Challenging Your Opponent’s Expert: Due Diligence is Key

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Introduction

As does yours, our firm frequently deals with cases involving challenges to expert witnesses. In a recent matter, the challenge was unusually successful, which, in turn, dictated a more favorable end result of the case than would have otherwise been had. Neither the challenge nor the result of the case would have been as successful but for the rigorous, thorough, and penetrating investigation performed on the plaintiff’s expert witness. By consulting a variety of sources and performing extensive leg work, we were successful because, to borrow a term from our transactional colleagues, we performed our “due diligence.”

Inspired by those efforts, this article intends to detail one example of the effort undertaken to conduct due diligence research on an expert witness. Why recommend to your client to spend significant additional time, money, and manpower to research an expert witness beyond what the generic discovery process affords? Because uncovering exaggerations, falsities, inconsistencies and misrepresentations in the testimony of expert witnesses can drastically alter the outcome of any case. To achieve these results, due diligence must be done when researching your opponent’s expert. The process should be undertaken early and updated with regularity. The ordinary reliance on materials published during the generic expert discovery during litigation is not nearly thorough enough when expert witnesses whose opinions can materially affect the outcome of the case are involved.

Utilize Your Local Bar Resource

A thoroughly diligent expert witness search includes utilizing your local bar resource to gain information. For example, the Alabama Defense Lawyers Association website, along with similar organizational websites in other states, provides members with an expert witness database.1 The State Defense Association in some states will for a fee issue an email blast or mail post cards to its members asking for commentary on a particular expert. Such local bar resources, when they do not provide an

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expert witness database, often provide links to other websites offering expert witness research tools for defense lawyers.²

While utilizing local bar resources is a step beyond the ordinary procedure for researching expert witnesses, due diligence requires more. The nature of information obtained through such local resources may be limited in scope. To most effectively challenge your opponent’s expert you should research the expert’s testimonial history in other parts of the country as well. Thus, to perform complete due diligence, your research should expand outside of your local and regional area by taking advantage of national resources.

The DRI Expert Witness Database

The DRI Expert Witness Database provides the ideal national resource to take your research to the next level. The database contains over 65,000 plaintiff and defense experts and affords DRI members access to a bevy of information and documents pertaining to these expert witnesses.³ Researching and downloading the information on the database can be accomplished with ease.

Begin by simply signing-in to DRI Online where a member can drag the mouse over the Membership Services tab causing a menu to drop down. From this menu, select the “Expert Witness Database.” From the database homepage, select the “Search” option at the top left corner of the page. The search page will prompt you to select the side for which the expert is testifying and to enter either the case name or case file number. Once you enter this information and click the “Continue” button at the bottom of the page, you will then have the option to search for any witness by name, topic, or keyword.

Once you perform the type of search desired and find the desired expert, you will have access to a variety of information. For example, previous depositions, a trial transcript, curriculum vitae, and the expert’s contact information are ready for download. Allowing you to delve further into the information you will also find on the database the identities of DRI members who previously inquired about the particular expert are made available for contact.

Offering such tools, the database provides an excellent means by which you can juxtapose what an expert says in your case with what the expert has said in previous cases. What is great is that all this information is accessed and downloaded at no cost to DRI members. A simple mailing, email blast or telephone call to attorneys who have had prior experience with the expert often results in additional documents, as well as hints and assistance from these attorneys who are all too often of the ten willing to share their experiences and insight. Still, as we stated at the outset, due diligence requires research through multiple sources in an effort to access as much information as possible, so you cannot stop here.

Independent Pay Sources

Although they will add to your overall litigation costs, independent pay sources are also an option you should consider. Dedicated to providing information about expert witnesses, these sources often can access vital information in much less time than it would take attorneys to access the same information on their own. Recently, services such as Idex⁴ and the TASA Challenge History Report⁵ have emerged as go-to sources for attorneys researching their opponent’s experts.

Turning first to Idex, the network is an excellent pay source which identifies and indexes expert witnesses around the country. The service allows defense attorneys to tap into a nationwide network providing a wealth of information pertaining to expert witnesses. Attorneys are presented with two options: conduct a “do-it-yourself” search through Lexis, or have the Idex research staff conduct the search for you via the Full Service feature.

Needing only a Lexis ID, users can conduct the search themselves and search not only a portion of Idex content made available to Lexis users but also additional material from sources such as Daubert Tracker⁶ and Martindale-Hubbell.⁷ Over 90,000 testimony transcripts and over 40,000 curriculum vitae are available. Users can also access a case database containing over 1 million case records involving some 220,000 expert witnesses.

No Lexis ID? No time to conduct such a search on your own? No problem. The Idex Full Service feature offers defense attorneys a convenient alternative. Simply go to the Idex website, create a free member account, provide the name of the expert and a few details about the case, and submit a request specifying the types of searches desired.

The types of searches are numerous and yield specific information related to the expert. A good starting point is the Testimonial History Report which provides an overview of the expert’s testimonial history and makes available documents such as depositions or trial transcripts which can be purchased directly from IDEX at an additional cost. Additionally, if the expert is subject to a state licensing board, users can search for any documented disciplinary action
taken against the expert by such a board. Other options include a search for articles written by the expert, and a search for opinions and available briefs and rulings regarding any previous challenges to exclude the particular expert.

If the particular expert is found in the database, the results will be returned within two to three business days. Users receive a concise report from which they can request further information if necessary. Additionally, IDEX can be a vital tool for researching not only your opponent’s expert witness but also your own expert witness so as to avoid getting hoodwinked yourself. Although extremely broad, the IDEX network is not the only independent pay source worth using.

In July 2009, the TASA Challenge History Report began providing attorneys access to a much more concise database limited to past challenges to expert witness testimony. The database includes all federal and state evidentiary standards dating from 1993 to the present, and the TASA research staff performs the search for attorneys.8 The database is particularly useful in that it focuses on challenges made in unreported cases which are otherwise difficult to find. Conveniently, the reports are billed at one flat rate: $45.00 per report including all available supporting documents, and the reports are returned within one business day.

Westlaw/Lexis Search

Once you have utilized your local bar resource, the DRI’s database, and any independent pay sources, you next fill in any gaps which may exist in your due diligence research. One way to fill in such gaps involves searching Westlaw or Lexis to obtain court documents, if any, related to the expert witness. Searching for the expert by name can uncover prior cases in which the expert’s testimony has been proffered, questioned or excluded. Judges sometimes include information about the expert in their written opinions and may even include excerpts of the expert’s testimony.9 This data may reveal instances where the expert has committed to certain opinions and methods or instances where the expert witness has been disqualified.

Oftentimes these research websites will also allow you to view copies of expert witness reports, depositions, and motions filed regarding the expert witness. If not, you can attempt to contact the court in which the action took place and obtain copies of such documents. Having these documents allows you to compare them to what you already have and fill any gaps you find.

General Internet Search

Another way to fill such gaps and to gain even more information is to perform a general internet search. A search engine such as Google is not only free, but usually quick and effective. As with much of the information found on the internet, however, one must obviously be careful when relying on such information.

In using Google to run a broad search for the expert by name only, you should utilize Google’s advanced search function and input the expert’s full name with middle initial to gain the best results.10 This search will often uncover information ranging from the expert’s personal website to the expert’s postings on discussion boards.

As opposed to such a broad search, Google offers tools to restrict your search with precision. To find published writings by your opponent’s expert that have been put online in pdf format, run a Google search for the expert’s name, but precede the name by the following operator: “filetype:pdf”. Additionally, you can search specific websites for the expert by using the following limitation: “site:” preceded by the expert’s name.

For example, to search the New York Times website for Evil the Expert simply use the following limitation: “Evil the Expert site:nytimes.com”. Finally, you can limit your Google search to educational websites by using the following operator: “inurl:edu”.

Regardless of how you find it, the expert’s personal website is a valuable source. The website will often contain information regarding the expert’s articles, references, and prior litigation experience. Once you locate the expert’s personal website, carefully review the entire website following all links on the website to thoroughly review the information the expert holds out to the public. Such websites may even contain information which, when revealed to a jury, may cast a negative light on the expert.

Where you are dealing with a more nationally recognized expert, two other general internet queries should be considered. If the expert has been involved in high profile cases, running a search of news sources may lead to articles and reports about the expert’s prior testimony.11 In some cases, an expert may have testified before Congress, thus a search of the Congressional Record may be worthwhile as well. The GPO Access website allows you to search at no cost the congressional record from 1994 to the present.12

A general internet search should also include searching the expert’s employment and professional affiliations.
Access the websites of the colleges or universities the expert lists as alma maters to verify credentials and even request copies of courses and records. If a professor, access the website of the institution employing the expert and search for information within the institution’s website. If the expert is a doctor at a hospital, visit the hospital’s website and use the website’s search tool to locate information regarding the doctor. If the expert is affiliated with a professional organization, search the organization’s website for information pertaining to the expert.

By now, you are getting the big picture. To truly investigate and challenge your opponent’s expert, you have to grab the expert by the horns and refuse to let go until you have wrestled the expert to the ground. Along with all the other research you have done, a general internet search gives you the final push you need to bulldog the expert.

Moreover, utilizing the internet is particularly effective when one considers the cost-effectiveness and ease with which such a search can be conducted. It would be unwise, however, to rely solely on a general internet search because in today’s internet-saturated world, people are constantly searching for and removing information on the internet that may be damaging to them. Thus, it is only after you have exhausted the more penetrating methods outlined above that you should resort to a general internet search.

**You’ve Completed Your Due Diligence - So Now What?**

Ok. Having accumulated six boxes of information pertaining to your opponent’s expert witness, what do you do with all the information? The first thing you should consider is to categorize the information into what supports your opponent’s expert, and what tends to undermine the expert or opinion, his credentials, expertise or opinions. A large amount of the information will undoubtedly neither support nor damage the expert, but finding even one or two pieces of damaging information can make your efforts worthwhile.

Once all the information has been sorted and categorized, you may find that you do not have any information significantly damaging the expert. That is, you find you are dealing with a “bullet-proof expert.” All you can do at that point is perhaps use pieces of information gained in the deposition of the expert to attach the means and method used to reach the pending opinion. Focus, for example, on the methods the expert employed in your case as compared to other prior cases. The expert may be bullet-proof on credentials, but did the expert follow the requisite standards and protocol in arriving at the conclusions in the case at bar? Did the expert follow standards represented on the website or used in prior cases? Consider such issues if you run into the case of a bullet-proof expert as even Superman had kryptonite.

On the other hand, the fun begins when you sort and categorize your information and realize you are dealing with a “bullet-riddled expert.” In such a situation, you can further categorize the damaging information into what you want to discuss at the deposition and what you want to save for trial. In some cases, you can use the information you have discovered in conjunction with deposition testimony you have elicited from the expert to have the expert excluded prior to the trial even starting.

**Conclusion**

Miguel de Cervantes is quoted as saying “[d]iligence is the mother of good fortune. . .” Without a doubt, Cervantes did not foresee this quote being used in a discussion about expert witness due diligence, but the quote is quite apropos of the message behind this article. Defense lawyers cannot expect to be able to simply follow the ordinary procedure offered by generic expert discovery and uncover the information needed to properly critique the opponent’s expert and/or opinions. Such will rarely, if ever, be the case. It is only after using due diligence in researching the opponent’s expert and opinions that defense lawyers may have the good fortune of being able to challenge their opponent’s expert, and gain an advantage in this strategic battle in the war of litigation.

**Endnotes**


Associations currently without a website: Defense Counsel of Alaska; Defense Counsel of Delaware; Defense Trial Lawyers of Nevada; South Dakota Defense Lawyers Association (site under construction); Defense Trial Lawyers Association of Wyoming, Inc. (all the above websites were accessed on October 19, 2009)

3 Overview, DRI Expert Witness Database, http://members.dri.org/experts/user_info.asp?MemberId=xxxxxx (last accessed on October 6, 2009).
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