



CLM 2018 Midwest Conference
June 14-15, 2018 in Chicago, IL

Strategic Thinking and Cost Saving in Retention of Experts

I. Strategic Thinking in the Retention of Experts

Who to Hire as an Expert

One of the first issues an attorney must consider when first analyzing a case, is determining how to prove his or her theory(ies) of the case and how to disprove his or her adversary(ies) theories of the case. Often, cases, especially complex personal injury and construction site cases, involve matters far beyond the attorney and the average juror's realm of knowledge and experience. For example, a slip and fall case may involve evaluating the coefficient of friction on a walkway. A construction defect case may require testimony and evidence in the record pertaining to various codes and standards. A car accident case may require an accident reconstructionist to recreate the happening of the accident. All three of these examples are situations where an attorney will not likely have the requisite expertise and knowledge to identify critical questions to ask during discovery and at depositions of witnesses. An attorney also does not likely have the educational or experiential background to properly understand these nuanced and technical issues. Accordingly, retention of an expert well versed in such areas becomes critical to proving or disproving a case. Often, experts will help attorneys identify other areas where additional or different expert testimony will be required in proving case theories. Attorneys will need to seek the approval of adjusters for hiring the proper experts for each case.

It is important that the expert is carefully vetted both for his or her credibility and for his or her work ethic and ease to work with. It is important that the attorney and expert have a working relationship that permits easy communication and results in a usable and solid expert opinion and testimony. The expert's behavior and personality both at depositions and on the stand are crucial to how the expert will play to a jury. It is important to have interviews, both in person and on the phone, with your selected expert early and often to understand the weaknesses and strengths of the testimony and to have firsthand knowledge of how the expert will play to a jury.

When to Hire an Expert

It is best to hire an expert as early as possible during the course of litigation. This provides the attorney time to work with the retained expert to identify critical issues that need to be fleshed out and explored during discovery, including the necessity for inspections, testing, etc. This also provides the expert time to properly analyze the case and formulate opinions. During this time, it is possible that the

retained expert may identify other experts whose testimony will be critical in proving or disproving case theories. Early identification of additional experts will provide attorneys and adjusters time to evaluate and discuss the benefits of hiring additional experts, and decide whether to proceed with retention of same.

Why Hire an Expert

Expert testimony is critical for proving or disproving cases. As discussed, above, attorneys are generalists and experts are specialists. Experts help attorneys and adjusters understand the nuances of each case early on and help identify areas where additional expert testimony may be necessary in proving or disproving the case. Experts also help develop and select important demonstrative evidence to use at trial.

Mistakes to Avoid in Hiring Experts

Selecting the right expert can make your case; selecting the wrong expert can break your case. There are many things to consider when hiring an expert. It is important to exercise objective, independent judgment when hiring an expert by making sure that the expert's opinion, as favorable as it may sound on its face, is supported by the record. Consider how the adversary will depose the expert or cross-examine him or her during de bene esse depositions or at trial and understand how and why your expert's opinion may be undermined. Be aware of the potential flaws in your expert's opinion and any weaknesses in his or her CV. This goes hand in hand with being sure to properly vet the expert's CV. It is important that your expert has actually earned all degrees and accolades listed on the CV. Make sure that your expert has not been barred from testifying, and if the expert has been barred from testifying, be sure to question that expert as to why his or her testimony was barred. Also be sure to inquire as to the percentage of your expert's income that is based on providing expert testimony.

Similarly, it is important to make sure that you hire the "right" expert. For example, hiring an academic rather than an expert who works in the field may end up being a mistake. Jurors tend to favor experts who have recent and relevant experience in the subject matter as to which he or she is testifying over experts who simply have academic knowledge of the subject. Along with that consideration, it is important that the attorney and expert have a good working relationship. Speak with your colleagues who have utilized the expert's testimony in the past. Ask if the expert was easy to work with, if the expert testified well, if the expert presented well to a jury. You can easily reach out to attorneys who litigated the cases listed on the expert's CV or ask around on listservs in your practice area to identify other attorneys who have used your expert in the past.

It is a critical mistake to fail to communicate with your retained experts frequently during the course of litigation. Take advantage of the expert's knowledge and expertise in preparing discovery, taking depositions, and hiring other experts. Consulting with your expert will also provide you with an opportunity to learn your expert's personality, identify weaknesses and strengths in his or her opinion and testimony, and help you understand how the expert will present to a jury.

Carefully prepare your expert for trial. Play devil's advocate with your expert to identify any holes or weaknesses in his or her opinion. Consider how you would cross-examine the witness, if you were on the other side of the case. If time allows, actually sit down with your expert and have a mock

cross-examination to prepare him or her for the tough questions the adversary will likely ask at trial. Ask your expert the tough questions before the adversary does.

Finally, make sure that you have a detailed discussion with your expert regarding his or her fee schedule prior to retention. It is imperative that both you and the witness are on the same page regarding fees, including travel, trial expenses and testimony, and other expenses that may arise should the case actually go to trial at the outset so that there are no surprises or disputes.

II. Cost Saving in Retention of Experts

Cheapest is Not Always the Best

As tempting as it may be to hire the most inexpensive expert witness to get the “best deal,” this may not be the most cost effective strategy in the long run. If you choose to retain an inexpensive expert who ends up providing weak testimony or opinions or has flaws in his or her CV, you could potentially face motions *in limine* to bar your expert’s testimony. This could end up leaving you without an expert on the eve of trial and in a position where you may not be able to prove your case.

Likewise, if you hire an inexpensive witness who ends up not being responsive or is difficult to work with, you may end up running up the bill by having to constantly reach out to the expert to get responses, work more closely with the expert than you would with others to finalize the report, or run into other issues that would not arise with more professional experts.

Hiring from a Group

You may be able to save money on expert retention by hiring from a group such as ExamWorks or other expert database groups. However, be aware that such an expert may derive close to 100%, if not actually 100% of his or her income from expert testimony. This may mean that the expert is no longer hands on in the field or that his or her credibility will be attacked by your adversary with regard to compensation.

Retain Experts Jointly with Other Defendants

It almost goes without saying that in a case where there are multiple defendants, a cost saving tip is to cost share for expert fees among all, or at least some, defendants. Not only will this help to reduce costs, but it will avoid duplicative or conflicting testimony that could ultimately undermine your defense positions.

Consult with Experts Early On

This is becoming a repetitive theme throughout this presentation for good reason. Not only does early expert consultation help to refine the discovery process and save time and money by eliminating unnecessary discovery, depositions that do not touch on the critical issues and go off on unnecessary tangents, but also helps the attorney understand how the expert will act at depositions and

during trial testimony. If an expert is one who will not be helpful to your case, it is important to identify issues early on, so that you may terminate the working relationship, stop paying the unhelpful expert's fee, and retain an expert who will actually serve your needs sooner, rather than later.

Make Sure You Actually Need to Retain the Services of an Expert Witness

If the case is not worth a lot of money, it may not be cost effective to hire an expert witness. If you can reach a settlement prior to hiring an expert, you will ultimately save a lot of money in litigation expenses, including expert fees. Additionally, hiring an expert witness and therefore causing the other side to also hire an expert witness, could cause both sides to spend money unnecessarily, driving up the amount required for a plaintiff to accept a settlement offer while diminishing the amount of money available to put towards a settlement offer and ultimately making a settlement unlikely or impractical for both sides. Furthermore, if you do hire an expert, there is no guarantee that the expert will be permitted to testify, especially in the event that the court determines that the expert's testimony will not aid the jury, despite the expert's qualifications. Therefore, it is important to consider the risk/reward balance to spending money on an expert.