Selecting "The Right" Testifying Expert and Best Practices for Getting the Most Out of Your Expert during the Pretrial Phase of the Litigation

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I. Selecting an Expert

Selecting the right testifying expert witness can sometime be the most important decision a litigator makes in a case. The testifying expert witness will be the person who makes sense for the jury or judge of complex scientific or technical matters, and explains how these complex matters fit into the party’s theory of the case. A bad expert witness can lead to confusion – or worse – sway the trier of fact to rule against the party.

Standard Factors to Consider

There are many factors that should be considered when selecting an expert; some are general and some are case-specific. Typically, the following factors will be standard in selecting an expert in any case:

Skills.  Does the expert have the skills necessary for the opinions required, such as medical, engineering, financial, real estate, etc., as well as any specific case issues?

Knowledge.  Does the expert have the requisite knowledge, not only of the general area in which he or she practices, but also knowledge of the industry, market, economy, and relevant emerging technology? Does the expert have specialized knowledge of the specific product, project or other matter at issue in the case?

Education.  Does the expert’s education match the areas at issue in the case? Does he or she have advanced degrees and continuing education in the area of expertise?

Credentials.  Are credentials, board certification, and licensing an important distinction in the expert’s field (e.g. CPA, PE, CFA, MAI, CPCU, MBA, PhD, etc.)?

Training.  What specialized training, including ongoing continuing education, does the expert have?

Professional Experience.  What is the expert’s actual experience, both in the subject matter, as well as the industry? Is the expert involved with national or international standards committees? Is she involved in involved in relevant community or industry organizations?

Testifying Experience.  What is the expert’s experience testifying? How has the expert handled testifying in the past? Was she able to handle tough cross-examination? Was he personable and knowledgeable on direct testimony?

Communications Skills.  Can the expert communicate complex issues in a manner that can be readily understood by a jury or trier of fact? Is the expert readily available and responsive?

Style.  What is the expert’s management/work style? Does the expert take on a “hands-on” and detail-oriented approach, or more of a “big picture” or “conceptual” approach? Which approach is best for the case?

Understanding of Litigation Process.  Does the expert understand the litigation process, such as time constraints, the purpose and nature of depositions, the adversary process, cross examination, discovery, non-privileged communication, etc.?

Competitive Concerns.  Does the expert work for a competitor of a party to the case? Will he have access to business strategy or product design if retained as an expert? Typically in-house counsel or corporate client will be more sensitive to these issues.
Due Diligence

When selecting an expert, the attorney should conduct sufficient due diligence to determine not only whether the expert has the qualifications necessary but also the expert’s prior work history, both professionally and as an expert witness. Questions that should be asked include:

- Has the expert’s testimony been excluded as a result of a Daubert challenge, or some other challenge as to the methodology the expert utilized, or the use of unreliable data?
- Has the expert failed to be qualified?
- Does the expert appear to have a bias, such as only working on behalf of plaintiffs or defendants?
- Has the expert testified previously on similar matters and was the approach similar to the approach he would use in the current matter?
- Has the expert worked for/against the opposing counsel or the adverse party in the current case? If so, what position did he take then?
- Has the expert written any articles or provided prior testimony taking a position that would adversely impact the case?
- Are there any negative facts in the expert’s personal life that could negatively impact the jury (e.g. been involved in litigation, been terminated by an employer, convicted of a crime, such as DUI)?

Counsel should review the expert’s web page and social media to determine position taken in the past, as well as all past articles and speeches and available testimony. Counsel should contact attorneys that the expert has worked with and against in order to gain an understanding of the expert’s management/work style, the persuasiveness the expert’s testimony, and the expert’s demeanor at trial and deposition. Also, how responsive was the expert to the time demands of litigation, and what is their overall assessment of the expert’s strengths and weaknesses? Has the expert posted recommendations of individuals or comments to specific articles that could be used against them?

Role of In-House Counsel in Selecting and Managing Expert Witness

Increasingly, in-house counsel are becoming more involved in litigation and litigation is becoming more and more become complex. Cases such as patent litigation, product liability claims, mass tort, antitrust and RICO cases can be highly technical and often difficult for a trier or fact or outside counsel to understand, particularly at the start of the case. The in-house counsel can be a key partner with an outside counsel in selecting an expert witness. The in-house counsel will likely have a better understanding of the exact nature of the problem and the type of specialist needed for the case. The in-house counsel may have dealt with the issue before or even simultaneously in another jurisdiction, and will typically have more robust experience, expertise, and knowledge than the outside counsel.

Before an expert is formally retained to provide testimony, the in-house counsel, outside counsel, and the expert should meet and review the expert’s preliminary opinions and conclusions. The in-house counsel’s more intimate knowledge of the issues and facts can aid in selecting the expert, including ensuring that the expert’s opinions are consistent with the client’s positions. A final consideration is whether the expert might give an opinion that could be damaging to the client in another case or in its business plans. The in-house counsel will likely be more sensitive to these issues than her outside counsel counterpart.

In-House Experts

Before selecting and hiring an expert, the lawyer should determine whether an employee of the corporate party can serve as the expert. If the employee has the requisite expertise, there may be advantages to selecting an in-house expert. She may have intimate factual knowledge of the
subject matter of the lawsuit or the project, product, issue in the case. An expert coming in after the fact did not live through the issue, and there is sometimes a learning curve that cannot be or is difficult overcome. For example, if there is litigation over a delayed construction project, it may be useful to use an expert who lived through the delays and can explain them with personal knowledge. An in-house expert is usually more knowledgeable about the bigger pictures issues impacting the business and the role of the case in the larger context of the corporate party’s business. Similarly, he will likely be more sensitive to the potential impact of his testimony on the company’s business operations or other pending litigation.

On the other hand, there are disadvantages to using a party’s employee as an expert witness. The employee will have an obvious bias or motive, and will likely be viewed as having a duty of loyalty to her employer. As an employee of a party, the person may have a financial interest in the lawsuit, such as her salary or bonus, or may be a shareholder. The employee is unlikely to have the same academic credentials as a retained expert and may understand the litigation process.

**Experienced versus Inexperienced Witness**

Similarly, counsel should weigh the benefit of having a potential expert who has testified numerous times and may practice full time as an expert witness, versus having a well-qualified individual who has never testified, or has testified sparingly.

An experienced witness brings a range of prior experience, which may be valuable, and an understanding of the litigation process (e.g. discovery, depositions, etc.). In addition to the experience, the experienced witness may have developed persuasive methods to explain complex technical facts to a jury and is aware of the sense of urgency needed to respond to the unpredictable demands of litigation. However, the experienced expert may look like a “hired gun” and may have a long history of testimony in other matters that could be harmful to the present case.

An inexperienced witness, although well qualified, may require more of the attorney in educating the witness as to the process and may not be able to withstand tough cross-examination. An inexperienced witness may have a shorter track record of prior testimony, providing less ammunition for cross-examination and possibly mitigating the appearance of a “hired gun.”

Similarly, counsel should consider whether for a particularly case an academic in the role of expert would be preferable to a professional expert who testifies frequently.

**Matters that Involve Multiple Experts**

Often, the litigation matter has several prevailing issues that may need multiple experts to address. Multiple experts can be used in a variety of litigation matters and at different phases of the litigation lifecycle. If you have a strong in-house expert but are worried about bias, you might consider pairing her with an outside expert witness. Although having multiple experts could potentially allow for more arguments or potential points of attack from the other side, it allows for each expert to focus on their specific areas of expertise. It also allows a party to take inconsistent positions without putting an expert in the middle of that legal strategy. For example, a party may use an expert to strenuously argue that it has no liability, but also present an expert to proffer an alternative damages model to present to the jury if liability is found. Multiple experts might minimize the possibility of the opposing side discrediting a potential expert for straying outside her area of expertise.

Although the experts are handling different areas, their overall arguments should be consistent and the experts’ opinions should all synergize with counsel’s arguments. Legal counsel should be aware of how one expert’s opinion may impact another’s approach or methodology. For
example, how does the class certification expert’s opinion influence the damage expert’s model? How does the damage expert’s opinion square with the liability expert’s opinion?

II. Preparing and Developing the Expert Opinion

Documents and Data

There are a wide variety of documents that are useful to an expert. Experts should be provided with the complaint, answer, any counterclaims, and all relevant deposition transcripts, discovery responses, and disclosure. Other case documents, including correspondence, should also be provided to the extent relevant to the expert’s analysis. It is important that the expert be retained early in the case so she can advise counsel what documents are needed from the opposing side that will be critical for her analysis. If the expert is retained too late in the case, there may not be sufficient time to serve the necessary discovery request in advance of the expert report deadline.

When it comes to analyzing damages of a company, an expert will nearly always want to review financial statements, including the income statement, balance sheet, statement of cash flows, and any footnotes to the financial statements. To the extent that the company has audited financial statements, those should be provided. Depending on the complexity of the business and the underlying case, the expert may want to review just annual statements but may be interested in quarterly or monthly statements as well.

The expert may also want to review some or all of the following:

- Contracts and agreements
- Management reports
- Business plans
- Budget/variance analyses
- Margin analysis
- Minutes for Board meetings
- Price lists
- Customer lists
- Sales invoices
- Sales commission reports
- Marketing materials
- Customer surveys
- Market and industry data
- Engineering studies
- Alternate product designs

Let your expert guide you on the documents that are important to her analysis. If the expert asks for a particular document, counsel should supply it unless there is an overpowering reason not to. The expert will inevitably be asked at deposition whether she wanted to see a document that was not provided. When in doubt, counsel should consult with the expert to determine the relevancy of particular documents. All documents that may be either helpful or harmful to an expert’s analysis should always be disclosed to prevent the expert from seeing a document for the first time in deposition or trial without having a chance to consider how the document might impact his or her opinion.

In a data intensive case, the data involved could be very voluminous and very often beyond the capabilities of a simple tool, like MS Excel, to warehouse and analyze. Opposing counsel will need to work together to ensure that the data is produced in a format that is capable of being understood and used by both sides. The testifying or consulting expert will be a useful partner in this exercise, and will be helpful in preparing counsel for the discovery meet and confer
discussions on the production of the data. Before she retains the expert, counsel will need to
confirm that the expert is able to handle large datasets. Does the expert or his staff know how
to properly extract the information and are they able to properly track their procedure from going
from raw data to the warehouse on their system. Do they use best practices for maintaining the
structure of the data? What tools do they use to manage the data? Are these tools industry
standard? A consulting expert might be useful here to help counsel understand whether the
testifying expert is using the data properly and in a defensible manner.

Along with several issues regarding data and data management, how the data is analyzed is
also critical. Does the issue require statistical modeling and does the expert have the proper
credentials to not only properly execute the model, but to also properly opine on what the model
means in a concise and clear manner? Does the expert have a history of complicated models
or simple ones? For the particular issue which type of model makes the most sense to put on in
front of the trier of fact?

Causation Opinions

To award damages, courts require that a defendant’s wrongful conduct actually caused the
damages alleged by the plaintiff. Experts can assist in showing causation, such as an engineer
or scientific expert that can show how a product’s design led to an equipment failure, or an
economist can analyze data and develop statistical models that show the relationship between
independent variable and the dependent variable revealing the cause and effect of the alleged
actions. Like any expert opinion, an expert addressing causation must base her opinion on the
relevant expert standards in your jurisdiction and may be subject to the *Daubert* or *Frye*
challenge if it does not have the necessary foundation. The causation expert must base her
opinion on sufficient facts or data, a product of reliable principal and methods, the principles and
methods are reliably applied to facts in the case.

Sometimes the damages expert will proffer an opinion on damages causation and sometimes
the damages expert will be asked to assume causation, and counsel will rely on a different
expert for the causation issue in the case. Even in the cases when counsel instructs the
damages expert to assume causation for purposes of his analysis, an expert retained to
measure damages must, as noted in the Litigation Service Handbook, Fourth Edition,
understand and be prepared to explain the following:

- plaintiff’s theory of the defendants’ wrongful conduct
- how the plaintiff alleges that the defendant’s wrongful conduct caused damages to the
  plaintiff, and/or how the defendant alleges that it did not cause the damages
- whether the plaintiff’s damages could reasonably be expected to have flowed from the
  defendant’s wrongful conduct
- other factors that may have caused and/or exacerbated the plaintiff’s damages.

Damage Theories

There are a number of different damage theories which can drive an expert’s damage
calculation and methodology. During the early stages of consulting with an expert, counsel
should explore the different damage theories, and collaboratively decide which theory best
matches both the facts in the case and the legal theory.

In a breach of contract case, three separate damage theories should be considered:
expectation damages, reliance damages, and restitution or rescission damages. Expectation
damages provide the plaintiff with the benefit of achieving the position that would have expected
to receive had the contract been performed by the defendant. Reliance damages calculate the
losses caused by a plaintiff’s reliance on a contractual obligation. Finally, restitution or
rescission damages seek to return the plaintiff to their pre-contract position.
In a typical breach of contract or lost profits analysis, the expert will consider whether the damages suffered are truly lost profits, indicating a temporary loss to the business, or are more of an overall loss in the company's value, reflecting a permanent impairment to the business. The expert's damage model will differ depending on the extent of the loss to the future of the company. The damages expert will be a critical partner to counsel in assessing this important theme in the case and which type of damage the company truly suffered. A plaintiff's expert might help counsel and the client understand the full scope of the damages which counsel extend far beyond the loss profits for sales for a particular widget for a limited period of time, where a defendant's expert may help counsel to explain why loss profits is a more appropriate damages analysis than loss business value or reputational losses.

Another consideration for an expert and counsel is to identify areas for actual “but for” damages separately from any consequential damages. Consequential damages compensate a plaintiff for losses other than those directly tied to the defendant's contract breach. For example, a defendant's failure to deliver a certain component part within the time required may have prevented the plaintiff from launching a consumer product in advance of the holiday selling season. The plaintiff in this scenario may have also lost sales for other related products.

In certain instances, an expert may also be useful in addressing punitive damages. As an example, an expert can review the financial condition of a defendant company to assess whether a certain level of punitive damages would be material in affecting the viability of a defendant company on a go-forward basis. Or, the expert can provide an opinion on what punitive damages amount will truly punish the defendant for its bad conduct.

III. **Expert Reports**

Whether the case is in federal or state court may determine the extent of the disclosure or report required of an expert. In federal cases, the Federal Rule of Civil Procedure 26(a)(2)(B) requires a specially retained expert to prepare and sign a written expert report. The requirements of an expert report for federal court include a complete statement of all opinions to be expressed and the basis thereof, the data or information considered by the expert, the expert's qualifications and compensation, and a list of other cases in which the expert has testified in the prior four years. State courts may only require a more limited disclosure of the expert's opinions without a full expert report, and in some states you need only disclose the identity of an expert and her opinions if specifically requested in discovery. Of course, in those circumstances, you may consider disclosing the expert and providing a report to ensure that the expert will not be barred from testifying at trial.

While individual practice varies by expert, generally an expert's report should be detailed and should stand on its own, permitting a reader to fully understand all of the opinions and the bases for the opinions. While some experts might simply limit their expert report to the bare requirements, it is often helpful for an expert to truly tell the story at the basis of the expert's opinion. Thus, a damages expert will want to include a robust explanation of how a party has (or has not) been damaged, supporting the analysis with case documents, deposition testimony, and sometimes external authoritative literature. The expert's damage theory and opinions should be reasonable and should conform to commonsense given the supporting facts and documents of the case.

An expert should also ensure that the opinion, process and/or model utilized is based upon generally accepted methodologies, and it is often helpful for the expert to cite or reference an authoritative source which describes the selected methodology.

Counsel should always review the expert's report prior to issuance to confirm the expert's opinions are sound and are consistent with the factual evidence in the case. In federal court, counsel will have a strong basis for arguing that this review and any exchange regarding the report between counsel and the expert is protected work product. In 2010, the Federal Rules of
Civil Procedure were amended to add work product protection to communications between a party’s counsel and its expert witnesses. Specifically, amended Rules 26(b)(3)(A) and (B) protect communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: (i) relate to the compensation for the expert’s study or testimony; (ii) identify facts or data that the party’s attorney provided to the expert and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party’s attorney provided to the expert and that the expert relied on in forming the opinions to be expressed. (Of course, the rules will likely be different in state court, so it is important to check the rules of procedure and evidence in the state where your case is pending before engaging in written communication with your expert.)

With the increasing role of in-house counsel in litigation, a key question has arisen as to whether communications between the in-house counsel and experts are protected communications under the 2010 amendments to Rule 26. This can be particularly a concern with an in-house counsel who is active in the litigation, but is not counsel of record in the case. Parties, of course, often have many attorneys, including in-house counsel, outside general counsel, national coordinating counsel, and counsel in other cases dealing with the same or similar subject matters. The drafters of the amended Rules recognized this reality and addressed it in a Committee Note to Rule 26(a)(4)(C). That note recognizes that the work product protection “should be applied in a realistic manner,” and that there be a “pragmatic application” of the rule to apply to communications with these broader groups of counsel, when appropriate.

If an in-house expert is being used as a testifying expert in the case, there is an open question whether she must prepare a report under the federal rules. Rule 26(a) requires written reports from experts who are “retained or specially employed to provide expert testimony,” as distinguished from party employees do not “regularly involve giving expert testimony.” An in-house expert witness might be “specially employed” and required to provide expert report pursuant to Rule 26(a)(2)(B) if the witness was retained primarily to testify on behalf of the employer, rather than performing a job for the employer as a business. Factors to consider include the following:

- Was the in-house expert engaged in the issue before there was anticipation of litigation?
- Does the in-house expert have independent factual knowledge about the matter?
- What percentage of time does the in-house expert spend testifying on behalf of the employer v. percentage of time doing a role for the employer’s business?

If a witness will be proffering expert testimony but is not required to provide a report, Rule 26(a)(2)(C) mandates counsel-prepared disclosures, which must state the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions to which the witness is expected to testify. Although there is caselaw that holds that this disclosure requirement applies to all non-retained persons giving expert evidence, including parties, when in doubt the better practice is to have the expert prepare a Rule 26(a)(2)(B) report.

IV. Use of Experts in Addition to Trial Testimony

The assistance that expert witnesses can provide to counsel goes beyond solely the anticipated trial testimony. Among other things, expert witnesses can assist by:

- Educating counsel on complex concepts in the expert’s field.
- Providing insight into industry/business issues
- Identifying the critical issues in the case
- Identifying sources of financial, technical or scientific information for discovery requests
By helping in these areas, a credible expert can assist in settling a case even before it goes to trial. With complicated cases, it is even more critical to retain competent expert witnesses at the initial stages of the case. When deciding whether to retain a liability expert, for example, consider whether a specific analysis is needed to determine causation. A competent expert is critical in complex litigation. Even if a case does not go to trial, a credible expert can help counsel and the client understand the case, assess liability and/or damages, and assist in the eventual disposition of the case.

Consider for example, the many uses of a financial expert. At a threshold level, a financial expert is necessary when the value of the item is not easily measurable by a lay person or to help the trier of fact make sense of monetary issues. The financial expert is used to quantify monetary damages in accordance with counsel’s legal theories and to rebut the opposing expert’s damage calculations. But, a financial expert can be useful far beyond the damages testimony in a lawsuit. She might be able to get facts before the trier of fact that might otherwise be difficult to get it into evidence since an expert can rely on hearsay and other documents customarily used by an expert. When a financial expert has prior experience with the client’s line of business or industry, that expert’s knowledge may be particularly useful in a case. A financial expert can also assist with establishing a connection (or lack thereof) between the cause of action and the damage suffered, and the expert’s analysis can be used to prove that a plaintiff did or did not incur a financial loss which can be helpful in supporting or opposing summary judgment motions.

Depending on the circumstances of a particular case, counsel should also consider the use of a consulting expert. A consulting expert can advise counsel in many of the same areas noted above but without providing testimony and without being disclosed to the opposing party. The advantage of utilizing a consulting expert is that the work product is subject to attorney work product privilege and will not have to be produced to opposing counsel. A consulting expert can help you identify an independent expert; the consultant knows the field, will have recommendations on who to retain, and will know what questions to ask potential testifying experts when you are interviewing them. Sometimes it is useful to explore damage theories with a consulting expert prior to discussing such theories with a testifying expert witness. A consultant role might be a useful role for an in-house expert, who might be perceived as having too much of a bias to designated as a testifying expert. Of course, if the in-house expert is a fact witness for the particular case, this would not be a good choice because he might be subject to deposition or trial testimony in his fact capacity and it would be difficult – if not possible – to shield his work for counsel from production.

Depositions

The expert can help identify individuals at a company that may have information that bears on damages; such as a controller or chief financial officer, on issues as to liability; a product marketing manager who is responsible for profit and loss of the product at issue in the case; the
project manager on a construction project; or a V.P. of engineering or research and development.

The expert can also assist in identifying documents that can be used, such as projections, management analysis, marketing plans, and results of scientific trials.

Finally the expert can assist in identifying areas of inquiry for the opposing expert’s deposition and other relevant parties. Counsel may also want their expert to sit in on the deposition of the opposing expert or other key witnesses. The expert will be a useful partner in discussing the testimony with counsel during breaks and in helping formulate follow-up questions, particularly when areas arise at the deposition that may not have been anticipated.

**Mediation**

An expert, acting in the capacity of a consultant, can assist counsel in developing various damage calculations based on different theories of the case using differing assumptions, and a range of potential damages can be evaluated. This will help the defendant client understand its liability exposure in determining settlement authority, or the plaintiff client in understanding its actual damages and likelihood of recovery in determining what settlement amount it will accept to avoid the risk of trial.

If the damage model is extremely complex, the consulting expert may be asked to attend the mediation to 1) explain the key assumptions to the mediator if necessary, and 2) run various iterations of the damage model during the mediation. Counsel might consider having the expert might preview the testimony and presentation she will make at trial to induce the opposing party to more fully consider the settlement offer or demand.

**Arbitration**

Experts can also be used in arbitration. Recent Supreme Court decisions such as *AT&T Mobility v. Concepcion, American Express v. Italian Colors Restaurant* and *D.R. Horton, Inc. v. N.L.R.B.*, as well as the increased recognition of the propriety of dispositive motions in arbitrations, will have the effect of potentially pushing matters that would normally be litigated in trial court going to arbitration, even complex commercial cases. Experts can be utilized in arbitration and there is often more flexibility with how the expert is selected. If an expert can offer credible testimony to the issues at hand then the expert can be used. There is no specific requirement that an expert qualify under specific evidentiary rules. Additionally, the arbitrators are often subject matter experts themselves so the burden of having to explain complex issues in a simple manner to a jury is much less of a concern. Thus, the expert can focus on highly complex issues because it is likely that the arbitrator will understand the foundational issues.

Because of the stricter control of discovery in arbitrations as compared to court proceedings, counsel will have more flexibility with his expert. Privileged consultants likely are not needed in arbitration because disclosing work product to an expert in arbitration is usually not an issue. Similarly, counsel can play a more active role in assisting in crafting the expert report and expert opinion. It is likely that the opposing party will not know the identity or opinions of the expert until the written direct testimony is produced and thus counsel has some freedom and flexibility in how and when the expert’s opinion is disseminated to arbitrator or the opposing party.