear that conducting detailed background research beyond the usual scope of obtaining prior testimony can produce very favorable results. Even in circumstances where the information may not directly involve the expert, important information can be obtained that will become an effective tool for cross-examining and discrediting expert witnesses retained by other parties.◆

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