



LEGAL & REGULATORY

THE NECESSITY, SELECTION AND USE OF INDEPENDENT EXPERTS IN LITIGATION



REPRINTED FROM:
MAY 2010 ISSUE

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LITIGATION

The necessity, selection and use of independent experts in litigation

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The subject of consultants and experts in complex and mass tort litigation is neither new nor novel. It is central to building case theories for plaintiff and defence counsel, has been the occasional focus of trial and appellate courts, and with experienced practitioners has become as routine as opening a new file. The subject for this article is best placed in context by considering the following hypothetical: the chief litigation counsel for a large corporation and long-time client calls outside trial counsel after referring a new matter. He says that on this matter trial counsel should consider ‘new blood’ in the line of experts who had been assisting the client and counsel quite successfully in litigation matters for many years. After the initial affront, trial counsel realises that the process of selecting experts had become so routine that it had not been re-examined for some time. It forced trial counsel to consider: (i) why were those particular experts hired; (ii) how were they identified and located; (iii) how were they utilised to bring about the successes for the client(s); and perhaps most importantly, (iv) were they needed at all?

If the forgoing questions could not be spontaneously answered for a long-time client familiar with trial counsel’s practice, how could that chief legal officer explain the process to other senior executives in his company who were primarily responsible for non-legal functions if he were asked? This article revisits the process of selection, retention, use and necessity of experts. It is in essence an article that could be subtitled ‘Experts 101’ and is intended to assist corporate executives involved in the process of managing litigation, and more importantly to corporate executives charged with responsibility for other areas of the company. The article speaks mostly to expertise in the scientific community but the principles are equally applicable to financial and management areas as well.

Necessity for independent expertise

Thanks to the global educational advancements and forward thinking corporate environment, today’s corporations are staffed with many highly-educated and well-trained professionals. The credentials of in-house engineers, accountants, and managers in many disciplines match that of academia and the consultant world. Their focus, however, is sometimes too narrow, being overly limited to the company for which they work, and expectantly overly biased for fairly evaluating and defending the company in litigation. What is needed is excellence in education and training, highly-respected qualifications, independence of thought, and application of principles accepted throughout a field of expertise often, if not always, broader than the specific industry, field or specific product or problem which they are asked to examine and opine.

More than a decade and a half ago, the United States Supreme Court established admissibility guidelines for expert witness opinions and testimony in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Prior to that, federal and many state court systems described when such expertise was appropriate in trials and what credentials experts must possess to present themselves as an ‘expert’ (Federal Rule of Evidence 702). Among other things, it is expected that the proposed expert: (i) has tested his theory; (ii) has published articles which have been peer reviewed; (iii) has used ‘reliable’ methods in evaluation; and (iv) has sufficient facts or data upon which his evaluation is based.

Although the law pertaining to experts as well as consultants in litigation has been articulated and is still debated in the courts, little is discussed concerning the desirability and necessity of such expertise when a lawsuit is neither pending nor threatened. If a corporation is about to bring a new product to market or un-

dertake a new or novel accounting or cost control system, does the independence of evaluation and unbiased formulation of opinions have equal importance? Obviously, the answer is yes.

It is the combination of qualifications, knowledge, unbiased approach, credibility and believability possessed by the independent expert which requires his opinions to be favoured over the in-house expert. Those same credentials speak to the necessity of retaining the independent expert in the defence of any case.

Selection and retention of experts

The purpose for which the consultant or expert is to be hired should be the guidepost for their selection. One should look to the specific field and the expert's standing and reputation in that field whether it is engineering, physics, bio-science, accounting, or management. Fit the expert to the issue to be addressed. Has the expert been retained by governmental agencies as a consultant or adviser? What other companies have retained him? Such qualifications move the expert to the 'follow up and interview' category.

The expert may be needed to articulate a complex theory such as product design in simplistic, understandable terms. Occasionally, it is to explain basic science as it applies to design concepts or testing of a specific product. He may be called upon to examine the accounting system in place or procedures employed by the company in handling intellectual property matters. Those roles primarily fit the expert whom you expect to give sworn testimony before a jury but apply equally to the auditing of procedures and practices currently in place.

The primary source of experts for any experienced litigator is typically his own database of experts developed over years of experience. Secondly, those experienced litigators have developed a network of lawyers who have similar practices that can be accessed when new experts or experts in new fields are sought. These networks may be formal in the case of legal networks (the rough equivalent of trade associations), or informal created from contact lists of respected, experienced colleagues. This avenue provides the advantage of the ability to candidly discuss the potential expert's credentials, performance in past engagements, hourly or project rates, and qualities as both an independent evaluator and testifying expert.

It is not only those possessing respected post-graduate experience who should be considered as experts. Retirees from industry typically 'qualify' as an expert, and may possess industrial knowledge that cannot be located outside of a given trade. *Kumho Tire Co. v Carmichael*, 526. U.S. 137 (1999), further defined and clarified the background which can provide the required qualifications of an expert. Expertise can be acquired through experience and need not be limited to scientific knowledge but includes both technical and 'other specialised' knowledge that might only be available from persons who have worked in a specific area over an extended period of time.

Another usually reliable source of experts is academia. Look at institutions that have a national reputation of expertise in the field necessary for your case. Examine the publications within the expert's area to determine if the expert has performed significant studies and has published results which have been reviewed by others in the field.

Today there are many independent consulting and testing firms that typically can be located through internet sources by searching specific areas of expertise. This is only a first step since the regulation of such 'advertisements' is virtually nonexistent. It will nonetheless identify individuals or organisations that hold themselves out as experts in a variety of fields. Once identified, such sources must be more closely examined through references and contacts in the same field.

Eliminate 'hired guns' that have only taken one position on topics within their field of expertise. They can prove dangerous and their monolithic approaches both cause problems on cross-examination at trial and erode their credibility before jurors.

Finally, all experts should be retained through outside counsel. It is a good practice to send them an engagement letter requiring signature and return, which sets forth generally the scope of the retention and expectations of performance. Be mindful of referencing case theories or discussing privileged matters in the correspondence. In the US, such letters are subject to discovery and cannot be shielded as attorney-client privilege, and in most cases will not constitute work-product.

Proper utilisation of experts

There is an often quoted saying about hiring experts in litigation: 'the earlier, the better'. If an accident has occurred, the company has called their counsel for advice, and there appears a better than even chance a lawsuit will follow, now is the time. Once an expert is retained, it is crucial that the attorney consult directly with him, either in person or by extended telephone conference. During these consultations, it is important for the attorney to reserve his advocacy skills for court and focus on known facts in an unbiased manner. Be leery of experts who begin as advocates for the company that has retained them. The neutrality of the expert needs to be maintained and he needs to remain neutral until his own evaluation, research and testing convinces him of a position from which he can be a strong proponent of the company's position.

At some point, the expert should receive a firsthand view of the company and the manner in which it conducts the pertinent business, e.g., engineering, design, customer service, or marketing. This can be accomplished by a personal visit or by meeting with a company representative who has extensive knowledge of its operations.

Once the expert possesses relevant facts, identifies the issues to be addressed, and understands the company background with the product or issue, his work should begin in earnest. Testing and retesting, research, analysis, and creating and testing hypotheses are a must. Those activities lead to the independent opinions for which the expert was retained. Constant dialogue between outside counsel and the expert, as well as between in-house counsel and outside counsel must occur at each stage of theory development.

In a litigation setting, expert opinions are often proffered as part of the discovery process in written reports. This typically will be followed by depositions that may prove beneficial if not indispensable to summary disposition of the case. If the case is not dismissed or does not settle, the expert must be prepared to testify at trial, which itself is a topic for another full-length article. ■



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