EXPERT WITNESSES: ETHICAL AND PRACTICAL CONSIDERATIONS

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Demand for the modern expert witness really took off when trial by lay jury governed by rules of evidence replaced "[t]rial by a community of witnesses-cum-jurors" and "specialist jurors" sent out to "investigate" and "report back." . . . . The medical malpractice expert witness appears in recognizable visage in an English case of 1767 and by the end of the eighteenth century the acceptability of expert testimony in litigation was pretty well settled, in the abstract. Since then, the devil has literally been in the detail.

"X-Spurt" Witnesses, by Richard H. Underwood, University of Kentucky College of Law, 1995

I. ETHICAL CONSIDERATIONS


B. SCR 3.130(1.9) would prohibit attorney from testifying as an expert witness against a former client in any "substantially related matter" in which the former client's interests are "materially adverse."

C. Ethical implications related to disclosure of communications between attorneys and testifying experts due to unclear understanding of Kentucky law.

1. Unlike FRCP 26(a)(2)(B)(ii) and FRCP 26(b)(4)((C)(ii), Kentucky Rules of Civil Procedure 26 makes no reference to disclosure, or discovery, of facts or data "considered" by the expert in forming opinions.

2. Newsome By and Through Newsome v. Lowe, 699 S.W.2d 748, 752 (Ky. App. 1985), pre-litigation "consultant" was later named and disclosed as a "testifying" expert. Court of Appeals precluded discovery of pre-litigation communications from the expert based on CR 26.02(4)(B).

3. Alliant Hospitals, Inc. v. Benham, 105 S.W.3d 473, 476-77 (Ky. App. 2003). Letter from attorney to testifying expert while the expert was still a "consultant" and before suit was filed was ruled inadmissible only because of Newsome By and Through Newsome v. Lowe, 699 S.W.2d 748, 752 (Ky. App. 1985). The Alliant decision, however, went on to say:

   Courts have long sought the proper balance between CR 26.02's incorporation of the work-product rule, pursuant to which a lawyer's trial
preparation is shielded from appropriation by his adversary, and its policy of facilitating meaningful cross-examination of expert witnesses (citing Karn v. Ingersoll-Rand Co., 168 F.R.D. 633 (N.D. Ind. 1996). As expert testimony has steadily assumed greater importance in our courts, the trend has been decidedly toward open discovery and disclosure of the materials, including a lawyer's work product, that a testifying expert considers. (citing Gall ex rel. Gall v. Jamison, 44 P.3d 233 (Colo. 2002)). Were we writing on a blank slate, therefore, we would not hesitate to find the letter at issue here admissible.

Id. at 467. (emphasis added) The Karn and Gall cases cited in Alliant, were both decided under a Federal model of CR 26 which explicitly required disclosure, and discovery, of material "considered" by the expert. Karn required disclosure of a medical chronology prepared by the attorney and provided to the expert and the attorney's letter to the expert – both despite the expert testimony that he did not rely on these documents for his opinions. Gall required production of a letter from the plaintiff's attorney in a medical malpractice case discussing (1) deposition testimony the attorney considered important, (2) assessments of how the defendant's conduct fell below the standard of care, and (3) citations to literature the attorney believed important.

4. Hager v. Allstate Ins. Co., No. 2007-CA-002599-MR, 2009 WL 3320938, at *16 (Ky. App. Oct. 16, 2009). This unpublished decision affirmed the Fayette Circuit ruling requiring the disclosure of the engagement letter to plaintiff's expert which was used to refresh the expert's opinion during the expert's deposition. It also affirmed the trial court ruling requiring disclosure of drafts of the Rule 26 disclosures. The decision underscores the wide latitude given to the discretion of the trial court on issues of discovery and admissibility.

D. Ethical Guidelines of Expert Professional Organization

Examples:

1. American Medical Association (AMA). Providing expert opinion/testimony in legal matters is (a) akin to the practice of medicine and (b) subject to peer review.

2. In 1992, the AMA and numerous medical specialty societies participating in the AMA/Specialty Society Medical Liability Project (AMA/SSMLP) filed an amicus curiae brief in the U.S. Supreme Court case, Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 US. 579 (1993). The AMA/SSMLP brief argued that the Federal Rules of Evidence require judges to make a determination that expert
opinion offered by a party is based upon scientific knowledge, as shown by publication in peer-reviewed journals or by other reliable indicators of sound scientific methodologies. Since the Daubert decision, the AMA has tracked court decisions regarding scientific testimony and intervened when appropriate. (Report to American Medical Association Board of Trustees, B of T Report 5-A-98)

3. American Medical Association Ethics Opinion 9.07 – Medical Testimony. When physicians choose to provide expert testimony, they should have recent and substantive experience or knowledge in the area in which they testify, and be committed to evaluating cases objectively and to providing an independent opinion. Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field. If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such. Also, testimony pertinent to a standard of care must consider standards that prevailed at the time the event under review occurred.

E. Substantive Violation of Professional Conflict of Interest

Examples:


   We are of the opinion that members [sic] of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients. They owe their patients more than just medical care for which payment is exacted; there is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary and to attend court when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation. The doctor, of course, owes a duty to conscience to speak the truth; he need, however, speak only at the proper time. Dr. Ezickson's role in inducing Dr. Murtagh's breach of his confidential relationship to his own patient is to be and is condemned. (Emphasis added).

3. Case law precluding *ex parte* communication between plaintiff's physician and defense lawyer, and precluding testimony from such *ex parte* communications.


4. Ohio provides a cause of action for civil damages against any physician who without consent reveals patient information. Hammonds v. Aetna Cas. & Sur. Co., 243 F.Supp. 793 (D.C. Ohio 1965). The physician was a subsequent treating doctor who was cooperating with a malpractice carrier and attorney for a previous doctor in a malpractice case. Hammonds also held that the insurance carrier may also be liable in civil damages for inducing the subsequent doctor to reveal information.

5. Brandt v. Medical Defense Associates, 856 S.W.2d 667 (Mo. 1993). Physician may be liable to patient for breach of fiduciary duty for *ex parte* contacts with counsel defending the physician in medical malpractice claim.

II. KENTUCKY RULES OF EVIDENCE

A. KRE 702. Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise.

1. "Assist the trier of fact" – the test.

2. "Opinion or otherwise" – includes specialized knowledge witnesses as "experts." Robert G. Lawson, The Kentucky Evidence Law Handbook p. 430 (4th Ed. 2003) observes that the Advisory Committee Notes of the Federal Rules drafters also make this distinction:

   An intelligent evaluation of facts is often difficult or impossible without the application of some . . .
specialized knowledge. The most common source of this knowledge is the expert witness . . .

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of . . . principles relevant to the case, leaving the trier of fact to apply them to the facts.

See Fed.R.Evid. 702, Advisory Committee Note.

3. KRE 702 does not require opinion in terms of "reasonable scientific certainty" (i.e., w/i reasonable degree of medical certainty) to be admissible.


4. U.S. v. Johnson, 488 F.3d 690, 697-98 (6th Cir. 2007) (citations omitted). "When a court certifies that a witness is an expert, it lends a note of approval to the witness that inordinately enhances the witness's statute and detracts from the court's neutrality and detachment. Except in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion and counsel should not ask the court to do so."

5. Daubert.


   i. "Reliability and relevance" test replaced the "general acceptance" test.
   ii. Trial court to be "gatekeeper."

Trial court rulings under Daubert are not to be reviewed under a stringent standard of review, but rather are reviewed for abuse of discretion.


Daubert gatekeeper role is not limited to "scientific" testimony but applies equally to all expert testimony where expert is testifying based on technical or other specialized knowledge (i.e., engineers who are not scientists).

e. Kentucky law.

i. KRE 702 incorporates Daubert.

ii. Mitchell v. Commonwealth, 908 S.W.2d 100, 102 (Ky. 1995)

Rejected Frye and adopted Daubert. Also, adopted abuse of discretion standard for review of Daubert rulings by trial court.

iii. Goodyear Tire and Rubber Co. v. Thompson, 11 S.W. 3d. 575, 578 (Ky. 2000).

Would follow Kumho Tire and apply Daubert to all expert testimony.


a) Reliability of expert testimony is a factual determination for the trial judge under KRE 104(a).

b) The offering party has the burden of establishing this requirement.

c) Factual issues under KRE 104(a) are judged against the preponderance of the evidence standard.

f. State law may vary. Examples:

i. North Carolina Rule of Evidence 702 – requires a standard of care expert in medical malpractice action must be (1) currently licensed, and (2) actively involved in clinical practice, or teaching in an accredited medical school, in the same or
similar specialty. Upon motion, a Court may allow exception upon a showing by of extraordinary circumstances and a determination that the ends of justice so require.

ii. Tenn. Code Ann. 29-26-115. Claimant's burden in health care liability action – Expert testimony – Presumption of negligence – Jury instructions. A medical doctor is not competent to testify as expert in a medical malpractice case unless licensed to practice in the state or a contiguous bordering state in relevant profession or specialty, and had practiced this profession or specialty during the year preceding the date that the alleged injury or wrongful act occurred. The court may waive this requirement when it determines that the appropriate witnesses otherwise would not be available.

iii. Caveat: In Legg v. Chopra, 286 F.3d 286 (6th Cir. 2002), the district court granted summary judgment because plaintiff's medical expert witness did not meet the competency requirement of the Tennessee statute. On appeal, the Sixth Circuit rejected the argument that plaintiff should have been given time to obtain another expert.

B. KRE 703. Bases of Opinion Testimony by Experts

1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

2. If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

3. Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference.

a. i.e., Physician experts relying on medical records not in evidence.
b. "Subdivision (a) codifies Buckler v. Commonwealth, 541 S.W.2d 935, 940 (Ky. 1976) with one change. The word "reasonably" is substituted for the word "customarily" in describing the type of information which may be used under the rule. The change is made for two reasons: (1) to further the objective of uniformity with the Federal rules; and (2) to leave no doubt that the propriety of relying on inadmissible data to formulate opinions is to be decided by judges and not solely by the experts of a particular field." Evidence Rules Study Committee, Kentucky Rules of Evidence – Final Draft, p. 69 (Nov. 1989). See Lawson, supra at §6.25[2], p. 461.

c. Expert not Conduit for hearsay.

Trial court must insure that an expert witness is truly testifying as an expert and not merely serving as conduit through for otherwise inadmissible hearsay. U.S. v. Cormier, 468 F.3d 63, 73 (1st Cir. 2006); U.S. v. Lundy, 809 F.2d 392, 395 (7th Cir. 1987); Pelster v. Ray, 987 F.2d 514, 525-527 (8th Cir. 1993).

C. KRE 705. Disclosure of Facts or Data Underlying Expert Opinion. The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

- Codifies case law that hypothetical questions are not mandatory

D. KRE 706. Court Appointed Experts

E. Federal Rules of Evidence 704. Opinion on an Ultimate Issue (i.e., In General – Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.)

**There is no KRE 704**

1. Drafters proposed abandoning the prohibition against expert opinion on ultimate issues, and KRE 704 was enacted by Legislature.

2. Kentucky Supreme Court rejected at Rules.


4. "We now once again depart from the 'ultimate issue' rule and rejoin the majority view on this issue. Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the
requirement of Daubert . . . , (3) the subject matter satisfies the test of relevance set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702." Id. at 891.

III. COMMUNICATIONS AND DRAFT REPORTS – KENTUCKY LAW

A. Attorney-Client privilege does not apply.

A testifying expert "does not fall in the definition of representative of lawyer. In this situation disclosure is contemplated and the privilege is eliminated. A contrary finding would permit a party to exclude relevant evidence. A party ought not be permitted to thwart effective cross-examination of a material witness whom he will call at trial merely by invoking the attorney-client privilege to prohibit pretrial discovery." Weinstein and Berger, 2 Weinstein's Evidence (1982), Paragraph 503(a)(3)[01] subparagraph 3, p. 503-36 (emphasis added) (internal citations and footnotes omitted), quoted in Sanborn v. Com., 892 S.W.2d 542, 549-50 (Ky. 1994).

B. If used as basis of expert's opinion, they are discoverable.

[C]onfidentiality implies that the information will not be used to form the basis of expert testimony at trial; this is because expert testimony must be cross-examinable." Sanborn v. Com., 892 S.W.2d 542, 549-50 (Ky. 1994) (citing KRE 705, and Foster v. Com., 827 S.W.2d 670, 678-679 (Ky. 1991)).

C. If court finds that drafts and/or communications are relevant to credibility and/or impeachment, they are discoverable. Hager v. Allstate Ins. Co., No. 2007-CA-002599-MR, 2009 WL 3320938, at *16 (Ky. App. Oct. 16, 2009).

1. While the expert can be questioned about them, this does NOT mean that they will be admissible as evidence. See Alliant Hospitals, Inc. v. Benham, 105 S.W.3d 473, 476-77 (Ky. App. 2003).

2. KRE 403 balancing test applies.

a. "Primm tells us that a balance must be achieved between the potential impeachment evidence and the right of a litigant to retain an expert witness and not have such a witness burdened to the extent he will refuse to testify. This balance includes weighting the probative value of the desired evidence against the prejudicial and burdensome effects of such a request. Primm, (supra) cautioned against intruding into an expert's personal and professional relationships." Lake Cumberland, LLC v. Dishman, 2006-CA-000136-MR, 2007 WL 1229432 (Ky.
b. "If, after taking the deposition, a party can demonstrate that additional information is necessary to undertake reasonable bias impeachment, it may seek leave of court to take additional discovery." Primm v. Isaac, 127 S.W.3d 630, 639 (Ky. 2004) (emphasis added).

D. However, if expert was originally hired as a consultant, prelitigation consultative evaluations are still protected.

"Simply because Dr. Nathanson became the expert for trial purposes did not alone destroy his protective shield as an evaluation consultant with a privileged status." Newsome By and Through Newsome v. Lowe, 699 S.W.2d 748, 752 (Ky. App. 1985)

E. Decision is within discretion of trial court, and only reversed for abuse of discretion.

IV. COMMUNICATIONS AND DRAFT REPORTS – FEDERAL LAW

A. Federal Rule explicitly protects draft reports and almost all communications between attorney and witness.


1. 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 form in which the draft is recorded.

2. Trial-preparation protection for communications between a party's attorney and expert witness. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a) (2)(B), regardless of the form of the communications, except to the extent that the communications:

a. Relate to compensation for the expert's study or testimony;

b. Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

c. Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.
V. LITIGATION CONSULTANTS – REQUIREMENTS AND PROTECTION

A. Federal Law

1. What is required to establish someone as a litigation consultant?

a. FRCP 26 Work Product Protection Extensions.
   i. (b)(3)(A) – representatives and agents of parties and attorneys.
   ii. (b)(4)(D) – Consulting experts.

   This extension is grounded in the reality "that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial." U.S. v. Nobles, 422 U.S. 225, 238 (1975) (emphasis added).

b. Burden of proof is on the party asserting protection.

   Must make a detailed factual showing that protection exists.


   i. They must be:
      a) Employed by the attorney.
      b) To assist in rendering legal advice.

   ii. There must be a formal agreement.

   iii. Courts often look at whether the consultant is receiving compensation as evidence of the relationship.

   d. A consultant is considered an agent of the ATTORNEY.

2. Protection afforded to litigation consultants.

a. Litigation consultants are specifically protected under FRCP 26(b)(4)(D).
b. Only provides work product protection NOT attorney-client privilege

b. Under the work product protection, only those communications made in anticipation of litigation are protected.

c. Consultant's work product is potentially discoverable.

i. FRCP 26(b)(4)(D)(ii): a party may discover consultant's fact and opinion work product if

   a) Show exceptional circumstances.

   b) Impracticable for the party to obtain facts OR opinions on the same subject by other means.

ii. This is a more difficult standard for FACT work product than discovery of attorney work product under (b)(3)(A).

iii. But it allows for the potential of discovery of OPINION work product which is excluded from discovery under (b)(3)(A).

d. However, it is much more difficult to unintentionally waive the protection (Dublin Eye, 5:11-cv-128-KSF-EBA, Record No. 326).

i. Disclosure, even voluntarily, to a third party is not sufficient to waive.

ii. Must disclose to an adversary or potential adversary.

B. Kentucky Law

1. Essentially the same as federal except for consulting expert evaluations ordered under RULE 35.01.


Requirements to establish litigation consultant:

a. Retained or specifically employed by another party.

b. In anticipation of litigation or preparation for trial.

c. Not expected to be called as a witness at trial.
3. Extent of protection.
   
a. Facts known and opinions held.

b. Acquired or developed in anticipation of litigation.

4. Discoverable if:
   
a. Exceptional circumstances.
      
      Must show exceptional circumstances that make it impracticable to obtain facts or opinions on the same subject by other means.

b. Rule 35.02.
   
   i. If the consulting expert examined the physical or mental condition of a party under a Rule 35.01 Order for Examination, discoverable if requested by party Rule 35.01 issued against or the person examined.

   ii. Must disclose a copy of report including all tests, diagnoses and conclusions.

C. Kentucky courts have "read CR 26(b)(4)(B) as a recognition that a trial is still an adversary proceeding and that, so conceived, fundamental fairness requires that 'discovery' not be used to defeat a litigant by probing for real or apparent weaknesses in his case which may have been revealed in his trial preparation." Morrow v. Stivers, 836 S.W.2d 424, 427-28 (Ky. App. 1992).

D. "The intent and spirit of the rule is to afford the greatest latitude possible in discovery. However, the discovery cannot encroach upon the attorney's work product or the attorney's or other representative's (here consultant's) mental impressions, conclusions, opinions or legal theories concerning the litigation." Newsome By and Through Newsome v. Lowe, 699 S.W.2d 748, 751-52 (Ky. App. 1985), quoted in Brace v. Clark, No. 2012-SC-000021-MR, 2012 WL 4328203, at *5 (Ky. Sept. 20, 2012); see also Alliant Hospitals, Inc. v. Benham, 105 S.W.3d 473, 476-77 (Ky. App. 2003).

VI. EXPERT WITNESS DISCLOSURE DEADLINE

A. Federal Law
   
   1. Failure to disclose and RULE 37(c)'s mandatory exclusion.

      a. Federal Rule of Civil Procedure 37(c) provides that any expert who is not disclosed by the deadlines set by the Rules or the court will be excluded.
 Failure to disclose in a timely manner is equivalent to failure to disclose. Trost v. Trek Bicycle Corp., 162 F.3d 1004, 1008-09 (8th Cir. 1998) (emphasis added) (citation omitted).

b. In the Sixth Circuit – Rule 37(c) has been found to be a mandatory exclusion. Blair v. GEICO General Ins. Co., 917 F.Supp.2d 647, 655 (E.D. Ky. 2013).

Some Circuits do not require mandatory exclusion: "In assessing whether to preclude an expert's report, courts should consider: (1) the party's explanation for the failure to comply with the discovery order; (2) the importance of the testimony of the precluded witness; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance." GlobalRock Networks, Inc. v. MCI Communications Services, Inc., 943 F.Supp.2d 320, 329-30 (N.D.N.Y. 2013) (Second Circuit); see also Disney Enterprises, Inc. v. Kappos, 923 F.Supp.2d 788, 796 (E.D. Va. 2013) (Fourth Circuit).

2. Two exceptions – The party seeking to avoid a Rule 37 sanction has the burden of establishing an exception.

a. Substantial justification.

i. A mere excuse is not sufficient.

ii. Some cases require affidavits or other corroboration (See GlobalRock Networks, Inc. v. MCI Communications Services, Inc., 943 F.Supp.2d 320, 329-30 (N.D.N.Y. 2013)).

iii. Insufficient time between opposing party's deadline is not a justification.

"If [the plaintiff] had a legitimate need to await [the defense expert]'s report before producing the evidence necessary to meet his burden of proof, then his proper course of action would have been to seek an extension of the deadline. Trost v. Trek Bicycle Corp., 162 F.3d 1004, 1008 (8th Cir. 1998) (emphasis added).

b. Harmlessness – must show both:

i. Honest mistake by the party who failed to disclose; and
ii. **Sufficient knowledge** of the opposing party of the identity of the expert and the substance of his or her testimony

iii. What constitutes an honest mistake?

   a) A genuine misinterpretation or misunderstanding of a rule or order.

   b) Deliberate disobedience of a court's deadline is not an honest mistake, regardless of a good reason for failing to comply.

   c) Example: prior to the 2010 amendments to Rule 26(a)(2), failure to disclose a treating physician who was not retained solely for trial could be considered an honest mistake.

   HOWEVER – This is no longer considered an honest mistake. The 2010 amendments to Rule 26(a)(2) make clear that a treating physician is included under the expert disclosure rule by "requiring the disclosure of . . . any expert, whether retained exclusively for trial or not." Blair v. Geico General Insurance Co., 6:11-cv-156-GFVT, Record No. 34, at 5 (E.D. Ky. Dec. 4, 2012).

   d) **Harmlessness is NOT equivalent to LACK OF PREJUDICE:** "Harmlessness, however, is the key under Rule 37, not prejudice." Sommer v. Davis, 317 F.3d 686, 692 (6th Cir. 2003).

3. The fact that exclusion of an expert may be "tantamount to a dismissal" or will result in summary judgment against the party that failed to disclose is not a consideration and does not affect the standard. Blair v. GEICO General Ins. Co., 917 F.Supp.2d 647, 655-59 (E.D. Ky. 2013).

   a. Plaintiffs need to be especially weary of complying with the disclosure deadlines: As the plaintiff, the party "had the burden of proof . . . . He had to produce sufficient competent evidence to make out a *prima facie* case regardless of what evidence [the defendant] might assemble." Trost v. Trek Bicycle Corp., 162 F.3d 1004, 1008 (8th Cir. 1998) (emphasis added).
b. If a dispositive motion has been filed based on the lack of proof due to failure to disclose an expert before seeking to disclose – it can weigh against harmlessness. Id.

4. Rule 37 exclusions will only be reversed on appeal for abuse of discretion, Sommer v. Davis, 317 F.3d 686, 692 (6th Cir. 2003), even where summary judgment results (even though the judgment itself will be reviewed under the normal standard), see Trost, 162 F.3d. at 1008-09.

B. Kentucky Law

Basic premise: "Kentucky courts have also been clear, however, that it is not appropriate for trial courts to use a summary judgment motion for punitive reasons to sanction parties for making untimely expert witness disclosures." Ward v. Housman, 809 S.W.2d 717, 719 (Ky. App. 1991). However, when the motion is based on an actual failure of proof due to a complete lack of expert testimony, and not on a failure to meet a deadline due to an untimely disclosure, summary judgment can be appropriate." Love v. Walker, 2012-SC-000602-DG, 2014 WL 712689, at *5, -- S.W.3d -- (Ky. Feb. 20, 2014).

There is no clear standard on when failing to meet deadline will lead to exclusion, or any exceptions to exclusion. However, below are the considerations Kentucky courts look at in determining whether to exclude.

1. Is there a dispute about whether expert testimony is necessary?
   a. Has the party indicated that he would retain an expert? Has the party requested any extensions based on the need to retain an expert?
   b. Does the cause of action require an expert?
         "There may, of course, be situations in which causation is so apparent that laymen with general knowledge would have no difficulty in recognizing it."
         • Requires an expert unless it is "a res ipsa loquitur case"
iii. Infliction of emotional distress claims: Osborne v. Keeney, 399 S.W.3d 1, 17-18 (Ky. 2012).

"[A] plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment." (footnote omitted)

c. Is it otherwise unreasonable to believe that you don't need expert testimony?

d. If the party has disputed the need for expert testimony, the Court must enter a ruling on this issue then allow sufficient time to disclose.

e. If there is no dispute as to the need for an expert – the court is not required to determine whether one is necessary prior to granting summary judgment for failure to provide expert proof.

However, "summary judgment is not appropriate when entered sua sponte as a sanction because expert witnesses have been identified in an untimely manner." Blankenship v. Collier, 302 S.W.3d 665, 674 (Ky. 2010).


a. This seems to be the main consideration for the courts when determining whether summary judgment can be granted for failure to disclose.

b. "[A] reviewing court must also consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling. In a medical malpractice action, where a sufficient amount of time has expired and the plaintiff has still "failed to introduce evidence sufficient to establish the respective applicable standard of care," then the defendants are entitled to summary judgment as a matter of law." Blankenship v. Collier, 302 S.W.3d 665, 668 (Ky. 2010) (emphasis added)

3. Has there been disclosure of the expert to the other party, even if not by the deadline?

"Dr. Love filed a motion for summary judgment on July 12, 2010, and, on July 23, 2010, the Walkers filed a response to that motion,
as well as a motion to reschedule the trial wherein they asked for an additional sixty days to list their experts. On September 14, 2010, almost sixty days from the date that the Walkers asked for additional time to list their experts, the trial court entered an order granting Dr. Love’s motion for summary judgment. Thus, the Walkers essentially received the additional time that they requested, but they still failed to provide any expert testimony that Dr. Love's performance during or after the surgery did not meet the standard of care." Love v. Walker, 2012-SC-000602-DG, 2014 WL 712689, at *5, -- S.W.3d -- (Ky. Feb. 20, 2014) (emphasis added).

4. If the party moves for DISMISSAL of the action under Ky. CR 41.02(1) based on failure to disclose:

"Considering whether a case should be dismissed for dilatory conduct of counsel, it would be well for our trial courts to consider the Scarborough case and these relevant factors:

1) the extent of the party's personal responsibility;
2) the history of dilatoriness;
3) whether the attorney's conduct was willful and in bad faith;
4) meritoriousness of the claim;
5) prejudice to the other party, and
6) alternative sanctions."

Ward v. Housman, 809 S.W.2d 717, 719 (Ky. App. 1991) (citing Scarborough v. Eubanks, 747 F.2d 871, 875-78 (3rd Cir.1984)).

5. ON APPEAL – Blankenship v. Collier, 302 S.W.3d 665, 668 (Ky. 2010).

a. Determination of whether a sufficient time for discovery (and disclosure of expert) has passed is reviewed for abuse of discretion.

b. Summary judgment ruling itself is reviewed de novo.

C. Ethics Issues in Failure to Disclose

1. Malpractice cases.


Supreme Court overturned verdict of not guilty in legal malpractice claim based on failure to present expert
testimony because trial court allowed ALJ to testify that she would not have changed her decision had the experts testified.


Summary judgment in favor of attorney in legal malpractice case reversed where attorney's failure to file disclosure and subsequent withdrawal from the case led to exclusion of expert which caused the plaintiffs to be "forced to settle" their medical malpractice claim.

2. **Disciplinary proceedings.**

a. Failure to make timely disclosure implicates Ky. SCR 3.130(1.1) and (1.3).
   
i. Competence: "Competent representation requires the legal, knowledge, skill, **thoroughness and preparation** reasonably necessary for the representation."

   ii. Diligence: "A lawyer shall act with reasonable diligence and promptness in representing a client."

b. **Cases.**

   i. **Kentucky Bar Ass'n v. Harris**, 875 S.W.2d 97 (Ky. 1994).

   ii. **Kentucky Bar Ass'n v. Williams**, 188 S.W.3d 437 (Ky. 2006).

### VII. SOME PRACTICAL CONSIDERATIONS FROM PLAINTIFF PERSPECTIVE

A. Selection of Testifying Expert **Hugely** Important, Easily "Mis-underestimated"

B. **Never** Yield Directorship

C. Less May be More

D. **Always** Consider Video of Opposing Experts

E. Geneva Convention vs Hama Rules

F. Beware of/Alert to Experts Who Want To Be Character Witnesses

1. *i.e.*, "competency."

2. KRE 405; see Lawson, Sec. 2.20[5][1].
G. Prostitutes Are Expensive & Lead to Bad Endings

H. **Never** Allow Expert to Tell Jury Who to Believe

Robert G. Lawson, *The Kentucky Evidence Law Handbook* §4.30[4], p. 325 (4th ed. 2003) ("It is clearly impermissible for one witness to testify to a belief that another witness has been truthful (or untruthful) in giving testimony."); *Hall v. Commonwealth*, 862 S.W.2d 321 (Ky. 1993), reversible error in child sex abuse case, to have permitted a psychologist to offer the opinion that the child accuser's statements were accurate and to explain why the psychologist believed such statements were accurate.; *Hellstrom v. Commonwealth*, 825 S.W.2d 612, 614 (Ky. 1992) (testimony which vouched for the truth of another witness "invaded the province of the jury by determining witness credibility ...."); *Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997) ("Generally, a witness may not vouch for the truthfulness of another witness – although the trial court in Stringer was not reversed on this ground because the issue was not properly preserved for appeal."); *Newkirk v. Commonwealth*, 937 S.W.2d 690, 694 (Ky. 1996) ("Where determination of credibility is synonymous with the ultimate fact of guilt or innocence, expert opinion is inadmissible."); *Greenwell v. Boatwright*, 184 F.3d 492 (6th Cir. 1999) (wherein testimony by an expert regarding the accuracy of another witness's statement was held inadmissible in a personal injury and wrongful death suit even though the testimony was intended only to explain the expert's reasons for basing his theory on physical evidence rather than the testimony of the eyewitness – although the testimony at issue was found to be improper, the Sixth Circuit in Greenwell found harmless error since the defense counsel discontinued this line of questioning upon objection by the plaintiffs' counsel.); *Nichols v. American Nat. Ins. Co.*, 154 F.3d 875, 882-884 (8th Cir. 1998) (held reversible error to admit testimony of expert impugning credibility of plaintiff's allegations of sexual harassment - "It is plain error to admit testimony that is a thinly veiled comment on a witness' credibility...and in this case the prejudice was increased because of the use that was made of the testimony in closing argument.") (Emphasis added) (internal quotations omitted).

I. Literature

1. **Always** include in your Expert Interrogatory a request that the expert "identify all titles, authors and publication dates of those texts, articles and publications upon which the expert relies, in whole or in part, in the formation and support of any opinion, or which the expert will make reference to at trial."

2. Find out if your judge will allow bushwhacking.

3. Have a non-bushwhacking agreement with opposing counsel.
J. Remember: Expert Testimony Not Limited to Paid/Testifying Experts

1. KRE 702 – "in the form of opinion or otherwise."

2. Opinions may be expressed by fact witnesses (i.e., treating physicians).

3. Opinions may be expressed by Defendants (i.e., defendant physician/professional).


VIII. SOME PRACTICAL CONSIDERATIONS FROM DEFENDANT PERSPECTIVE

A. Try to retain the expert as soon as possible after notice of the claim. Do not wait to employ experts until plaintiff makes their disclosure.

B. Remember the work product rule.

1. The expert should be retained by counsel not by the company or insurance carrier.

2. Expert must be retained in anticipation of litigation.

3. Prepare an engagement letter for the expert and closely review the expert's letter provided to you.

C. Use the expert to help you evaluate your claim.

Can also employ a separate consulting expert for claim evaluation. If they do not testify, disclosures, communications, and opinions will not be discoverable unless exceptional circumstances are established.

D. Anticipate that everything you give the expert will be produced during discovery.

E. Assume that all draft reports and preliminary opinions will be discoverable. Try to delay expert's report until after defense expert has had time to review plaintiff's expert's deposition. Keep in mind amount of time between disclosure of plaintiff's expert and disclosure of defendant's. Try to get as much time as possible remembering delays for depositions and scheduling.

F. Do not forget to disclose non-retained or "experienced experts."

Does the mechanic, police officer, company employee, or tow truck operator have the required knowledge and experience to offer expert opinions?
G. Keep in mind co-defendant experts and what happens if the defendant or co-defendant settles.

What if plaintiff proposes to settle with one defendant on the condition that that defendant's retained expert does not testify for a co-defendant?

H. Try to determine plaintiff's expert opinion as early as possible in the litigation.

1. What experts are you going to need and what issues are to be addressed?
2. Request a scheduling order (state court v. federal court).
3. File motion for summary judgment to force plaintiff to disclose expert opinion.
4. Do not wait until after plaintiff makes their expert disclosure to start looking for experts.

I. Do you really need to take the plaintiff's expert's deposition?

1. What are you going to learn that you do not already know?
2. Will the deposition give plaintiff's expert the opportunity to fill in holes in his opinion?
3. Will the judge hold the plaintiff's expert to his disclosure?
4. Will taking the deposition disclose weaknesses in plaintiff's theory of the case?
5. What is the ultimate goal of case? (Settle or trial?)
6. If the case is substantial, will not taking the plaintiff's expert's deposition expose defense counsel to criticism should the case go south?

J. Prepare the expert for his/her deposition. Do not assume that just because the expert has experience or knowledge, that the expert understands the litigation process.

K. At trial, do you really need your expert to testify?