

How to Find an Expert for Your Case

By William F. Horsley

Modern litigators increasingly rely on expert witnesses to establish or enhance their cases. In cases such as medical negligence, experts are required as a *sine qua non* to filing suit. In others, such as product liability, they are a practical necessity. Even more routine cases may require expert testimony: A life care planner may be needed to establish the future needs of an injured plaintiff or an economist may be needed to place a present value on those needs. Accident reconstruction engineers are increasingly used in motor vehicle collision cases. Accountants are needed for business evaluations. Sometimes health care professionals are needed for second opinions or to establish causation.

ing to review the case, leaving it to the lawyer to contact and make financial arrangements with the expert. Using a location service may save time, but drawbacks include paying the service fee in addition to the expert fee, risking losing that money if the expert proves unsatisfactory, and being questioned about the expert's affiliation with the service at deposition or trial. Some services insist on an exclusivity agreement with the expert, which may create credibility problems.

The "lawyer grapevine" may be the best way to find an expert witness because you get the benefit of the referring lawyer's experience with the expert. You may be able to find out the expert's fees and availability for consulting or for tes-

someone predisposed against involvement in litigation may be induced to serve as an expert.

If you know the specialty the expert needs to have, an Internet search should give you access to organizations related to that specialty. For example, if you need an otolaryngologist, you will find the American Academy of Otolaryngologists (www.entnet.org). From there, you can link to each state, where you will find resumé-like information for each member.

Once you have located a potential expert, always do as much background investigation as possible. In some areas of law, it doesn't matter how much an expert has testified. A forensic engineer may be in the "testifying business," but an orthopedic surgeon may be open to

Having a diploma or a specific area of expertise doesn't necessarily mean someone can be an effective expert for your case.

You can find expert witnesses using expert location firms, attorney referrals, jury-verdict reporting services, directories, society membership rosters, trade associations, regulatory bodies, and private consulting firms. Below are some tips for getting started in your search and ways to ensure you find the right expert for your case.

For a fee, an expert location service provides one or more names of experts who meet the criteria you specify. Some services present a case summary to the expert or a set of the appropriate records, and then present the lawyer with a report; some services only provide the name of an expert will-

timony before contacting the person. Some legal publications that report on verdicts and settlements will include the names of experts involved in a case. Consider contacting the lawyer who used the expert first to get information on just how useful or effective the expert was.

Many bar associations maintain Listservs that allow you to send an email requesting suggestions for experts. Again, the referring lawyer can be consulted for more information about the expert.

Check the technical literature in the field in which you need an expert, and find out who has written on the subject. If there is an intriguing situation, even

impeachment for spending a lot of time as an expert witness.

Always talk to the expert to get a feel for how he or she communicates. Having a diploma or a specific area of expertise doesn't necessarily mean someone can be an effective expert for your case. **YL**

William F. Horsley, a trial lawyer with a law practice in Greensboro, North Carolina, can be reached at wfh@horsleylawfirm.com.

READY RESOURCES

■ *A Litigator's Guide to Expert Witnesses*. 2006. PC # 5150306. General Practice, Solo, and Small Firm Division. To order online, visit www.ababooks.org.

The Pros and Cons of Telecommuting

By Kelli Carter McCloskey

I had been working with my current law firm for almost four years and was happy with my practice areas and the people with whom I worked when my husband and I decided to move back to our hometown. I approached my firm's partners about continuing to work for them from home (about an hour and a half south of the firm's location). Given the available technology, we agreed that I could do almost everything I was doing at the office from my home. Together, we were able to work out an arrangement that worked well for the firm and for me.

At first, a lot of the details were touch and go. For example, I had to email my time entries to our office administrator to manually enter into our time-keeping system. Before I had access to the firm's document system, I had to call my legal assistant to search for the documents I needed, and she would email them to me in Word format.

Now, a little more than a year later, things are running very smoothly. My firm's network administrator installed software on my office computer that would allow me to remotely access my office computer. He gave me a CD-ROM containing the same software that I was able to install myself on my home computer. Now that I have remote access, when I sign in from home, it's like I'm sitting at my desk in the office. I am able to access our document, email, and time-keeping systems, plus many other programs on my office computer. I do all my legal research online, just like I did at the office. My



incoming mail is either scanned and emailed to me or forwarded to my house. I participate in conference calls just as if I were in the office (although there is the occasional embarrassing dog bark in the background).

Of course, I still travel for depositions and court appearances. I also go into the office twice a month and work a full day, which allows me face time with the partners and other associates to discuss cases. Because I so rarely get to spend time in the office, I really look forward to these visits.

Working from home definitely has its pros and cons. I really like having no commute, no dress code, and plenty of flexibility. But on the downside, it also brings distractions, distractions, distractions. Also, I miss the daily social interaction with my coworkers. While it is great to have the flexibility to take an hour here or there to do things around the house or to run errands, it is not so great to have to make up the hours at 9:00 p.m.

So I try to keep normal business hours, just as if I were at the office. This also allows me

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The Age Factor

PERCEPTIONS THAT IMPACT YOUR CAREER

By Rashada N. Jamison

Do you believe that experience is the best teacher? Do you agree that you can't judge a book by its cover? Whether you subscribe to these clichés or not, as an attorney, you will be judged or judge others time and time again based on perceptions of age. Assumptions about age lead to assumptions about a person's level of experience or ability. Often people make these assumptions after one look.

Have you ever heard any of the following phrases?

- "He's certainly too young to have experience in this area."
- "She appears to be a seasoned professional, so I trust she knows my situation well."

■ "We are looking for an energetic, eager candidate to join our firm."

How much does perception about age affect decisions to select an attorney? Does an attorney who appears to be younger necessarily have less experience? Besides age, what other factors do people associate with a qualified attorney?

Before going any further, take the following quiz to evaluate your own perceptions about age and experience. Do you think the attorney in each scenario has been practicing law more or less than five years?

1. has tried a case before the Supreme Court
2. is committed to personal

- and family obligations so sticks to a start and stop time in the office
3. sits on a board for a leading national law association
4. is uncertain about the precedence set for a major issue within his or her area of focus
5. is licensed in multiple states
6. has practiced law in several areas such as criminal, civil, and organizational

There are no correct answers to these questions. The goal is to have you think about the perceptions and criteria by which you and others choose legal representation.

Put yourself in the shoes of a potential client. Based on your answers to the above quiz, consider the factors that affect your ultimate decision to select legal representation and how you align with those.

Present your experience, not your age. At the end of the day, experience is what instills trust. Be cognizant of your profes-

sional demeanor and attire. An organized, thoughtful professional typically looks and speaks that way.

Now, consider this:

An attorney who appears to be older and more experienced could be new to the field. Perhaps he or she has worked for many years in a different industry and now is fulfilling a long-term dream.

An attorney who appears to be younger could be extremely rich in knowledge from having studied diligently and having taken advantage of key opportunities within a short time frame.

An attorney who has been working in his or her field longer can appear, and may indeed be, a more qualified, knowledgeable resource and subject-matter expert.

There are a number of factors, including overall chemistry, philosophy, and subject-matter competency that ultimately determine how suitable the pairing of any professional



is with a potential client, employer, or organization.

Whether you are selecting legal representation or are being considered to represent someone, give thought to what factors are most important to you and make an informed decision. **YL**

Rashada N. Jamison is a vice president with GolinHarris in Chicago. She may be reached at rashadajamison@yahoo.com.

READY RESOURCES

- *Through the Client's Eyes: New Approaches to Get Clients to Hire You Again and Again*, Second Ed. 2002. PC # 5110480. Law Practice Management Section.

To order online, visit www.ababooks.org.

Informal Discovery

AN EFFECTIVE STRATEGY AND COST-SAVING SOLUTION

By Corey David Kintzer

The most expensive aspect of most cases is formal discovery, yet attorneys often overlook the potential for less costly informal discovery prior to or shortly after commencing formal litigation.

Informal discovery begins from the first moment a case is handed to the attorney or from the moment a potential client walks into the office. As the client's story unfolds, you as the attorney must determine what facts to gather. If you are the plaintiff's attorney, you will continue this process of outlining potential discovery until the moment a complaint or petition is filed. If you are the defense attorney, the window is often narrower, as little time often passes between commencement of the action and the initiation of formal discovery.

Once you have verified all the elements of each potential claim, remedy, counterclaim, and

possible defense (verification can often be obtained through pattern jury instructions), you can then determine the fact sources from which each element can be proved or disproved.

Typically, sources for obtaining proof are the client, the opposing party, third-party witnesses, experts, and any relevant documents. Focus any informal investigation on those facts that are both favorable and unfavorable to the case. Only after discovering those unfavorable facts can you truly evaluate the case and begin the search for those facts that negate the effects of any damaging information.

Also, evaluate fact sources broadly, paying special attention to those typically overlooked sources of information, such as electronically stored data in email messages and portable digital media devices in the possession of the client or any cooperative witnesses.

After identifying each source of relevant, informally obtainable information, determine how to proceed with acquiring the information important to the case. Here, the most common methods of investigation are client and third-party witness interviews, documents obtained by or provided by the client and/or neutral, third-party witnesses, and expert witness interviews and retention.

Witness interviews and document requests performed prior to suit and early in the investigation are often preferable because remembered facts are closer in time to the actual event. Also, informal discovery is less costly, and third-party witnesses tend to be more cooperative at this earlier stage of the proceedings. Furthermore, both the target of the investigation and/or opposing counsel usually need not be privy to such an investigation prior to suit.

The advantages to engaging in informal discovery are numerous. An attorney can often obtain vital information at a dramatically lower cost than in formal discovery, and the information acquired is often more reliable. In addi-

tion, having a head start in the fact acquisition race is invaluable. As stories, witnesses, or facts change or are modified, the process should likewise change. The depth of every attorney's informal discovery should be all encompassing, covering as many elements of every claim or defense as possible. After completing a thorough informal discovery, you will have a significant advantage over opposing counsel and have saved the client from at least some of the unnecessary costs associated with formal discovery. **YL**

Corey David Kintzer is an assistant attorney general in the Internet Enforcement Unit of the Consumer Protection Division at the Texas Attorney General's Office. He may be reached at corey.kintzer@oag.state.tx.us.

READY RESOURCES

- *171 Ways to Improve Your Discovery Techniques: A Treasury of Ideas from Leaders in the Section of Labor and Employment Law* (DVD Package). 2003. PC # V03WIDD. Center for CLE and the Section of Labor and Employment Law.

To order online, visit www.ababooks.org.

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Navigating the World of Class Actions

By Catharine Brooke Wooten

One misstep and a company could find itself the target of class action litigation, often a high-stakes game in which the legal expenses can be high and the risks (and rewards) much higher. Knowing how to successfully maneuver through the world of class actions gives young lawyers a strategic advantage.

Class actions allow large groups to litigate, in a single action, multiple claims involving similar or identical questions of law or fact that arise from the same set of operative facts. The litigation of claims by the representative party, or "named plaintiff," will determine the rights and remedies of all class members. In federal courts, class actions are governed by Federal Rule of Civil Procedure 23 and may proceed only when they satisfy all requirements of this rule. Most state courts have class

actions provisions, although not all states have embraced the Rule 23 guidelines. Some states, such as Virginia, do not provide for class actions at all.

Class actions can be pursued on behalf of proposed state or nationwide classes, although certification of a nationwide class is difficult because state laws can differ significantly. Plaintiffs' attorneys still aggressively pursue nationwide class actions, and a defense attorney will take early steps to dismiss the case and defeat class certification.

Jurisdiction. First, the defense will remove the case to federal court, if possible. Many proposed class actions are filed in state court, but federal courts often are more favorable for defendants, making removal a critical first step for the defense of a putative class action. The Class Action Fairness Act of 2005

(CAFA) made it easier for defendants to remove class actions to federal court. A class action defendant may remove a case to federal court under CAFA if 1) there is minimal diversity (i.e., any member of a class of plaintiffs is a citizen of a state different from any defendant), 2) the proposed class contains at least 100 members, and 3) the amount in controversy is at least \$5 million. See 28 U.S.C. § 1332(d).

Rule 12(b)(6) Motions. Second, the defense will move to dismiss some or all of the named plaintiff's claims. Proposed class actions are often pled as generally as possible, with little emphasis on the named plaintiff's facts. The plaintiffs' attorneys take this approach to avoid identifying individual issues of fact and to set the stage for class certification early in the litigation. As a result, some or all of the named plaintiff's claims may be subject to a motion to dismiss for failure to state a claim under Rule 12(b)(6). The 12(b)(6) briefing process allows defense counsel to highlight individual facts about the named plaintiff's claims early

in the litigation and may result in an early dismissal.

Discovery. Third, both sides will conduct written document and deposition discovery to explore the named plaintiff's claims and issues relating to class treatment. The named plaintiff's deposition is critical and allows defense counsel an opportunity to explore the elements of Rule 23 and to determine whether the named plaintiff's claims can be litigated on behalf of the class. During the named plaintiff's deposition, the defense seeks information necessary to support a motion for summary judgment and to defeat class certification.

Summary Judgment. Fourth, the defense will move for summary judgment on the named plaintiff's claims based upon facts established during discovery. The named plaintiff must submit proof of a valid claim to proceed on behalf of the class.

Class Certification. Fifth, the defense will try to defeat class certification. The class certification phase in a class action is critical and perhaps more important than the trial of the case.

This phase will determine whether the case will proceed on behalf of one or a few plaintiffs or on behalf of an entire class. In opposing class certification, a defendant will object on the grounds that class treatment is inappropriate, showing, for example, that individual issues of material fact make the case unsuitable for class treatment, the named plaintiff will not adequately represent the class, or the case cannot be efficiently managed as a class action. The named plaintiff has the burden of proving that class treatment is appropriate.

Although class actions are procedurally complex, early steps can be taken to prepare for and succeed at the class certification phase. The above strategies will help counsel anticipate early obstacles and opportunities while navigating their class actions cases. ■

Catharine Brooke Wooten is an associate with the law firm of Morris, Manning and Martin, LLP, in Atlanta, working in the firm's Litigation Practice Group. She may be reached at cwooten@mmmlaw.com.

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If you plan to attend the 2007 ABA Annual Meeting in San Francisco, come to the YLD Assembly August 10–11. The Assembly is the Young Lawyers Division's policy-making body, and its meetings are open to all. This year the Assembly will:

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We also encourage you to attend the Fellows Dinner Dance, where the YLD Fellows, former YLD leaders, will recognize a prominent person who has done outstanding work to serve the public at large. This is a ticketed event. See the link below for current purchase information.

The Assembly will be held at the Palace Hotel Friday, August 10 from 1 to 5 p.m. and Saturday, August 11 from 9 a.m. to noon. The Fellows Dinner Dance will be held Friday August 10 from 7 p.m. to midnight. We hope to see you there.

More information is online at www.abanet.org/yld/annual07/.



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What You Need to Know about Homestead Exemptions

By Georgia L. Stone

Whether you're counseling clients through bankruptcy proceedings, evaluating tax liabilities, or just house hunting for yourself this summer, keep in mind the potential financial advantages for residences designated as "homesteads." A homestead is generally defined as an individual's primary residence, and most states provide various protections to owners in the form of a "homestead exemption." Claiming a residence as your homestead offers bankruptcy advantages that you hope you'll never need and property tax relief that you likely will pursue.

Each individual may claim only one residence as a homestead regardless of the jurisdictions in which the person owns real estate. The protections a homestead exemption offers vary

by state and are established by state law. Generally, a homestead exemption prevents certain forced sales of a homeowner's primary residence, protects a debtor's primary residence in bankruptcy proceedings, and provides a property tax exemption to eligible residents.

Limited Bankruptcy Protection. In bankruptcy proceedings, the homestead exemption protects debtors by allowing them to exempt their primary residence from distribution to creditors in an amount up to either the federal exemption of \$18,450 or the amount of their applicable state exemption. The state exemption was capped at \$125,000 in 2005 by the passage of the Bankruptcy Prevention and Consumer Protection Act. This exemption allows debtors to retain their primary residence if

the residence is valued at less than the applicable exemption amount. In the event that the residence is worth more than the applicable exemption amount, the creditor(s) can still force the sale of the property, but the debtor obtains the amount of the exemption from the proceeds of the sale.

Property Tax Exemption. As with the bankruptcy protection, the value of the property tax exemption available varies depending on limits set by each state. Generally, the state sets a fixed dollar amount for which the homestead will not be subject to state property taxes. To the extent that the residence is valued above that fixed exemption amount, regular property tax rates apply to the value of the residence minus the exemption amount. Thus, in a state where the exemption is capped at \$100,000, a homestead valued at \$300,000 would only have \$200,000, the amount of the value that is above the exemption limit, subject to the state's property tax rate. The

exemption rate is often variable, and a higher limit may be in place for elderly property owners. Many states make up for the lost property tax revenue with additional sales taxes. Exemption amounts and home valuation methods vary across the nation, so be sure to check your state's limits to determine your potential tax savings.

Don't let the rustic connotations of the word "homestead" fool you. Homestead exemptions provide valuable protections and can offer significant financial savings to the urban, suburban, or rural homeowner. **YL**

Georgia L. Stone, an attorney licensed to practice in Pennsylvania, may be reached at GeorgiaStone@lawyer.com.

READY RESOURCES

■ *What Estate Planners Need to Know About Asset Protection* (Audio CD Package). 2007. PC # CET07EPNC. Center for CLE and the Section of Real Property, Probate and Trust Law. To order online, visit www.ababooks.org.

Telecommuting

■ continued from page 1

to respond in a timely manner to important emails and phone calls. I find it productive to do all of my work in my home office on a desktop computer, not a laptop, so there are fewer distractions. Working from home takes discipline, and to be able to meet deadlines and not fall behind, you have to set boundaries for yourself.

If working from home is something you are interested in doing, whatever the circumstances, don't be scared to approach your partners about it; they may be much more receptive than you would think. **YL**

Kelli Carter McCloskey is an associate with Carroll Warren & Parker, PLLC, in Jackson, Mississippi. She may be contacted at kmccloskey@cwplaw.com.

READY RESOURCES

■ *Telecommuting for Lawyers*. 1998. PC # 5110401. Law Practice Management Section. To order online, visit www.ababooks.org.