

Expert Witnesses and The Sunshine Act – What Does the Future Hold?

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The involvement of expert witnesses in litigation almost always leads to discovery aimed at establishing a potential financial bias on the part of the expert. The amount the expert has been paid for his or her involvement in the case at issue, along with their lifetime earnings as an expert, are often fruitful areas for cross-examination in the effort to cast a financial motive over the expert's opinions. In the area of pharmaceutical and medical device litigation, discovery into consulting relationships with product manufacturers is an additional avenue to find evidence of financial relationships that can be used to suggest bias. While traditional means of discovery have long been available to explore such consulting relationships, the more recent enactment of "The Sunshine Act" has created a federally managed, publicly available resource for identifying ties between expert witnesses and drug and device companies.

"The Sunshine Act"

The Sunshine Act has been a controversial piece of legislation, the future of which is clouded by uncertainty. The Physician Payments Sunshine Act (PPSA) is Section 6002 of the Patient Protection and Affordable Care Act (Public Law No. 111-148), as amended by the Health Care and Education Reconciliation Act of 2010 (Public Law No. 111-152). Also referred to as "Open Payments," the program was created as a part of the Affordable Care Act. The Open Payments Program is managed by the Centers for Medicare and Medicaid Services which compiles information on payments made to physicians and hospitals by pharmaceutical and medical device companies for consulting services and ownership interests that physicians have with industry. The Center is charged with periodically reporting to Congress on the data it collects. It also maintains a publicly accessible website – <https://openpaymentsdata.cms.gov/> – that allows a user to search the financial information collected. Over the course of the program almost 17 billion dollars in payments have been reported since data began being collected in 2013.

The availability of the data has been widely publicized and media reports have focused on companies and physicians that have paid and received the most according to the data. Attorneys should be aware of the nature and extent of the available data when dealing with expert witnesses. While large payments on their face can be an effective tactic for suggesting bias on the part of an expert, delving into and explaining the nature of the payments can be an effective way of defending the credibility of an expert under the right circumstances. For example, Kansas City orthopedic spine surgery expert, Dr. Roger Jackson, was listed as receiving the most post payments from industry in 2015, but the details of those payments show that nearly all of the compensation he received was for royalty fees resulting from Dr. Jackson's numerous inventions aimed at improving patient care.

Repeal of the Affordable Care Act

A repeal of the Affordable Care Act raises questions about the future of the intertwined Sunshine Act. The commentary on whether or not The Sunshine Act will survive in some form under a revised healthcare act has been split, due in part to the many stakeholders involved. The short history of the Open Payments system has raised questions about the burdens and accuracy of the system. Yet, strong support remains for open release of financial relationships that have both an important role in scientific research and medical treatment, but also shed light on potential conflicts of interest that may otherwise be unknown. From a litigation perspective, the loss of The Sunshine Act would eliminate a means for unearthing financial relationships that could potentially impact the credibility and effectiveness of an expert witness. This result would not only impact an attack on the credibility of an opposing expert, but would eliminate another means of vetting the financial relationships of an expert that a lawyer and client are considering hiring. Time will tell if The Sunshine Act will survive or not, but in either case the practice of challenging and retaining expert witnesses will continue to be affected by the scope of information available about financial relationships between physicians, their institutions, and drug and medical device manufacturers.