

May 25, 2021

ARTICLE

The Expert Witness: Friend or Foe?

Selecting your expert—insights from an experienced trial lawyer.

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One of the most rewarding experiences in my professional career is to work with knowledgeable experts. I have worked with experts predominantly in the medical field, and what I appreciate the most is their enthusiasm for their profession and work. The best experts bring their enthusiasm to the forefront of a case, and that enthusiasm captures others who listen with interest. An expert is not simply a brilliant person with an extraordinary amount of knowledge in a given field; this person is capable of simplifying the most complex topic and engaging the audience—from our perspective, a jury—in his or her life's work. The successful expert brings to your case enthusiasm with the following message: We are explaining this to you because we believe in the subject matter and what we are saying. We believe in this because it is our labor of love.

The expert's passion and enthusiasm for his or her chosen field can help engage the jury and the court. A dry and confusing expert presentation can confuse the fact finder and lose the key points. Below I offer my views on what to look for and what to avoid in selecting an expert.



The Ideal Expert as an Acknowledged Leader in the Specific Field

Experience matters. In my experience, the most persuasive experts are those who are leaders in their field with specific prior expertise on the subject of their testimony. The expert must be not only well published in his or her field but also respected by his or her peers. Credentials and experience matter: For example, experts may be presidents of societies, be frequent invited speakers, or have expansive reputations—nationally or internationally.

Specificity of experience/knowledge. Experts should have a specific niche for which they are recognized. An expert in the generic field of neurology, rheumatology, cardiology, or obstetrics might not be able to opine on the specific subject matter—for example, a rare complication of lupus resulting in transverse myelitis. Will the expert be able to address this rare situation?

Strategic considerations. What will your opponent do to try to disqualify or minimize the impact of your expert? What can you do to help make your expert the acknowledged leader in the field? Has your expert published on the topic? Who is the opposing expert? Is that expert truly an expert in this subject matter? Can you get your opposing expert to acknowledge that

your expert is truly one of a few in the country with this specific expertise? You should obtain this acknowledgement in a deposition and pursue this acknowledgement at trial. Honesty and candor prevail in my experience.

Finding Your Expert: Research, Research, Research

Before you decide to retain an expert, study his or her curriculum vitae and review his or her publications. Obtain depositions from other cases and make sure there are no inconsistencies. Obviously, your expert should not have published or testified in a contradictory fashion in another case. After you decide this is the person you desire as your expert, make the phone call. It is much better to initiate the contact by phone. You want the expert to hear your voice, sincerity, and passion for your case.

Preparation

You must do your homework on the subject matter. After you have identified your possible expert, you want to make sure you are knowledgeable about the subject matter as well. When you make your initial phone call and discuss the case, you want to make sure you have identified most, if not all, of the pertinent issues. Your expert should understand that you know the issues, are informed on the topic, and are seeking the expert's sage advice and expertise to develop your case. Of course, this encompasses understanding areas of vulnerability and potential pitfalls. This provides for a pleasant conversation and the beginning of mutual respect. Your expert must understand you are in this together for a purpose. The goal is a successful resolution to a complex case either by settlement or trial. You and your expert need to understand the pros and cons to avoid the pitfalls.

The Novice Expert

There is one word to describe this expert: refreshing! You found this special person who is acclaimed in his or her field but does not do expert work by delving into the literature. Your task is twofold: to convince the expert that you need the expert's particular expertise in this most interesting case and that you will assist the expert with the nuances of the legal system. I once retained a cardiologist who had never been an expert before, because I specifically wanted someone who had never testified as an expert witness. The goal was to have him tell the jury, "This is my specific niche in cardiology, and I am doing this only because I believe in the defense of this physician and his care." I had explained the standard of care in a civil case, as opposed to a criminal case, and all went well at his deposition. On cross-examination at trial, however, he testified that my defendant physician was "innocent" beyond a reasonable doubt. As I shuddered in horror, he saw the look on my face, and when I stood up on redirect, he asked me if he could make a correction to his last testimony. I said, "Of course." He looked at the jury and said, "I must correct myself. I understand the difference between the standard of proof in criminal cases and civil cases. While I applied the criminal standard by mistake, I would like you to know that I feel this defendant physician was 'not negligent' beyond a reasonable doubt." The jury appreciated his naiveté and met it with smiles and laughter.

The Expert Who Plays Lawyer

Beware of this expert. I was thrilled to find an expert in a case involving two uncommon autoimmune diseases. While I applauded myself for finding such a renowned and well-credentialed expert who agreed to work on this case, I learned this treasured wizard had flaws. This expert was well published and highly acclaimed in his field, had taught and lectured, and was known nationally and internationally. This expert was seldom challenged in his opinions or expertise. He would tell you he was ready for anything. No lawyer had ever challenged, nor would challenge, his opinions. This expert may come across as extremely or somewhat arrogant. This expert also understands the law and does not need your advice. The expert walks into the deposition without any notes. The expert does not need a file because he has not made any markings on depositions, has no tabs, and has a vast understanding of the publications on the topic because most of them are his. Despite thousands of pages of documents, the expert states his memory is impeccable. This sadly translates into a lack of preparation, hostility to opposing counsel, a poor memory of the facts, and, in short, a disaster.

The Expert and You

I feel blessed to work with some of the most erudite and intriguing individuals I have ever met. The relationship is based on mutual respect. This has often developed into lasting friendships.

I ask myself, How did this happen? I look back with the understanding that I have chosen carefully and my experts have chosen me as well. We share the same passion and devotion to the subject matter and, more importantly, to the truth.

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Donna Kaner Socol is a founding member and shareholder of Hughes Socol Piers Resnick & Dym, Ltd.

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