

Finding the Right Expert

By Megan S. Peterson

By doing your ground work, you can identify potential candidates, choose wisely, manage your expert, and achieve good results for your client.

Expert Witness Retention and Management in Personal Injury Litigation

When defending personal injury cases, one frequent question is whether an expert witness should be retained. The principal goal of expert retention in most defense litigation is to contain the client's exposure, while keeping costs in

check and maintaining efficiency. Ultimately, your expert should align with your theory of the case and help bring resolution to fruition, while not breaking the bank. In many instances, associates and young partners are tasked with identifying, vetting, and managing the defense's experts. However, as a younger practitioner, experience and a referral base are still growing, making the task more complex and likely more time-consuming and costly. With some suggestions and tips, any practitioner, whether an experienced trial lawyer or a new associate, can manage the task competently and produce good results.

Research the Role Your Expert Will Fill

After you've investigated your case and understand the facts at issue, begin con-

sidering whether you may need an expert and what role the expert will need to fill in your case. Often, the best way to do this is to research your jury charges and the elements needed for the plaintiff's burden of proof. In fact, at the outset of your case, it is wise to research the foundation for a motion for summary judgment. You will better understand how you can develop your case for motion practice and the facts needed from the plaintiff and witnesses. The research also will allow you to assess whether and to what extent expert testimony is typically needed in similar cases. With this research, you will know whether the plaintiff needs to hire an expert to meet his or her burden of proof and can anticipate the plaintiff's needs, as well as yours as you develop rebuttal opinions.



■ Megan S. Peterson is a partner with Simon Peragine Smith & Redfearn LLP in New Orleans, Louisiana, where she focuses on the defense of clients in matters involving transportation and trucking defense, premises and product liability, and commercial litigation. She is licensed to practice in all state and federal courts of Louisiana and Mississippi, as well as the U.S. Court of Appeals for the Fifth Circuit and United States Supreme Court. She is an active member of DRI, serving on both the Young Lawyer and Retail and Hospitality Steering Committees.

Sometimes, such thorough preparations are not realistic. You may receive opposing counsel's expert designation or report and, at that point, realize that you may need an expert in your case. However, whether you anticipated the expert retention, or were broadsided by an expert report with little time to spare on your own deadlines, you still must ensure that whoever you hire is right for your case and will address the issues appropriately. To this end, be wary of a scheduling or case management order that separates deadlines for expert designations or disclosures and expert reports. In such instances, you may only know *who* your opponent has hired but not *what* that expert's opinions will entail, and thus designating your own expert will be more challenging. Strive to obtain a scheduling order from the court that provides you with both the identity of and opinions held by the opposing expert, or the report of the expert, with sufficient time to identify and obtain a report from the experts who you intend to retain.

Thus, once you have the benefit of knowing who opposing counsel retained, begin researching that individual. Under the federal rules, opposing counsel must provide you with their expert's qualifications or credentials and a list of previous testimony for at least a period of four years. Fed. R. Civ. P. 26(a)(2)(B). Research the cases in which the opposing expert has previously testified or been retained. Do they involve similar facts? Can you get a copy of the expert's report or affidavits from the previous cases? Were the expert's opinions challenged or limited? In doing so, you will better understand the opposing expert's history and potential weaknesses in expected testimony or opinions. When researching, pay attention to the experts hired by the defense in those cases that effectively counteracted your opposing expert. Those individuals should be on your list of who to contact.

Identify Potential Experts

Once you understand the legal standards in your case, and hopefully have the benefit of the report from your opposing counsel's experts, the search for your own defense experts should begin. Perhaps you only need a liability expert in your case to assess the safety of the condition at issue. You may need a biomechanical engineer to assess whether the incident could have caused

the injuries, or a human factors expert to weigh in on whether the incident could have been avoided if the plaintiff had taken more timely action. Some cases require different and unique expert types that you may never have had to use before. The search begins.

As suggested previously, in researching your opposing expert, always be mindful of the experts who were retained by the defense in the opposing expert's previous cases, particularly if a favorable result was obtained in motion practice or at trial. The same approach is appropriate as you are researching supporting cases for a summary judgment. The next step is to call the defense lawyer; chances are he or she is willing to help and share her experiences in the case involving the expert. You will likely collect valuable information, such as pitfalls to avoid, or even copies of depositions or reports.

However, if you are starting with a blank slate, a similar approach can be taken to begin gathering potential experts. Ask colleagues—both in your firm and elsewhere—for recommendations. Contact DRI substantive law committee members or those in your local defense or trade organization for recommendations. DRI's own resources, such as the committees' "Community" pages for posting requests for recommendations, or the DRI Expert Witness Database, can prove great starting points. Thomson Reuters offers expert witness search assistance, where they will search available experts and schedule interviews for you, with their fee incorporated into the expert's retention should you choose to hire the recommendation. Contact the larger forensic expert witness groups for assistance locating someone uniquely suited to your case. Once you have your list of experts, the next step is to determine who is the best fit for your case.

Investigate Your Own Potential Expert

Just as you researched your opposing expert, it is essential to research those you seek to hire for your own case. You must obtain information from the expert, as well as third parties, to evaluate fully the expert's appropriateness and fitness to withstand any challenges that may arise.

First, contact the expert to ask for a copy of his or her curriculum vitae or resume and the rate that expert typically charges. Set up a phone or in-person interview to get to

know the expert and explain the facts of your case and the role that you seek the expert to fill. Find out if he or she has handled similar cases or issues and discuss the methodology that would be used to render opinions. Inquire about previous testifying experience and get a list of prior testimony to assess similarity in cases. Although previous testifying experience is not always essential, balance inexperience with the likelihood that your expert may be deposed or testify at trial. Consider the expertise and aggressiveness of your opposing counsel. If opposing counsel has a reputation for vigorous cross-examination, perhaps you should opt for an expert with testifying experience. A skilled expert with weak testimony does not advance your case.

Second, don't take what the expert tells you at face value. Conduct independent research. Search generally online to determine if the expert has written publicly available articles or blog posts. Are those posts favorable to your case, or would they present a method of attack for opposing counsel? Check whether the expert received any sort of press mentions, positive or negative. If he or she has social media accounts, particularly LinkedIn, determine whether he or she posts professional information; and again, are the posts favorable, or would they perhaps weaken the expert's opinions in your case?

Third, conduct legal research to ensure that the expert can withstand a *Daubert* challenge. Under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*, courts must assess the expert's fitness by applying the following standards:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.

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Fortunately, there is one way to avoid resorting to motion practice to answer this question if there is no precedent in your jurisdiction on this question: the Rule 26(f) Report. Make sure to discuss this topic in your meet-and-confer conference and to break down which costs will be covered by each party. If necessary, break down the expenses by line item; for example, list in bullet points all relevant categories such as travel expenses, discussion time with attorneys, reviewing documents, and gathering materials, to name a few. This type of specificity will inevitably save time

and expense when a potential conflict emerges. Be sure to come prepared with the current law in your jurisdiction, and to justify your position, for example, why deposition-preparation expenses should not be covered. Finally, be prepared to negotiate. Especially in complex cases, when litigation continues for years and cooperation with opposing counsel is key, starting off discovery on a positive and constructive note about expenses will set the tone for a professional relationship, and it will also signal to the other side that you have done your homework. It's a win-win for everyone. **FD**

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579 (1993). Confirm whether your own expert has been challenged, struck, or limited in previous cases. Evaluate his or her list of previous cases and find out the outcomes. You may uncover an opinion limiting the expert's testimony of which he or she was previously unaware. In conducting such research, you can assess whether he or she has been relied upon for motion practice or at trial and whether the result was favorable.

Finally, balance the proficiency of your proposed expert with the unique needs of your case, including the need to contain costs. If you are searching for an expert who is particularly scarce and thus are obligated to hire someone across the country, perhaps the need outweighs the cost considerations. Alternatively, are you simply hiring a counter-expert to pressure resolution and do not anticipate that the expert will be deposed? In assessing the needs of your case and weighing the costs and complications that may arise from retaining the expert, you are doing your client a service by ensuring that you are selecting the best expert for your case within the parameters that are reasonable, considering the overall value and complexity of the case.

Engaging with Your Expert

After deciding which expert to retain, the work of managing your expert and achieving a favorable opinion begins. At the outset, obtain a budget for the work expected so that you can gauge the progression of costs as you advance toward different stages of the case, whether report drafting, deposition testimony, or trial preparations. All engagement with and work done by your expert should be guided by cost concerns. In assessing the materials to provide to your expert, ensure that you provide all available documentation and supporting materials on which the expert will base his or her opin-

ions, but do not simply dump your entire file on the expert. Make strategic decisions, with input from your expert, about which information is truly needed for the opinions. For example, if you are dealing with a record-reviewing physician or surgeon, provide the records and films necessary to opine about the relevant body part or medical condition; sending all medical records is not always the most helpful approach.

Know the law in your jurisdiction for disclosure of expert materials, particularly in state courts. Distinguish between your testifying experts and non-testifying, consulting experts, because the rules for disclosure vary. See Fed. R. Civ. P. 26(a)(2). The Federal Rules of Civil Procedure exempt from disclosure any draft reports, but state laws may differ. Fed. R. Civ. P. 26(b)(4)(B) ("Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded."). Notably, this exemption is not absolute, allowing for production of draft reports in certain instances. See, e.g., Fed. R. Civ. P. 26(b)(4)(d) (excluding discovery of work product from a consultant absent "showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means"); *United States ex rel. Wall v. Vista Hospice Care*, 319 F.R.D. 498, 510 (N.D. Tex.2016) (finding that "Rule 26(b)(4)(B) extends work-product protection to any draft of such a report," even if the draft was written by defense counsel).

Additionally, your communications with the expert under the Federal Rules of Civil Procedure are protected from disclosure unless they deal with compensation of, facts provided or relied on by, or assumptions made by the expert. Fed. R. Civ. P. 26(b)(4)(C). However, your state-specific rules may vary, rendering draft reports or communications with the expert dis-

coverable. Be mindful of the information that you include in your correspondence with the expert to ensure that it is neutral and free from your mental impressions of the case.

Once employed, your expert can aid you in evaluating the opposing expert. Ask your expert where he or she agrees and disagrees with the opposing expert. Find out if there are any gaps in the reliance data or methodology. For example, your expert may be aware of a scientific or medical article that controverts or questions an opinion of your opposing expert. Use your expert to help develop lines of questions, particularly if the questions that you need require specialized scientific or medical knowledge. Equipped with this article, you can examine the expert more thoroughly and develop testimony to aid you in a *Daubert* challenge or to establish a foundation for the jury to question the opposing expert's credibility at trial.

Conclusion

Experts often prove a useful tool in supporting trial themes and defense strategy, as well as counteracting and rebutting the plaintiff's expert's evidence that was developed to meet the ultimate burden of proof. Using proper screening and investigation techniques can help ensure that you select the best expert, while also considering costs and the unique needs presented by your case. Take advantage of the resources available to you, through your existing legal network and through organizations such as DRI. Lay the appropriate foundation with your retained experts, confirm the scope and details of the work to be provided, and use your expert's knowledge to aid aspects of the case beyond mere report production. With this roadmap, engaging and managing expert witnesses in personal injury litigation should be a smooth ride. **FD**