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## **Being An Expert, When It Comes To Finding An Expert**

For larger claims, especially construction litigation matters, finding the appropriate technical expert early in the case is critical. Whether it's a fire, structure collapse, metal fastener failure, or an industrial equipment accident, how do you know what type of expert to call? Where do you go to find them? What happens if your go-to expert is conflicted out of the case? This panel will discuss the difficulties associated with the search for a scientific or engineering expert, as well as how to find the most appropriate person, or team for the job.

### **1. Finding the Most Effective and Efficient Expert**

#### **1.1. Understanding and Identifying Which Expert Is Needed**

**1.1.1.** The first step in selecting an expert for an insurance or litigation matter is to understand what kinds of experts are available and what type of expertise is needed. Is this a simple matter, or complex? Will it require one, or multiple experts across various fields? Is this only a consulting matter, or do you need to find someone with a strong testifying background? Does this involve Intellectual Property or Patent expertise, if so; do you need to find the subject matter expert? At what point in the case should I bring them in? Sometimes, these answers may come easily, other times you may be up for a challenge to find the appropriate fit. Finding someone early is always encouraged in order to bring the expert up to speed and working with the litigation or claims team from the start. This will help with strategic planning as the case or claim unfolds.

#### **1.2. Consulting vs. Testifying Experts**

**1.2.1.** In general, there are two different types of experts: the consulting expert, who primarily engages in research and support for the litigation team, and the testifying expert, who prepares reports submitted to the court and testifies before the court. Often, the same person performs these two roles. The job of the consulting expert is to act as an advocate and advisor for the litigation or claims team while engaging in research and analysis. The consulting expert can be used to comment on the strengths and weaknesses of both parties'

respective positions and to probe many alternative theories and damages analyses. They can be used as a resource to test different theories of the case, to research alternative ideas, and to reject those that are least favorable. They can also advise the team on different lines of inquiry while still retaining confidentiality.

Consulting experts will not testify, and their role is purely advisory. The consulting expert is there to research, test, survey, and advise the team. Their primary goal is to help educate, evaluate the underlying issue, testing and experimentation (if needed), assist with discovery and case development, and possibly help identify expert witnesses.

The role of the testifying expert is to objectively articulate his or her client's position based on the investigation results using fundamental scientific and engineering principles. Furthermore, because these experts may end up in deposition or in court, they will need to be able to relay these facts essentially independent of influence from the client in a way for the judge, jury, or arbitration body to understand.

Consider, for example, a case in which it is alleged that a particular contaminant is released during melting and casting of various metal alloys which may be a health hazard for the employees as well as an environmental risk. At first glance, you may think that you need a toxicologist or an environmental expert. But instead of thinking in terms of expertise per se, think in terms of what objectives support your overall strategy. Potential objectives may include:

- Investigate the process. Review all raw materials and processing techniques used within the manufacturing facility to determine if it is likely for the alleged contaminant to form during standard operating procedures
- Evaluate the quality control measures intended to prevent employee or environmental exposure to this specific contaminant
- Assess the potentially harmful effects of the contaminant on human health and the environment, in addition to determining harmful exposure levels

Each objective suggests a different type of expertise and perhaps a different type of expert. On the other hand, you may find a candidate that can perform everything: a toxicologist with a strong chemistry and kinetics background, as well as extensive experience in product manufacturing, process control, and safety procedures within similar manufacturing facilities. The goal is to identify an expert with the ability and expertise to help you objectively investigate the core technical issues of your case.

Alternatively, consider construction and environmental claims; can the project or site manager be considered an expert witness? While there may be the opportunity to price construction claims and calculate damages claimed in construction and environmental litigation, scheduling, and proving, as a project

manager, their goal is to determine time and cost, not fault. If you are hiring an expert, it is your responsibility to understand what that expert's role will be.

Prior to your search for an expert, outline the issue at hand, define a scope, and determine which specialty or expertise you may need. Every expert is unique, proper planning and preparation on the front end will reduce the stress and prepare your case for success.

### **1.3. If Testifying, How Will The Expert Be Perceived By the Jury?**

**1.3.1.** For a consulting expert, the perception of the jury will not be a factor in your expert selection. However, if you're expert will be in front of a mixed jury, how will they be perceived? Using the same testifying expert for every case comes with its own challenges, but determining if your expert can address a mixed audience professionally requires good insight as to who that audience may be. If you have found the expert with the appropriate background, but you anticipate a varying reaction from the jury, work with your expert prior to entering the courtroom. A benefit of diversity in experts from one case to another provides the ability to tap into the many talents which from different backgrounds, perspectives, and abilities bring to the case.

Additionally, how does implicit bias impact the selection of and expert witness? Unfortunately, when selecting an expert, it is important to not only think about the technical capabilities, but how will this expert be perceived by a jury. If you are selecting an expert outside of the stereotypical demographic, work with your expert and use their differences to your advantage.

## **2. The Truth about Engineers, Scientists, and Technical Experts**

### **2.1. Communication, Communication, Communication**

**2.1.1.** Overall, technical experts make great witnesses. More often than not they are personable, have good credentials, and will most likely have at least some litigation experience, depending on your initial search. However, there's still a possibility that something could go wrong, and an expert can quickly become a problem. Working with and discussing with your expert prior to the deposition or trial is highly recommended. Courtroom or deposition behaviors, including demeanor, professionalism, dress attire, and knowing how to stay within the scope of their expertise and the questioning, are a few of the more important things you and your expert should initially discuss.

### **2.2. Common mistakes that experts may make and how to catch them early**

**2.2.1.** Some of the more common mistakes an expert may make may be a fault of theirs, a lack of communication or simply a dysfunctional relationship between the expert and their client. One mistake an expert can make is to only rely upon

information provided by the attorney. The expert needs to take responsibility to ensure that he or she has a full knowledge of all the underlying facts (at the very least those which may impact the overall issue or incident in question) and full access to all relevant records. Merely accepting the word of the attorney, or the client, that, for example, "generally, all production specifications were met and were produced based on routine standard operating procedures" without verification, can have a devastating effect upon the expert's credibility if proved wrong. And, if the expert's credibility is successfully impeached on any point, it is impeached on every point.

Additionally, expert witnesses, similar to fact witnesses, should tell the truth, simply, directly, and with sincerity. The legal world is now focusing more upon the expert witness's methodology rather than simply relying upon his or her credentials as an "expert". Since the *Daubert v. Merrell Dow Pharmaceuticals, Inc* case, the court is now the "gatekeeper" of expert testimony, and a court will not permit an expert to testify unless satisfied that he or she not only has sufficient and valid credentials to pose as an expert in the field in which testimony is sought, but that the expert's methodology was also valid. However, the jury is the sole judge of the credibility of all witnesses, including experts. It is not the expert's job to be an advocate for the client. Their role is to provide the unbiased truth, based on their findings during the investigation. For an expert, trying to fit an opinion into a predetermined objective or goal will be the end of their credibility, and, ultimately, the case.

Lastly, communication is critical between you and your expert. However, it is equally as important that your expert can communicate with others as well. Be careful that your expert doesn't "sound and act" like an expert. When selecting your testifying expert, remember that communication is crucial and that your expert should be able to explain their opinions without appearing condescending or talking down to their audience. Whether it is a spousal relationship, business relationship, or witness and jury, effective communication is vitally important. Encourage your expert to be sincere and concise. Try to discourage the long, excessive, exaggerated professor-like answers. They are not nearly as powerful as a few good well-chosen words. The ability to make the same statement in only a few words is a sign, more often than not, of organization and preparation. In addition to communication, the expert should practice common courtesy. Whether the expert is providing a deposition, or is in front of the jury, remind them that while the audience may not practice or work within a technical field, it doesn't mean that they're incapable of understanding a complex idea or technical matter.

### **3. (OPTIONAL) Predictability is Key to Success**

#### **3.1. Pre-trial Rules and Potential Consequences**

- 3.1.1.** For best results for your case, review the rules of procedure and evidence to avoid any issues in the pre-trial phase with your expert. Although your expert's testimony may be at the root of evidence presented at trial, there are several

preliminary steps that must be taken before your expert can testify. Important rules prescribed by both statutes and the courts govern pretrial proceedings. Failure to adhere to these rules could result in disastrous consequences for your expert's testimony.

### **3.2. Scope, Schedule, and Budget: Pick Any Two**

3.2.1. Once you have defined your scope and you are on the path to finding the perfect expert or team of experts, the amount of time needed to carry out this scope should be considered. The scope of work translates directly into the level of effort, and therefore the labor charge for the investigation. Fast-paced projects tend to require more effort than slow-paced projects with the same scope. Large damage claims may warrant an extensive level of investigative effort; small damage claims will likely not warrant as much effort. It will probably take more than one conversation, but definitely have the conversation about your scope, schedule, and budget expectations. Both you and your expert will appreciate it later.

3.2.2. While being mindful of the schedule and budget expectations, it is encouraged to ask your expert to define the scope of their investigation in a way that identifies and evaluates reasonable alternative hypotheses or scenarios. This is especially important when evaluating causation claims. Testing alternative hypotheses is the hallmark of the scientific method. Whether in federal court or not, you will stand to benefit if your expert conducts their investigation in a manner that meets the Daubert criteria for a sound, scientifically defensible methodology.

For example, the expert may be helpful in refining production requests to ensure that useful technical information is obtained during discovery. In addition to the usual production requests involving documents, correspondence, emails, drawings, and memoranda, your expert may request digital media like photographs, video, or audio files.

As the discovery process gets underway, having the expert work through a time line of the incident is an excellent tool to help you and your expert correlate and evaluate preliminary observations about the case. This is also a good way to develop new lines of inquiry or to determine where more information may be useful. A time line could be a narrative, a table, a spreadsheet, or a graphic. Placing events in a time sequence does not necessarily prove causation, but it does help reveal the story (sequence of events) and can clarify the relationship between events.

### **3.3. Preparation and Practice Makes Perfect**

3.3.1. While it may seem overwhelming initially, finding an expert that you trust early on will make or break your case. As with every relationship, communication and transparency are essential. Good communication builds good teams. When the leader, attorney, claims specialists, or client, are effective communicators, they

are able to strategize and work with their experts towards a clear goal. Good communicators make sure everyone knows their responsibilities and how to perform them. Ensuring that the expert knows the scope of work will reduce the likelihood of unneeded investigation analyses or costly invoices. It will prevent misunderstandings and ultimately, will help you be more prepared for success when the time comes for you to defend your case.