A Pragmatic Approach to Retaining and Presenting Expert Witnesses: Picking All-Stars and Avoiding Busts

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I. SCOPE OF ARTICLE

A refrain heard with some frequency when sports fans and commentators discuss their teams during the off season also applies to the decision whether to retain a testifying expert witness: “The best trades are those that are never made.” Sometimes in sports and in litigation it is best to stand pat, and the difficulty is making the right decision that will substantially improve the team or the prospects for success in a lawsuit.
In sports, a trade removes one player and substitutes another. These moves may be the final pieces of a championship team, or they may backfire for one or both teams. Similarly, an expert’s testimony is rarely the decisive factor in the successful outcome of a case, but hiring an expert witness who performs poorly before or during trial can create severe problems that make it difficult to prevail. As a result, when expert witnesses are required, it is critical to scout and hire qualified, persuasive experts who will score points for the party who retains them.

When experts do testify, they are undeniably important threads in the fabric of the trial – they can make the tapestry stronger or they can cause the garment to unravel. This article provides a practical, trial lawyer’s perspective on selecting and presenting expert witnesses in deposition and at trial. Attached is a useful checklist of factors to consider when hiring and working with experts. Avoiding the pitfalls involved when testifying experts are retained not only results in a more defensible expert opinion at trial, it also avoids a potentially devastating outcome – the disqualification of the expert or the elimination, in part, of the expert’s opinions at trial.

II. BEGIN WITH THE TRIAL IN MIND: CAREFUL SELECTION IS CRITICAL

A. Applicable Authorities Governing Admissibility of Expert Opinions

The two often-cited cases that have emerged as controlling authority regarding the admissibility of expert opinions in Texas are Daubert v. Merrell Dow Pharms., 113 S.Ct. 2786 (1993) on the federal level, and E. I. Du Pont de Nemours and Co. v. C. R. Robinson, et al., 923 S.W.2d 549 (Tex. 1995) at the state court level. In brief, and by way of summary, both cases mandate that an expert’s testimony be relevant and reliable.

Specifically, the two fundamental questions to be addressed when considering a potential expert are: (1) have this expert’s qualifications and training prepared him/her to understand the evidence and utilize the method on which the expert opinions are based; and (2) is the expertise of the particular expert actually tied to the facts of the case so that the opinions offered will be germane to the issues in dispute.

B. Are You Sure You Need an Expert Witness?

The prevalence of experts today in litigation seems unprecedented. Nevertheless, it does not mean that testifying experts are always necessary or beneficial. Some reasons to consider foregoing the use of testifying experts include the following: (1) retaining an expert witness who falters before or during trial may be more detrimental than declining to retain an expert; (2) expert witnesses are expensive, and hiring an expert most often assures that the opposing party will hire one, as well, even when the case size and/or the facts do not warrant incurring this significant expense; and (3) hiring a qualified expert does not guaranty that the expert will be permitted to testify if the court concludes that the expert’s testimony will not assist the jury despite the expert’s qualifications.

Some examples of cases in which qualified experts were denied the opportunity to testify at trial include the following: see, e.g.,

Schutz v. State, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997) (Expert testimony constituting a direct opinion on the truthfulness of a child complainant’s allegations does not assist the trier of fact.);

Yount v. State, 872 S.W.2d 706, 710 (Tex. Crim. App. 1993) (Experts, such as psychologists, are not experts on credibility of witnesses and do not assist the trier of fact in such capacity.);
Puente v. A.S.I. Signs, 821 S.W.2d 400, 402 (Tex. App.—Corpus Christi 1991, writ denied) (Rule 704 “is not authority for permitting an expert to give an opinion or state a legal conclusion regarding a question of law. Such questions are not ‘an ultimate issue to be decided by the trier of fact.’ Questions on duty are for the court.”);

Askanase v. Fatjo, 130 F.3d 657, 673 (5th Cir. 1997) (“Whether the officers and directors breached their fiduciary duties is an issue for the trier of fact to decide. It is not for [the expert] to tell the trier of fact what to decide.”).

C. General Goals: Locate a Qualified Testifying Expert Who is Also Persuasive

The search for a testifying expert starts with the parameters established by the holdings of Daubert/Robinson. In selecting a testifying expert, it is best to begin with the trial in mind, because the expert will ultimately express her opinions to the jury. Expert witnesses tend to fall into three broad categories based on their background and qualifications and/or on where they are located. These categories are: (i) professorial experts in, or retired from, academia, (ii) professional or industry experts who testify frequently as professionals, and (iii) “occasional” experts who testify infrequently, but who have unique or distinctive expertise, which qualifies them to offer expert opinions.

D. Consideration of “Professorial” Experts

An academic expert may be the best choice when scholarly research and opinions will help the jury with the subject matter at issue. Universities, colleges, law schools and other graduate school programs are the typical places for these professorial experts – many of whom are lively and charismatic on the witness stand. A good testifying expert shares many of the same qualities as an effective classroom instructor. The expert who loves to teach and is able to make a dry subject come to life can be superb in presenting important ideas and concepts at trial.

1. Pros – Attributes that Favor Retaining a Professorial Expert

Not all professors are talented in the classroom (or courtroom), but most of them write well. Therefore, the typical professorial expert will furnish a well-written and well-researched report. Academics generally boast impressive resumes and credentials, and they have access to information, third-party sources and academic support to assist with research and analysis of the facts, data and scientific and theories at issue.

2. Cons – Disadvantages of Retaining the Professorial Expert

The stereotype of the “ivory tower” professor contains a grain of truth and is a factor to be considered when retaining a testifying expert. While impeccable credentials and academic renown are important, these attributes do not always create strong jury appeal. The removal from real world experience can diminish the professor’s effectiveness in front of a jury; and at its extreme, it can render the expert’s testimony irrelevant, and vulnerable to a Daubert challenge. See, e.g., Pack v. Crossroads, Inc., 53 S.W.3d 492 (Tex. App.—Fort Worth 2001) (limiting the expert’s opinion to discuss only the standard care for a nurse, rather than nursing home standards).

The professor’s lack of litigation savvy can also be detrimental in addition to the absence of real world experience. By way of example, the academic expert is likely to be less sensitive to
litigation concerns such as the danger of creating drafts of the report, the risks of making ill-
considered notes on documents, and other missteps that afford opportunities for highly effective
cross-examination at trial.

Further, professors may not be attuned to the time commitments required of a testifying expert.
An academic expert may consider this work to be “moonlighting” and fail to spend the time
required to obtain a nuanced understanding of the case. Some professorial experts tend to focus
too much on the big picture and substitute a general knowledge base for a more specific grasp of
the vital details of the case.

E. Consideration of Professional Experts

Professional experts make their living, or a significant portion of it, by testifying in specific areas
of expertise. A number of firms across the country are devoted largely, if not entirely, to
providing expert testimony in legal proceedings. Professional experts can be found in a vast array
of fields who hold themselves out as qualified to testify on a seemingly endless number of topics.
A number of on-line resources and data banks can be helpful in locating a professional expert.
Trade groups and professional organizations such as the AMA (physicians) and the AICPA
(accountants) can also serve as reliable resources to trial counsel in search of a qualified testifying
expert. Further, there are organizations such as TASA that serve as clearinghouses for expert
witnesses in a variety of fields, which can be accessed on the internet and via traditional means.

1. Pros – Advantages to Retaining a Professional Expert

There are many benefits that result from retaining a professional testifying expert, who is focused
on the assignment from trial counsel. By definition, a professional knows what he is doing and
applies his skills effectively. A professional expert knows how to estimate time and use the
resources available to him to ensure the best results possible for trial counsel and the client. Past
experience in testifying often makes a professional expert more confident before a jury and
during a difficult deposition or cross-examination. When the testifying expert is experienced at
presenting information in court, it increases the likelihood that his testimony is going to be
understood and appreciated by the jury.

The professional expert also tends to be more technologically advanced and adept. This can be a
tremendous asset during trial presentation and in day-to-day communications with the expert.

2. Cons – The Disadvantages of Retaining a Professional Expert

Two distinct disadvantages arise when the decision is made to retain a professional testifying
expert. First, the fees of professional experts often exceed the fees that are charged by
professorial experts, because the professional generally has a sizable staff that can (and often
will) devote numerous hours to the project, which makes it more difficult to control his fees. As a
result, special care should be taken when discussing the litigation budget and the anticipated fees
of a professional expert.

The second, more dangerous risk of retaining a professional expert is his track record.
Professional experts are valuable, in part, because they have “done it before.” The expert’s past
experience can carry with it, however, a trail of undesirable associations including, potentially,
undisclosed issue conflicts, impeachable prior statements or actions that give rise to accusations
of bias. An expert whose prior testimony leans heavily toward one side may present a perception
of bias, which negates the advantages of using a professional expert. In sum, the professional
expert’s past work makes it essential to conduct due diligence about his work on previous cases before he is retained.

A “trial court has wide discretion to determine whether previous, arguably inconsistent statements of an expert witness are relevant to that witness’s credibility.” Collins v. Wayne Corp., 621 F.2d 777, 785 (5th Cir. (Tex.) 1980); Longenecker v. General Motors Corp., 594 F.2d 1283 (9th Cir. 1979). In a case involving a serious bus accident in which the passenger seat and backrest design were claimed to be faulty, the trial court in Collins allowed the expert to be cross-examined regarding his previous statements concerning backrest failures in a different type of vehicle. The appellate court affirmed noting the “possible inconsistency in [the expert]’s testimony that the Wayne bus seats were defective and his prior testimony that the Volkswagen seats were not defective.” Id. Compounding the problem in that case, trial counsel failed to rehabilitate the expert by asking him to explain why his opinions were not inconsistent. Id.

The lesson is clear: the lawyer must strive to discover all potentially-conflicting prior testimony of the professional expert and be able to distinguish that testimony if necessary. The Fifth Circuit noted almost 30 years ago that “prior inconsistency is a particularly appropriate weapon for attacking expert testimony, since demonstration of the inconsistency is designed not to show that the expert has erred, but that he is capable of error.” Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1283 (5th Cir. (Tex.) 1974). Therefore, trial counsel must assess how damaging the past statements of an expert will be in deciding whether to retain his services.

F. Consideration of “Occasional Experts”

The occasional expert is like the accidental tourist – he has not studied to become a testifying expert specifically, and is not seeking opportunities to testify on the subject. Instead, this witness likely works in, or has retired from, an industry in which he has extensive practical experience, which is the subject of the issues in dispute in the lawsuit. This expert may work for (or have previously worked for) a company that is a party to the action, or for a competitor, a vendor or customer. The occasional expert can be difficult to locate and/or reluctant to accept the assignment, but he can also be a valuable find once identified and on board. With an excellent occasional expert, trial counsel has unearthed a “diamond in the rough.” The occasional expert can make a tremendous difference in a case, but it is also possible that his extensive subject knowledge and experience may be outweighed by his lack of neutrality, professionalism, savvy and courtroom experience.

1. Pros – Advantages to Retaining an Occasional Expert

To a jury, the occasional expert seems uniquely qualified. He has real world experience, is hands on, and legitimate. Industry experts often communicate very well and sincerely with a jury. An occasional expert is believable and highly credible because he is not seen as personally gaining a great deal from his participation in the lawsuit. In fact, the occasional expert’s credibility may be enhanced if the jury perceives some amount of bravery or altruism in his coming forward to offer his opinions in the case. If this person is still active in the industry, the thinking is that he would not risk expressing a controversial opinion unless he truly believed it.

In addition to appearing less “high dollar” or profit-oriented, the occasional expert is, in fact, generally more reasonably priced than academic or professional experts. He does not typically have a large staff and is reasonable in billing for his expertise. This apparent economy can have its own price-tag, however, if the lack of staff also results in slower turnaround and less professionalism, responsiveness and range of capabilities.
2. Cons – the Risks of Retaining an Occasional Expert

As previously noted, it can be difficult to locate an industry expert and equally difficult to persuade him to take on the assignment. This type of expert is unproven and carries attendant risks, e.g., will he present well at trial, be too accommodating to opposing opinions, and too middle-of-the-road in expressing his own opinions? Many industry insiders shy away from agreeing to become a testifying expert for fear that it will hurt their reputation in the professional community and prove harmful to their day-to-day livelihood.

In addition, the industry expert may not fully understand the nuances of litigation or the requirements of evidentiary and procedural rules. This overall lack of familiarity with the process requires more involvement and hand-holding by trial counsel. As a result, trial counsel must be willing to accept this greater level of involvement when retaining an occasional expert as a testifying expert witness.

Finally, from all three categories of experts, the industry insider remains the most likely to waiver from his opinion, be swayed or persuaded by the other side. While the industry expert’s jury appeal is generally high, his ability and desire to persuade the jury may be low if he tends to balance and validate “both sides of the story.”

III. CONFIDENTLY PRESENTING AND DEFENDING THE TESTIFYING EXPERT

By monitoring and nurturing experts during the earlier phases of the relationship with trial counsel, this final stage becomes much more straightforward. Presenting and defending a testifying expert occurs in two different venues. Although there is definite overlap between the guidelines for handling experts at deposition and at trial, there are enough distinctions that the topics each deserve individual treatment.

A. Deposition of an Expert Witness

By the point of deposition, the attorney will know the expert fairly well and be able to tailor suggestions to the expert’s particular personality, style and demeanor.

1. Preparation for Deposition

It is usually true when preparing expert testimony that waiting until the last minute can be problematic. As discovery and the pre-trial phase progresses, experts must be kept apprised of material new developments so that the expert can integrate them in his thinking and opinions. Some specific examples of the type of information that should be shared include new court rulings, new pleadings filed by opposing parties and new evidence obtained in discovery whether in depositions or documents.

2. Prepare the Witness

It is helpful to prepare for the deposition examination with a testifying expert through actual practice examination. Using another attorney to “play the part” of opposing counsel is wise; if the trial attorney is then able to observe the expert testifying, he is likely to notice and provide better input. Counsel should resist the urge to use video, even if the witness might benefit from seeing
himself testifying, because the videotaped record is discoverable potentially, thereby causing more harm than good. For the same reason, no notes or script should ever be given to the expert regarding his testimony.

Consider carefully the items that the expert will bring to the actual deposition. He should have his report, the documents that are ticked and tied to his report, plus any references that are cited in the report. It is important that the expert be able to substantiate his opinions at the deposition.

Assessment of opposing counsel’s style is also required – how aggressive is he likely to be and will he be trying to trick the expert at the deposition? If so, brainstorm with your expert regarding the anticipated areas of attack and then prepare by actually examining the expert in that style.

3. Consider Having Your Expert Attend Opposing Expert’s Deposition

A final consideration is whether to have an expert attend the deposition of an opposing party’s expert. This is worth considering, particularly if the expert that you retain has been designated as a rebuttal expert, because it will give the expert a better understanding of the witness whose opinions he is rebutting. A previous glimpse at the competition can aid your expert’s trial preparation. Further, sitting in on the deposition of an opposing expert will inform your expert of the strength of the opposing expert’s convictions. Moreover, the cost of bringing an expert along may more than pay for itself if he can provide meaningful assistance at the deposition. Often an expert can listen, observe and suggest questions that are outside your technical expertise or scope of knowledge. This is particularly true with an industry expert, who will know the terminology and be able to spot the flaws in the opposing theories, which can be invaluable.

B. Presenting The Expert at Trial

On the eve of trial, the only task left for the expert is to plan for and prepare to seize the opportunity to give the jury the benefit of his opinions. This is where an expert truly earns his keep. The testifying expert should be able to explain the key issue persuasively and why it should be decided in favor of your client. In short, a skilled expert witness will make the issues come alive for the jury. The question then is how to present the issue at trial in a way that is compelling to the jury.

1. Adding Life and Color for the Jury

At trial, demonstratives are going to be employed extensively. Although new information and opinions cannot be revealed or admitted, new ways and techniques for explaining the expert’s opinions and conclusions are welcomed and helpful. There exists a vast range of creative methods for the presentation of expert opinions. Encourage the expert witness to concentrate on new ways to present information to the jury. He must hold the jury’s attention – how will that be achieved? This is not an area that can be left to chance.

We live in a visual era and receive messages constantly via video, audio, television, computers, books, tapes and a vast array of print media. Thinking “multi-media” for an expert presentation leads to the right path. Combine your client’s overall story and your big picture view of the case with the testifying expert’s specific expertise and skill using “multi-media” resources such as hand-outs, poster-sized charts, whiteboard or chalkboard, PowerPoint projector, photographs or videos. The combination, along with hard work and creative thinking, should result in a courtroom presentation with impact.
If you have chosen a professorial expert or another who is skilled at teaching – it may be best to stand back and get out of his way. Letting an expert teach and present his findings in an interesting way tends to raise the expert’s comfort level. A good presentation dramatically enhances the credibility of an expert. A poor presentation is an opportunity lost. If the well-prepared trial counsel uses a testifying expert to make a compelling presentation and the other side fails to do so, this can play a decisive role in the outcome of the case.

2. Refrain from Neglecting the Substance

Aside from the manner of presentation of the expert’s opinions, the goal remains to focus on the expert’s substantive testimony to ensure that his opinions are adequately conveyed. Consider having a testifying expert sit in the courtroom for certain portions of the trial before he testifies. It can be worth the expense if used judiciously, and is generally permitted, because “The Rule” does not typically apply to experts and will not usually be invoked to exclude your expert from the courtroom. See Elbar, Inc. v. Claussen, 774 S.W.2d 45, 52 (Tex. App.—Dallas 1989, writ dism’d); Riton Oil v. E. W. Moran Drilling Co., 509 S.W.2d 678, 685 (Tex. App.—Fort Worth 1974, writ ref’d n.r.e.). It can be very helpful for a testifying expert to attend opening statements and to observe the opposing expert. It is more persuasive for the jury to hear an expert comment on the opposing expert’s opinions from first-hand knowledge.

Along with the substantive preparation and courtroom observation, a measure of last minute tactical coaching usually proves helpful as well. Remind your expert not to be combative. A hostile approach will not enhance his credibility or jury appeal. Similarly, being overly protective with objections will undermine the expert’s credibility. It can be an uncomfortable feeling, but the expert must largely stand on his own to present what he knows and hold to his ground.
APPENDIX “A”

CHECKLIST FOR RETAINING A TESTIFYING EXPERT WITNESS

1. **Conduct due diligence:**
   - Review articles authored by expert
   - Review previous cases involving similar topic(s)
   - Review previous deposition and trial testimony

2. **Perform internal assessment:**
   - Run “conflicts” check
   - Follow up on all replies re: knowledge of expert

3. **Conduct detailed resume check:**
   - Note any discrepancies

4. **Meet with potential expert:**
   - Discuss note-taking procedures
   - Give broad overview of case
   - Assess appearance and demeanor
   - Elicit experience and knowledge
   - Discuss any resume discrepancies uncovered
   - Resolve discrepancies, if possible

5. **Ask tough questions before retaining the expert:**
   - Has the expert’s testimony been excluded/limited by a court?
   - Has the expert ever failed to be qualified?
   - Have expert’s opinions been subject of any written opinion?
   - Has expert been opposed before to other side’s expert?
   - Consider experts’ personal life - is there anything negative?
   - Does the expert have any substance abuse issues?
   - Is expert going through a contested divorce?
   - Has the expert ever been a party in any litigation?
   - Has the expert ever been sued by a client or former client?
   - Has the expert ever been subject to any criminal proceedings?
   - Has the expert ever been accused of breach of fiduciary duty?
   - Has the expert ever been fired from any position?
   - Has the expert ever been charged with sexual harassment?

6. **Discuss estimated fees and litigation budget:**
   - Determine expert’s hourly rates (and staff rates)
   - Agree upon range of estimated fees (total and each phase)
   - Do not confirm estimated range or budget in writing
   - Get assurances in the form of an oral commitment

7. **Draft retention letter or review expert’s draft:**
   - Scope of specific assignment is outlined
   - No conclusions or opinions are stated
   - Hourly fee and pay-as-you-go specified
No budget estimate is given
Specify that payment is not contingent on outcome
Consider having lawyer or firm designated as “client”
Thoroughly read and review entire letter