

# Chapter 4 Report Writing

## Introduction and Executive Summary

The value of writing a high-quality report cannot be overemphasized. Experts who write superior reports:

- are sought out by attorneys and other clients,
- command premium fees,
- assist attorneys in settling cases,
- clarify the issues for counsel, and
- can use their reports as effective marketing tools.

Experts who make report writing mistakes can adversely affect the value of the cases they are working on. This, in turn, may adversely affect their reputations. Experts should avoid the following mistakes:

- **Mistake:** Allowing internal inconsistencies in one's report, especially where computer-generated standard "boilerplate" language is used in all of one's reports.  
**Solution:** Have all reports specifically checked for internal inconsistencies by an intelligent and careful person before they are finalized and released from the expert's office.
- **Mistake:** Not numbering the report's pages.  
**Solution:** Number the pages in your expert report, preferably in this fashion: 1 of *x*, 2 of *x*, etc.
- **Mistake:** Asking the retaining attorney to call if you can be of more help.  
**Solution:** Omit statements in reports offering counsel further assistance.
- **Mistake:** Making negative comments about forwarded records.  
**Solution:** Call counsel when records arrive in a disorganized fashion. If counsel chooses not to resend the records in an organized fashion, take whatever time you need to organize the records and bill retaining counsel for your time in doing so.

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Alternatively, have a staff member organize the records for you and bill for the staff member's time.

- ***Mistake:*** Making typographical errors.  
***Solution:*** Proofread your report carefully. Afterward, have an intelligent person proof the report to catch any mistakes that you may have missed.
- ***Mistake:*** Writing reports that are based on inadequate testing or measurements.  
***Solution:*** Each and every written expert report should be of such quality that you can easily defend it at deposition and trial.
- ***Mistake:*** Not specifically listing the records reviewed.  
***Solution:*** Have a separate section in your report in which you list all of the documents, records, reports, etc. that you have received and reviewed.
- ***Mistake:*** Writing comments in your report that make you look like an advocate.  
***Solution:*** Avoid superfluous comments in reports that indicate bias. Reports that are filled with *objective* facts and reasoning are the most persuasive.
- ***Mistake:*** Inartfully drafted language.  
***Solution:*** Carefully check your report and give the words contained in the report their common usage. It is also a good idea to have an intelligent person proof the report for typos, internal inconsistencies, and inartfully drafted sentences. Make sure the report accurately reflects your opinions and cannot be easily misconstrued.
- ***Mistake:*** Including exaggerations in the report.  
***Solution:*** Review your report and remove any and all exaggerations.

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- ***Mistake:*** Letting counsel help write your report by sharing a draft report with her.  
***Solution:*** Do not permit counsel to bully you into modifying your expert report. If changes are made (for example, to comment on additional areas, reformat the report, or clarify areas), these should be made transparently through an addendum and not by “ditching” the draft or original report.
- ***Mistake:*** Playing games to avoid admitting that retaining counsel helped write the report.  
***Solution:*** Do not let counsel influence your report. Do not play games to hide the fact that counsel influenced your report. If counsel does influence your report (for example, by suggesting innocent formatting changes or the addition of an executive summary), do not cover this up.
- ***Mistake:*** Using phrases that undercut your opinion.  
***Solution:*** In your reports, avoid using phrases that undercut your opinion.
- ***Mistake:*** Allowing your word processing software to track the changes that you make to your report.  
***Solution:*** Disable the track changes function on your word processor and save your final report as a PDF.
- ***Mistake:*** Basing the report on insufficient data.  
***Solution:*** When you do not have sufficient data or information to provide a report or an opinion to a reasonable degree of certainty, either refuse the assignment or inform counsel that after studying the available evidence you are unable to render an opinion to a reasonable degree of professional certainty.
- ***Mistake:*** Using vague terms in the report.  
***Solution:*** Be as precise as possible in your report.

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- **Mistake:** Writing a report without being asked to by counsel.  
**Solution:** Do not write a report until retaining counsel requests one.
- **Mistake:** Not covering all of the issues retaining counsel asked you to cover.  
**Solution:** Check retaining counsel's cover letter and make sure that all the issues raised are covered in the report.
- **Mistake:** Covering issues not requested by retaining counsel.  
**Solution:** Do not address issues in an expert report that have not been requested by counsel.
- **Mistake:** Including subjective, self-serving characterizations of the investigation or review.  
**Solution:** Omit any self-serving, subjective characterizations in your report. Let the quality of your investigation speak for itself.
- **Mistake:** Using language soliciting additional work.  
**Solution:** Do not put requests soliciting additional work in your expert reports.
- **Mistake:** Listing documents that were not available.  
**Solution:** List in your report only the documents you received and have reviewed. Do not flag for opposing counsel the documents that were unavailable.
- **Mistake:** Not knowing your report cold prior to testifying.  
**Solution:** The expert is well advised to know his expert report cold prior to testifying at deposition or trial.
- **Mistake:** Using informality in the report.  
**Solution:** Leave any and all informal salutations to counsel out of your expert report.

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- ***Mistake:*** Drawing legal conclusions.  
***Solution:*** Do not use legal terms in your report unless you are also an attorney. Many times, legal ideas can be stated in non-legal terms. For example, instead of stating that the defendant doctor committed “malpractice,” state that “No reasonably prudent doctor would have failed to have ordered a CT scan given this patient’s history, signs, and symptoms. The failure to order a CT scan caused the patient to lose a significant chance of being cured.”
- ***Mistake:*** Using pronouns instead of proper names.  
***Solution:*** Avoid using pronouns in expert reports.
- ***Mistake:*** Using the passive voice.  
***Solution:*** Avoid using the passive voice in your reports.
- ***Mistake:*** Failing to format the report with paragraph headings.  
***Solution:*** Format your expert reports with paragraph headings.
- ***Mistake:*** Speculating.  
***Solution:*** Do not speculate in your expert report.
- ***Mistake:*** Using run-on sentences.  
***Solution:*** Review your expert reports to make sure they do not contain run-on sentences. Break run-on sentences into two or more shorter sentences.
- ***Mistake:*** Including disclaimers that are not carefully thought out in the report.  
***Solution:*** Only put those limitations or disclaimers in a report that specifically apply to the case at hand and can be defended.
- ***Mistake:*** Trashing the opposing expert.  
***Solution:*** Effective expert reports use objective data, facts, and figures to support their conclusions regarding other experts’ opinions.

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**MISTAKE: ALLOWING INTERNAL INCONSISTENCIES IN THE REPORT—  
ESPECIALLY WHERE COMPUTER-GENERATED STANDARD “BOILERPLATE”  
LANGUAGE IS USED IN ALL OF YOUR REPORTS**

Expert reports are usually proofread for typographical and grammatical errors. Computer programs can assist in this regard, but they usually will not pick up internal inconsistencies. Internal inconsistencies in expert reports are difficult errors to find. Such mistakes are spotted only by diligent proofing by an intelligent person. The failure to catch an internal inconsistency in a report can undermine the entire report.

**Example 4.1: Report internally inconsistent**

**Q:** You stated on page 14 of your report, “I have personally inspected the trees on the property referred to in this report.” Am I reading that correctly?

**A:** You are.

**Q:** Could you read what you stated on page 7, the last sentence?

**A:** “I did not have an opportunity to view the trees before they were removed.”

**Q:** Can you explain this apparent inconsistency, sir?

**A:** Yes—well...the “I have personally inspected” language is standard language that should have...should not appear here...what probably happened....

**Lesson:** Experts need to diligently proof their reports for any and all internal inconsistencies. Special attention should be paid to standard or boilerplate language that does not apply to the case at hand.

**Solution:** Have all reports specifically checked for internal inconsistencies by an intelligent and careful person before they are finalized and released from your office.

**MISTAKE: NOT NUMBERING THE REPORT’S PAGES**

Expert report pages should be numbered. Numbering will assist both the reader and the expert when referring to the report. As with other minor mistakes, the impact of this mistake is cumulative and can be portrayed to reflect an expert who lacks a concern for details.

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### **Example 4.2: No page numbers in report**

**Q:** Please direct your attention to page 27 of your report and the paragraph that is entitled, “Volunteers, Directors, and Committee Members.” Do you have that in hand?

**A:** I am looking for the page numbers—where are they? I can’t seem to find...

**Q:** Your report contained no page numbers. Was that intentional or was that an oversight?

**A:** I assure you that it was not intentional.

**Q:** Would you like to take a few moments to number the pages of your 86-page report now? Would that help you?

**Lesson:** Not having the pages numbered in an expert report makes it more difficult to locate key passages, especially when the expert is under pressure. The lack of page numbers forces the expert to admit either a sloppy mistake or laziness.

**Solution:** Make sure that the pages in your expert report are numbered, preferably in this fashion: 1 of  $x$ , 2 of  $x$ , etc.

### **MISTAKE: ASKING THE RETAINING ATTORNEY TO CALL IF YOU CAN BE OF MORE HELP**

A report in which the expert comments on his concern for whether he has been helpful enough or where the expert offers further assistance can be viewed as a desire to please retaining counsel. This can negatively affect an expert’s credibility when seized on by a skillful cross-examiner.

### **Example 4.3: Expert offers to help**

**Q:** You were trying to help retaining counsel make a case here, correct?

**A:** No—I just answered his questions.

**Q:** So, when you wrote at the end of your report, “I hope this is sufficient information for your needs at this time,” you were just being polite?

**A:** I guess you could call it Southern politeness.

**Q:** Was it just more Southern politeness when you further stated, “If you need any other information or assistance, please call me and I will be happy to provide it”?

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**Lesson:** While the vast majority of experts do not mean anything unethical by their offers to help, it is easy for opposing counsel to twist these statements into something that sounds sinister and conspiratorial.

**Solution:** Omit statements in reports that offer counsel further assistance.

**MISTAKE: MAKING NEGATIVE COMMENTS ABOUT FORWARDED RECORDS**

Experts are sometimes quite upset about the state of the records they receive from counsel. While it is best to send organized records, the place to comment on the sad state of the records is *not* in the expert's report.

**Example 4.4: Expert complains about state of records**

**Q:** You were very upset when you reviewed the records in this case, correct?

**A:** I was not very upset.

**Q:** Your report states, and I quote: "I am extremely disappointed with the state in which these records were received. Granted, 4,000-some pages is quite a bit to go through, but the sheer volume makes it even more necessary that the records be delivered in reasonable order...Records from other health professionals were in similar disarray, requiring me to flip back and forth...At a minimum, I would suggest that when including records of multiple hospitalizations, each individual occurrence (either inpatient or outpatient) should be tabbed and labeled. When your reviewer then needs to go back to the record, he can find the appropriate pages much more quickly and efficiently...I also found it disconcerting the way the records were bound together. I am not sure how a legal office manages such a thick stack, but for me, trying to bind more than 300 pages together simply does not work. I ended up having to separate what your staff had bound together in six-inch stacks of paper just to be able to go through it. If I had not done so, your piles would have fallen apart, because the clips were placed at their maximum stretch and would not have held."

Am I quoting you correctly, Doctor?

**A.** Yes—I guess I was pretty upset, but you can see the reasons for me being upset.

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**Lesson:** Do not comment in your report about the state of the forwarded records. This telegraphs to opposing counsel a hot-button issue for cross-examination.

**Solution:** Call counsel when records arrive in a disorganized fashion. If counsel chooses not to resend the records in an organized fashion, take whatever time you need to organize the records and bill retaining counsel for your time in doing so. Alternatively, have a staff member organize the records for you and bill for the staff member's time.

### **MISTAKE: MAKING TYPOGRAPHICAL ERRORS**

While anyone can make an innocent typographical error, jurors, judges, and counsel look on reports that contain numerous errors with skepticism. The question that is raised is: if the expert is not careful enough to correct obvious typographical errors, how careful was he with the underlying science?

#### **Example 4.5: Wrong date of accident**

**Q:** Your report is based on a motor vehicle accident on October 16, 2004?

**A:** Yes, it is.

**Q:** Would you read the first sentence of paragraph 2, page 1 of your report, please, to the jury?

**A:** "This 59-year-old, right-handed woman was involved in a motor vehicle accident on October 16, 2005." That's a typo.

**Q:** Which one, the 2004 date or the 2005 date, or, as you sit here today, are you sure of the actual date of the accident?

#### **Example 4.6: Numerous typographical errors**

**Q:** You have done a careful and precise expert witness analysis and report?

**A:** Thank you, Counsel.

**Q:** That was a question, sir.

**A:** Sorry. Yes, I have.

**Q:** Now, on page 1 you wrote, "I forming my opinions...."

**A:** That's just a typo. Obviously, it should read "In forming my opinions...."

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**Q:** When you wrote, still on page 1, “I am further qualified to render opinions in this case based personally presiding...,” is that another typo?

**A:** Yes. That should read “based on me personally....”

**Q:** Several words missing?

**A:** Yes.

**Q:** When you wrote “coveys ownership” you meant?

**A:** Well, let’s see...“conveys,” I guess.

**Q:** When paragraph 6 starts out “?????????6,” that’s just another typo?

**A:** That’s probably a computer glitch—I must have held my finger on the key while I was thinking.

**Q:** Would you agree that this report with 67 typographical errors, words missing, and computer glitches is not a very precise report?

**Lesson:** These types of errors are commonly found by the authors when we travel and train expert witnesses. Experienced experts take great pains to avoid these types of unnecessary and embarrassing mistakes. Experienced experts also recognize that errors can occur when a word processing document is converted into a PDF format.

**Solution:** Proofread your report carefully. Afterward, have an intelligent person proof the report again to catch any mistakes that you may have missed.

**MISTAKE: WRITING REPORTS THAT ARE BASED ON INADEQUATE TESTING OR MEASUREMENTS**

Experts frequently write reports that they do not anticipate will become part of the litigation process. It is, of course, these inartfully drafted reports that sometimes actually encourage litigation. The failure to do adequate testing will always look worse when the expert is forced to testify and support his report.

**Example 4.7: Mistakes in measurements**

**Q:** As part of your arborist expert report you did some measurements and calculations, correct?

**A:** Yes.

**Q:** Would you agree that your measurements are not accurate?

**A:** Well, I measured to the foot and inch.

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**Q:** But you had a bit of difficulty with your measurements, correct?

**A:** I would not say that.

**Q:** Would you read the highlighted portions of your report, please?

**A:** Sure. “Here are my measurements (as best as I could reproduce them) for you. The main portion from the southernmost pole to the next pole were very easy to forward; following that, we used different points (trees) to measure from as starting points to keep the tape straight and level. On Tuesday, I double checked the last few, and the trees and stumps marked looked right. Now, trying to look back at my notes after using them to change partial inches from twelfths to tenths, they are rather worked over.”

**Q:** So there were problems?

**A:** Yes—I was out in the field.

**Q:** Didn’t you admit the problems in your last sentence of your report which states, “I am sorry for the confusion on this last sketch. I am an arborist, not a surveyor and mathematician. Give me a call for further clarification.”

**Lesson:** Experts writing reports should always anticipate that they may have to defend their reports at deposition or trial. Care should be taken to avoid confusion. Take measurements with precision and care.

**Solution:** Each and every expert report should be of the quality that can be easily defended by the expert at deposition and trial.

**MISTAKE: NOT SPECIFICALLY LISTING THE RECORDS REVIEWED**

Experts should specifically list in their reports the records they reviewed. This should be done in a separate section of the report. This allows a quick and easy answer to the common question: “Did you review this record?”

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**Example 4.8: Documents reviewed not listed**

**Q:** Did you review the wage and RRB reports before you wrote your report?

**A:** Well—let’s see—if I did review it, I would have mentioned it...can I have a moment...I know it’s probably in here somewhere....

**Example 4.9: “Pertinent” documents reviewed**

**Q:** You didn’t review all of the documents in this case, correct?

**A:** I commented on that in my report...I stated, “I have reviewed pertinent excerpts from retaining counsel’s file.”<sup>1</sup>

**Q:** Retaining counsel decided which documents and which portions were “pertinent”?

**A:** Yes—that’s correct.

**Q:** Of the 247 pages of back records, how many pages did he send you?

**Lesson:** Experienced experts list all of the records (with their dates) and documents that they have reviewed. When questioned about a document, they go to the report to check to see if it is listed.

**Solution:** Have a separate section in your report listing all of the documents, records, reports, etc. that you have received and reviewed.

**MISTAKE: WRITING COMMENTS IN YOUR REPORT THAT MAKE YOU LOOK LIKE AN ADVOCATE**

Experts who evidence bias or advocacy in their reports severely undercut their credibility and effectiveness. Comments that evidence bias should not be included in expert reports.

**Example 4.10: Biased comments in report**

**Q:** Are you an impartial expert?

**A:** Yes, of course.

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<sup>1</sup> Not insisting on receiving all records from retaining counsel is also a mistake. When counsel chooses which documents to send the expert, the expert is vulnerable to the charge that he based his report and opinion on limited information which retaining counsel spoon fed and manipulated.

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**Q:** You call cases as you see them?

**A:** Yes.

**Q:** Can you please read what I have highlighted from page 8 of your report?

**A:** “Not only was there no breach of the standard of care, this case is the poster child for why there needs to be tort reform to prevent frivolous lawsuits that are driving good doctors out of practice and raising the cost of everyone’s health care. A lot could be achieved by simply regulating the outrageous testimony provided by experts for the plaintiff, as occurred in this case.”

**Q:** You believe that the tort system should be reformed?

**A:** Yes.

**Q:** That there are too many lawsuits against physicians?

**A:** Yeah.

**Q:** That there are doctors who will testify to anything for money?

**A:** Unfortunately, yes.

**Q:** That medical malpractice litigation is bad for doctors in general?

**A:** Yes.

**Lesson:** The more comments that the expert puts in his report that sound biased, the more he looks like an advocate and the less he looks like an impartial expert. Once the expert is perceived as biased or trying to reach a certain result, then it becomes difficult to believe anything he says in his report.

**Solution:** Avoid superfluous comments in reports that indicate bias. Reports that are filled with *objective* facts and reasoning are the most persuasive.

### **MISTAKE: USING INARTFULLY DRAFTED LANGUAGE**

Experts need to recognize that how they say something in their reports can be as or more important than what they actually say. Inartfully drafted sentences that can be misconstrued when read by outsiders can be *very* damaging to the expert and her career.

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**Example 4.11: Subcontracts out reports**

**Q:** This report is not your work product, correct?

**A:** I resent that implication.

**Q:** Would you read footnote 7 on page 3 of your report?

**A:** “I provide forensic accounting reports as part of my service. I subcontract them and they are identified with my logo and phone number.”

**Q:** I ask you again if this report is your work product?

**Example 4.12: Unclear what records were reviewed**

**Q:** Did you review the emergency room records in this case?

**A:** Yes.

**Q:** Could you explain how you could review them if you say in your report, “I did not have the emergency room records per se”?

**Example 4.13: Very poorly drafted sentence**

**Q:** Your report is on the alleged excessive force applied to this inmate, correct?

**A:** Yes.

**Q:** You condone cruelty and physical abuse in prisons, correct?

**A:** I never said that.

**Q:** Please read the highlighted portion of your report.

**A:** “It seems abundantly clear that Inmate Jones was the subject of cruelty and physical abuse well beyond what should have occurred in a safe detention facility.”

**Q:** How much cruelty and physical abuse should have occurred in a safe detention facility?

**Lesson:** Experts should take a step back and read their reports as the attorneys, judges, and trial jurors will. Inartfully drafted sentences can sound strange or just plain wrong.

**Solution:** Experts should carefully check over their reports and give the words contained in the reports their common usage. It is also a good idea to have an intelligent person proof the report for typos, internal inconsistencies, and inartfully drafted sentences. Experts should make sure that their reports accurately reflect their opinions and cannot be misconstrued easily.

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### **MISTAKE: EXAGGERATING IN THE REPORT**

Experts sometimes make the mistake of exaggerating when they attempt to drive home a point. An exaggeration is merely a lesser form of a lie. Exaggerations can have a severe negative impact on an expert's credibility. Exaggerations must not be contained in expert reports.

#### **Example 4.14: Taught “every” week since 1987**

**Q:** You state in your report that you have taught every week since 1987. Is that what you claimed?

**A:** Yes, that's what I said and it's true.

**Q:** Were you ever ill and miss a week?

**A:** Yes, I probably did.

**Q:** You didn't teach the week of 9/11/2001, correct?

**A:** That's true—everything came to a halt.

**Q:** You don't teach on Christmas week, do you?

**A:** No.

**Q:** How many weeks do you think you actually missed?

**A:** Not too many.

**Q:** You knew, however, when you stated, “I have taught every week since 1987” that that was simply not true, isn't that right?

#### **Example 4.15: Read “all” literature**

**Q:** You stated in your report that you have read all of the scientific literature concerning PCBs, correct?

**A:** Yes—I try and read everything.

**Q:** Here is a list of the 1,200 articles. Is it your testimony that you have read *all* of these articles?

**Lesson:** The more the expert exaggerates, the less valuable the report becomes. Experts should be particularly careful when using absolute words such as “all,” “never,” and “every.” Absolute words can be shown to be exaggerations through counterexamples.

**Solution:** The expert should review his report and remove all exaggerations.

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**MISTAKE: LETTING COUNSEL HELP WRITE YOUR REPORT BY SHARING A DRAFT REPORT WITH HER**

It is usually not a good idea to allow retaining counsel to help you write your report. The most common way this is done is by allowing the attorney to view and comment on a draft report before it is finalized. Allowing counsel to do so will open the expert up to credibility challenges where the expert will be portrayed as the puppet of retaining counsel who is merely paying for the expert's signature.

**Example 4.16: Counsel helped with report**

**Q:** Counsel leaned on you to firm up your opinion, correct?

**A:** I resent that.

**Q:** You wrote in your report "there appears to be causal relationship to the fall at work," correct?

**A:** Yes.

**Q:** Then after you faxed this report to counsel you crossed out the words, "appears to be" and wrote in the word "is," is that what you did?

**A:** How'd you find out about that?

**Q:** Would you like to consult with an attorney?

**Lesson:** The expert should never permit counsel to help rewrite his report. If it can be proven that the expert permitted counsel to rewrite his report, severe damage may be done to the reputation of the expert.

**Solution:** Do not permit counsel to bully you into modifying your expert report. If changes are made (for example, to comment on additional areas, reformat the report, or clarify areas), these should be made transparently through an addendum and not by discarding the draft or original report.

**MISTAKE: PLAYING GAMES TO AVOID ADMITTING THAT RETAINING COUNSEL HELPED WRITE THE REPORT**

Experts and attorneys know that the expert will be asked about draft reports that were circulated to retaining counsel. This can show counsel improperly influenced the expert's opinions. To get around this, experts and attorneys will play games to avoid having to say that retaining counsel reviewed a draft report. Such games include having the expert write the report on a laptop in the attorney's office and having the attorney have

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access to the draft document through computer networking. Such games should be avoided. When the facts come out on cross-examination, the expert will suffer a devastating loss of credibility.

### **Example 4.17: Expert makes a bad situation worse by trying to conceal retaining counsel's role in drafting report**

**Q:** Your report and opinion are 100% independent, right?

**A:** Yes.

**Q:** Your report wasn't written in any way by retaining counsel, correct?

**A:** Correct.

**Q:** That would be pretty bad, right, if the lawyer wrote your report?

**A:** Yes.

**Q:** You never sent a draft report to counsel, correct?

**A:** Correct. I was told not to write a draft.

**Q:** Did counsel ever see your report prior to it being finalized?

**A:** Ahhhh. No.

**Q:** Did he ever see an electronic version of it?

**A:** I believe so.

**Q:** Where and when did that occur?

**A:** In his office where I wrote the report on my laptop.

**Q:** Do you normally go to a lawyer's office to write your reports?

**A:** No, that's what retaining counsel suggested in this case.

**Q:** Was that to make sure he could see the draft reports without leaving a paper trail?

**A:** You'd have to ask him.

**Lesson:** Experts who allow counsel to influence their reports and then play games to hide this fact will have almost no credibility.

**Solution:** Do not let counsel influence your report. Do not play games to hide the fact that counsel influenced your report. If counsel does influence your report (for example, by suggesting innocent formatting changes or the addition of an executive summary), do not cover this up.

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**MISTAKE: USING PHRASES THAT UNDERCUT YOUR OPINION**

Experts can do precise, exhaustive work on their reports and completely undercut their opinions with a few poorly chosen words.

**Example 4.18: Assumed facts inaccurate**

**Q:** If any of your critically assumed facts are inaccurate, your opinion fails, correct?

**A:** Well—I wouldn't go that far.

**Q:** Don't you say, "If any of the assumed facts are found to be inaccurate, the appraisal could be rendered misleading or meaningless"?

**A:** Yes—but that's standard language.

**Q:** Let's go over the 12 mistaken assumptions you made before you formed your opinion.

**Example 4.19: Language in report undercuts opinion**

**Q:** Do you have confidence in the opinion you expressed in this case?

**A:** Yes—sure.

**Q:** You don't sound too confident when you state, "I have endeavored to be accurate."

**A:** That could have been worded better—I agree.

**Lesson:** Experts should diligently proof and review their reports and remove meaningless phrases that do nothing but undercut their opinions.

**Solution:** Experts should avoid using phrases in their reports that undercut their opinions.

**MISTAKE: ALLOWING YOUR WORD PROCESSING SOFTWARE TO TRACK THE CHANGES THAT YOU MAKE TO YOUR REPORT**

Word processing programs have powerful features that can track every change made to a document. These changes can reveal an expert's thought process and any undue influence from retaining counsel. Experts should disable any change tracking or redlining features on their word processors and save final reports as PDF documents that do not have change tracking capability.

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### **Example 4.20: Track changes feature used against expert**

**Q:** Did counsel help you write this report at all?

**A:** No.

**Q:** You wrote on page 7 of your report that, “There is clear and convincing evidence of discrimination in this case,” correct?

**A:** Yes.

**Q:** Did counsel ask you to use those words to firm up your opinion and help him win his case?

**A:** Of course not.

**Q:** Those were your words, “clear and convincing evidence”?

**A:** Correct.

**Q:** Please look above at the screen at the redlined version of your report.

**A:** Where’d you get that?

**Q:** You originally wrote that there was “some” convincing evidence of discrimination and you then changed it to “clear and convincing,” didn’t you?

**A:** I don’t remember that.

**Q:** That’s the exact language the statute requires and it’s still your testimony that counsel didn’t suggest that language?

**A:** I can’t recall.

### **Example 4.21: Redlining feature in word processor comes back to haunt the expert**

**Q:** So, you transmitted your report to counsel in Word so he could mark it up and send it back to you?

**A:** That is an outrageous question and I expect an apology or else the bar, Counsel, will be forwarded a copy of this transcript.

**Q:** Didn’t your report conclude, and I quote: “After thorough examination and comparison of all documents submitted, it is my professional opinion that the entire group of Daniels signatures are identified as probably genuine signatures and were signed by Daniels. The unique and identifying features were observed throughout the group of signatures dating from 1985 to 2003 which establishes the wide range of feature variation that, in and of itself, becomes the pattern used as a basis of this opinion. No significant dissimilarities were observed. There were no indications that the questioned signatures of Daniels had been traced or duplicated by freehand writing or other means. The quantity of known

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exemplars and the legibility of some of the exemplars limit and qualify this opinion.”

**A:** Yes, it did.

**Q:** Are you aware that when your report was forwarded to this office and we checked “markup” in Word the redline comments of counsel were contained?

**A:** Oh, shit!

**Q:** What was that?

**A:** Nothing—it was nothing.

**Q:** So, you did have a back and forth with counsel about your report?

**A:** Well, yes. If you look at it that way.

**Q:** You know the “comments” on the side of your report also suggest that you changed: “possibly genuine” signatures to “probably genuine” signatures?

**A:** Yes, I see those now.

**Q:** And you made the change?

**A:** The wording was clarified.

**Q:** You changed: “no dissimilarities” to “no significant dissimilarities” also?

**A:** That’s how it now reads.

**Q:** These changes to your original report are significant, correct?

**A:** That’s not for me to say.

**Q:** What is your area of expertise again?

**A:** Document examiner.

**Q:** I ask you again, did you transmit your report to counsel in Word so he could mark it up and send it back to you? Isn’t that the truth?

**A:** I need to call my own lawyer....

**Lesson:** Word processing documents that track changes can give opposing counsel cross-examination ammunition.

**Solution:** Disable the track changes function on your word processor and save your final report as a PDF.

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### **MISTAKE: BASING THE REPORT ON INSUFFICIENT DATA**

Experts are often asked to take on forensic assignments only to later learn that insufficient data are available to do a quality job. Experts must have the professional confidence and fortitude to refuse to render reports where insufficient data are present to render a report to a reasonable degree of professional certainty.

### **Example 4.22: Expert produces report despite insufficient information**

**Q:** You did not have enough information to issue a report on the failure of the transformer to a reasonable degree of engineering certainty?

**A:** I felt I did—I did the best I could.

**Q:** Didn't you say in your report, pages 8 and 9, and I quote: "Forensic analysis of the transformer failure is very difficult at this time since the failed 750kVA transformer was disposed of by personnel. Whoever disposed of the transformer failed to preserve it for a failure investigation by independent examiners. Once evidence has been removed from the scene, it should be maintained and not be destroyed or altered until others who have a reasonable interest in the matter have been notified. With the data that has been made available to date, some degree of forensic analysis can be conducted. However, the root cause of the failure may never be determined by anyone beyond speculation and conjecture since personnel failed to preserve the transformer for examination, testing and dismantling or adequately document its condition with testing and photographs"?

**A:** Yes, I did.

**Q:** You were quite upset about the bad hand you were dealt here?

**A:** Yes—I was mad.

**Q:** You could have simply refused to write the report, correct?

**Lesson:** Do not express an opinion in a report or otherwise until you have sufficient facts to do so.

**Solution:** When the expert does not have sufficient data or information to provide a report or an opinion to a reasonable degree of certainty, he should either refuse the assignment or inform counsel that after studying the available evidence he is unable to render an opinion to a reasonable degree of professional certainty.

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**MISTAKE: USING VAGUE TERMS IN THE REPORT**

Experts should endeavor to be as precise as possible in their reports. Terms that are open to a wide variety of interpretations do not serve the expert or the client well.

**Example 4.23: Not sure of plaintiff's age**

**Q:** How old was the plaintiff in this case?

**A:** I am not sure.

**Q:** You stated in your expert report that he was a “relatively young man.” Could you tell us what you meant?

**A:** Well, I am 61. He was younger than me. That is what I remember.

**Lesson:** Instead of using a term open to interpretation such as “relatively young man,” the expert would have been better served by saying he was 47 years old. The expert does not want to give the impression that he was lazy, that his opinion was preordained, or that he is too busy and important to get bogged down in details.

**Solution:** The expert should be as precise as possible in his report.

**MISTAKE: WRITING A REPORT WITHOUT BEING ASKED TO BY COUNSEL**

Experienced experts do not write *any* reports without first discussing the matter with retaining counsel. This is because expert reports are generally discoverable and the expert's opinions may not be favorable.

**Example 4.24: Expert writes report before checking with counsel**

**Attorney (frantically calling the expert):** I received a 14-page report in the *Armstrong* case. I never even asked for a report—we did not go over your findings...what possessed you to write this report?

**Expert:** I just assumed you would need the report and I had some time, so I...

**Lesson:** An expert should never assume counsel wants her to write a report in a case in which she has been retained. Experienced experts do *not* write any reports until specifically requested to do so by retaining counsel.

**Solution:** Do not write a report until retaining counsel requests one.

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### **MISTAKE: NOT COVERING ALL OF THE ISSUES RETAINING COUNSEL ASKED YOU TO COVER**

Experts should take great pains to identify the specific issues retaining counsel wants addressed in the expert's report. Experienced experts address these issues and only these issues.

#### **Example 4.25: Expert omits crucial issue from report**

**Attorney (calling the expert):** I received your report. Nice work on the arson residue issue, wood samples, concrete, and roofing materials. What happened to the carpet materials? This is one of the issues I asked you to address in my cover letter of 4/17/07.

**Expert:** I am sorry...in my haste to get you the report...I will do a supplemental report. Is that OK? My apologies.

**Lesson:** It is not uncommon for experts to overlook an issue in their reports. This mistake is all the more egregious when the request to address the issue is made by counsel in writing to the expert.

**Solution:** The expert should check retaining counsel's cover letter and make sure that all the issues raised are covered in the report.

### **MISTAKE: COVERING ISSUES NOT REQUESTED BY RETAINING COUNSEL**

Many experts are frustrated detectives at heart and love to figure out the puzzle of what actually happened in a particular case. This intellectual curiosity usually serves them well. However, when experts address issues not requested by counsel, this can raise very serious problems for counsel because the expert's report is usually discoverable. There may be many valid reasons counsel has not requested that a specific issue be addressed, for example:

- insurance coverage,
- orders by the judge,
- agreements amongst opposing counsel,
- trial strategy, and
- another, more qualified expert is addressing the issue.

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**Example 4.26: Expert addresses an issue not requested by counsel**

**Attorney (irate call to expert):** Who the hell told you to write about therapeutic complications in my malpractice case? Do you realize the damage that you have done? I hope you have insurance for this type of mistake.

**Expert (apologetically):** I didn't think...I mean, this is what I discovered when I dug into the records...can't I undo the damage?

**Attorney:** How do you un-ring the bell? Any ideas?

**Lesson:** Addressing issues not requested by counsel can be a serious, and, in some cases, a fatal mistake. If questions are raised in the expert's mind, a phone call to retaining counsel would be the appropriate action.

**Solution:** Do not address issues in an expert report that have not been requested by counsel.

**MISTAKE: MAKING SUBJECTIVE, SELF-SERVING CHARACTERIZATIONS OF ONE'S INVESTIGATION OR REVIEW**

Some experts include in their reports subjective, self-serving characterizations of their investigations and review of records. The problem is that these characterizations raise the bar very high and can be used against the expert during cross-examination. The wise expert conducts a very careful review and investigation but lets this fact speak for itself through the report's quality and detail.

**Example 4.27: Exhaustive investigation**

**Q:** Your report indicates that you performed a vocational and earning capacity assessment correct?

**A:** Yes—that's correct.

**Q:** As part of your analysis, your report states that you performed "an exhaustive investigation of the labor market"?

**A:** Yes, it does.

**Q:** Do you normally do a thorough investigation of the labor market when you do a vocational and earning capacity assessment?

**A:** Yes, I do.

**Q:** As you did an exhaustive investigation here, that would be above and beyond your normal thorough job. Let's take a look at all of the labor data

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that was available to you and see how exhaustive your investigation actually was.

**Lesson:** There is no need for an expert to characterize his investigation or work as thorough, exhaustive, or detailed. Such a self-serving, subjective characterization will make it much more difficult to defend the expert's report and opinion.

**Solution:** Omit any self-serving, subjective characterizations in your report. Let the quality of your investigation speak for itself.

### **MISTAKE: USING LANGUAGE SOLICITING ADDITIONAL WORK**

The expert report is *not* the place to solicit additional work from retaining counsel.

#### **Example 4.28: "Please call me"**

**Q:** You are very interested in obtaining additional work from retaining counsel, correct?

**A:** I would not say very interested.

**Q:** You do say in your report, page 4, "I would be happy to testify in this matter," true?

**A:** Yes—but I was just letting counsel know about my availability.

**Q:** You state on page 7 of your report, "If I can be of assistance to you in any similar type cases, please call me at any time." 2:00 A.M.? It doesn't matter if it means another assignment?

**Lesson:** There is nothing wrong with an expert talking to retaining counsel about obtaining additional assignments. However, these types of requests should not find their way into the expert's report.

**Solution:** Do not put requests soliciting additional work in your expert reports.

### **MISTAKE: LISTING DOCUMENTS THAT WERE UNAVAILABLE**

Experts often list in their reports the documents and reports they received and reviewed. This is good practice. However, there is no need to draw opposing counsel a roadmap by specifically listing documents that were

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unavailable. Let opposing counsel figure this out on her own by looking at your list of documents reviewed.

**Example 4.29: List of missing documents included in report**

**Q:** You listed in your report some documents you did not have access to, correct?

**A:** Yes.

**Q:** These documents include:

1. Drawing prepared by Wilcox Associates Incorporated entitled “Swimming Pools, Plans & Sections,” (June 16, 2006).
2. Report of “Description of Necessary Swimming Pool Repairs, April 15, 2006.
3. “Workmanship Standards for Swimming Pools and Spas,” National Spa and Pool Institute, dated June 2006.
4. “Standard for Residential Swimming Pools,” National Spa and Pool Institute, dated November 2007, correct?

**A:** That’s correct.

**Q:** Let’s go over each of these documents so you can tell us why you felt they were crucial and how they may have impacted your opinion in this case.

**Lesson:** The expert need not make opposing counsel’s job easier by affirmatively listing all or some of the missing documents in the case. If opposing counsel wants to compile a list and ask the expert about these documents, let her do so.

**Solution:** List in your report only the documents you received and have reviewed. Do not flag for opposing counsel the documents that were unavailable.

**MISTAKE: NOT KNOWING YOUR REPORT COLD PRIOR TO TESTIFYING**

Experts are well advised to know their reports cold before testifying at deposition or trial. Opposing counsel may have been studying the expert’s report for weeks, months, or even years prior to the deposition or trial. Failing to know one’s expert report cold will make effective testimony very difficult.

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### **Example 4.30: Failure to be thoroughly familiar with own report prior to testifying**

**Q:** You defined “predatory” in your report as “an act directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization,” correct?

**A:** Well...where are you...let me look at my report...I know it’s in here somewhere.

**Lesson:** The expert who does not know what is and what is not in his report is at a serious disadvantage when being cross-examined. Counsel will probe until he determines that the expert is not familiar with his own report. Counsel will then ask a series of questions that may agree with or conflict with statements in the report.

**Solution:** The expert is well advised to know his expert report cold prior to testifying at deposition or trial.

### **MISTAKE: USING INFORMALITY IN THE REPORT**

Experts should avoid any and all informality (and slang) in their reports. Informality that indicates a close relation to counsel is not helpful because it may call into question the impartiality of the expert.

### **Example 4.31: “Dear Teddy”**

**Q:** You are a good friend of retaining counsel, correct?

**A:** I know him.

**Q:** You must know him pretty well as in your expert report you state “Dear Teddy” and conclude by stating “give my regards to your wife Shirley and to Alex and Jim.” I assume they are counsel’s children?

**A:** Yes, they are.

**Lesson:** While there is nothing wrong with being polite, making a point of drawing attention to your personal relationship with retaining counsel and his family may raise the issue of bias.

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**Solution:** Leave any and all informal salutations to counsel out of your expert report.

**MISTAKE: DRAWING LEGAL CONCLUSIONS**

Experts may use legal terms in their reports in an attempt to emphasize a crucial point. When the expert does not fully understand the term, this can get him into difficulty. Was the expert just trying to be helpful? Does the expert usually testify using terms he can't even define?

**Example 4.32: Expert uses legal term in report and cannot define the term**

**Q:** You found that the actions of the defendant in this case were reprehensible and constituted “gross negligence,” correct?

**A:** Yes—that is correct.

**Q:** Would you please define the term “gross negligence” and explain how it differs from ordinary negligence?

**A:** Well—gross negligence would be worse than regular garden variety negligence. As to a strict definition....

**Lesson:** Experts who use legal terminology in their reports should be able to easily define the terms and distinguish them from similar legal terms. If not, they will lose credibility.

**Solution:** Do not use legal terms in your report unless you are also an attorney. Many times, legal ideas can be stated in non-legal terms. For example, instead of stating that the defendant doctor committed “malpractice,” you could state that “No reasonably prudent doctor would have failed to have ordered a CT scan given this patient’s history, signs, and symptoms. The failure to order a CT scan caused the patient to lose a significant chance of being cured.”

**MISTAKE: USING PRONOUNS INSTEAD OF PROPER NAMES**

Experts may, in an attempt to save time and be less repetitive, use pronouns such as “he,” “she,” “they,” and “it” instead of using the parties’ proper name in their reports. Pronouns are by nature imprecise and create unnecessary confusion.

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### **Example 4.33: “She gave...permission”**

**Q:** You state in your report that you were called by Gina Thompson, discussed the matter with Jennifer Lax and Frederica Klein and then “she gave...permission to do the inspection.” To whom are you referring: Gina, Jennifer, Frederica, or some other person?

**A:** I am sorry for the confusion—I was referring to Frederica—I guess I should have made that clear.

**Lesson:** Pronouns create confusion for readers—and for you when you testify months or years after writing the report.

**Solution:** Avoid using pronouns in expert reports.

### **MISTAKE: USING THE PASSIVE VOICE**

The passive voice is imprecise. Wise experts avoid the passive voice. Use the active voice at all times because the active voice specifies who did what.

### **Example 4.34: Using the passive voice**

**Q:** You wrote in your report that an “inspection was conducted on September 28, 2007”?

**A:** Yes.

**Q:** From reading your report, we don’t know who conducted the inspection, do we?

**Lesson:** The passive voice is imprecise.

**Solution:** The best experts avoid the passive voice.

### **MISTAKE: FAILING TO FORMAT THE REPORT WITH PARAGRAPH HEADINGS**

Experts should format their reports, especially lengthy ones, with paragraph headings (for example, “Executive Summary,” “Documents Reviewed,” and “Opinions”). This makes the report more user-friendly and professional looking. In addition, the expert can use a properly formatted report as an offensive weapon during cross-examination because she will be able to find important facts and information quickly.

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**Example 4.35: Expert unable to locate information in report**

**Q:** Maryland’s professional engineers are governed by a code of ethics, correct?

**A:** Yes, that’s true.

**Q:** Where do you reference this code in your 27-page expert report?

**A:** Yes—I do mention it—I believe it’s in the middle...I can’t seem to be able to put my finger on the precise location.

**Lesson:** When the expert has a lengthy report that is not formatted with paragraph headings, it may be difficult, if not impossible, to locate key facts quickly when under the pressure of cross-examination. In the above example, the simple paragraph heading “Ethics” could have prevented the problem.

**Solution:** Format expert reports with paragraph headings.

**MISTAKE: SPECULATING**

Experts who engage in speculation in their reports can undermine their entire work product. Counsel will show that they are biased, sloppy, or trying to achieve a certain result.

**Example 4.36: Expert makes a speculative comment**

**Q:** As a CPA and expert, you are careful and precise, correct?

**A:** I try to be.

**Q:** How hard were you trying to be careful and precise when you stated in your report, “Had we received the complete audit files, I am sure that we would have located additional errors”?

**Lesson:** Experienced experts stick to the facts at hand and do not speculate about what might have happened or what they could have found had the circumstances been different. When the expert starts to predict, guess, or speculate, he becomes particularly vulnerable to cross-examination.

**Solution:** Do not speculate in your expert report.

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### **MISTAKE: WRITING RUN-ON SENTENCES**

Experts should take care to avoid run-on sentences. Break run-on sentences into two or more shorter sentences.

### **Example 4.37: Run-on sentences in a report**

**Q:** You have advanced training in writing quality expert reports according to your CV?

**A:** Yes.

**Q:** Would you read the first sentence of your report, please?

**A:** “For the purpose of orientation, the front of the structure (side nearest South Arch Rock Drive) will be the east face the referenced project is a one and one-half level, residential type structure with a crawl space, on a level lot and the building is constructed of dimensional wood floor joints for the main level floor framing, bearing on the concrete masonry foundation walls around the perimeter of the crawlspace and laminated veneer lumber girder beams supported by concrete masonry piers on the interior of the crawlspace, the garage is a cast-in-place, concrete slab on the grade and the upper level floor structure is constructed of heavy timber joists and the roof is constructed of heavy timber rafters.”

**Lesson:** Lengthy run-on sentences detract from the value of the expert’s report.

**Solution:** Review expert reports to make sure they do not contain run-on sentences. Break run-on sentences into two or more shorter sentences.

### **MISTAKE: DISCLAIMERS IN REPORT THAT ARE NOT CAREFULLY THOUGHT OUT**

Experts often use standard limiting conditions and disclaimers in their reports. Depending on how they read, these may cause problems. The longer, more general, and all-encompassing the limitations and disclaimers, the more the expert may have to explain at trial. Experts should also avoid including standard computer-generated limitations that don’t apply to the case at hand.

### **Example 4.38: Limitations and disclaimers**

**Q:** You stand behind your 74-page report on the valuation of the subject closely held business, correct?

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**A:** Absolutely.

**Q:** Is that what you meant when you put in the limiting condition of your report, “All facts and data as set forth in this report were obtained from sources considered to be reliable. However, we assume no liability for the accuracy of the information provided to us by others”?

**A:** Well, that is standard language that all CPAs doing this work use.

**Q:** Is that the same reason you put in, “The valuation report is based upon facts and conditions existing as of the date of valuation. We have not considered subsequent events. Unless specifically requested by the client and agreed upon by us, we have no obligation to update our report for such events and conditions”?

**A:** Essentially...yes.

**Q:** You have 67 similar limitations in this report that you stand behind?

**Lesson:** There may be good reasons to put some limitations and disclaimers in expert reports. However, continuing to add limitations and disclaimers without taking a step back and looking at the document as a whole may be counterproductive.

**Solution:** Only include limitations and disclaimers that specifically apply to the case at hand and can be defended.

**MISTAKE: TRASHING THE OPPOSING EXPERT**

Experts are frequently called upon to write rebuttal reports or comment on the opposing expert’s conclusions. Some experts take this opportunity to settle old scores, tear into competing experts, and air their personal beliefs. This is not a good idea. The best practice is to state objectively why you disagree with the opposing expert.

**Example 4.39: Personal attack on opposing expert**

**Q:** Your expert report is in fact an attack on the opposing expert, is it not?

**A:** That’s not true, Counsel, and you know it.

**Q:** On page 2 of your report, you state that his profit analysis is incorrect, ridiculous, and outrageous?

**A:** That is my opinion, sir.

**Q:** On page 3 of your report you state that the opposing expert intentionally omitted significant facts, his assumptions are erroneous, his

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conclusions are unreliable, and he has been permitted to get away with this type of behavior for way too long?

**A:** Yes.

**Q:** When you questioned whether he is truly a licensed CPA and whether he received his license from a correspondence course, was that your impartial expert opinion as well?

**Lesson:** There is nothing wrong with an expert legitimately criticizing another expert's procedures or conclusions in an expert report. When the attacks become personal and vindictive, they are counterproductive.

**Solution:** Effective expert reports use objective data, facts, and figures to support their conclusions regarding other experts' opinions.

### **Conclusion**

Experienced experts develop and utilize a protocol for producing a high-quality defensible report. For more detailed information on expert report writing, please see *Writing and Defending Your Expert Report: The Step-by-Step Guide with Models* (SEAK 2002) and *Writing and Defending Your IME Report: The Comprehensive Guide* (SEAK 2004). SEAK, Inc. also offers a one-day Expert Report Writing workshop.