



## Factors to Consider When Hiring an Expert

By Donald M. May, Ph.D. | May 26, 2011

Expert guidance and testimony play a central role in the late stages of legal proceedings, when experts provide reports and serve as witnesses concerning the substance of the case and the appropriate damages. In the hope of minimizing fees, many insurers often wait until the late stages to engage them.

But that's false economy. Early retention of experts is critical to helping insurers decide if a case is worth pursuing or disputing; or if it makes more sense to settle, based on forensic evaluation of specific evidence and economic evaluation of likely damages.

If the case is worth pursuing, these experts can increase the odds of winning by helping improve strategy, guiding discovery and depositions, and enhancing the quality of Daubert challenges, both to exclude the opposition's experts and to achieve summary judgments.

The sooner insurers add this expert knowledge to the case preparation team, the greater the benefit they will be able to realize. The overall impact of early-stage expert contributions is an improvement in efficiency and win rate.

While a significant impact of economic and forensic experts is on the "go/no go" decision at the outset, and in challenging opposition experts, they can make a meaningful contribution throughout the development of a case.

For instance, expert knowledge of forensics and economics can guide the case "narrative," generate more effective depositions, inform the discovery process, and improve the development of expert and rebuttal reports.

Hiring an expert can be a complex process, and it deserves the same consideration as any other aspect of case preparation. There are several factors to weigh, including:

- Hiring from a group can be easier and more cost-effective than identifying the right individual – but it's important to make sure that the group doesn't always draw on its own full-time experts. If that's

their practice, then it's necessary to consider the possibility that they may be force-fitting someone on you for their own financial benefit.

- You must also determine the type of expert you need – forensic or economic, a subject-matter expert or someone who is also versed in litigation.
- Make sure the expert has recognized subject-matter credentials, as well as litigation experience.
- Perform due diligence on individual candidates, through public domain searches and one-on-one interviews, to make sure they present well, can commit time to the case, and will fit comfortably into the team. Strictly speaking, there are no absolute “right answers” the expert must produce to prove his or her qualifications, but there are certain issues to consider.

Among the most critical questions to ask, and issues to consider, are:

• **How many times have you testified?**

Obviously, experience is an advantage. Particularly when you are thinking about adding an expert to the case preparation team, knowledge of the litigation environment and of the case preparation process will be extremely helpful.

But there can be too much of a good thing. An expert who spends the bulk of his or her time testifying – a “professional witness” – can come under attack for lack of credibility.

The best qualified expert is one who is experienced, but who also pursues a range of activities in the furtherance of his or her expertise.

• **Of the times you have testified, what percentage was for the plaintiff and what percentage was for the defendant?**

Again, balance is the watchword. You want an expert who understands the defense's terms and conditions of engagement. But an expert who testifies only for the plaintiff can be portrayed by plaintiff's counsel as a “hired hand” who lacks objectivity.

• **Have you ever been excluded? If so, why?**

This is a straightforward due diligence question. You want to understand whether (and why) the expert might be at risk of exclusion.

Although any exclusion by an expert is a red flag and reason not to engage that expert, equally important is his or her explanation – the discussion of the circumstances can tell you a great deal about the expert's bearing and professionalism.

• **What percent of your income is based on expert testimony?**

Similar to the first two questions, this is designed to expose professional witnesses. The most credible expert is one who works in his or her field of expertise, not just on the witness stand.

• **Do you have specific experience related to this matter? What is that experience?**

Again, a matter of due diligence – you want to make sure that the expert can address the particular matter at hand and not be subject to challenge.

A generic expert is no expert at all – only specific expertise is credible. Here, too, the tone of the response matters – watch for defensiveness, a clear red flag. An expert who understands the intent of the question is likely to be one who will be comfortable participating in the case development process.

Also consider the tradeoff between general experience versus industry or case specific experience. In many cases general experience, which gives credibility to the analysis techniques used, may be more relevant than industry or case specific experience.

The process of disputing a claim can be risky and expensive – investigations, mediations and lawsuits are costly, and outcomes are uncertain. As these questions indicate, engaging experts early certainly adds to the workload in the initial stages. However, in weighing the costs and benefits, the payoff is a well-prepared case that is more likely to succeed.

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