



## So, You Need to Retain an Expert Witness?

By Steven Phillips

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**Y**our testifying experts are often the most important witnesses in the case. And, the experts you retain may often be the best source for understanding your opponent's best case arguments. Given this, the process of identifying and selecting experts has become increasingly significant. The testifying expert witness will be the person who explains how complex scientific or technical matters fit into your theory of the case, or how damages are calculated. A bad expert witness can lead to confusion or can turn the finder of fact against your case.

### IDENTIFY YOUR EXPERT NEEDS

The logical first step on the road to retaining an expert is to determine the elements of proof and the technical or scientific aspects you need to demonstrate to prevail in the case. Will you need more than one expert? On what aspects of the case will you need expert testimony – in order to prove liability, support a defense, on damages? What are your case-specific deadlines for disclosing experts and their opinions? In most cases, identifying an expert or experts early on will aid in developing your case theories and allow you to focus discovery in areas that will provide the necessary factual background for the experts' opinions.

### LOCATING POTENTIAL EXPERTS

There are numerous sources available to identify experts in diverse areas. Consult with your client, partners or colleagues about experts who have proven effective in a given field or in similar cases. In more unique or specialized areas, national expert search companies may be consulted. Case law research may help identify experts who have been qualified and testified favorably in like cases. Internet research and literature review is helpful in identifying experts where scientific or technical expertise is required. Consider whether an in-house expert – a scientist or accountant employed by your client, for example – may fit the bill. While retaining a client employee who is already educated about the issues of the case may be tempting, before you do so consideration must be given to the amount of emails, letters, internal memoranda and the like that the employee-expert has generated, all of which may be fair game in discovery.

### INITIAL SCREENING

Once you've selected a potential expert, you must screen them to ensure he or she is the right fit for your case. At the outset, identify any conflicts – ethical, competitive or positional – that might prevent the expert from participating in the case. When appropriate, enter into a confidentiality agreement with the expert to ensure that all information and documents shared with the expert remain private. Give consideration to whether, owing to the procedural rules applicable to the case, your communications with the expert will be discoverable and act accordingly. Find out whether the expert's billing rates are in line with your client's expectations and whether the expert will have the time and resources necessary to complete his or her work on time and is available to testify during the dates, if any, blocked off for the trial.

### OTHER EXPERT SELECTION FACTORS

While there are many factors that should be considered when selecting an expert, a standard analysis should focus on whether the expert has the requisite skills, knowledge, education, credentials, training and/or professional experience to provide the opinions you seek. An expert should be truly knowledgeable and not simply a *hired gun* who will say anything for money.

In conducting due diligence, find out about the expert's prior testifying experience. Has the expert ever failed to be qualified to testify? Has the expert's testimony ever been excluded or limited as a result of a *Daubert* challenge or similar challenge under applicable state law? Economists, accountants and appraisers are among the most frequently challenged expert witnesses. Consideration must thus be given to whether the expert appears to employ a sound methodology and whether the expert has in the past provided thoughtful support for his or her opinions. Does the expert appear to be biased, such as only working on behalf of plaintiffs or defendants? Has the expert ever testified on behalf of the opposing party or counsel? Has the expert been retained on similar matters and taken an approach that is similar (or dissimilar) to the approach he or she will take in your case? Is there anything about the expert's personal background (e.g., a prior arrest, criminal conviction, bankruptcy, personal

involvement in litigation or employment termination) that could negatively impact the fact-finder's view of the expert?

Review the expert's resume, Web page and social media, as well as articles, speeches and prior testimony to ensure that positions taken by the expert in the past are consistent with your theories. Talk with attorneys who have worked with and against the expert to help you determine whether the expert's style, demeanor and work ethic are consistent with what you are looking for. Is the expert so pompous as to be off-putting to a jury? Does the expert understand the litigation process, including expert report preparation, discovery and depositions, cross-examination and trial? Importantly, experts should always be good teachers. The best credentialed experts will be of no use to you if they are unable to explain a complex subject matter in a way that is understandable to a jury or fact finder.

### RETENTION

Once you and your client have determined that an expert is the right fit for your needs, the expert should be formally retained through a written agreement.

Some experts use a standard form of retention agreement. While some of those forms are fine, others contain unnecessary or potentially troublesome clauses that may not be appropriate for your case or situation. Typically, the attorney signs the expert retention agreement, not the client. That said, the agreement should make clear whether the attorney or the client will be responsible for paying the expert's bills. Some experts require a retainer and if that is applicable, it should be spelled out in the agreement. The retention agreement should indicate that the expert will not use or disclose information and documents provided to the expert in any fashion unrelated to the retention on your case. If your case is subject to a protective order or confidentiality stipulation with the other parties, a copy should be provided to the expert at the time of retention and the expert and all others working with the expert should sign off on any required documents signifying their assent to be bound to the applicable restrictions.

In sum, thoughtful identification, selection and screening of expert witnesses will go a long way toward ensuring that your case theories, technical evidence or damages claim will be effectively presented to the jury or fact-finder.

