



## EXPERT USE OF EXPERT WITNESSES

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Litigators are many things. Persuaders. Tacticians. Speakers. Writers. What they are not, usually, are experts in the subject matter of the cases they present in the courtroom.

Enter the expert witness. The expert witness possesses specialized knowledge that will assist the judge or jury in deciding the facts in the case. The expert witness can also help the trial lawyer understand complex facts and technical issues to allow for a more effective presentation of the case at trial.

This article will address pertinent issues arising out of the use of expert witnesses in litigation.

### Finding and Selecting Experts

The goal is to find the perfect witness for this case. Try thinking about KIPACE.

**Knowledgeable** is the first factor. To be qualified as an expert, a witness must have "knowledge, skill, experience, training, or education" (Rule 702, Federal Rules of Evidence, and comparable state evidence rules). The witness needs to know about the subject matter, needs to have "scientific, technical, or other specialized knowledge."

**Independence** is important. The fact finder will be assessing the credibility of all of the witnesses, including the experts, particularly where there are competing experts. Bias or prejudice will be exposed on cross examination. Be wary of using someone who has testified before on behalf of your client, or your firm; who depends to a substantial degree on revenue from

expert testimony as a significant component of annual income; or who appears to have a vested interest in a certain outcome of the case because of its impact on the expert's own research.

**Persuasion** will be something to consider. Can the expert move jurors from one position to a different one?

**Articulateness** is related to persuasion. The individual may be an incredibly smart person with an extraordinary IQ, but if they can't construct a simple, understandable sentence, or can't translate complex principles into everyday terminology, all you do is confuse and frustrate the jury.

**Credentials** will help show the jury that this is someone to be believed. Degrees from prestigious colleges and universities, published articles and books, speaking engagements, academic and business titles, all set the stage for the expert's opinions.

**Experience** as an expert witness means the expert has been around the block before and knows how to prepare narrow opinions and handle the rigors of cross examination. As a caution, as some experts gain experience, they become over confident, think they have seen it all, and may be a little more difficult to prepare for trial. Of course, no matter how often they have served as an expert, they have not seen it all.

As to where to go to find the perfect KIPACE expert witness, one place to start is with the client, who may know others in the industry who are smart and have good reputations. You can also inquire of your colleagues, university professors and departments, bar association

files and publications and professional organizations and societies. An Internet search may turn up some good prospects. Some useful sites are [www.freereferral.com](http://www.freereferral.com); [www.expertpages.com](http://www.expertpages.com); [www.expert4law.org](http://www.expert4law.org); [www.claims.com](http://www.claims.com); and [www.expertlaw.com](http://www.expertlaw.com).

Similarly, experts may be located by searching the jury verdicts and settlements databases on Lexis and Westlaw. For a pediatric toxicologist, for example, a search might be "expert /s testif!s pediatric! /s toxic!"

There are also expert witness search companies. One of those is TASA, 1-800-523-2319.

After *locating* prospective experts, and interviewing them to assess the KIPACE factors, you then need to *select*. And before making the selection you need to at least have an idea of the expert's preliminary opinion. Note that all of this must be done well in advance of any disclosure of the expert's identity to the court and your adversary. It is a very uncomfortable experience to disclose an expert, and then learn that the opinion is unfavorable.

### The Expert as a Resource

The expert can be used for more than just opinions during trial. The expert also plays a valuable role in the pretrial stage as a consultant.

Your expert can help you understand the facts, can help you identify and evaluate the issues, and can advise you as to whether you may need other experts.

Your expert can also help you with formulating interrogatories

and document production requests, and with your preparation for the deposition of an opposing expert.

### **Preparing Your Expert for Trial**

Do not assume that because your expert is the world's foremost authority on the issues present in your case, he or she does not need extensive preparation. He or she, and your client, will thank you for taking the time to do it right.

Have your expert review all the discovery taken in the case that could prove relevant to his or her testimony.

Review with your expert statements in treatises or articles that relate to the testimony, especially those that appear to contradict the testimony.

As a team, consider possible demonstrative evidence to help the expert's testimony come alive and capture and hold the jury's attention. Diagrams, graphs, timelines, charts, and blowups of exhibits can all be helpful; these must be developed and prepared well in advance of trial.

Conduct a mock cross examination of your expert. This may be a

good assignment for a colleague. Videotaping this experience allows you to go back and critique the expert's performance, without interrupting the flow of the cross examination.

Videotape is an excellent medium to point out to the expert problems with demeanor, such as arrogance, halting or hesitant answers, egomania, and furtive glances.

### **The Expert at Trial**

Traditionally, the advocate begins direct examination of an expert witness with a review of the expert's qualifications and expertise, then moves to the information the expert reviewed to help him or her formulate his or her opinion, and, finally, to the opinion.

I tried a slight variation on this recently, which I thought would help, but didn't. In the arbitration of a home construction dispute, I asked our expert to state his name, place of employment, and title. I then said, "Mr. Expert, I'm going to ask you about your education, training and experience in a minute, but first, to put this in context, could you please tell the arbitrator the areas on which you have

formed opinions in this case?" The arbitrator interrupted and said that he first wanted to hear the expert's qualifications. I suggested that the qualifications might have more meaning if the arbitrator knew the subject matter of the opinion, but the arbitrator insisted on hearing the qualifications first. I still like this approach and intend to try it again in my next case.

After the expert states the opinions, each of the grounds for the opinions should be stated.

To steal the thunder from the coming cross examination, adverse facts and authority should be presented so that it can be swatted away, and then the jury will be left wondering why this same ground is being retried if the same questions are repeated on cross examination.

### **The Verdict is in**

Identifying, selecting, preparing, and presenting an expert witness requires careful, skilled preparation. It also requires time, and therefore must begin early in the case. Success in the courtroom often depends on imaginative and creative approaches to expert testimony. ⚖️

## **BOOK REVIEW**

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*Words That Work: It's Not What You Say, It's What People Hear*, Dr. Frank Luntz, Hyperion, 2007

Babe Zacharias used her golf clubs. Jesse Owens used a pair of track shoes. Jim Thorpe used a crosse ... a bat ... cleats ... and well, just about everything. These famous athletes were all winners, and they knew how to make the tools of their games work for them.

Trial attorneys, the famous and the rest of us, want to win too. In the sport of oral and written advocacy, we win with our words. Frank Luntz has written a book about "words that work." It's a winner.

Luntz is a tireless pollster and focus group moderator. He has worked for politicians and large corporations. You may have seen him on cable news channels at

