

Selecting and Vetting Your Client's Expert Witness

by John T. Lay, Jr. and Shaun C. Blake

As any litigator will attest, expert witnesses often are the most critical witnesses in a lawsuit. A good expert witness retained early in the litigation can help a litigator navigate the evidentiary landscape of a case from the inception of the case to the closing argument. Furthermore, at trial, juries provide substantial weight to the testimony that an expert provides to them. The gravitas that "experts" carry with them into the courtroom should not be underestimated, and prudent litigators ensure that all experts, even their own, are worthy of that gravitas by properly vetting and selecting experts well in advance of trial.

As early as possible in a case, you should identify whether an expert witness will be needed to present your client's case or to defend your client's position. One question that is helpful in identifying this need is whether expert testimony is necessary to establish an element of which your client bears the burden of proof. Also, consider whether your opponent has engaged an expert, or whether they will need to engage an expert to meet the burden of proof. Finally, even if you do not need an expert to testify, consider whether a consulting expert can help you frame discovery, prepare for depositions, and proceed to trial with the tools you may need for success.

In some cases, the need for expert testimony is obvious. For instance, expert testimony is required, often pursuant to statute, to establish causation in professional misconduct or malpractice cases. Doctors and psychologists are needed to establish matters such as bodily condition and mental capacity. Expert testimony from appraisers or other experts experienced in a related field is needed to establish the value of services, personal property, and real property. Similarly, experts with relevant knowledge or experience are needed to establish business custom and trade usage. As a general rule, you will need to employ expert testimony to establish factual matters that are scientific in nature or not commonly known to jurors.

Find the Right Expert Early

The key to effectively employing experts is to start early. Experts can help from the outset of the case by developing themes. Remember that your expert may have discovery needs too, and often you will need to conduct this discovery in a tight time frame.

For instance, unless you are under a scheduling order that states otherwise, all parties must disclose their experts for trial, including the written report described in FRCP 26(a)(2)(B), at least ninety days before the case is to be ready for trial. Moreover, rebuttal experts must be presented thirty days after the opposing party's disclosure. Since you will need to help develop your expert's testimony, which can take a lot of time, getting paired up with your expert early is key to meeting these discovery deadlines and using discovery to your advantage.

However, looking for an expert can take time. Therefore, knowing where to find them is important. In many cases, the best place to start looking for an expert is with your client because they are often involved in the field where an expert is needed. Also, check for references in case law stemming from your region or involving your parties. Do not forget to check with colleagues around the office or in the area. Finally, you should be aware that there are a number of internet based services that will help you find an appropriate expert, often for a fee that is charged to the expert rather than you.

Websites for Locating Expert Witnesses:

- www.mlegal.com
- www.expertpages.com
- www.oshc.com/experience.htm
- www.experts.com
- www.tasanet.com
- www.teklicon.com
- www.nocall.org/links/expertwitness.html
- <http://catalog.loc.gov>
- www.llrx.com/columns/expert.htm

When looking for an expert, try to find one that is the total package – an expert with both a high level of education and a lot of real world experience. Jurors often respond better to someone saying, "I've been an accountant in this industry for 20 years and I think the defendant's financial statements are in accordance with GAAP and industry standards," rather than, "I've taught accounting for 20 years and I think the defendant's financial statements are in accordance with GAAP and industry standards." Do not retain an expert just because she is well-published. Remember that the jury may be indifferent to this fact. Furthermore, numerous

publications may increase the likelihood of contradiction, providing your opponent fodder for cross-examination.

An effective communicator will carry more weight with the jury than someone who is just well-published. Therefore, once you have found an expert that looks good on paper, imagine how he or she will come across in the courtroom. Consider speaking abilities, confidence in the witness' own knowledge, and ability to explain complicated topics in a way that everyone can understand them. Communication skills are key, and if that physicist cannot express herself in layman's terms to you, she likely will struggle in front of a jury.

While you are communicating with the witness to test his communication skills, keep your eyes out for some red flags. Be wary of agreeable experts – experts that quickly agree with you may quickly agree with your opponent when the facts are presented in a different light. Also, talk to the witness about his testifying experience. Even if a witness appears qualified on paper, it is very risky to use an expert that has never been on the witness stand. At the same time, determine if the witness is a “hired gun,” because professional experts will be easily impeached by your opposing counsel.

Websites to Confirm whether a Witness Has Been Excluded

- www.dauberttracker.com
- www.medxonline.com
- www.lexis.com
- www.westlaw.com

Look Beyond the Expert's CV

To avoid a nightmare on the witness stand, and potentially a malpractice claim, scrutinize your candidate as you would your opponent's expert. If your client can establish that you “failed to exercise the degree and skill commonly possessed by a member of the legal community” in selecting an expert witness, which results in the dismissal of a meritorious claim, then they may succeed in establishing legal malpractice based on your failure to vet the witness you selected. See *Dimond v. Kazmierczuk & McGrath*, 15 A.D.3d 526 (2005); *Costanzo v. Pennsylvania Turnpike Com'n*, 50 Pa. D. & C.4th 414 (2001). First, you should double-check your expert's credentials were possible, such as confirming licensure or education with the appropriate boards and schools. There are a number of online services that can verify credentials. Moreover, most schools will verify degrees over the phone.

Websites for Confirming Expert Credentials

- www.degreechk.com
- www.docboard.org/docfinder.html
- www.avvo.com

Some notorious cases of falsified credentials have

hit the media in the past few years:

- Major League Baseball's handpicked steroids expert falsified his resume for congressional hearings in 2005, which resulted in even more skepticism from Congress.

- In 2006, an “expert” toxicologist of over 30 years was found to have entirely falsified his resume; by one estimation, he testified in over 4,000 DUI cases throughout his career, many of which are now being reviewed.

- A federal judge recently threw out a jury verdict in favor of Merck after it came to light that a cardiologist testifying in the Vioxx cases had misrepresented his credentials.

- In 2001, a D.C. police officer who testified in thousands of drug cases was found to have falsified his resume, causing a number of convictions to be overturned and was an embarrassment to attorneys on both sides of the bar who had used his services.

Second, review the published works that your experts include in their curriculum vitae and ask for copies of non-published works. Confirm your expert's authorship of the writings found on the curriculum vitae. When you are going through these materials, take time to look for bias or potential contradiction in these works as well. Also, search for unlisted writings that may be embarrassing or discrediting to your witness.

Additionally, you may consider checking to see if the expert is a party to any pending litigation. Public records and the internet are great resources to use to perform vetting on your witness. If the expert maintains any websites, review the history of these sites. Furthermore, many experts utilize social networking sites such as LinkedIn or Facebook. If these sites do not reflect that your witness is who he claims to be, then steer clear of him.

Table 4:

Social and Professional Networking Websites for Vetting Experts

- www.linkedin.com
- www.xing.com
- www.ryze.com
- www.ecademy.com
- www.yorz.com
- www.myspace.com
- www.facebook.com

These additional efforts, though time-consuming and tedious, are well-worth the security they provide your client and you. There is no question that your client can sue an expert who ultimately proves to be a fraud or professionally negligent. However, that expert may be able to drag you into court along with him. In *Forensis Group, Inc. v. Frantz, Townsend & Foldenauer*, 29 Cal.Rptr.3d 622 (2005), a claimant sued his expert witness for professional negligence

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stemming from his work in a wrongful death case. The Court of Appeals allowed the expert to maintain an equitable indemnification cross-claim against the hiring attorney to share in the fault for the case's dismissal. Therefore, in order to get the best result for your client and avoid the risk of a malpractice claim, be sure that the expert you retain is appropriate, qualified, and honest.

EXPERT CHECKLIST

- Do you need an expert to fully prove your case or dispute an element of your opponent's case?
- Do you fully understand what you hope to accomplish by having an expert?
- Have you checked a variety of locations for the right expert?
- Will your expert be able to satisfy Daubert and FRE 702 and 703?
- Does the expert you have chosen meet your specific needs?
- Is your expert too agreeable?
- Does the expert have good communication skills?
- Have you thoroughly scrutinized the expert as you expect your opponent to do?

**A Minor Assignment
Cont. from page 17**

ment is proper, he will look at your proposed Order. Be sure to look at the Code so that your Order will include all necessary information. Assuming it is done correctly, the judge will probably sign it, therefore requiring the execution of a proper receipt and release, upon payment of the settlement proceeds.

"You and the Plaintiff's attorney will need to have the Release executed, and you will need to give them the check. Section 62-5-103 will tell you how the check should be made payable."

"Great, thanks!" Flea headed for his car, pulled the parking ticket off of the windshield, threw it into the back seat, and drove to the office.

The following Friday, Senior Partner came to Flea's desk. "Son, I've reviewed the papers that you have drafted for the minor settlement. Have you set up a hearing?"

"Yes, sir,"

"Good work. Oh, by the way, I hope you didn't have any big weekend plans... You handled this so well, I want you to review the law and draft the necessary documents for the approval of a wrongful death settlement for me by Monday!"

- Have you confirmed all of their credentials?

Conclusion

When a client approaches you with a case that involves elements that will require expert testimony, the search for the right expert should begin as soon as possible in the representation. Finding the right expert takes advanced planning and thoroughness, and flipping through the CV's of familiar experts will rarely result in locating the best expert for your client's needs. With a little extra research, you can be assured that you have fulfilled your professional obligations to your client and have positioned your case to achieve the best results.

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