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Working With an Expert Witness: a Lawyer's Guide

by Bob Greenstreet, Dean of the School of Architecture and Urban Planning, University of Wisconsin-Milwaukee

Introduction

Expert witnesses form an integral part of many legal proceedings where provable, substantiated fact must be backed up by subjective, professional opinion. While many experts have an extensive background in such work, it is sometimes worth remembering that most of them are likely to be far more familiar with their own professional territory. The realm of law with its own rules and protocols can sometimes take them unawares, reducing their credibility during deposition or in court. The simple admonition "communicate convincingly with credibility" may not be enough, and a few basic questions by the attorney in advance may be helpful to ensure the appropriate selection and performance of each expert witness.

1. Is the expert suited to the job?

All potential expert witnesses should be assessed carefully, not only in terms of their credibility, but also for their suitability to the case in question.

A. Credibility

Initially, credentials play a big part in establishing the foundation of credibility for each expert witness, so qualifications are important to check out. Degrees from reputable academic institutions are important, but a record of subsequent specialist courses and ongoing continuing education helps to build an impressive profile of long-term, sustained learning and knowledge. This is

enhanced if the individual has also taught at the college level, has given lectures to professional groups, or has written articles or papers within the subject area. In the latter case, it would be advisable to ask for copies of any written work that might relate to the present field of dispute. Should they contain opinions at variance with the ones likely to be proffered in the current case and the opposing counsel becomes aware of their existence, the consistency of the expert's opinion may be called into question. As an additional safeguard, it would be prudent to confirm that the expert's curriculum vitae is accurate and contains no exaggeration or embellishment that could potentially be brought to light during questioning. Any discrepancies could effectively weaken an expert's perceived validity.

Solid credentials need to be backed up with extensive experience, and a lengthy track record of comparable professional work is helpful. In addition to work in the field, a demonstrated proficiency in undertaking expert witness work may also be useful, although the two areas should appear balanced. An expert boasting a long list of reports may give the impression of being primarily a professional witness and becomes vulnerable to the claim that he or she is nothing more than a "hired gun," having a primary source of income in undertaking expert work, and being therefore less likely to provide a detached, objective viewpoint.

Experts who can demonstrate that they are primarily involved in practice but undertake the occasional expert report can arguably demonstrate a greater degree of professional detachment and less financial dependency, and they can therefore be more convincing expert witnesses than those perceived to be "hired guns."

In some instances it may be advisable to seek out an expert who has a primarily academic background—i.e., teaching and researching at a major university. Certainly, the credibility of such individuals is enhanced by the academic connection, both in the credentials they possess and the sense of objective detachment from the professional world that their professorial role may engender. However, they may be questioned on their lack of actual experience, and their theoretical perspective should be introduced only where appropriate, or where a reasonable balance of academic and practical experience can be demonstrated.

B. Applicability

A quick cruise through Google will confirm that there is no shortage of expert witnesses in a variety of professional fields, offering their services to the legal profession, either directly or through placement agencies. The trick is to find one that matches the profile of the case as closely as possible. Opposing counsel will immediately try to probe for a lack of appropriate experience relevant to the details of the case, so check the background of the potential expert witness first to ensure a suitable match. Ask for copies of previous reports written for similar cases. This will give an indication of the individual's writing skills (an important criterion in itself), and it may also reveal any inconsistencies of opinion that might later arise. An expert providing a persuasive opinion in one report that is contradicted by a previous one with similar case facts may appear disingenuous. This situation, coupled with the obvious fact that he or she is being paid handsomely by the party who is helped by the opinion, may diminish his or her credibility.

The match between expert witnesses and case facts may not be perfect, but they may be hired anyway. (Time deadlines may be approaching, for example.) In this case, do not be tempted to ask experts to render opinions that may fall outside their respective realms

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of expertise, and do not expect them to exaggerate or even provide false testimony to help your case. If they are tripped up in cross-examination on one point, all their testimony may be called into question, even in the areas where they are proficient. Similarly, give the expert all relevant information pertaining to the case in a timely manner. Leaving out facts that may inconveniently temper the conclusions of the report may make for more emphatic reading, but if the opposing counsel picks up on the omission, the expert will be forced to reassess his or her opinion, possibly in a recorded or public venue, and invalidate his or her previous position. A wrong-footed expert, forced to publicly recant or revise an opinion based on new evidence, should be avoided at all costs.

2. Can the expert perform?

While the primary value of expert witnesses will lie in the preparation of the written report, they may be called upon to defend their written opinions by submission to rigorous questioning. Accordingly, potential expert witnesses should be assessed for both for their writing and presentation skills before engagement. Asking them how many times they have been previously submitted to deposition and have appeared in court would also be prudent.

A. How well does the expert write?

As so many disputes are concluded outside the courtroom, a persuasive report is initially the expert witness's most valuable offering. As previously mentioned, check out previous reports, articles, books, and papers for basic writing skills before you hire. Can he or she write clearly and concisely, with a lack of confusing jargon or technical references, and in a style that is appropriate to the intended audience? Can he or she avoid questionable metaphors, colorful turns of phrase, exuberant adjectives, or sweeping statements? Is the impact of his or her words objective, reasonable and, above all, persuasive? While some professional fields produce consistently competent writers, others (design professionals come to mind) have less writing experience in their day-to-day lives and should be checked more carefully before they are hired to write a report that will, after all, be carefully scrutinized for weakness, ambiguity, or inconsistency if the case proceeds to deposition.

B. How well does the expert speak?

Once the expert has completed the report, he or she now enters the legal world, the

territory of the attorney. The latter is far more experienced in the give and take of deposition and cross-examination, so some preparation is advisable.

i. At deposition

Remind your experts to prepare extensively before the deposition, refreshing their memories on reports and any associated material. Of course, they may refer to materials during deposition, so remind them not to answer a question without reference to their notes or other documents if they are unsure of the subject in question. Every answer will be recorded by a stenographer, and must to be as accurate as possible. Experienced expert witnesses will be conversant with techniques for dealing with deposition tactics, but a review of basic principles is never amiss. Remind your witnesses to stay cool and not to get flustered under a barrage of questions. Tell them to think carefully before answering every question (counting to five before every answer regardless of how easy the question appears is not a bad strategy), and not to worry about being accused of wasting time or creating silences. Tell them to ask for questions to be repeated as often as they like, to ask for breaks, and to answer each question as briefly and accurately as possible. Instruct them never to volunteer extra information even if the questioner remains silent; remember, the silence belongs to the opposing counsel, not the witness.

Remind your experts never to interrupt the opposing counsel, and to be comfortable with saying "I don't know." While repetition of the phrase may concern them if they feel that it weakens perceptions of them as experts, explain that it would be far more damaging to answer questions outside their areas of expertise and be proven inaccurate. Above all, impress upon them the need to proceed with caution now that they are venturing into territory that is not their familiar habitat. Attorneys are trained for deposition and cross-examination. They do it regularly and they are often very good at it. Instruct your experts not to try and outsmart opposing counsel – they will lose – and remind them that every word spoken adds to the content of their reports to create an overall impression of professional expertise. Humorous asides, defensive outbursts, or boring, unnecessarily detailed ramblings during testimony, either recalled from a deposition or delivered on a witness stand, can only serve to diminish the overall professional impact that the expert witness needs to demonstrate.

ii. In the courtroom (or hearing room)

Statistically, the majority of disputes are resolved well short of an appearance before a judge, jury, or arbitrator, so expert witnesses, even the experienced ones, are likely to have spent limited amounts of time in such venues. While many of the pieces of advice in the previous section of this article still apply, the expert now has the added pressure of cross-examination, potentially in front of an audience. Again, some preparation is advisable.

Appearance and performance are both important, so instruct your experts accordingly. They need to project an impression of balanced, reasonable, and almost detached professionalism to enhance the credibility of their report opinions. Accordingly, their testimony and responses need to be delivered calmly, accurately, and objectively without exaggeration or complex technical jargon. Likewise, obscure abbreviations, baffling acronyms, and expressions that will be unfamiliar to a lay audience will only serve to confuse the issue. In short, the reliable expert witness should stick to concise, lucid answers that respond directly to each question without any additional commentary or unnecessary speculation. A practice session before the actual hearing might be valuable. It would be unfortunate to incur the considerable expense of a detailed report, only to have its valuable content invalidated by a poor verbal performance, so familiarize your experts as much as possible beforehand with what to expect and how to react.

Summary

Expert witnesses form an integral part of many legal proceedings where factual evidence must be supplemented with professional opinion. They are not cheap, and their time should be used appropriately to optimize their effectiveness. Regardless of the experience of expert witnesses, always remember that when they commit to a case, they are moving from their professional realms to yours, where they are less familiar with the rules of engagement and less skilled in dealing with the combative style of deposition and cross-examination. Given the investment involved in engaging their services, it is prudent to select them carefully based upon their fit to the case and their demonstrated skills and experience, and then to prepare them carefully at each stage to ensure that their expert opinions are defensible and not invalidated by inconsistency or poor performance.