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Expertly Working With Expert Witnesses
How to Collaborate to Win the Case

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Expertly Working with Expert Witnesses

When the key to the case depends upon quality expert testimony, how do you make sure you choose the right professional for the job? And then, once selected how do you collaborate successfully to make sure that expert opinions are clearly presented to the trier of fact. Whether your expert is a medical professional, a real estate appraiser, a mechanical engineer or a wiz in some other field, you need to make sure that their technical expertise translates in a way that makes it possible to win the case. This can only be achieved through effective communication and collaboration. Achieving success often required working with an expert early on and continuing that engagement until the very end.

First Things First – Know Your Case

The first step to choosing the right expert is to know your case. As obvious as this may seem, it can be challenging to identify the myriad of issues that may arise when a case first commences. The more time you spend identifying the area at issue and the potential questions an expert witness will need to address the more successful you will be in selecting the right expert witness or witnesses.

When Should You Retain an Expert Witness

Retaining an expert early has numerous benefits. For one, an expert will help you develop a case strategy. If you are the Plaintiff, the expert can help evaluate whether a claim is meritorious, identify additional issues with the defendant's conduct, and guide you in properly documenting damages early. Similarly, if you are the defendant, the expert can help evaluate the plaintiff's claims, identify potential defenses, and prepare for discovery. On either side, the right expert can educate an attorney on the area at issue by suggesting reading material and supplying helpful background information. In particular, experts are often necessary with respect to damages – and waiting until the calculation must be made to retain one often means the expert may not have all the information needed to appropriately calculate damages.

Selecting and Retaining an Expert Witness

Identifying the right expert witness can be a challenge. One way to identify potential expert witnesses is to ask trusted colleagues, or other experts you have retained, for recommendations. Other options include researching the subject matter and reading scholarly articles on the topic. The author of an article, or someone repeatedly quoted on the subject, are often worth further investigation. You can also search for people who have the appropriate credentials and/or work history.

Once you have a pool of potential expert witnesses, you must properly vet each potential expert. Vetting potential experts requires more than simply reading a potential expert's curriculum vitae. The curriculum vitae will tell you whether an expert is qualified, or can at least represent themselves as so, only on paper. The goal is to select an expert witness who can educate you in the field, advance your case theory, and increase your chance of a successful outcome. Keep in mind that an expert witness will need to write a good report and potential testify. Executing both effectively can require a different skill set and the goal is to select an expert witness who will excel at both.

To that end, you should determine whether the potential expert witness has testified in your jurisdiction. In addition, you should determine whether your expert has ever been determined to be *unqualified* to provide expert testimony. If you can obtain copies of prior testimony provided by the potential expert, either at a deposition or at trial, you should do so. No matter what, you should speak

Expertly Working with Expert Witnesses

to a potential expert directly before executing any engagement letters.

Once you have selected an expert witness, it is important to carefully review the draft engagement letter. In doing so, you should verify that the scope of the engagement is properly stated and the fee arrangement is as discussed. Some attorneys prefer to have the client sign the engagement letter with an expert rather than the attorney themselves. Whoever signs the engagement letter will be directly responsible for paying the expert witness. However, keep in mind that in certain jurisdictions, the attorney signing the engagement letter may help protect communications with the expert as privileged.

Working with the Expert Witness

Once retained, it is important to provide your expert witness with all relevant, or potentially relevant, material. Choosing to share only limited information with the expert witnesses, whether to save money or for another reason, or providing an expert witness with only one point of view, will likely backfire when the expert witness is attacked during a deposition or at trial for forming an opinion based on incomplete information. In addition, if your expert requests particular information, consider whether you can obtain that information through the discovery process and any potential benefits or drawbacks of doing so.

Before engaging in communications with your expert witness, familiarize yourself with your jurisdiction's holdings on whether there is any privilege that applies to communications between counsel and expert witnesses. If certain requirements must be met in order for privilege protection to apply, make your best efforts to ensure you comply with those requirements.

If one expert needs to rely on another expert, be sure to connect the experts so that they may communicate with each other. For example, if your appraiser needs to rely on a land development planner, it is important that they communicate and the appraiser is immediately aware of any modifications to the land development planner's opinion.

In most cases, expert witnesses will be asked to write a report stating his or her opinions and the basis for those opinions. The expert report is disclosed to opposing counsel as part of discovery. Each jurisdiction is likely to have specific rules and requirements for expert disclosures and/or reports, it is important to become familiar with such rules and requirements well in advance of the disclosure of the expert witness and his or her report.

If your expert witness is drafting a report, be sure to leave plenty of time to review and finalize the expert report prior to its submission. When reviewing the expert report, be conscious of your jurisdiction's rules with respect to draft reports and, as discussed above, privilege protections. Edit the report with an eye toward the falls that opposing counsel will seek to expose and seek to shore up any potential holes. Further, consider whether additional exhibits or visual aids should be created to help the trier of fact understand the expert report and opinions.

Expert Testimony at Depositions and Trial

You carefully selected your expert witness. You collaborated with your expert throughout discovery. You painstakingly reviewed the draft report and disclosed an expertly drafted expert report (pun intended). Then you receive the deposition notice from opposing counsel seeking to depose your expert. Upon receipt, you should immediately send a copy to your expert and confirm if your expert is available for the deposition as noticed. Whether or not your expert is available, if your expert did not do so previously, he or she should immediately begin to prepare any material you may need to disclose in connection with the deposition. This often includes a copy of any and all material or sources the expert witness relied upon in forming his or her opinions.

You should prepare your expert for deposition and trial testimony with the same scrutiny you applied in retaining your expert witness and finalizing the expert report. This may require multiple preparation sessions spread out over a few days. Be sure you and your expert start preparation early in case additional sessions are needed.

When it comes to trial, your expert should sit through the entire trial, not just when the opposing expert is testifying. Your expert may find testimony or evidence relevant to their opinion that you, as an attorney and not an expert in the field, failed to fully appreciate.

Finally, your expert witness should help prepare you to depose the opposing expert and cross examine the opposing expert at trial.

Conclusion

While it is impossible to predict with certainty the outcome of a legal dispute, engaging the right expert early and treating that expert as a member of the team will provide your client the best chance of success.