



The Due and Diligence of Choosing an Expert:

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A look at issues surrounding the selection and hiring of experts in litigation.

You mustn't fool yourself with the idea that you could hire experts to attend to things; for how could you know that a man was an expert unless you knew as much as he did? Some day your foreman might drop dead, or some other fellow would buy him away from you, and then where would you be? Be your own expert, said Dad!

This chapter will review the necessary steps you will need to take when considering a possible expert witness. The steps include consideration of their education, work experience, relation to opposing (and pro) experts, publications, organizational affiliations, certificates received, previously issued expert reports or presentations, appearance, cost and previous testimony. All of these categories need to be analyzed from the perspective of the jury, opposing counsel, and your own case. Once each category has been reviewed and weighed, you'll be ready to choose an expert. The following chapter will help guide you towards asking the types of questions that expose the pros and cons of your expert selection. The goal is to consider all angles and weigh your options.

When choosing an expert consider the factors that the court will consider in determining if your expert qualifies as such. The Daubert Court held that trial judges must determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the fact finder in understanding the issues presented. "This entails a preliminary assessment of whether that reasoning or methodology properly can be applied to the facts in issue." The Daubert Court The Daubert Court went on to suggest that trial judges consider the following factors when making such determination: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication (publication is not required, "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected."); (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has

attracted widespread acceptance within a relevant scientific community.

The factors used by the court are the same ones you should consider when considering the strengths and weaknesses of your expert.

Consider the following in the categories below, they are what opposing counsel will be looking for: (1) inadequate or poor qualifications (lack of expertise); (2) Incomplete analysis of opinion area; (3) Insufficient or date or material to form opinion; (4) Incorrect assumptions; (5) Biased; (6) Incorrect/Faulty methodology; (7) Imprecise work.

Choosing a Side

Plaintiff or defendant, which side you represent may play a significant role in how you proceed. While a plaintiff must prove each and every element of the case, the defendant can choose which elements to attack, and thereby which expert to attack. A defendant also has the luxury of knowing which expert(s) plaintiff plans on employing and can therefore choose the particular expert who best counters. Consider your side and how to best defend/pursue your position while exploiting opposing's weaknesses.

Finding an Expert

Before you can begin vetting an expert, you will need to find an expert. A great place to start is with a simple Internet search of what you are trying to find. See what names come up with frequency in your area of interest. You can also look to the professors at local colleges or universities as a source of possible experts, or perhaps a lead to one.

There are also organizations that specialize in placing experts with attorneys. These can be found in advertisements in any bar magazine and online. One company, The Expert Institute, will match you with an expert to suit your case, with all of the vetting work performed by them, for a nominal fee of course. (You cannot delegate

away the responsibility you have towards your client and will still be on the hook for malpractice should something arise.)

Use this process as a starting point to a better understanding of your case, your opposition's case, and the science that you are going to have to present and defend. It may be easier to have another perform the selection and background work on your expert, but you will lose a significant portion of the education that comes through choosing an expert.

Within this process, you will encounter the curriculum vitae of the experts you are looking. These are a great place to begin a deeper investigation of the experts.

It is not only you choosing an expert, but also them choosing you. An expert gets to the position of an expert after a significant amount of education and time in their field. They do not want to be put on the stand and be made to look an ass because of your faults.

In the end, you want to investigate your expert just as you will the opposing expert.

Jurisdiction

What is the law (elements of case) in the jurisdiction of your case? The required legal language (proof) may differ from jurisdiction to jurisdiction, and thereto might the language of the expert need to differ. Compare the language of the law and the language of the expert. Is there a discrepancy, if so is the expert willing to work with it? An example being a jurisdiction that requires "X" be a substantial factor in "Y", and another jurisdiction which requires "X" be the factual cause of "Y." Consider this also when looking into previous deposition or trial testimony of an expert.

Education Experience

The education of the expert can be important for reasons that go beyond the knowledge gained from that education and there are many factors to consider when look-

ing at the education of your expert.

The schools reputation should also be considered when choosing an expert. The general population nationwide knows certain schools and attaches prestige to them, such as Harvard, Yale and Princeton. While other schools are known for being leaders in particular areas, such as Johns Hopkins in medicine, or MIT in science. Also consider by whom your expert was educated. This will especially become more relevant with post college levels of education. Did leaders and innovators in the field educate your expert? This will be more relevant in the medical field when doctors have both internships and residency programs that are part of their education.

Consider how extensive your expert's education is in their respective field. Have they achieved that highest possible level of education or degree in their respective field? A Ph.D. may not be required to be considered an expert in chemistry, but the lack thereof should be considered. Because although it may not be relevant to the validity of the expert's opinion, it might be very relevant in the eyes of the jury.

Does your expert maintain continuing education in their field, or are they one of those who contribute to that continuing education? Ideally you would like your expert to be at the forefront of knowledge and research in their field, but at a minimum you want your expert to be up to date on the information and research in their field.

And while a Harvard educated expert may seem like the right choice in any situation, it might look a little different when presenting a case to a jury from a small Midwestern town. In that situation, a local expert educated at a State school may be more appealing to the jury. It is important to consider what type of case you are presenting, and to whom you are presenting that case. Think about how a local jury will perceive your expert.

Professional Appointments and Societies

You will next want to investigate any professional appointments and societies that your expert may belong. Is there anything with their involvement with these groups that could add or detract from the expert? Does your expert's opinion go against

the opinion of any of the groups they're involved? Do any of the groups have a long history of opinion in the area in question? Experts who have worked for, or been appointed to, governmental organizations, as well as editors of peer-reviewed journals, are typically viewed favorably in the eyes of the jury.

You want to look at their involvement in the groups, what they have contributed while a part of, and whom they have associated or contributed material with. Perhaps they have contributed material or opinions that, although not relevant to their current opinion, may be brought in by opposing counsel to show bias or sloppy methodology.

Do not fail to consider membership in all organizations. Anything that can be used by opposing counsel to discredit your expert will be. Do any of the organizations have a storied history? An organization may have a neutral name, but perhaps only pushes a one sided story. Investigate the organization, where does the funding come from, and who are the members of the organization. Just like in politics, there are many neutral sounding groups, but most of them are anything but. In every situation you are going to encounter bias, that is what you are trained to do. Take all of that possible bias into account and weigh it in light of the case. Consider two different opinions addressing whether gasoline may be carcinogenic, one from an expert who is a member of the American Cancer Society, and one who is a member of the American Petroleum Institute. Even if the science behind the expert who is a member of the API is sound, there is still the appearance of bias.

Certifications

Does your expert hold any certifications within their area of opinion, or for that matter, outside of their area of opinion? Look for anything directly related to the area of opinion that may enhance their credibility to the jury. Take the time to investigate where these certifications come from to be sure that they are as good as they sound. Also be sure to check that all certifications are up to date and valid. You don't want to find out that your radiologist, a certified B-reader, has let that certification lapse while on the stand.

Work/Class Presentations

What, if anything, has your expert presented to an audience? This could be classroom material, work PowerPoint's, or seminar presentations.

If the expert has presented material related to their opinion, to whom or what group was this material presented? Is the material consistent with their current opinion? Pay particular attention to the audience that your expert has presented to. If the material was presented to defense attorneys, or a particular side of an industry (think smoking study showing smoking doesn't cause cancer presented to a tobacco group), this could be used to show bias of your expert.

Classroom or teaching material is an often-overlooked area that should be addressed if applicable. You do not want to find out at trial that your expert is teaching material that may contradict or undermine their opinion in the case. This material might also be beneficial when presenting your case to the jury, since you are essentially trying to educate the jury on the subject.

Cost

The cost of the expert, their income derived from testifying/legal field, and the sources of their payment are important factors to consider both from your standpoint and that of the jury.

Compare the cost of your expert with others in the field. Is there a significant variance and if so what is the cause of such variance? Consider how the jury might view such a discrepancy, especially if the opposing expert is significantly less. You want to avoid the appearance that your expert is a hired gun. This may be difficult to do considering top experts command a corresponding fee, but you will likely find opposing counsel in the same position. Do not just consider the individual fee, but also how much the expert has derived from legal work over their career. These amounts can become quite substantial and should be considered in light of the case and possible jury.

Another consideration with regards to cost is where or to whom does that fee go? Experts can come from any number of areas, but most likely they will come from educational institutions or private firms. The expert hired from a private firm will likely carry more stigma than the college professor, but that is not to say that the professor cannot be framed in a negative light. Because even though many experts who are employed by educational institutions do not personally pocket the fee, they receive for legal work, (the institution collects this money) they will typically see the benefit through funding for their department. And this is not to say that private firms are always hired guns, just that their profit motive is a little easier to see.

Consider the cost of the expert in your current case and with regards to possible future cases. What is the cost of the expert with respect to what is at stake in your case? Will you seek to use this expert again and form a relationship with? Is the case one that could form a precedent both legally and with who you represent? Will a negative defense verdict get plaintiffs swimming circles around your “former” client?

Where does the expert derive their income, or who is paying for the expert to perform the work/studies they perform? You will be relying on the opinion of your expert, and this opinion will likely come from research and studies performed by your expert, or relied upon by your expert. The source of funding for this research should be of significant concern to you. An expert being paid a significant amount of money to perform a study financed by a major corporation and coming to a positive conclusion for said corporation will send an obvious message to the jury. It is important to look into the source of funding for all research performed by your expert, even if not directly related to the current opinion at hand. Always be on the lookout for anything that could be used to paint your expert as biased.

Other Experts

You are of course looking for a particular opinion and an expert that will confirm that opinion, but consider what all experts in the same/similar field opine. Is the

opinion of your expert the only one, or an extreme outlier in the field? Now of course may breakthroughs in science come from going against the grain, and I am not attempting to discount that. Only to remind you that you must first convince the judge, and then the jury of the legitimacy; don't forget the steps laid out in Daubert. What is the consensus of experts in the field, and where does your expert lie? Who do experts in the field recommend and hold to esteem?

Appearance

Only the opinion of your expert matters more than their appearance. No matter how on point your expert and their opinion may be, if the jury doesn't like and connect with them, it will be for naught.

The saying "perception is reality" applies in this section. The goal is to obtain an expert who is professional, approachable, and capable of properly relaying their opinion to the general public (jury) who will likely be hearing information of this sort for the first time. You want your expert to be someone that can talk to the jury about technical material, in a way that they can understand, without being condescending. Consider what the jury sees when they look at your expert. Is this a person that the jury will see as trustworthy and believable? This point cannot be stressed enough; the expert must be trustworthy, and be able to convey their opinion to the jury. You will become seasoned with the expert and their opinion, and will, therefore, have a better understanding of that opinion. Consider the proximity you have to the case, the expert, and their opinion. You may begin to fill in some blanks the expert is not fully explaining them. It is prudent that you realize the jury, who are likely unfamiliar with the topic, may not understand key terms or concepts relevant to the expert's opinion and testimony. To avoid this, have the expert explain their opinion to an uninvolved party. This pre-presentation highlights unclear portions of your expert's opinion that may have been overlooked.

What is the disposition, posture, tone, eye contact, and physical appearance of your expert? Your expert will be making a first impression upon the jury, and you want it to be a good one. Consider your first impression of the expert, is there anything

that you believe needs to be changed before putting them before a jury? I'm trying to say that you should look for common stereotypes and basic psychology. You want to get your expert's opinion across but you need to remember that you are dealing with people often unfamiliar with technical issues. Use all of the basic psychological and educational steps one can to enhance their uptake of the knowledge. This process of education works the same for juries, as is does for members of the board of a company.

Even what the expert is wearing while testifying should be taken into consideration. We as a society have ideas of what certain types of people or professions should look like. We are impressed by the uniform and see it as a symbol of authority and status. Take for example a medical doctor from the local hospital appearing in court in their white doctor lab coat; having just come from the hospital and returning there after testifying. Now compare that with another doctor appearing in a suit, who may be doing the exact same thing. The first will likely come across as a worker who has been pulled from their work, which is helping people, to render an opinion. The latter is a professional testifier who is appearing in court to work for their paycheck. This, of course, isn't a rule, but a consideration that you should be aware.

How does the expert stand up to cross-examination? Just as you will find and flaunt every weakness of the opposing expert, the same will be done to yours. Their ability to stand up to cross-examination is critical. The cross doesn't even necessarily have to hurt their opinion, if opposing counsel can fluster and confuse your expert, that may be enough. Can the expert address the weak areas of their opinion without becoming emotionally involved? Are they able to hold their ground without seeming evasive? There are going to be weaknesses in every expert opinion, know what these weaknesses are and address them. Be sure that your expert also knows them and is prepared to deal with them before opposing counsel does. How your expert explains their weak points may be just as important as how they explain their opinion itself. In a sense, the jury knows that each expert will say the opposite, and in turn each will say it with much authority. How well they explain their weaknesses will, therefore, play a critical role with the jury. This, of course, should never be portrayed as a weakness, but as a purposeful choice with reasoning to back it up. If

your expert used 100 of “X” instead of the 120 used by another expert, a purposeful distinction should be made. Your expert should always be able to explain why certain choices were made and have reasoning for such.

How well can the expert differentiate between their opinion and opposing expert’s opinion? Why is it that their opinion is correct, or more applicable than the opposing expert? The expert not only needs to be able to explain their opinion but also fully understand opposing expert’s opinion so that they can explain why it is incorrect.

Opposing Expert

You’re ultimately choosing your expert to battle with opposing counsel’s expert. You need to investigate this person in the same way you’ll investigate your own expert. Look for the things that their expert is not addressing and find out why. Find the similarities and differences between opinions and the reasoning for such.

Work Experience

What are the past and current work experiences of your expert?

Review each job your expert has held and determine how it can be used to bolster their credibility and opinion. Do their jobs build upon one another and advance their skill and understanding in their field? Are there any gaps and if so why? Consider your expert’s past employers. Why did they leave, is there anything negative about the employer that could be implied upon your expert? You don’t want to come to trial and find out that early in your expert’s career they worked for an employer with a checkered history.

Where does your expert currently work and what do they do on a daily basis? You need to consider how these fit into their expertise and opinion. An expert can come from anywhere, from a local college to a for-profit scientific consulting firm. This is an important factor that should be considered from the eyes of the jury. There is likely much more baggage that will come along with what may be considered a

hired gun working for a firm that consistently represent clients on a single side. There are scientific-consulting firms that are consistently used by major corporations. These same firms have a track record of coming to conclusions that are to the benefit of those corporations. Even if you are not the major corporation, consider how your use of an expert from such a firm could be spun. This is not to say that you cannot find experts working at universities who consistently testify for a particular group, but there seems to be a difference between the professor and professional consultant. Does you expert deal with their opinion area on a daily basis or is this something they do when required? Consider a plaintiff in an asbestos lawsuit who has been diagnosed with mesothelioma, a cancer specifically linked to asbestos. You could have an expert who deals with cancer on a daily basis or one who deals with mesothelioma on a daily basis. While both may have extensive knowledge of cancer, the expert who deals with the cancer on a daily basis will likely hold more weight with the jury. And in the same vein, consider an expert in mesothelioma who comes from the for-profit consulting firm, versus the expert from a hospital that treats patients with the disease on a daily basis. The science that both uses may be the same, but one will hold a distinct advantage over the other. The situations will always be different and will likely not include these obvious distinctions, but you should always keep in mind that they can exist and may apply.

Consider the length of time that your expert has in their field. An expert with a significant amount of time in his or her area may seem like a no-brainer. You'll likely want an expert who has experience and in knowledgeable in the nuances of their field. But situations could arise where it could be viewed negatively, or perhaps isn't needed or even a possibility.

Publications

What has your expert said, and where have they said it.

What material has your expert published that is directly related to the issue at hand? This is material that both you and your expert will rely upon and therefore should be thoroughly investigated. What is said in the publications is the easy part;

it is what hasn't been said that should occupy your time. What hasn't been said or used are typically the points opposing counsel will target. You need to identify these points and determine how they may affect your case.

When reviewing each publication of your expert (and those relied upon), specifically address whether the expert's field is a well-accepted body of learning with defined standards; the ability of the opinion to be tested; the body of literature concerning your expert's opinion; the error rate of your expert's theory or technique; the general acceptance of the technique or theory within the relevant scientific community; the non-judicial uses of the theory or technique; the extent to which the theory or technique relies upon the subjective interpretation of the expert; and the expert's credibility to the extent that it affects reliability.

Where or in what has your expert published material? And do not simply confine your search to journals alone. You need to look through all the material the expert has put into the public forum, this includes blogs, letter to the editor, etc. Different publications (journals, magazines, papers) will carry different weight with those in the field and with the jury. A peer-reviewed article in the *New England Journal of Medicine* or a textbook used throughout medical schools will likely carry more weight than a non-peer reviewed article appearing in a trade journal. You should also consider how the source of the publication could be viewed negatively. Articles published in a corporate trade magazine that reinforce the opinion of the industry will likely be viewed differently than articles published in more neutral journals.

When was the publication published? While older material may still be relevant and relied upon, there is a greater likelihood of errors or changes in the field to be found. Also, recently published material may suffer from being so new as to be missing many of the factors listed above. There is another issue with timing that should be considered, which is publications that coincide with litigation may be viewed with bias. Especially if these publications develop a new "litigation" theory.

Consider whom your expert has published in conjunction with, because your expert may be bringing along their baggage as well. If your expert were to publish in conjunction with another expert who had previously been cited for faulty methodology,

bias, etc., these things will be brought in to discredit your expert.

Where the funding for publications has come from is a step you do not want to overlook. Experts can be found that consistently publish material that is beneficial to the industries that pay for the studies/publications. That is not to say that these publications are automatically disqualified, only that they should be investigated thoroughly. There are of course many situations in litigation when studies will have to be performed by plaintiff or defense, and will most certainly be paid for by an interested party. Publications that result from these studies may be viewed with skepticism, but likely exist on both sides of the table. The publications being peer-reviewed will help them withstand attack from opposing counsel.

What type of material has your expert published and what type are you relying upon? Treatises, textbooks, peer-reviewed articles will obviously carry more weight than other material, but that doesn't mean the other material cannot be used, just that it is easier and more likely to be attacked. Be careful of articles that have the ability to be peer-reviewed but are not. There may be good reasoning for this, but the jury will need to understand and accept that reasoning.

Do not fail to consider all of the material that the expert has published, even material not directly related to their current opinion. Perhaps your industrial hygiene expert is also an expert in stamps and has published material regarding such. You want to check this material just as you would material related to the opinion in your matter. You don't want to find out at trial that the expert has been cited for bias or bad methodology in another area, has this will be inferred upon the current. And this goes for all forms of publication, not simply journal articles and related material.

How are the publications of your expert similar or different from others in the field? Are your expert's opinions extreme outliers in the field, or are there other experts that share the same opinion?

When analyzing your expert's publications look at sources relied upon and the meth-

odology used, this applies to your expert's sources as well. If your expert uses statistics to extrapolate the results, and the statistics have issues, so might the results of your expert. Each publication needs to be separately analyzed for weakness.

An expert is an expert because of their knowledge and experience in their field. Much of this knowledge and experience will come through research and publications. This, of course, will not be true for every type of expert, but the majority of experts are performing these functions. It cannot be stressed enough to pay attention to where funding for the research comes, and the methods used to conduct that research. Even though a university may employ your expert, the money for their research may come from interested parties.

Previous Expert Reports

Can you get or have access to any of the expert's previously issued reports? The availability may depend on a variety of factors, but if possible get copies of all available reports. Check them as you would any other document, especially for consistency. If a report will be issued in your case it is important to have an understanding of what is and is not included and the reasons for such.

It is especially important that your expert has all of the necessary information to form an opinion and issue a report if required. Previous reports and there subsequent treatments are a good place to check to make sure you have given your expert enough.

Previous Trial/Deposition Testimony

The closest thing to predicting the future that you may have available to you. This material should give you a very good idea of what you can expect from your expert, and opposing counsel.

You want to look for consistency throughout the expert's deposition and trial testimony. Have there been any material changes to their testimony? If so, what chang-

es have been made, and what was the reasoning for them?

How does the expert handle direct examination? Are they able to offer clear and concise answers to questions? Do they explain their opinion well and in an understandable way?

Most importantly, how does the expert handle cross-examination? Not only will you get an idea of how they handle themselves on cross-examination, you will also get an understanding of their weak areas, as well as the areas of their opinion that are likely to be attacked. Depending on the facts of your case, this information could be valuable in deciding which expert will work best for you. Previous testimony will also allow you to better deal with the difficult areas of your expert's testimony.

How have their publications and reliance material been treated during their previous testimony? This will give you a good indication of what you can expect, but should not be relied upon.

Previous testimony is also helpful in learning about the opposing expert. What are their strengths and weaknesses, how will you use them in your case, and which expert is best at combating them? Go over this material with your expert, understand your expert's perspective and the reasoning for their similarities and differences. Check other jurisdictions to see if the expert has had any judicial admonishments, or been barred from testifying.

Opinion

We finally come to the reason for the expert and their necessity to your case. To understand the reasoning and opinion of your expert, you need to become an expert yourself.

Pay attention to what your expert doesn't say in their opinion, what they have not included, and what they do not believe is relevant. An example being some experts who believe that every exposure to "X" is relevant and therefore include them in their sample, while others believe only exposures lasting longer than 10 minutes

are relevant. It is crucial that you understand the reasoning for both opinions, and the research supporting them.

In what areas does your expert and opposing agree and disagree? How can these be used for and against your expert, and ultimately your case? Differences could be as small as a few different assumptions in one area. This could be helpful to you and the jury if you are able to boil down the controversy to a few distinguishable points.

Depending on what type of expert you use, they may or may not rely on the material of others. But more likely that not, they are a link in the chain of knowledge, and have relied on others in forming their opinion. This is where books, publications, research and all other material come into play. You must understand each piece of this material, and its use within the expert's opinion.

Has there been any material published that disagrees/disputes with the material your expert has relied upon? Depending on the material, this could undermine the opinion of your expert, and ultimately your case. Be sure to pay particular attention to what specifically has been disputed as compared with what your expert has relied upon. Researching and studying all of this material will not only help you become your own expert; it will also give you a greater understanding of your case. Treat this just as though you were Shepardizing a case you were going to rely on.

A significant part of what can be disputed with your expert's opinion, and that of the material your expert may have relied upon, is methodology. What methods were used in obtaining the data that the expert is relying on? Are they within the acceptable range of standards in the field? If not, is there an arguable position for the divergence? How do the methods of your expert and the opposing expert differ? Understand the differences and the reasoning for them.

Conclusion

Whenever I'm asked a legal question, my usual response is to ask the questioner

questions, and then tell them “it depends”. Should I use an expert that has had their opinion disallowed in another jurisdiction? The seemingly obvious answer is no, but that isn’t always the case.

The point of this is that you learn to spot issues, ask questions, and search for answers, or at least a better understanding. I like to think that there is never a right answer, only one that comes across better than another. These factors will help you find that better answer.

- ▶ 1) Sinclair, Upton, Oil! 2007
- ▶ 2) refers to a trilogy of cases that came before the US Supreme Court that articulate the Daubert Standard. These cases are; Daubert v. Merrell Dow Pharmaceutical, General Electric Co. v. Joiner, and Kumho Tire Co. v. Carmichael.
- ▶ 3) See IDDO White Paper “Rats In A Lab Coat”