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Using a Company Witness as a Subject Matter Expert on a Company's Products

Virginia Rocket Docket Blog

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It is common in commercial litigation for a company to offer an employee as a witness to testify about the design, capabilities and features of the company's products or services. Usually, such a witness testifies as a fact witness offering testimony based on his or her personal knowledge under Fed. R. Evid. 602, rather than as an expert witness offering opinion testimony under Fed. R. Evid. 702.

The line between fact and expert testimony, however, is sometimes difficult to discern, especially when the testimony involves complex technology that is beyond the general knowledge of a lay witness. An employee who is a subject matter expert on a particular topic can easily veer into opinion testimony that is not entirely factual. When that occurs, the party offering the witness can sometimes rely on Fed. R. Evid. 701, which allows opinion testimony by a lay witness where that testimony is "rationally based on the witness's perception" and "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

The strategy of using a knowledgeable company employee to offer such mixed fact and opinion evidence has it limits, however, as shown in a recent decision by district judge Roderick Young in ***Daedalus Blue, LLC v. MicroStrategy Inc.***, Civil Action No. 2:20CV551, 2023 U.S. Dist. LEXIS 145602 (E.D.Va. Aug. 18, 2023).

Daedalus Blue involved a claim that MicroStrategy's software platform infringed the plaintiff's patents. In support of its summary judgment motion, MicroStrategy submitted a declaration from its executive vice president, Cezary Radko, that addressed the design and functionality of its products. Radko had worked at MicroStrategy since 1998, and so had deep personal knowledge of the company's software, and his declaration stated that he was intimately familiar "down to the code level" with the software's functionality.

The plaintiff moved to strike Radko's declaration, and the court referred that motion to a special master to issue a Report and Recommendation. The special master recommended granting the motion to strike, and the district judge adopted that recommendation. Radko's declaration, the court held, contained an opinion-based technical comparison of two MicroStrategy products. Further, the testimony was not admissible under Rule 701 because Radko had not worked in the division that created the products involved in the suit, and so his testimony was not based on his personal knowledge of the products.

Under Fourth Circuit precedent, the line between Rule 701 lay opinion testimony and Rule 702 expert opinion

testimony is primarily marked by the presence or absence of personal knowledge and whether the testimony relies on specialized knowledge that the jury lacks. Radko's analysis, the court held, was not based on his prior work or observation but rather an analysis based on specialized knowledge performed specifically for the litigation.

Going further, the court refused to admit Radko's declaration under Rule 702 because he had not been identified as an expert witness or provided a report in a timely manner. Applying Fed. R. Civ. P. 37(c)(1) and the factors in the Fourth Circuit's decision in *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592 (4th Cir. 2003), the court held that the failure to timely disclose Radko's testimony was neither substantially justified or harmless.

The takeaway for litigants is to remain cautious when relying on company fact witnesses for complex testimony that can be characterized as expert testimony. While there can be some advantage to using experienced employee witnesses to describe how a company's products or services operate, that testimony must be limited to factual testimony based on personal knowledge to avoid exclusion as improper expert testimony. If a party intends to go beyond purely factual testimony with a company witness, the best course is to identify the witness as an expert and provide an expert report disclosing the opinions that the witness intends to give.

The Court's Use of a Technical Special Master

Another interesting aspect to the *Daedalus Blue* decision is that Judge Young appointed a special master with a technical background, Joshua J. Yi, Ph.D., to issue a Report and Recommendation regarding the motion. Though not uncommon in other federal district courts, the use of technical special masters such as Dr. Yi is rare in the EDVA.

In *Daedalus Blue*, the court has appointed Dr. Yi as a special master to address several motions, including claim construction as well as several evidentiary issues. Until recently, Judge Young has adopted all of Dr. Yi's conclusions. In a decision issued September 12, however, Judge Young sustained MicroStrategy's objections to Dr. Yi's Report and Recommendation on the plaintiff's Motion for Summary Judgment. ***Daedalus Blue, LLC v. MicroStrategy Inc.***, Civil Action No. 2:20CV551, 2023 U.S. Dist. LEXIS 161894 (E.D.Va. Sept. 12, 2023). Specifically, Dr. Yi recommended that the court grant the plaintiff's motion for summary judgment on the defendant's defenses of anticipation and indefiniteness. Judge Young rejected these recommendations, finding that there was sufficient evidence to allow those issues to survive summary judgment.

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