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# Trial<sup>®</sup>

## GOOD COUNSEL

# THAT'S NOT MY EXPERT!

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Bearing the burden of proof means plaintiff counsel must carefully choose the right experts. But what happens when you have done your homework, vetted an expert, and prepared that expert for deposition only to see him or her fall short, or worse yet, give damning testimony? You need to formally abandon that expert!

Under most state statutes and case law, plaintiffs must give the defense written, reasonable notice of their clear and unequivocal abandonment. Reasonable notice is not always clearly defined, but usually means that the defendant has adequate time to contact the expert and adopt that expert as its own.

If you don't properly abandon the expert, be prepared to face a "missing witness" instruction at trial. This means the court will instruct the jury to presume that a reasonably prudent party would have produced its expert at trial if the testimony was favorable.

How does abandoning the expert prevent the instruction? In most states, a defendant must show a variation of the following four factors before the "missing witness" instruction will be given:

- The witness was under the plaintiff's control.
- The witness was not equally available to the defendant.
- The plaintiff would have produced the witness if favorable.
- No reasonable excuse is shown.

By properly abandoning an expert, you relinquish control over the expert, making the “missing witness” instruction no longer applicable.

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