Experts' Prior Testimony

The "Adoptive Admission" Provision of FRE 801(d)(2)(C)

By Tracey L. Turnbull and Brodie M. Butland

Contradictory authority in the area underscores that even the best preparation may not always prevent expert witnesses from becoming potentially damaging witnesses.

Selecting an expert witness is a critical litigation decision. It goes without saying that a litigator should thoroughly vet every expert. But as every experienced litigator knows, developments in a case can transform an expert from an asset buttressing a case into a liability undermining it.

- An expert may make concessions during his or her deposition that greatly damages the retaining party's case.
- An expert may make statements during his or her deposition that undercut another expert, fact witness, claim, or a combination of these.
- An expert may have a horrible testimonial demeanor.
- An expert may have prior criminal convictions, civil liabilities, or other similar bad acts that a retaining party did not learn of until afterward.
- New evidence may force an expert to reach a different, unfavorable conclusion given his or her experience or methodology.
- New evidence may allow a party to claim greater damages after an expert has opined to a reasonable degree of professional certainty that the damage figure was significantly lower.

In light of one of these unforeseeable developments, a retaining party may consider dropping an expert as a trial witness to avoid undermining its case. While the loss of an expert can be detrimental to a case, attorneys often overlook a separate and potentially more disastrous landmine: the "adoptive admission" provision of Federal Rule of Evidence 801(d)(2)(C). Under this provision, even if a retaining party does not call its expert to testify during a trial, the opposing party nonetheless may be able to use that expert's prior testimony as an "adoptive admission" to support its own case.

Unfortunately, the extent to which an opposing party may use an expert's prior testimony as an adoptive admission is far from clear. Three separate lines of authority have emerged in the Fifth and Third Circuits and the U.S. Court of Claims. One line holds that an expert's statements constitute a party-opponent admission once a party has designated an expert and the expert provides an

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opinion. Another line holds that an expert's prior testimony is never a party-opponent admission without direct evidence of an agency relationship. The final line holds that an expert's prior testimony becomes a party-opponent admission only once the expert is designated as a trial witness.

The inherently contradictory authority and the lack of a governing precedent in most federal jurisdictions can create a quandary when trying to decide how to proceed with a potentially ineffective expert. The conservative approach would involve designating the expert as a potential trial witness in the event that the expert becomes necessary during the trial. This approach may be warranted when a retaining party would prefer to use other evidence to establish liability or damages instead of its expert but that evidence is subject to pending admissibility challenges. In other words, the retaining party needs the expert just in case the court rules the other evidence inadmissible. Yet this precautionary approach may allow the opposing party to read parts of the expert's deposition into the record as a party-opponent admission and undermine other evidence of damages if the expert ultimately becomes unnecessary.

Under the *Collins* line of cases, an expert is presumed to speak for the party that retained the expert regardless of whether the expert testifies during a trial.

This article assesses different strategies available to you when you either seek (1) to prevent an opposing party to use your party's expert's prior testimony as an adoptive admission during a trial; or (2) to use the testimony of an opposing party's expert as a party-opponent admission during a trial. First, this article reviews Federal Rule of Evidence 801(d)(2)(C), which attorneys and courts typically rely on to deem expert deposition testimony a party-opponent admission. Second, this article explains the three lines of authority that courts follow in deciding whether prior testimony of an expert not called to testify during a trial can become evidence read into the record as a party-opponent admission. Third, this article suggests tactics that you can use if you encounter these lines of authority, or when a jurisdiction has not adopted one yet.

Adoptive Admissions: FRE 801(d)(2)(C)

Federal Rule of Evidence 801(d)(2) states that admissions by a party-opponent are not hearsay. Courts holding that at least in some circumstances prior testimony by an expert constitutes a party-opponent admission rely on the "adoptive admission" provision in subsection (C) of the rule, which states: "A statement is not hearsay if… [t]he statement is offered against a party and is… a statement by a person authorized by the party to make a statement concerning the subject[.]" Fed. R. Evid. 801(d)(2)(C). To determine whether the statement was authorized by the party, a court must consider the contents of the statements, but they cannot alone establish authorization. Fed. R. Evid. 801, Advisory Committee Notes (1997).

According to the committee notes, subsection (C) was phrased broadly to encompass statements to third persons and statements by an agent to the principal—it does not apply solely to statements made to third parties. *Id.* However, the Advisory Committee did not indicate whether, or to what extent, a retained expert's opinions and prior testimony constituted a party-opponent admission as an authorized statement by a party.

Three's a Crowd: The *Collins*, *Kirk*, and *Glendale* Lines of Authority

In discussing cases addressing the use of an expert's deposition testimony as a party-opponent admission, *Glendale Fed. Bank, FSB v. United States*, 39 Fed. Cl. 422, 423 (1997), aptly observed that "[t]his area of law is murky at best with several divergent streams and many highly fact specific eddies making up the case law." But from the legal quagmire emerges three primary lines of authority running the entire gamut of approaches. Each of these approaches is discussed below.

The Most Extreme Approach: *Collins v. Wayne Corp.*

An early approach to the question of admissibility of an expert's deposition against the retaining party, generally credited as originating with *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980), is that an expert's statements are attributable to a party as an admission under Fed. R. Evid. 801(d)(2)(C) once a party has designated an expert as such and the expert has rendered some form of opinion. It is, therefore, irrelevant to these courts whether or not the expert will testify during a trial.

In *Collins*, a party retained an expert to investigate and analyze a bus accident and report on the bus speed and its impact with a tractor-trailer. Before the trial, the defendant sought to exclude the expert's deposition because he was merely a "consultant." *Id.* at 780. The Fifth Circuit held that deposition testimony of an expert employed by a bus manufacturer to investigate an accident was an admission under Federal Rule of Evidence 801(d)(2)(C) because the expert witness was an agent of the defendant, who employed the expert to investigate and analyze the bus accident. *Id.* at 782. The court found that in providing his deposition, the expert performed the function that the manufacturer had employed him to perform. Specifically, the expert's investigation report and deposition testimony explaining his analysis and investigation was an admission of the defendant. *Id.* The district court erred in failing to admit the testimony as a party-opponent admission, though ultimately the Fifth Circuit found the error harmless. *Id.* at 782–83.

Several courts not within the Fifth Circuit have adopted the *Collins* rule. *Long v. Fairbank Farms, Inc.*, No. 1:09-cv-592, 2011 WL 2516378 (D. Me. May 31, 2011); *Dean v. Watson*, No. 93-C-1846, 1996 WL 88861 (N.D. Ill. Feb. 28, 1996). *See also BNSF Ry. Co. v. Lafarge Sw., Inc.*, No. 06-1076, 2009 WL 4279850, at *4 n.3 (D.N.M. Feb. 3, 2009) (finding that parties adopted expert's opinions because they designated the expert as such after knowing his opinions). Courts have applied *Collins* to the trial setting and

to pretrial motions practice. In *Long*, cross-claimants sought summary judgment on indemnification and other related claims. 2011 WL 2516378, at *1. In their briefing, third-party plaintiffs cited the deposition testimony of an expert retained by third-party defendants and argued that it constituted a party-opponent admission under Federal Rule of Evidence 801(d)(2)(C). The third-party defendants responded that the expert was hired "to fully explore and better understand the allegations against it," the defendants "always expected [the expert] to testify impartially," the expert was never subject to defendants' control nor authorized to make admissions for the defendants, and the defendants had not yet determined whether they would call the expert to testify during the trial. *Id.* at *9. "Even taking all of these assertions at face value," the court held that the expert "was authorized by [the third-party defendants] to make a statement concerning the subject matter about which he testified," and his statements constituted party-opponent admissions under Federal Rule of Evidence 801(d)(2)(C). *Id.* at *10. Among other authorities, *Long* cited *Collins* for support. *Id.* The court did not find it persuasive that the expert was not subject to control by the third-party defendants, as that would, at most, have indicated that there was not an agency relationship sufficient to find a party-opponent admission under Federal Rule of Evidence 801(d)(2)(D). *Id.*

Under the *Collins* line of cases, an expert is presumed to speak for the party that retained the expert regardless of whether the expert testifies during a trial. Accordingly, *Collins* and its progeny allow an expert's deposition to be used against the retaining party under Federal Rule of Evidence 801(d)(2)(C) with very little restriction.

The "Independent Expert": *Kirk* and *Soitec*

On the opposite end of the spectrum, courts find that an expert's deposition cannot be used against the retaining party as an admission because the expert is considered "independent." This view is exemplified by the Third Circuit's decision in *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147 (3d Cir. 1995), in which the court stated that the "agency theory" set forth in *Collins* misses "the entire premise of calling expert witnesses." *Id.* at 164. As the court explained,

> despite the fact that one party retained and paid for the services of an expert witness, expert witnesses are supposed to testify impartially in the sphere of their expertise. Thus, one can call an expert witness even if one disagrees with the testimony of the expert. Rule 801(d)(2)(C) requires that the declarant be an agent of the party-opponent against whom the admission is offered, and this precludes the admission of the prior testimony of an expert witness where, as normally will be the case, the expert has not agreed to be subject to the client's control in giving his or her testimony. Since an expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent.

Id. (citations omitted). Applying this analysis, the *Kirk* court noted, "because an expert witness is charged with the duty of giving *his or her expert opinion* regarding the matter before the court, we fail to comprehend how an expert witness, who is not an agent of the party who called him, can be authorized to make an admission for that party." *Id.* (emphasis in original). Based on this reasoning, *Kirk* held that an expert's deposition in a prior, unrelated case could not be used to impeach a party in a pending case. *Id.*

Though *Kirk* involved an attempt to use expert testimony from prior, different litigation as an admission in a present case, Third Circuit courts have applied *Kirk* with equal force to experts retained in the same litigation. *See St. Paul Fire and Marine Ins. Co. v. Nolen Group, Inc.*, No. 02-8601, 2007 WL 2571524, at *7 n.6 (E.D. Pa. Aug. 31, 2007) ("Although [one case] distinguished *Kirk* on the basis that *Kirk* dealt with expert testimony provided in a prior litigation, rather than in the same litigation, the distinction is unavailing. The critical distinction is whether an expert is, on the record, an agent of the party."); *Pfizer, Inc. v. Ranbaxy Labs., Ltd.*, No. 03-209, 2005 WL 2296613, at *2 (D. Del. Sept. 20, 2005) ("[T]he Court does not read *Kirk* to be limited to circumstances involving the prior trial testimony of a witness."); *Bostick v. ITT Hartford Group*, 82 F. Supp. 2d 376, 379 (E.D. Pa. 2000) (same).

The extension of *Kirk* to expert deposition testimony in the same litigation is exemplified by *Soitec, SA v. Silicon Genesis Corp.*, No. 99-10826, 2002 WL 34453284 (D. Mass. Feb. 25, 2002). In that case, an expert was designated as a trial witness of the plaintiff but later withdrawn. The defendant then attempted to introduce his prior deposition testimony as a party-opponent admission under Federal Rule of Civil Procedure 801(d)(2)(C). The court expressed its agreement with *Kirk* that in the relationship between a lawyer and expert, the "expert is more like an independent contractor offering his own opinion and is not 'controlled' by the party who employs him." *Id.* at *1. As a result,

> [t]he adoptive admission theory falters because it cannot be said that [the plaintiff's] actions represent acquiescence in or adoption of every aspect of [the expert's] testimony, and particularly the comment on which [the defendant' wants to rely, which was made in the course of the deposition…. [C]ounsel for the employing party is under no obligation to state 'we agree with that statement,' or 'we disagree with that one.' *Id.*

The court rejected the agency theory of admission of Federal Rule of Evidence 801(d)(2)(D) on the same grounds. *Id.*

Similarly, a bankruptcy court, though acknowledging *Collins*, also followed *Kirk*'s reasoning and held that the deposition testimony of an expert identified by the debtor, but not called during a trial, was inadmissible hearsay evidence. *In re Hidden Lakes Ltd. P'ship*, 247 B.R. 722, 724 (S.D. Ohio 2000). Citing *Kirk*, the court noted that "expert witnesses are supposed to testify impartially in the sphere of their expertise," and nothing suggested that the debtor had actual control over the testimony or conclusions of the expert. *Id.* The court thus precluded the non-testifying expert's deposition testimony. *See also Pfizer*, 2005 WL 2296613, at *2 (finding no adoptive admission because the plaintiff had not provided "independent proof of the existence of [the expert's] authority to speak for [the defendant]").

A handful of courts have also employed *Kirk*'s reasoning when an expert had testified and been cross-examined but the opposing party wished separately to admit the expert's prior deposition testimony as

a party-opponent admission. These cases rejected *Collins* and found that the expert's testimony did not constitute an adoptive admission. They also noted that the proper time to address prior deposition testimony was during the expert's cross-examination. *Smith v. United States*, No. 3:95-cv-445, 2012 WL 1453570, at *31–32 (S.D. Ohio Apr. 26, 2012) (rejecting *Collins* and adopting *Kirk* to preclude testimony); *Koch v. Koch Indus., Inc.*, 37 F. Supp. 2d 1231, 1244–45 (D. Kan. 1998), *rev'd in part on other grounds*, 203 F.3d 1202 (10th Cir. 2000).

Under the *Kirk* analysis, an expert's prior testimony is not deemed to be an adoptive admission without independent proof that a retaining party has control over the testimony or conclusions of an expert.

Thus, under the *Kirk* analysis, an expert's prior testimony is not deemed to be an adoptive admission without independent proof that a retaining party has control over the testimony or conclusions of an expert. This is even true for experts who are designated as trial witnesses but subsequently withdrawn.

Trial as the "Critical Juncture": *Glendale*

The third approach, originating with *Glendale Fed. Bank, FSB v. United States*, 39 Fed. Cl. 422 (1997), attempts to create a middle ground between *Collins* and *Kirk*. On the one hand, *Glendale* agreed with *Kirk*'s premise that an expert "is expected to give his own honest, independent opinion," and that "[h]e is not the sponsoring party's agent at any time merely because he is retained as its expert witness." *Id.* at 423. *Glendale* noted that deeming a deposition to be the point at which an expert's views become attributable to the retaining party "would unduly intrude on a party's ability to control its own case," as well as "inhibit a party's attempt to fully explore and understand its own case." *Id.* at 424. On the other hand, *Glendale* rejected *Kirk*'s premise that to constitute an adoptive admission under Federal Rule of Evidence 801(d)(2)(C), the expert must be an agent of the party. Rather, *Glendale* noted that Federal Rule of Evidence 801(d)(2)(C), which concerns "person[s] authorized to speak," is separate and distinct from Federal Rule of Evidence 801(d)(2)(D), which concerns agents. *Id.*

The court ultimately determined that an expert's deposition testimony may be an adoptive admission once the expert was designated as a trial witness, since by that point the court "may assume that those experts who have not been withdrawn are those whose testimony reflects the position of the party who retains them." *Id.* at 424–25. Importantly, *Glendale* was not based on a "retroactive[] finding [of] agency or control at the time of a particular deposition"; rather, *Glendale*'s rule was based solely on the perception that "[t]he beginning of trial is a critical juncture" when it was "fair to tie the party to the statements of its experts." *Id.* at 425. The court, therefore, permitted the plaintiff to use depositions of two of the defendant's experts as party-opponent admissions because those experts were not withdrawn before the trial. *Id.* The court, however, prohibited the use of a third expert's deposition as a party-opponent admission because he had been withdrawn before the trial. *Id.*

Numerous courts have found *Glendale*'s reasoning persuasive and allowed an expert's prior deposition testimony as an adoptive admission if the expert was designated as a trial witness. *Cadlerock Joint Venture, L.P. v. Royal Indem. Co.*, No. 02-16012, 2012 WL 511531, at *1, 3 (N.D. Ohio Feb. 15, 2012) (excluding the expert's deposition testimony because the expert was withdrawn before the trial); *Mann v. Lincoln Elec. Co.*, No. 1:06-cv-17288, 2010 U.S. Dist. LEXIS 43824, at *3–6 (N.D. Ohio May 5, 2010) (same); *Minebea Co., Ltd. v. Papst*, No. 97-0590, 2005 WL 6271045, at *1 (D.D.C. Aug. 2, 2005) (same). *See also Durham v. Cty. of Maui*, 804 F. Supp. 2d 1068, 1070 (D. Haw. 2011) (finding *Glendale* "persuasive" but declining to "craft a particular rule drawing a clear line between when expert opinions qualify as statements of party opponents"); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1016 (9th Cir. 2008) (citing *Glendale* and holding that an expert's testimony from the "first bellwether trial" in a multistage trial was admissible as an adoptive admission in a subsequent trial stage).

The *Glendale* line of authority seeks to compromise the two extremes exemplified by *Collins* and *Kirk* by holding that an expert's prior testimony only becomes an adoptive admission when the expert is designated as a trial witness. The testimony of an expert withdrawn prior to trial will not be admissible against the retaining party under Federal Rule of Evidence 801(d)(2)(C).

Navigating Uncertainty: Using an Opponent's Expert and Protecting Your Own

Not having a uniform standard for admitting an expert's prior deposition testimony as a party-opponent admission complicates understanding the circumstances under which courts may admit an expert's prior deposition testimony as an adoptive admission. However, we have some general suggestions for approaching the issue when you seek to protect an expert's deposition testimony, or, conversely, to use an opponent's.

Protecting Your Own Expert

When a party's expert is a potential liability the party should ensure that it does not open the door to an adoptive admission by unnecessarily designating the expert as a trial witness. Practitioners in the Fifth and Third Circuits have a reasonable expectation of how courts will analyze the issue: Fifth Circuit courts will likely follow *Collins*, and Third Circuit courts will likely follow *Kirk*. In these jurisdictions, it appears that a party will not suffer a meaningful disadvantage by designating the expert as a trial witness.

As for *Glendale* courts, you may face a fundamental strategic difficulty. It is a relatively easy decision to abandon an expert who significantly undercuts a party's case during a deposition or whose opinion no longer appears to be valid—and under *Glendale*, the opposing party will not be able to use that expert's deposition testimony as an

adoptive admission. The difficulty arises, however, when you can potentially establish a significant point through other evidence, including another potential expert, but your opponent likely will challenge that evidence. In those circumstances, you justifiably would not want to abandon an expert without confirming the admissibility of the other evidence. However, in practice, courts often cannot resolve evidentiary admissibility issues before the parties must disclose their trial witnesses.

In such circumstances, you could file a motion before the deadline for identifying trial witnesses seeking an expedited determination of outstanding admissibility issues, or, alternatively, for permission to withdraw the expert upon the admissibility ruling without rendering the expert's prior deposition testimony a party-opponent admission. The *Glendale* rule was founded on a presumption "that those experts who have not been withdrawn are those whose testimony reflects the position of the party who retains them." *Glendale*, 39 Fed. Cl. at 424. That presumption, however, arguably is not appropriate when a party designates an expert as a witness only because of pending admissibility issues for other evidence, and the party cannot establish its litigation position without judicial guidance. Without a ruling, you must choose the lesser of two evils based on the best available information.

Additionally, even if you identify an expert as a trial witness but later withdraw that expert, you still have means of mitigating or eliminating the potential damage from the prior testimony. First, all deposition testimony is subject to the rule of completeness in Federal Rule of Civil Procedure 32(a)(6) and Federal Rule of Evidence 106, which provide that when a party introduces part of a deposition as evidence, an adverse party may require the offering party to introduce at the same time any other portion of the deposition that in fairness should be considered with that part. Thus, if an opposing party designates for the record an expert's testimony as an adoptive admission, you could mitigate that testimony by calling for counter designations to ensure a fair evaluation of the admissions cited by the party opponent.

Second, you should question whether the testimony actually constitutes an "admission." In *In re Welding Fumes Prods. Liability Litig.*, No. 1:03-cv-17000, 2010 WL 7699456 (N.D. Ohio June 4, 2010), the court found that an expert's prior testimony "did not make a clear, admissible admission." *Id.* at *31. Further, the court noted that if the court admitted the deposition statement as evidence, "it would have to be accompanied by [the expert's] explanation, as well[,]" and the combined testimony "would be unduly confusing to a jury, carry very little probative value to the defendants' case, and, in the end, carry no clear 'admission.'" The court thus refused to admit the expert's previous deposition testimony. *Id.* at *32. Depending on the nature of the testimony the opposing party seeks to admit, you may move to preclude the testimony because it does not constitute an "admission." This would especially hold true in cases where subsequent evidence undermined an expert's conclusions.

Many of these strategies also apply to jurisdictions that have not considered whether and when an expert's prior testimony constitutes an adoptive admission. If a jurisdiction has not yet considered the issue, you preemptively could move to preclude the expert's deposition testimony as a party-opponent admission, arguing that a court should adopt *Kirk*. Should a court have the inclination to adopt *Glendale*, you alternatively could seek an expedited determination of the admissibility of evidence, or permission to withdraw the expert when the court rules on admissibility, as discussed above. As with the *Glendale* preemptive motion, you should file this motion well in advance of the trial witness disclosure deadlines.

If a court rejects a preemptive motion or declines to provide an expedited admissibility ruling, then you will have to make the best decision possible based on the circumstances. Sometimes not designating an expert as a trial witness may be the best strategic decision under the circumstances. Other times, you may need to designate an expert as a trial witness in case a court refuses to admit other evidence as inadmissible. In those cases, you will have to brief the issue. If a court adopts *Glendale* or *Collins*, you should take all necessary steps to preserve the issue for an appeal, and then try to exclude the proposed deposition testimony as not truly an "admission" or mitigate the damage through counter designations under the rule of completeness.

Using an Opponent's Expert

The strategy differs significantly when you contemplate using an opponent's expert testimony as an adoptive admission. Prior testimony of expert witnesses generally seems admissible as an adoptive admission in *Collins* jurisdictions. For *Glendale* jurisdictions, your approach will depend on the goal. If you want to encourage the opposing side to strike its expert altogether, then you may want to raise the adoptive admission issue before the parties must designate trial witnesses. In contrast, if you seek to ensure that a court will have adoptive admissions read into the record, then you should not raise the use of an expert's prior testimony as an adoptive admission until after an opponent has designated the expert as a trial witness.

The same applies to jurisdictions that have not yet adopted an approach. If your goal is to gain adoptive admissions for a trial, you should delay raising using an expert's prior testimony until after an opponent has designated the expert as a trial witness. Once an opponent has designated the expert as a trial witness, you may use the expert's prior testimony as an adoptive admission if the court adopts either *Collins* or *Glendale*.

Kirk and its progeny pose the most difficulty when you want to use the testimony of an opposing party's expert because they support precluding litigants from using the testimony of independent experts as adoptive admissions. That said, you still can use the prior testimony of the opposing party's expert as an adoptive admission if the opposing party controls the expert's opinion or testimony. While this typically will not apply to third-party experts, it may apply to in-house experts or to other experts who have an agency or employment relationship with an opposing party. Thus, even in a *Kirk* jurisdiction, you may have grounds for admitting an expert's prior testimony under certain circumstances.

Conclusion

Even the best preparation does not always prevent expert witnesses from becoming potentially damaging witnesses. When **Expert Testimony**, continued on page 85

Expert Testimony, from page 45
ney sometimes may have to designate that expert as a potential trial witness even if the attorney probably will not call him or her to testify during a trial. In jurisdictions allowing adoptive admissions, this tactic could mean that an opponent may use the expert's prior testimony as an adoptive admission against the attorney's party. You should remember that some jurisdictions permit this, keep in mind the ones that do, and understand the grounds for using an expert's prior testimony as an adoptive admission. You should also understand the three lines of authority on prior expert testimony as an adoptive admission to identify strengths and weaknesses of each persuasively in jurisdictions without governing rules so that you can obtain the most favorable result.