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Tales from the Trenches: Expert Witnesses can Make or Break Your Case But are You Getting the Most Out of Yours?

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Tales from the Trenches

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CROSS EXAMINATION

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I. Introduction

Experts can be one of the significant costs of a litigation. Despite this, often times the retention of experts happens well after the case has commenced. Waiting to retain an expert not only reduces their effectiveness, but it also can lead to even greater costs.

The purpose of these materials is to offer an overview of the process of finding, retaining and using experts to enhance results and maximize value — to get what you paid for (or think you paid for).

II. Assessing the Need & Type of Expert Desired

A. What is an Expert?

Federal Rule of Evidence 702 provides that:

> 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.

B. Consulting Expert vs. Testifying Expert

Generally speaking, a consulting expert is someone who is retained to assist an attorney on the technical aspects of a case and can help develop an overall litigation strategy. Consulting experts do not prepare expert reports or form a specific opinion. Materials provided to a consulting expert do not need to be disclosed, at least in the federal court system. See Federal Rule of Civil Procedure 26(b)(4)(D) ("Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.") Because of this, an attorney can share good facts, bad facts or privileged facts with a consulting expert without a significant risk of having to reveal those materials to the other side.

In contrast, a testifying expert is someone who an attorney expects to be called to testify at a deposition or trial. A testifying expert is to review and rely on materials that are necessary to prepare an informed expert report and testimony. Anything considered by a testifying expert in forming an opinion is discoverable. See Federal Rule of Civil Procedure 26(a)(2)(B)(ii).

In an ideal world (the one where the client has an unlimited budget), one could hire both a consulting expert and a testifying expert. The reality is that monetary constraints may make this impractical.

C. Do you Really Need an Expert?

An early strategic issue is whether or not to engage an expert at all. This depends on whether the attorney has sufficient knowledge to understand the subject matter without an expert, whether expert testimony will be allowed, and if it will benefit the presentation of the case or rebuttal of the other side's case. There are situations where this is an easy decision. For example, cases involving professional malpractice, patent infringement claims, errors or omissions in construction projects or cost overruns, all are likely to require expert testimony to meet the elements of proving a case or to explain complex matters. In contrast, a simple breach of contract case where the buyer failed to pay for goods that were delivered may not need an expert at all. Between these two extremes lay most cases, where an attorney has to make a choice.

While assessing the need for an expert, an attorney should consider the following:

1. Does the attorney (as opposed to the case) need an expert to understand the subject matter?

2. Does the case contain issues requiring an explanation or opinion by an expert or could a fact witness sufficiently prove/rebut?

If the answer to both questions is yes, then a testifying expert is likely needed. If the answer to question 1 is yes but the answer to question 2 is no, then no testifying expert is needed, but a consulting expert may be beneficial.

Having determined that an expert is necessary, counsel then needs to determine:

- About what subject(s) will testimony be needed?
- What type of expert does the matter need? (Avoid purple squirrels)[1]

D. Full Employment Act for Experts or How Many Experts Do You Need

Some types of cases will require expert testimony on a variety of interrelated issues, which can mean either multiple experts are needed or one expert will need to be qualified to testify on numerous topics.

For example, design and construction project disputes often involve discrete and isolated issues that can combine and interact to create new and more complex issues that generate various types of recoverable damages. The successful recovery of (or defense against) such damages is unlike many other types of disputes.

[1] It is well known among experts that attorneys typically want an expert that has credentials and experience that only can be found where you find purple squirrels. That is, attorneys want experts that do not exist in the real world.

Difficulties also arise because of the number of contractual obligations with requirements that can often be in conflict on even relatively small design and constructions projects. Examples of the players in a typical project can include:

- Owner
- Developer
- Users
- Financial Backer(s)
- Management Consultants
- Designers
- Contractors
- Regulatory and Licensing Bodies
- Insurers

This type of dispute also can involve a high volume of documents that have significant technical characteristics and complex contractual interactions. These can include

- Design Information
- Management information
  - Budgets
  - Schedules
  - Progress reports
- Business information
  - Pricing
  - Payroll
  - Financial records

Depending on the nature of a particular dispute, litigation on a design and construction project can sometimes become more complex than execution of the original project. For these reasons (among others), experts are often required to assist counsel in evaluating the factual evidence. Multiple experts in several areas of expertise are sometimes required to fully evaluate and/or present a case at trial.

Within the context of project-related disputes, the types of experts often needed during litigation can include:

- Project Managers
- Contract Managers
- Scheduling Specialists
- Cost Specialists
- Engineers
- Accountants

III. Acquisition of an Expert

A. Finding the "One"

Once it has been decided that an expert is to be engaged and the specific expertise needed (rather than the desired purple squirrel) has been determined, the task of locating the required expert(s) begins. This process frequently includes consulting the following potential sources:

1. Attorney Sources
   a) Members of the law firm
   b) Attorneys at other law firms
   c) State or local bar associations
   d) Publications
2. Industry Sources
   a) Experts previously used
   b) Consulting Firms
   c) Experts used in similar cases
   d) Publications
   e) Advice from the client
3. Academic Sources
   a) Local universities or colleges
   b) Authors of papers
4. Other Sources
   a) Litigation Consultants/Consulting Experts
   b) Experts in other related fields

B. Using the Client as an Expert

The client may suggest using one of its employees or consultants as an expert. There are risks in doing so – the principal one being that if the client is designated as a testifying expert, opposing counsel is likely to argue that there has been a waiver of the attorney-client privilege.

In re City of Dickinson, 2019 WL 638555 (Tex. Feb. 15, 2019) - Property insurer opposed a motion for summary judgment by filing an affidavit from its corporate representative who was also a senior claims examiner. The affidavit contained both factual and expert testimony. The City later discovered that drafts of the affidavit and emails about the affidavit were exchanged between the senior claims examiner and counsel. The City moved to compel the emails and all other information "provided to, reviewed by, or prepared by or for" the corporate representative related to his expert testimony. The property insurer claimed that the documents were protected by the attorney-client privilege. The trial court, however, granted the motion to compel. On appeal, the decision was reversed. The Court found that the communications fell within the attorney-client communications and hence retained their privileged nature.

C. Hiring Your Expert

After identifying potential experts, it is critical to interview the expert to discuss both the general issues of the case as well as the expert's background and approach in an un-scripted setting. A consulting expert may only need to be a specialist in one specific area. A testifying witness on the other hand might need to be able to satisfy many requirements of the specific case. The interview will allow the attorney to determine — first hand — the image that the expert presents as well as his or her ability to be convincing. An interview also affords the attorney the opportunity to examine the prospective expert's ability to analyze certain case issues with no prior preparation so as to gain insight into his/her approach to analysis and defense against potential counter-issues. Additionally, the ability of the expert to perform in the selected forum (bench trial, jury trial, or arbitration) can also be examined. One should also consider how a potential expert performs remotely – i.e., via video/Zoom. It is unclear whether and how COVID-19 will continue to impact pre-trial activities that used to always be in-person events (depositions, *Daubert* Hearings) as well as trials themselves. Experts who may have great courtroom presence may do less well over video.

Among the specific issues you should consider:

Expertise

When the dispute is in front of a jury, jury psychology must be considered when determining which expert to hire. This includes a consideration of the factors that allow a jury to accept or reject an expert as credible. If an expert has expertise, the jury will usually view the witness as being credible, but the subjective question of why jurors may believe that the expert is more or less credible than the opposing expert is often a function of two factors -- the juror's unarticulated preference or bias towards a certain expert witness and the expert witness's ability to convince the juror.

An expert witness demonstrates their expertise by offering: (i) experience, (ii) credentials, and (iii) case analysis and related opinions. Courts and tribunals frequently rely heavily upon credentials. Jurors on the other hand often rely more heavily on experience. By the time the expert is testifying, the only expert-controllable factor is analysis of the case and the related expert opinions. There is no ability to improve upon experience or credentials.

Jurors often believe that expertise comes from experience rather than training, degrees or titles. Witnesses who have academic achievements (or whose primary experience has been providing testimony) but who do not have the hands-on experience a juror prefers may not be viewed as having as much expertise as those with such experience.[2]

This does not mean that expert credentials are not important to jurors. They often perceive that people with advanced/professional degrees, titles, licenses, etc. have expertise because of the belief that simply obtaining credentials usually required some level of expertise.

[2] British attorneys and judges believe that experts are selected in the USA only by how often they have testified.

The potential expert's familiarity (or lack of familiarity) with the litigation process is also an important factor to consider. An individual who has previously served as an expert will have a working understanding of the litigation process and what a litigation work environment is like. Working with an expert who has never testified before is more time consuming than working with one who knows the ropes. One has to be prepared to explain the litigation process generally and spend additional time on preparation efforts for testimony (deposition and trial).

Trustworthiness

Jurors consider trustworthiness to be a major factor in witness credibility. If jurors do not believe that an expert witness is being honest and objective, all other factors are generally disregarded by the jury. Jurors are painfully aware of the hostile nature of litigation and expect an expert to offer testimony generally supportive of their client. Therefore, any hint of a lack of objectivity (and most assuredly any dishonesty) will destroy an expert's credibility (among other consequences). Generally speaking, an honest witness seems honest and a smooth presentation of testimony cannot cure apparent dishonesty.

The level of trust in an expert's testimony is also colored by the expert's analysis, preparation, and thoroughness of consideration of the issues. This is what most often raises or lowers the number of questions that may exist in the minds of a jury member regarding expert testimony. True dishonesty is addressed by the courts in the form of perjury while the appearance of dishonesty is addressed in the minds of the jurors and demonstrated by the jury's decision.

Presentation of Evidence

An expert — even one with courtroom experience — may or may not be an expert in courtroom presentations. While the overall case-presentation strategy is the attorney's responsibility, a strong expert presentation requires a strong analysis organized into an interesting and entertaining presentation.

Whatever choreography is required, the expert often needs to present dry information in a manner that is comfortable for the expert and enlightening for the trier-of-fact. This includes — if possible — getting down from the stand and close to the presentation media in order to break up the tedium of testimony. Additionally, the ability of experts to speak extemporaneously about their opinions will also greatly enhance the expert's credibility.

While the use of graphics and other aids can turn the expert into a teacher, the presentation should never become one that makes the jurors feel as though they are being treated like students. The practiced use of demonstrative evidence can help achieve this goal. Complex graphics, however, can i) confuse the jurors (or judge), ii) require the expert to talk to the chart rather than the audience, and iii) cause the expert to talk 'down' to the jury. Graphics this complex should be avoided at all costs.

The Expert as Salesman

An effective expert is one who enjoys selling. Although the term "salesman" has negative connotations, it must be understood that even the best product must be sold. For example, even the Rolls-Royce salesman must be very convincing, because a potential customer must be convinced to spend a huge sum of money for a car — even though it is arguably the best car in the world.

An expert must be able to sell his/her analysis and opinions on a technical subject while maintaining the objectivity required by the trier-of-fact. In other words, the expert is selling an opinion to the trier-of-fact. Unlike the typical car salesman, however, the expert actually needs to know how the car was designed, procured and built.

Such an expert could be described as someone that is an accomplished car designer, mechanic and also an experienced salesman.

Finally, the ability to not laugh at particularly stupid questions is also beneficial. Making the jury or trier-of-fact believe that you do not respect opposing counsel could completely destroy your credibility.

Due Diligence

In this day and age, one has to be prepared to do a deep dive on everything that an expert has ever said or done. In addition to the standard inquiries (past opinions, past testimony, articles written, speeches given etc.), an attorney needs to recognize that comments/statements on social media also need to be investigated. The advent of cell phones and social media mean that a potential expert's tweets, blog comments, Facebook posts, LinkedIn profile and comments at various symposiums are fodder for impeachment/cross-examination.

It is also is important to understand the past work that your expert has done and what confidentiality obligations he/she may be under.

D. Conflict Check

Before formally retaining an expert, it is easy to overlook the necessity of running a conflict check on your expert and his/her firm. In addition, one should ask an expert whether he/she or their firm has ever given contradictory testimony and whether the expert was previously employed by or testified on behalf of the opposing counsel or opposing party.

E. Formal Retention of Your Expert

You will want to have a formal engagement letter with your expert. The letter should include:

- Whether you are hiring the individual as a testifying or consulting expert
- That the expert will be paid regardless of the opinion rendered
- The expert's in-court vs. out of court rate
- Will the expert do all of the work himself/herself or will he/she employ others?
- The expert or his/her firm won't accept employment adverse to the client or would conflict with client's interests in the matter

- Outline the confidentiality rules applicable to the expert and that documents should be returned or destroyed at the end of the matter
- Outline how you want to communicate with the expert (i.e., only by phone, emails for scheduling purposes only etc.)

IV. How to Deploy Your Expert

A. Before Litigation Happens

Perhaps one of the most effective uses of an expert would be to mitigate disputes before they rise to litigation. There are a variety of ways in which experts can be used to sidestep litigation and to mitigate claims. When a contentious situation arises on a project, obtaining both legal and expert advice on a path forward can often prevent movement towards litigation.

For example, when a dispute on an on-going project involves an issue (changes, delays, cost overruns) counsel and/or an expert could be called in to assist with negotiations. The expert's objective outside review of the facts and counsel's assistance with assessing the legal position is beneficial because a party can perceive a claim as being either unfounded or overpriced, when — to counsel and an expert — it is neither. Outside assistance can sometimes help resolve these incremental disputes before they rise to the level of litigation.

Early retention of counsel and experts is recommended when quick settlement is desired and targeted. Counsel and experts can (as noted above) provide significant assistance in evaluating the dispute and helping to plan a more effective course of action. This would include an analysis of the strengths and weaknesses of the parties' positions, the litigation risks, and potential negotiating positions. Experts can provide valuable assistance to counsel in assessing the business risks as well as determining the most appropriate course of action.

B. Developing Case Strategy

If the consulting expert has significant experience in both the real world as well as litigation, he/she can greatly enhance the development of the legal strategy of the case. Consulting experts can:

- Explain and/or Confirm Industry Methods
  - Management
  - Cost Control
  - Schedule management
- Evaluate Business Practices
  - Assessment of Strengths and Weaknesses
  - Evaluate assertions made by the plaintiff and defendant
- Perform Preliminary Analyses
  - Preliminary evaluation of case issues
  - Perform What-If Analyses

Early engagement of a consulting expert can give counsel assistance with evaluating options related to the dispute and in evaluating the possible outcomes of various technical analyses. This can include assisting counsel in developing a risk assessment and cost estimate associated with the litigation. This often involves tasks such as:

- Understanding the type of documents
  - Quality
  - Quantity
  - Computer Readability
- Evaluate analytical requirements
  - Evidentiary value
  - Discovery Requirements
  - Method of analysis
- Evaluate business records
  - Project Reports
  - Corporate financial records

Industry publications sometimes contain information applicable to the case or that can be used to discredit opposing experts. Additionally, certain information supporting the analytical methods used in evaluating damages can sometimes be found in trade journals, books, and published articles. Experts should know where these ancillary sources of information can be found. as well as the relevance to the issues in dispute.

C. Role in Litigation

1. Discovery

One of the most valuable uses of experts is in the discovery. These benefits can include:

- Ensuring that comprehensive discovery requests are being made by ensuring that industry specific language is used.
- Determining completeness of information produced and identifying gaps.
- Translating technical information for non-technical attorneys.

a) Interrogatories/Production Requests

The training and experience of the expert can be of great help in recommending the type(s) of information to be obtained and the best place (or party) from whom to obtain it. This can include assistance by the expert in developing and responding to interrogatories which helps ensure that the names for documents and terms-of-art are used in the proper context.

Expert assistance in developing production requests can help ensure that required documents are obtained, and sometimes can reduce the volume of production by making document requests that are targeted and specific. For example, an expert familiar with a particular party can focus document requests

on the specific documents actually developed by that party to evaluate the issues in dispute.

Additionally, if the expert is participating with case and negotiation strategy, the expert can often prioritize document production to match analysis requirements with a negotiation and litigation schedule. This phased approach can sometimes enhance the possibility of a negotiated settlement before all documents have been produced and all analyses developed.

Finally, prioritization of production can allow a staged review of documents. which can sometimes result in a reduced document volume.

b) Depositions

Experts are often a key element in successful depositions — of other participants. This assistance include:

- Opposing Witnesses
  - discussions with counsel about information to seek in a deposition,
  - suggested lines of questioning,
  - development of specific deposition questions, or
  - advice to counsel based on the dynamics of the answers to previous questions, which usually requires participation by the expert in the deposition.
- Client Witnesses
  - identification of key documents and issues to be addressed,
  - assistance with preparation (with extreme caution so as to not modify a fact witness's testimony).

2. Expert Report & Testimony

The primary role of a testifying expert is that of providing testimony. This takes many forms, including depositions, written reports, and/or trial testimony. The quality of the report and testimony will depend in large part on the information provided to the expert.

Under Federal Rule of Civil Procedure 26(a)(2)(B)(ii) an expert's written report must contain "the facts or data considered by the witness in forming" the opinions to be expressed. The word "considered" should not be confused with the phrase "relied upon."

> *Pertile v. General Motors, LLC, et al*., 2017 WL 3767780 (D. Colo. Aug. 31, 2017) – General Motors refused to produce certain files that it had provided to its employee-expert. GM contended that the files were not pertinent to the expert's opinion. In affirming the magistrate judge's order that the files had to be produced, the court held that the purpose of the expert disclosures were to "provide an adversary with sufficient

information to engage in meaningful cross-examination" of an opposing expert.

a) Documents

As a result of the proliferation of email, most document productions now contain thousands, if not tens of thousands of emails or text messages in addition to traditional documents (financial reports, word documents, PowerPoints etc.). A balance needs to be struck between having a testifying expert review every single document produced in the matter and only providing the expert limited access to a few cherry-picked documents.

Obviously, a problematic situation can arise when an expert only considers information selected (cherry picked) by counsel. If cross-examination reveals that information made available to the expert was limited, it can undermine the expert's credibility. On the other hand, few clients will pay for both a team of attorneys to review voluminous document productions as well as an expert.

It is recommended that the expert (and his/her staff) be involved in identifying and selecting the documents that they want to review. Counsel should repeatedly follow-up with an expert to ask if there are other documents/ information that the expert would like to see.

b) The Expert Report

(i) <u>What is in the report</u>

The starting point for the expert report should be making sure that it includes all of the information required by the state or federal procedural rules. Federal Rule of Civil Procedure 26(a)(2)(B) contains specific requirements for 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 report must contain:

a. a complete statement of all opinions the witness will express and the basis and reasons for them;
b. the facts or data considered by the witness in forming them;
c. any exhibits that will be used to summarize or support them;
d. the witness's qualifications, including a list of all publications authored in the previous 10 years;
e. 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
f. a statement of the compensation to be paid for the study and testimony in the case.

After the required elements, what else goes in the report and how long/short it is should be discussed between counsel and the expert. Some counsel like 100-page opuses, while others want it to be succinct.

(ii) Discuss Deadlines

Make sure that your expert is aware of all critical deadlines applicable to the disclosure of the initial report, rebuttal report and deposition. Better yet, do not agree to any such dates until you have confirmed them with your expert.

Failure to meet court-imposed deadlines can result in the expert report/expert being excluded.

(iii) Attorney's role in drafting the report

The expert should be the author of the report. However, counsel is likely to be heavily involved in the drafting process, in large part because counsel understands the legal tests/issues that the report is meant to address. At the end of the day, however, the expert witness needs to substantially participate in the drafting and be prepared to state that the opinions expressed in the report are those of the expert's.

> *Keystone Manufacturing Co., Inc. v. Jaccard Corp.*, 394 F. Supp. 2d 543 (W.D. N.Y. 2005) – The defendants sought to disqualify plaintiff's expert on the grounds that he did not personally prepare his expert report. The expert, Mr. Deni, signed the report and stated that he was the author. During his deposition, he stated that he did not prepare the report himself, rather that he discussed the report with someone who then prepared the report for him. He also testified that he did not understand the legal standards applicable to the case. In opposing the motion to disqualify, Mr. Deni submitted an declaration that he prepared the report with the assistance of counsel but that he was actively involved, he read it before signing it and the opinions expressed in it were his own. In refusing to disqualify Mr. Deni the court noted that "attorneys are not precluded from assisting expert witnesses in the preparation of their reports so long as the witness remains substantially involved."

(iv) Use care in the words used

One has to strike a balance between hedging (maybe, I suppose) and absolute wording (without a doubt, 100% certainty). Superlatives should be avoided. It is not the expert's job to question the credibility of the other expert or other witnesses. Leave that to counsel.

c) Expert Depositions

Expert depositions are used to examine the credentials of the expert, understand their relationship with the counsel and party that hired them, delve into past testimony or published opinions and lock in the expert on their opinions.

3. Expert Management

On large projects/disputes, there can often be a team of experts, each representing a different discipline. Multiple experts can often have overlapping areas of expertise and testimony. In order to make this process work smoothly and efficiently, an expert can be of great help in organizing and managing the expert team.

An expert familiar with an overview of the analytical requirements and areas of expertise/testimony can help counsel maximize the analysis while minimizing the amount of redundant document review and overlapping areas of analysis and expertise.

D. ADR & Experts

Alternative Dispute Resolution (ADR) has become a frequently used alternative to formal litigation. While the discovery process is generally less formal, there is often an 'expert' pitfall. In an arbitration with three panelists, the panel will typically contain two or more practitioners in the industry in which the dispute sprang into life. As such, the panel is often much more critical and observant of the expert analysis and testimony. Therefore, arbitration can often require more expert involvement than a trial while the client may be expecting less.

V. Conclusion

Experts can be very cost effective in mitigating disputes. The greatest value can be found in early utilization of the experts' reasoned evaluation of the client's position, assessment of negotiation strategies, and development of positions based on sound business knowledge. After assessing need, an expert should be selected based on:

- Expertise
- Trustworthiness
- Ability to present the Evidence
- Ability to 'Sell' the analysis and opinions

Controlled use of experts can shorten litigation and trial, saving expert and litigation costs and reducing the client's internal management impact cost. Knowledgeable and qualified experts help avoid false starts and help promote early action and. if at trial help win the case. Effective uses of experts include:

- Assistance with mitigating disputes for ongoing projects
- Development of Case Strategy
- Assistance with Discovery
- Document Management
- Expert Management
- Negotiations

ABOUT THE AUTHORS

Daniel V. Murphy

Mr. Murphy is an executive with over 46 years of experience as a professional in the design and construction industry. As a Project Control Manager he has been responsible for risk management, cost & schedule control, and commercial management on megaprojects (from design through commissioning); and as a Project Manager he has developed and managed contracts for a wide range of projects. He has provided management services for clients on projects valued at over US$48 billion.

Mr. Murphy has significant experience in forensic analyses associated with claims and disputes. He has participated in, and managed (as the consulting or testifying expert) hundreds of analyses of technical (engineering) issues as well as management issues. He has provided forensic analyses on over US$2.8 billion of disputes for more than US$25 billion of projects.

He has been accepted in the USA and internationally by Courts and Tribunals as an Expert, testifying in mediations, arbitrations (AAA; ICC), and trials (State and Federal). He has been appointed as a Testifying Expert on over 30 matters, and has offered evidence by testimony over 40 times on disputes valued at more than US$1.3 billion for projects valued over US$10 billion.

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Courtney Worcester is a trial attorney in Holland & Knight's Boston office. Ms. Worcester focuses her practice on complex commercial litigation involving corporations, limited liability companies (LLCs), venture capital and private equity firms, and financial institutions and their directors and officers.

Ms. Worcester regularly counsels boards, individual directors and officers on a wide variety of corporate governance matters, including books and records demands, removal or election of directors, board committee investigations and reports. In addition, she represents clients in federal securities and shareholder litigation matters, including federal securities and consumer class actions, stockholder derivative litigations, as well as in disputes between co-founders. Ms. Worcester is also experienced in diverse commercial litigation matters, ranging from contractual disputes to the protection of trade secrets, unfair competition and other business torts.