

The Nuts and Bolts of Expert Selection*

**The first in a series of articles on expert witnesses*

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In today's litigation climate, experts make or break your case. Most litigators have had the unpleasant experience of seeing their experts implode on the witness stand. All too common are experts who are insufficiently prepared, have poor demeanor, are too talkative, speak in jargon or try to outsmart the lawyers. Most of these problems can be avoided on the front end by taking the time necessary to select the right expert. What follows is a step-by-step guide to expert selection.

A. Finding Your Expert

Research the field. Once you have identified the topic or subject matter requiring expert testimony, research the expert's field. This is now easier than ever thanks to the Internet. Many publications are available online free of charge. Even if publications are not free, you can find out what is being published and identify the leading authors or researchers. You can be cost-effective by screening publications to determine which would be the most valuable and worthy of ordering.

After conducting basic Internet research, select articles to read in respected and peer reviewed educational or scientific journals. These may not be available for free online, but they certainly can be located and subscribed to online. In searching for articles, look for specific authors identified in your Internet research and start to consider whether those authors might be appropriate experts.

Utilize local connections. Our area is fortunate to have a number of fine colleges and universities, each of which has faculty directories full of potential experts in many different fields. At the very least, talking with local academics can lead to the identification of well-respected but otherwise relatively unknown experts.

Do not forget to talk to practitioners. For example, if you are looking for an engineer, talk to engineers in the community who might be familiar with the issue and who might know the names of prominent individuals in the field. If your client is a business, one of your client's employees will likely know the identities of the leading experts in the field in question. It is also helpful to talk to local lawyers who have had cases involving similar subjects of expertise. They can often recommend expert witnesses and, perhaps even more importantly, tell you who not to use.

Research case law. Once you have identified and begun to zero in on a potential expert, plug his or her name into a basic Lexis or Westlaw search. This will allow you

to see if your potential expert has had any qualification problems and will give you a glimpse as to whether his or her theories have held up in court. While often overlooked, this brief search can serve as an important source of information with respect to which experts should and should not be used.

B. Evaluating the Expert's Credentials

Once you have zoned in on a possible expert, make sure to carefully review that expert's education as well as the credentialing requirements for the particular area of expertise. For example, if your expert witness is an orthopedist, look for a board-certified orthopedist because being board-certified will greatly enhance the doctor's credibility with the trier of fact.

It is also important to evaluate the expert's work experience. If little of the expert's work experience has been devoted to the specific area at issue, he or she will have less credibility than someone actively working in the field. Experts with little experience will also be less likely to convey and defend their opinions readily and in an effective manner. By the same token, if the expert is currently involved in relevant research, he or she will be much more up-to-date than someone who may have received a Ph.D. on the topic thirty years ago but has not since worked or performed research in the field in question.

Find out if the expert has any publications on the topic in question, as well as if he or she has made presentations on the topic. Read every single one of the expert's published papers: you know opposing counsel will! There are few better cross-examination techniques than using the expert's own publications to contradict points made on direct examination.

Determine if the expert is actively involved in professional organizations. If so, find out which ones. Involvement in one's professional community enhances credibility.

Ask the expert if he or she has ever testified in court or at a deposition. If so, track down the transcript. Do not be afraid if your expert has testified many times before. Although many writers will advise you to avoid the courtroom professional, this type of expert can be very effective. Experts who have previously testified are often better at getting their point across, have a more realistic idea of the work involved, and anticipate cross-examination points. In short, like most things in life, there is no one shoe that fits all, and careful judgment must be exercised in each case.

When evaluating an expert, do not hesitate to pass on any candidate with weaknesses in any of the above-mentioned areas. Generally, there is a large pool of possible experts for subject matter requiring expert testimony. Going back to the drawing board is preferable to hiring someone who is not a good fit.

C. Conducting an Interview

It is important that any potential expert witness be thoroughly interviewed in person by the lead trial attorney in the case. This part of the expert selection process is so critical that it should not be delegated. Among other things, make sure to review and verify all of the information in the expert's biography during the interview. It is uncanny how often errors in resumes or biographies become a major subject of cross-examination in the courtroom.

In addition to probing the expert's credentials, make sure that you give the expert a realistic idea of the work involved. It is not helpful to find the perfect expert only to find out that he or she does not have the time or interest needed to do the spade work, to write the reports, to attend the depositions or to provide the courtroom testimony.

Most all of us have had the unfortunate experience of working with a witness who was overly gabby or too confident. This can be death to your case. One interview technique that can be very useful is to practice examining the witness as if he or she was on the stand. You will then get a good idea as to whether the expert is easy to follow, whether he or she conveys ideas effectively as opposed to speaking in jargon, and whether he or she is a good teacher. All of these are important characteristics of a good expert.

Discuss the expert's methodology in detail so that you can assure yourself that the expert can meet the *Frye* standard (if in state court) or the *Daubert* standard (if in

federal court). Explore his or her depth of experience and do not accept generalizations without further probing. Taking nothing for granted also entails checking the expert's references. Although time consuming, a lot can be learned through such individuals. Finally, be realistic: any good expert will give away points to the other side.

D. Entering Into a Written Agreement

All expert witnesses should be placed under a written retainer agreement. This applies not only to testifying experts, but also to consulting experts, who are not intended to testify at trial. Topics that should be addressed in the written agreement include fee structure (often broken down by document review, report preparation and trial testimony), billing frequency, ancillary costs and payment terms. Set forth as specifically as possible the scope of the engagement, including the case name, subject matter of expert opinion, preparation of written reports and deposition and/or courtroom testimony. It is important to note in the agreement that the expert's fees are not dependent on the outcome of the case. In a contingency case, note that the fee is the responsibility of the client and that if the deposition is by opposing counsel, you are not responsible for the expert's fee. Be sure to address confidentiality of records and discussions. Finally, approach the relationship with a clear understanding of whether communications between the attorney and the expert are discoverable. Although they are not under state rules, until recently they were discoverable in many federal courts.

Conclusion

If you follow the basic steps outlined above for selecting an expert, and if you exercise good judgment in the selection process, you will find most of your experiences with expert witnesses to be satisfactory. Of course, in the practice of law, no matter how much you prepare, you should always expect the unexpected.

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