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Choosing an Expert Witness in Construction Cases

Robert Greenstreet

Expert: "A professional who has acquired knowledge and skills through study and practice over the years, in a particular field or subject, to the extent that his or her opinion may be helpful in fact finding, problem solving, or understanding of a situation."

— BusinessDictionary.com

When disputes arise in fields of activity like construction, some of the complex technical issues require the perspective of an expert witness to untangle the complexities of the problem and help present a coherent, persuasive case. As the definition above stresses, ideal experts possess skills and knowledge (based upon both study and practice) that ensure their opinions are sound and convincing. Of course, not all individuals vested with appropriate credentials and years of experience make effective expert witnesses, and finding the right persons, especially when time limitations prevent an exhaustive selection process, may lead to an inappropriate, and therefore ineffectual, choice.

The following article outlines a guide for busy attorneys to reach out to potential expert witnesses. By asking certain questions and requesting specific information, they can eliminate less appropriate individuals and become reasonably assured that the individuals finally selected will be effective players in the presentation of each case.

1. Selecting the Expert: Where do you find expert witnesses?

As a quick web search will reveal, there is no shortage of individuals or companies offering their services as expert witnesses. Lots of retrievable articles and papers written by professionals on the construction area in question (or on the expert witness process) can identify a pool of potential experts, which can be expanded by referrals from fellow attorneys whose opinions you respect. Assembling a list should not be a problem; Narrowing down the list is more challenging, but can be accomplished by asking two questions:

1. Are they credible?

A good expert witness will have an impressive array of academic credentials coupled with a solid background of professional experience. Level of terminal degree, institutions attended, subsequent continuing education and appropriate licenses and professional associations will establish the expert's credibility. Job titles and places of employment will also carry weight, as well as specific experience in construction. Relevant lectures, presentations, articles, papers and other publications will help to authenticate the position of authority necessary for a credible expert.

Previous expert witness work is impressive and builds a track record, but too much activity can become a double-edged sword. If individuals appear to make their living primarily servicing legal cases, their objectivity may be called into question if they appear to be a 'gun for hire.'

In preliminary discussions with potential experts (early conversations will at once determine the verbal qualities of the individual), determine the percentage of their professional time dedicated to expert witness

work and the relative number of times they have appeared for the plaintiff or the defendant (ascertaining the 'success' rate — cases involving the expert which were won or suitably settled — is also a useful exercise). A credible expert will have completed a substantial but not excessive number of cases, not exclusively appearing for plaintiff or defendant, but clearly have their primary professional focus with their field of expertise, not just in expert witness work. They may be drawn from the architectural or engineering professions, from the construction industry or even from academia, where the detached, research-based perspective may present a powerful, objective opinion (although in some cases this can be challenged by a perception of a lack of hands-on experience).

1. Are they suitable?

Beyond actual credentials and experience, attorneys must assess their potential expert's appropriateness to the case in question. If the area of dispute concerns hospital roof construction, for example, it is important to find an expert who has pertinent experience or knowledge relevant to the building type and/or the building area in question. A generalist, no matter how qualified or experienced in broader issues of construction, will be an easier target for opposing council anxious to undermine the expert's applicable credibility through carefully chosen questions during deposition.

Of course, the availability of experts and time available to select them may limit the ability to make a perfect match, but each prospective expert should be ranked on their suitability to the case in both their familiarity to the dispute topic in question and their professional perspective, whether academic or practical.

Attorney Tip #1: Hire early

If possible, don't leave hiring the expert to the last minute. Not only will this potentially limit the expert selection process, it will also prevent you from taking advantage of their perspective very early in the preparation of the case. Here, the expert may provide input on the technical details of the dispute, comment on what might be reasonable to request during discovery and even be present at the depositions of the opposing side's expert witnesses, providing perspective during the interrogation process.

1. Preparing the Reports

Before any expert's effectiveness is publically challenged, either in deposition or in a court appearance, they must prove their mettle in their written report. An ability to write coherently and convincingly must therefore be assessed carefully. Requesting articles, papers and, preferably, previous expert witness reports, is advisable before hiring. In addition to basic coherency, experts should exhibit a style which conveys professionalism, clarity and, as much as is possible, a sense of detached objectivity in the presentation of each opinion.

Language should be crisp, specific and spare; There is no room in a good report for flowery adjectives, vague metaphors or, conversely, overly technical jargon. Likewise, the style should be direct, avoiding overstatement (which can be picked apart by opposing council) but also eschewing overly cautious qualifications and caveats which, for your purposes, dilute the force of their argument.

Attorney Tip #2: Give them time

Just as it's important to bring the expert on board early in the process, so is it valuable to give him or her as much time as possible to write the report. Time to consider the available materials, to prepare a first draft for reflection/discussion and to evolve a well conceived, defensible position will only serve to strengthen the case. Reports prepared under time pressure lose the element of reflection and can be unraveled more successfully.

1. Pressure Under Fire

However well constructed and effective the written report, the expert will ultimately have to personally defend its contents and to convincingly convey a sense of personal credibility as an expert witness.

In the context of a deposition, the focus is really on defending/explaining the report and parrying a plethora of questions from opposing attorneys seeking to undermine the validity of its findings. Assessing an individual's verbal ability under pressure is important in their selection, and reminding them of their focus — and the limitations of their role — is advisable before they encounter opposing counsel. Experts are employed to tell the truth, not to win a verbal jousting match, be admired or be liked. In the first case, they are highly likely to lose anyway, given that the opposing attorney conducts depositions on a regular basis, while the average expert will encounter such an exercise on a far more limited basis.

In the relatively unlikely event of the case going to trial the expert, although able to refer to the report, will be expected to 'perform' before third parties who will assess the effectiveness of their opinions. Presentation style is therefore important. Experts should present a detached and thoughtful demeanor, coupled with a professional appearance. They should behave in a manner which is perceived as helpful and objective without appearing either combative toward opposing counsel or defensive in their opinions.

Preparing experts before a deposition or hearing is therefore advisable; stressing three guidelines:

1. Not too quick

Tell the expert to pause before answering any questions, even counting to five if necessary. This gives a little time to think out the implications of an answer, prepare for the follow-on question and prevent a flustered, blurted response which may be spontaneous but poorly thought through. If a question is unclear in any way, the witness should be reminded to ask for it to be repeated or reread from the stenographic record, if relevant. The expert should control the pace of their delivery and not be rushed.

1. Not too much

Remind the expert to answer the questions concisely, clearly and briefly — and then stop talking. It is not necessary to elaborate or fill a silence. If the opposing counsel is unsatisfied with the completeness of an answer they will follow up, but continued talking by the expert only opens up opportunities for undermining the carefully formulated written opinions through poorly thought out reflections formulated under pressure. Silence is a gift to the expert witness — make sure they appreciate it.

1. Not too technical

No matter how qualified an expert and how well written the report, their performance in front of an audience (particularly a lay jury) is vital in communicating the strength of the case. Prepare the expert beforehand and make sure they are forewarned of the venue, the procedures and the court's expectations of them. Tell them not to be nervous, appear pompous or remote and to try and connect with the 'audience.' Overly complicated or technical jargon will not play well with members of a jury who may not understand or appreciate it. Again the expert is there to help, not to win the case (that's the attorney's job) or impress anyone.

Attorney Tip #3: Give them a hand

Once the expert has completed the report, they become vulnerable to attack from opposing counsel seeking to undermine their credibility. This is fair game, and any good expert will understand the process and respond professionally. However, there is a certain loneliness under deposition or on the stand which can be helped by the expert's attorney providing a sense of support. Pre-hearing preparation, good eye

contact during the questioning, requesting breaks, and objecting when necessary to protect the expert all help to give a reassuring sense of teamwork and support. Alternatively, if the attorney is sparring with opposing counsel during depositions, constantly objecting and arguing and creating a tense, combative atmosphere, the expert will likely suffer the consequences of more hostile questions. Your ability to help create a professional, even congenial atmosphere during depositions will benefit the expert (remember, this is not their natural environment) and enable them to do their job more effectively.

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