

SECOND LOOK

Controlling a Local Government's "Expert" Employee

by Pete Haskel, Executive Assistant City Attorney, Dallas, Texas

Cities and other local government organizations (LGOs) are blessed with many employees who are experts in their fields. These valued employees can (and sometimes do) qualify as expert witnesses under Federal Rule of Evidence 702 and state equivalents. The also often serve as consulting experts in anticipation of and during litigation to which their LGO employer is a party. However these valuable employees[1] can also present problems for government litigators. There are many contexts in which such problems might arise, but here are three:

1. A litigation party's lawyer wants to use to use the expert employee as an expert witness in an action to which the LGO is not a party (but may be a potential party or may have an interest in the outcome).
2. The government is not a party to litigation and the employee wants to "moonlight" for one of the parties as a consulting or testifying expert in the same field as the employee's government work.
3. The government is a party to litigation, has not designated the employee as an expert but opposing counsel (or maybe even another party on the same side of the "v") wants to depose or call as a trial or hearing witness the employee and elicit the employee's expert opinions.

Here are some considerations for addressing such problems – but no simple solutions.

Experts Unaffiliated with a Party Cannot be Involuntarily Subpoenaed. Federal Rule of Civil Procedure 45 provides in relevant part:

> To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
>
> (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

Fed. R. Civ. P. 45(d)(3)(B).

Several states have similar rules or judicial doctrines – often with exceptions for compelling need or similar situations. *See generally,* Annot., *Right of independent expert to refuse to testify as to expert opinion*, 50 A.L.R.4th 680 (Originally published in 1986) (viewed on WestlawNext, May 14, 2015). However, does an LGO have standing under Rule 45 and state law counterparts to move to quash a subpoena directed at an employee for expert testimony? Rule 45 motions should work if the employee does not wish to testify under subpoena – but what if the employee wants to testify? Perhaps the motion belongs exclusively to the employee? I have found not cases on point. But the LGO could probably make the employee use vacation time and, unless the employee were an "always on duty" peace officer or the like, perhaps ask the employee to emphasize that the witness was not speaking for the government.[2] Could the LGO seek protection from the court such as a finding, jury instruction, or other measure to the effect that the employee's opinion was the employee's alone and not necessarily the official view of the LGO? This might insulate the LGO from later use of the testimony as a statement of an employee within the scope of employment. *See* Fed. R. Evid. 801(d)(2)(D). But I have never heard of a court granting such relief for the benefit of a non-party. Perhaps the most effective approach would be to suggest to the attorney for the party against which the employee would be testifying that cross-examination questions that emphasized that the witness was not representing the position of the LGO would weaken the impact of the witness' opinion.

Personnel Rules on Moonlighting and First Amendment. LGO's usually have broad latitude to adopt personnel rules that prohibit or limit off-duty employment – particularly employment related to the employee's government job. Of course state law, collective bargaining agreements, and other local considerations can limit that power. But what additional restrictions on that power of LGOs might flow from the First Amendment as applied to regulating employees' expert testimony on a subject related to their employment? The Supreme Court has stressed

> the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

Garcetti v. Ceballos, 547 U.S. 410, 418 (2006). *See generally*, Annot., *Governmental control of actions or speech of public officers or employees in respect of matters outside the actual performance of their duties*, 163 A.L.R. 1358 (originally published in 1946) (viewed on WestlawNext May 14, 2015)(collecting

Continued on page 23

cases). There is little question that a public employee's fact testimony at a trial (at least at a criminal trial and at least under subpoena) will be protected by the First Amendment if the employee's routine duties do not include testifying. *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014) ("[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes"). Will *Lane* also apply to expert opinion testimony related to but not in the course of a government employee's job? Will it matter whether the employee was compensated as an expert?

Sixteen years before *Lane v. Franks*, the Fifth Circuit sustained a preliminary injunction against enforcing this State of Texas policy on the ground that it discriminated against speech based on content:

> Because of an inherent conflict of interest, none of the funds appropriated by this Act shall be expended in payment of salary, benefits, or expenses of any state employee who is retained as or serves as an expert witness or consultant in litigation against the state, unless the state employee serves in that capacity on behalf of a state agency on a case in which the state agency is in litigation against another state agency.

Appropriations Act 1997-99, art. IX, § 2(5); Tex.Sess.Law Serv. at 6352, *quoted in Hoover v. Morales*, 164 F.3d 221, 223-24 (5th Cir. 1998). Six years later the same court sustained claims of civil rights conspiracy arising from Texas A&M's retaliation against instructors who gave expert testimony for the plaintiffs in a civil rights excessive force case. *Kinney v. Weaver*, 367 F.3d 337, 361 (5th Cir.) (en banc), *cert. denied*, 543 U.S. 872 (2004). However, the Ninth Circuit has established a slightly less pro-employee standard, and apparently would only protect expert testimony given under subpoena if the testimony related to a matter of "public concern," *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1105 (9th Cir. 2011), relying on *Connick v. Myers*, 461 U.S. 138 (1983), and related case law. With that qualification, however, the Ninth Circuit's approach is similar to that of the Fifth Circuit.

I suspect that *Lane v. Franks* will not weaken the First Amendment protections granted by such decisions to truthful opinion testimony by local government employees, even if the testimony relates to the same subject for which the LGO employs them. However, "false statements knowingly or recklessly made" may not be entitled to protection. *Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563, 574 (1968) – if the LGO or a maligned supervisor can prove "malice"

State and Local Ethics, Conflicts and Unlawful Gratuity Standards. However, if an LGO were careful to avoid content-based prohibitions, it might be permissible to bar an employee from receiving compensation for expert testimony, or to enter into a contract with the party soliciting the employee's testimony, depending on the precise terms of applicable laws and rules on conflict of interests and unlawful gratuities. *Cf.*, *In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 737 F. Supp. 399 (E.D. Mich. 1989) (denying on ripeness and standing grounds motions of airline and aircraft manufacturer for judicial declaration that former branch chief of aircraft systems in FAA and FAA employee involved in certification of aircraft could testify as expert witnesses without violating Ethics in Government Act). For example, it might be impermissible for a building inspector to enter into a contract with a developer on whose projects the inspector often works, or to accept payment for testimony closely related to the employee's work. Elimination of the profit incentive may or may not reduce the employee's interest in testifying – but enforcement must not be aimed primarily (or perhaps at all) at this result.

The Federal "Housekeeping" Rules Approach. Nevertheless, several federal agencies attempt to restrict employee testimony by adopting regulations under the purported authority of the so-called federal "housekeeping" statute, which generally empowers departmental secretaries to control agency records and employees. 5 U.S.C. § 301.[3] However, at least since a 1958 amendment added the last sentence to section 301, courts have often (perhaps usually) rejected broad federal agency assertions that regulations adopted under the statute can validly allow an agency head to refuse to make department employees available to testify under a valid subpoena in litigation to which the United States is not a party. *See, e.g., Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 777 (9th Cir. 1994) (with annotated explanation of legislative history); Federal Rules of Evidence, *Official Information–The Housekeeping Act*, 26A Fed. Prac. & Proc. Evid. § 5682 (1st ed.), viewed on WestlawNext May 14, 2015) (thorough discussion of § 301 history and application).

Consistent with the idea that expert opinion testimony cannot usually be compelled, some federal agencies persist in resisting subpoenas for their employees' expert testimony in cases where the United States is not a party. For example, the SEC General Counsel has the purported power to limit "non-expert, non-privileged, factual ... testimony" by SEC employees, in such cases, but not to authorize employees' expert testimony. 17 C.F.R. § 200.735-3(b)(7)(ii), (iii). I have not found an opinion invalidating that approach.

Litigation Where Government Employer is a Party. What discovery rule or likely protective order might prevent the following scenario: The opposing party discovers the identities of the key city employees who might have expertise on a subject relevant to litigation, via interrogatories, depositions, or even pre-litigation open records requests. The opponent then deposes each of those employees looking for someone who disagrees with the LGO's position on any key issue or who has a low opinion of the LGO's designated expert's expertise. The opponent will run no appreciable risk in eliciting answers favorable to the LGO –the LGO would be unlikely to find any way to get those statements in evidence except perhaps under the rule of optional completeness if the opposition were to introduce only portions of a witness' deposition. *See* Fed. R. Evid. 106. Any jurors would expect LGO employees to

Continued on page 38

Federal Cont'd from page 38

chicken-cage-standards-stalls (last updated Jan. 5, 2015, 2:39 PM).
24. *See e.g.* Ass'n des Éleveurs de Canards v. Harris, 729 F.3d 937, 2013 U.S. App. LEXIS 18154, 2013 WL 4615131 (9th Cir. 2013) (affirming the denial of an injunction to prevent the enforcement of a California statute that forbids the sale of products resulting from force fed birds in the state, finding no Commerce Clause violation).
25. *See generally*, Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L. Rev. (2013); http://digitalcommons.law.lsu.edu/lalrev/vol73/iss4/5.
26. Denning, *supra*, note XXV. ML

Listserv Cont'd from page 29

threatened with physical harm.
I receive 1.2 million e-mails every day and have time to answer four of them.
I answer lots of questions from people in my doorway who wonder if I have a minute and then leave an hour later.
I counsel and console.
I reprimand and admonish.
I advise (and get ignored).
I advise again (and get ignored again).
I try to convince co-workers that I truly don't remember anything about divorce law.
I hand out a lot of phone numbers for lawyers that do divorces.
I get ignored some more.
I pick my battles and refuse to be ignored when it really matters.
I protect my client's representatives to the extent they are watching out for its best interests.
I protect my faceless client like a fat kid covers the last piece of cake.

Okay. But Why?

sigh If I could definitively answer that question, I could save all of us a lot of money in the therapist's office and at the liquor store. I suppose, if I'm completely honest with myself, I like being part of something as critically important as local government. We're never going to be wealthy lawyers by the world's standards and most of us are never going to be legendary legal gods, two things that, I sheepishly confess, bothered me the first few years of my municipal career. I guess it's true, though, that with age comes wisdom and I have left those concerns further and further behind me as I've become more and more aware of the direct impact local government has on the quality of life for the people around me. (It also could be that with age comes laziness and I just don't feel like expending the energy to worry anymore. You'll have that.)

I have to say, though, that my "why" recently has become clearer. When I began writing this article, things were rolling along as usual: too much to do and not enough time to do it, but it all was general, garden-variety municipal work. And then, in a moment, life changed and work stopped and attention shifted to matters larger and more intense than I could have ever imagined.

The details of my Moment aren't important because, for each of us, there has been or will be a Moment that defines our "why." A Moment may be the result of a natural disaster ravaging your city or a school shooting or a bad decision or a political scandal or one of the billion other things completely outside of the individual, direct control of a city attorney. Trust me: the genesis doesn't matter when you define your "why." Nothing matters as you realize that your presence as legal counsel for your city right then, in that Moment, matters more than anything else you've done in your career and instinctively you know that it will greatly matter in all of the hours and days and weeks and months to follow. Your presence, your help, your mind, your experience will make a difference for this client and its people and you suddenly realize why you do this. It's because protecting this faceless client is as much a part of who you are as the color of your eyes and you know that this is why you were put on this spinning terrarium – to protect and serve and defend in this Moment and in all the little "m" moments to follow.

You were put here to pick up these pieces and help your city put itself back together. You are here to handle the Moment, counsel shaken employees who are suddenly willing to listen, and send them back to the comfort of their daily work with the confidence and knowledge that they've got it now.

You do it because that's who you are. It's who you were made to be.

And after everyone else has moved past the Moment, you will continue to deal with it and its consequences and its mind-numbing minutiae that nobody else will ever see. But you see it, you live it, you breathe it, you lose sleep because of it ... because you're still there, camped out in the Moment long after it's over.

That's just what you do.

In fact, you've been in the damn Moment armpit deep from the time it happened and you know you'll stay in it until the file is finally closed and stored away. You'll do that for the employees and the electeds and the department heads so they can return to the important work they do for your client and for its citizens. You'll handle the Moment and still manage the zillion other issues that won't stop coming just because you've had your Moment. You'll keep going because your city and its operation under the unique laws that govern its ultimate success or failure is in your hands. You'll stay in that Moment for as long as it takes because municipal law found you and you couldn't let it go and now it's who you are. It's what you proudly do even if it seems nobody understands what it is or why you do it.

Hear me, though: I understand. I know what it is you do and I get why you do it.

And I'm floating on this timber with you. ML

Second Look Cont'd from page 23

support the LGO's position – giving little weight to such evidence even if they heard it. By contrast, any opinion adverse to the LGO from the LGO's own expert employee would be pure gold for the opponent. Designating all your expert employees as consulting experts in an attempt to insulate their opinions from discovery will probably not work even if done in good faith because the limits on discovery about consulting experts usually applies only to consultants specially retained for the litigation, not to general employees. *See* Notes of Advisory Committee on Rules—1970 Amendment, Fed. R. Civ. P. 26 (discussing Rule 26(b)(4)(B) [now 26(b)(4)(D)]).[4] Time and resources permitting, the LGO's lawyer could question each such employee and obtain an affidavit neutralizing the employee's usefulness as a hostile expert witness if the affidavit were truthful. Otherwise, my best suggestion would be to encourage LGO's to hire and train their expert employees carefully so that they hold in common the significant opinions relating to the subject of their work. In some instances the most effective deterrent to such tactics will be that the adverse party will be equally or more vulnerable to this approach as the LGO.

Conclusion. An LGO has a strong likelihood of success in helping an employee who does not want to testify as

an expert (in a case where the LGO is not a party) quash a subpoena. But an LGO trying to prevent a willing employee from testifying as an expert will face substantial difficulties – particularly if the employee receives a subpoena and does not wish to quash it. Local law and agreements permitting, an LGO's personnel policy or ordinance restricting the right of employees to testify as experts in litigation to which the LGO is not a party could be enforceable if the factors for determining availability relate to the efficiency of government operations and allocation of resources and not on the anticipated content of the testimony. LGO's can almost certainly require the employee who wants to testify as an expert to take vacation time if that requirement were not imposed only when the anticipated testimony could hurt the LGO. But if instead an LGO refused to grant vacation for any testimony, and continued to pay the employee regardless of the nature of the litigation or of the testimony, might the LGO be able to retain greater control of content? I do not know but I doubt it. I think this would be viewed as a wrongful, perhaps criminal, attempt to influence testimony. Keeping the employee on duty might help the LGO prohibit expert compensation to the employee – thereby perhaps weakening the employee's motive to testify. But keeping the testifying employee on duty also weakens the force of the argument that the witness' testimony is not given on behalf of the LGO and therefore should not be admissible as an employee's statement as a hearsay exclusion under evidence rule 801(d)(2)(D. Also, the more that restrictions on an employee's availability relate to whether the testimony will later harm the LGO employer, the more likely that the LGO could face civil rights liability on the theories adopted by the Fifth and Ninth Circuit cases cited above. The LGO might explore the possibility of invoking conflict of interest, other ethics rules, and unlawful gratuity prohibitions, but should be careful to do this, if at all, using carefully considered content-neutral standards. Where the LGO is a party to litigation, it is very difficult to prevent an employee with expertise from being deposed or called as a witness by another party.

Notes

1. Different but often related problems are presented regarding consultants and other contractors used by LGOs. For example, will an LGO's ediscovery vendor testify for adverse parties or testify in a case unrelated to the LGO but generate testimony that might be used to impeach the vendor as a witness for the LGO in later litigation? LGO's probably can draft contracts to avoid some but probably not all such problems. I am not going to discuss contractor issues here. But for both employees and contractors, we should consider that any clauses in contracts or personnel policies that restrict the subject matter or content of their potential expert testimony will be used to oppose their expert qualifications and, if they do testify as experts, to impeach the weight of their expert opinions if the LGO ever tries to use them as testifying experts. ("Q. Isn't it true that your contract prohibits you from testifying to an opinion adverse to the city?"). Also consider that, as with expert employees, any attempt to limit testimony may run into free speech and anti-competition arguments. In addition, what effective enforceable remedy could an LGO have for breach of a contract clause relating to the vendor's expert testimony? Would a court award damages to an LGO based on a vendor's truthful testimony? Finally, what value would any conceivable contract provision have if it could not bind former employees of a vendor – and I strongly doubt that a contract between an LGO and a vendor, even if incorporated into a vendor's employment contract with its experts, could bind the expert to any extent useful to the LGO after the expert left the vendor's employment.
2. The LGO would have to be very careful to avoid even appearing to be trying to tamper with the witness' testimony. I recommend that any attempt to get relief be accomplished only in open court.
3. § 301. Departmental regulations
The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.
4. However, some jurisdictions prohibit one party from calling another party's expert as a witness. *See* e.g., Spino v. John S. Tilley Ladder Co., 448 Pa.Super. 327, 353-54, 671 A.2d 726, 739 (1996), *aff'd*, 548 Pa. 286, 696 A.2d 1169 (1997). **ML**

