

*Thought Leadership Article*

# The Value of an Expert Witness

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*Trying a lawsuit is much more than letting the facts speak for themselves. Regardless of the size of the case, every trial involves real people with a real story. Expert witnesses can play an important role in telling the story.*

## INTRODUCTION

The pool of potential fact witnesses is dictated by the fortuity of who happened to be involved in the events that gave rise to the lawsuit. There are only so many people who can observe the negotiation of a contract, the design of a product, or most of the other sorts of activities that prompt litigation.

A lawyer, if he or she is lucky, may have some choice about which observers to call as fact witnesses. However, in most cases, that choice is severely limited. The lawyer is likely to be stuck with some fact witnesses who are inarticulate or otherwise unlikely to persuade for any number of reasons.

On the other hand, which expert witness to put forth is an important decision that the legal team should not waste.

Unrestrained by the requirement that the witness have personal knowledge of the facts, a lawyer can range widely in search of experts with the intelligence, communication skills, and demeanor that make for a strong proponent of the case.

Experts tend to be better proponents than fact witnesses simply by virtue of the traits that make them experts in the first place. Most experts are intelligent, well-spoken people. To succeed in their field, regardless of the subject matter, they must be skilled at convincing others.

Because fact witnesses are likely to be at best a mixed bag as advocates, a lawyer will use each of the experts to maximize the persuasive force of the case.

## THE ROLE OF THE EXPERT

The rules of opinion testimony give experts a powerful comparative advantage: to play the role of a per-

suasive “intermediary.” Although the line between fact and opinion is notoriously fuzzy, much of the most effective testimony by experts falls pretty clearly on the opinion side.

Persuasion depends critically on selecting and characterizing facts in a normative fashion. Such characterization, coming from a witness, almost always constitutes opinion.

Experts are allowed much greater freedom than lay witnesses to present opinions. Opinion testimony by lay witnesses is restricted to opinions that are “rationally based on the perception of the witness.”<sup>1</sup>

That rule limits permissible lay opinions in the same way that the personal knowledge requirement limits the scope of lay testimony generally. A lay witness may be able to testify that a factory’s handling of chemicals was “sloppy” but not that it “fell below industry norms.”

An expert labors under no such disability. An expert can testify freely in the form of opinions, and those opinions can address the ultimate issues in the case.<sup>2</sup> An expert can tell the jury not only that the factory’s conduct fell below industry norms, but also that it “violated the applicable standard of care.”

This means that an expert has virtually the same freedom that a lawyer has in advocating her case during closing argument. In permissive jurisdictions, some trial lawyers take this insight to extreme lengths.

They will have an expert review all the key evidence and then, at trial, walk him through a wide-ranging direct examination to summarize the facts, opine on the ultimate issues, and deliver what amounts to an early, and extra, closing argument.

A second important role of the expert is to endorse and lend credibility to the concerns of the party that called the expert at trial. In a typical case, most fact witnesses that a party presents have pre-existing out-of-court allegiances to that party: they are the party's employees, officers, physicians, family members, etc. The fact that such people testify in support of the party is not in itself likely to impress the trier-of-fact, just as no one is likely to put much stock in a mother's claim that her son is the smartest and best-behaved boy in school.

An expert, however, enjoys an aura of neutrality. However, an expert is not really neutral. The expert is in court to sell a particular point of view.

Nonetheless, the expert's lack of pre-existing connection to the party calling him or her goes a long way to create the appearance of impartiality.

The honorific label of "expert" that the jury is likely to hear also bestows the appearance of impartiality. Thus, when an expert appears on behalf of a party, his or her presence conveys an important message that is unrelated to the content of the testimony: "Although I have no stake in the dispute, I have looked at this case and believe [the sponsoring party] is right."

The potency of that message depends on (among other things) the expert's credentials and the ostensible reasonableness of his compensation.

A well-credentialed expert who does not charge an absurd amount for his or her services can give a significant boost to the sponsoring party just by showing up at trial.

A third role of the expert witness is to make a record on critical elements of claims or defenses. As a matter of substantive law, there are some issues that only an expert is competent to address.

Examples include the standard of care in professional malpractice actions, the causation of the plaintiff's injuries in toxic exposure cases, and the reasonably certain amount of economic damages.

On such issues, the presentation of expert testimony is not a luxury to "assist" the trier-of-fact but a necessity to meet the burden of proof, avoid a directed verdict, and protect the record for appeal. Even so, the trial lawyer should not treat the expert's appearance as merely a technical requirement but should take advantage of the opportunities for persuasion and endorsement that are inherent in expert testimony.

## AN EXPERT DOES NOT HAVE TO BE MUCH OF ONE

Outside of the law, the term "expert" gets tossed around a lot. Most newspaper and television news magazine analyses are not complete without sound bites from individuals described as "experts." No one ever says what expert really means. But, to establish a source's status as an expert, the popular media typically invoke his occupational credentials or the fact that he has written a book on the topic.

That practice suggests that the media consider an expert to be, roughly speaking, someone who knows enough about a topic to make a living off that knowledge. That definition is probably in line with most people's everyday understanding of the term.

The law sets the bar quite a bit lower. The expert need not make a living dealing with the subject matter about which he testifies. In general, an expert need not possess any particular credentials.<sup>3</sup>

The quickest way for a trial judge to have the exclusion of an expert witness reversed, notwithstanding the lenient abuse-of-discretion standard of review, is to find fault with the witness's formal credentials.

For example, in many settings, a witness need not be a medical doctor to testify as an expert on medical issues.<sup>4</sup> In fact, an expert witness need never have thought about the issue at hand before being retained to testify.<sup>5</sup>

Should we expect the judicial branch of our government to employ a standard of "expertise" at least as rigorous as the one used by, say, Dateline NBC? In some settings, the law's indifference to credentials does seem odd.

If the issue in dispute is one that occupies the professional attention of a large number of individuals outside of litigation—for instance, the design of automobiles—it is difficult to see why a party should



be allowed to bypass that pool of potential experts and offer a witness who has never made a living in that field.

A party that is unable to secure an expert with the most relevant occupational credentials cannot have much of a case.

But in most cases, the law's refusal to insist on particular credentials makes sense. Many of the technical issues that come to court are so narrow and fact-specific that no one makes a living thinking or writing about them. In such cases, there is no reason to expect that people who work in the general field of endeavor, but who do not regularly deal with the specific issue, have any monopoly on relevant expertise.

Moreover, given the narrowness of the issues, even if a court is inclined to insist on a particular credential, it is often far from obvious what the relevant credential should be. In an antitrust case involving the cement market, who has the "right" credential? Is it the seasoned economist who has never been employed by a cement company, or the former director of strategic planning of a cement company?

Courts wisely avoid time consuming and probably intractable threshold disputes over what sorts of paper credentials are relevant to a given case.

Insistence on particular credentials is also unnecessary. This is because the evidence rules give courts another, much more finely calibrated tool for identifying expert witnesses. The reliability requirement of *Daubert*, now codified in Rule 702 and the analogous principles under state evidence rules, aims to screen out phony experts by focusing on the methods and reasoning by which the expert reaches his conclusions.

This approach is tailored to the specifics of the case in a way that a focus on credentials can never be. It addresses what the expert has done rather than what he or she is. A witness with unorthodox credentials can testify as an expert as long as he or she has done the work necessary to render a reliable opinion on the particular technical question in dispute.

Conversely, a highly pedigreed academic or professional who does not bother to do the homework should not be allowed to appear in court as an expert.<sup>6</sup> The *Daubert* approach is generally superior to a regime that uses paper credentials as the test of expertise.

## EXPERTS ARE MADE, NOT FOUND

Many novices undoubtedly expect that the hardest part of dealing with an expert will be convincing the

individual to work on the case and that, after clearing that hurdle, the expert's testimony will almost take care of itself.

After all, the individual is the expert. The expert is smart and well educated and knows far more about the subject matter than lawyers or other ordinary people. All you need to do is tell the expert when the report is due and make sure the expert's invoices get paid.

The experience of generations of litigators can be summed up as: It just does not work that way. Experts do not parachute into the case with their opinions fully formed, supported, and ready for trial.

They normally require more of the lawyer's time and effort, not less, than fact witnesses with comparably prominent roles in the case. The reasons trace back to one of the defining distinctions between fact witnesses and experts. A fact witness is someone who has lived through the events in dispute. An expert is someone who has not.

For better or worse, the scope and general content of the fact witness's testimony are preordained by his or her experience in the underlying events. The fact witness will need to have his or her recollection refreshed, but at least there is a recollection.

Coming in, an expert knows nothing about the case or what led up to it. If you are lucky, the expert has done research or had professional experience that is relevant to the case. However, almost surely that work did not involve the specific facts of the dispute.

Unless you plan to have the expert simply testify about his or her past work without reference to the specifics of the case—an approach that squanders many of the advantages of expert testimony—the expert will need to have a solid grounding in the facts. In short, the expert will need to be educated about the case.

## EDUCATING AN EXPERT

To be clear, educating an expert means providing the expert with the information necessary to render a reliable opinion. It is not a euphemism for telling the expert what opinion to reach or how to testify.

Although "liar for hire" is an epithet that lawyers often bestow on opposing experts, there is no reason to think that lawyer-contrived testimony is any more common from experts than it is from lay witnesses. The machinery of the adversary system, although not perfect, is pretty good at exposing manufactured testimony.

If an expert is just mouthing opinions like a ventriloquist's dummy, it is unlikely that the expert will be able to explain or defend the opinions in a convincing manner. Putting words in an expert's mouth—or merely appearing to have done so—is an excellent way for a lawyer to torpedo the client's case.

Most experts are quick studies. Distinctive features of modern litigation, however, make the process of educating an expert a formidable challenge. Ideally, your expert would review every document, deposition, and discovery response that is arguably relevant to his area of testimony. In many cases, that simply is not practical.

Experts have only a limited amount of time (and you only have a limited amount of funds available to pay expert fees). Indeed, the process of convincing the expert to work on the case in the first place may have involved a delicate negotiation over the time commitment.

Most experts are not full-time witnesses. They shoehorn litigation work into an already full schedule of research, publishing, teaching, attending to patients, or non-litigation consulting.

In academia, a typical limitation imposed by universities is that a professor may spend only one day per week on outside activities, and your case is unlikely to be the expert's only outside commitment. Time is precious—even among experts who work at consulting firms that offer litigation support.

Good experts at consulting firms are in high demand and do not have the leisure to devote uninterrupted weeks to your case. If you overburden them with material, it may be read by a junior analyst but will probably not reach the testifying expert.

While the expert's available time is limited, the cases these days are large. Business communications that 15 years ago would have been handled

by phone or across a desk are now conducted by e-mail and are thereby preserved for later use in litigation.

Any commercial dispute worth litigating will generate tens of thousands of arguably relevant e-mails. It is now common to see litigations—mass tort, anti-trust, securities cases—in which millions of pages of documents are produced in discovery and hundreds of depositions are taken.

If your case is, say, a traditional medical malpractice case where the hospital records and other primary documents fit into a few file folders, educating your expert may be simple enough. But in complex cases, lawyers walk a fine line between inundating (or, even worse, scaring off) the expert with too much information and leaving the expert unprepared to formulate defensible opinions by giving him or her too little.

## COMMUNICATING WITH AN EXPERT

Add another complication to this condition: the process of educating the expert takes place in a fish-bowl. Unless there is an agreement to the contrary with the other side, when your “consultant” is designated as a testifying expert, all communications between you and your expert since the expert began work are discoverable. This means that every step of your work is an open book.

In federal court, an expert's report must specify all information the expert “considered” in forming expert opinions. In deposition, opposing counsel can and will ask the expert what information and documents he received from you, what he asked for and didn't get, what he obtained on his own, and what you and he discussed about the subject matter. You should ensure that the expert knows from the outset that this is coming.

Needless to say, all written exchanges between you and the expert should be extremely circumspect. Good: “Enclosed are additional documents for your review.” Bad: “Here are the only favorable documents we have been able to identify in our Hot Documents database.” For his part, the expert should never send you anything in writing unless you specifically ask for it, and the expert should exercise care in taking notes.

The prospect of exposure in discovery cannot prevent you from having substantive oral discussions with the expert. The need to educate the expert outweighs the risks of disclosure. But, such discussions are not the place for ruminations about litigation strategy or the strengths of your opponent's case and the weaknesses of your own. Stick to the expert's issues and act as if the conversation is being transcribed for the other side.





In educating the expert, there are two related goals.

The first goal is to provide the information that the expert, as a professional, believes he or she needs to form an opinion.

The second goal is to create a record that will survive the scrutiny of a future *Daubert* challenge and cross-examination at trial. If you do your job right, the expert will submit the expert report feeling comfortable that there is a solid technical basis for the stated opinions.

Furthermore, at a later stage, the court and the jury will conclude that:

1. the expert conducted a reasonable investigation,
2. counsel was forthright in providing the expert with information, and
3. the expert's opinions have a reliable basis in fact.

It is generally best to proceed incrementally. You should not do a "data dump" on your expert on the first day of retention.

First, send the expert the core materials that provide an overview of the facts and case-specific issues: the complaint, any relevant motions, the opposing party's deposition, and the opposing expert's report (if available).

Second, talk to the expert to get a preliminary take, emphasizing that you don't expect the expert to form his or her ultimate opinion very early on and without seeing most of the relevant information. Based on the first wave of material, the expert may tell you that he or she cannot support your client's position—a piece of news that is better to receive sooner rather than later.

Third, assuming the expert is supportive, you should then send larger successive waves of material containing more detail about the facts. It is also important to ask the expert what information is needed to form an opinion. You should make it clear that the expert has access to anything in the discovery record.

This procedure preempts a charge that the expert based his or her opinion solely on the information that was spoon-fed by counsel. If material that an expert requests is available and not privileged, you should provide it unless there is a compelling reason not to do so. It will not be helpful if the expert later testifies that you failed to supply information that was requested and believed to be relevant to the expert opinion.

Fourth, compromises may be necessary along the way. The universe of relevant documents may be far more than any one person can assimilate within the time frame of litigation. In that situation,

you and the expert should try to isolate reliable summary documents that eliminate the need for the expert to review the entire collection.

Fifth, the expert should be able to articulate the rationale, other than "counsel told me not to," for why he or she did not look at the omitted materials. Also, by the time you are working with the expert, fact discovery may have clarified which relevant documents the other side is focusing on, and the expert should pay special attention to those.

Of course, if the universe of relevant documents is huge, the opposing expert faces the same problem, so neither side is likely to emphasize the other's investigative shortcuts.

## THE "PROFESSIONAL WITNESS" IS NOT TO BE TAKEN LIGHTLY

When lawyers refer to an expert as a "professional witness," they do not mean it as a compliment. The term derisively describes someone who testifies frequently, earns substantially all his or her income from litigation, and does not perform the sort of scholarly research or other nonlitigation work that occupies respectable members of the field.

It is a mistake, however, to expect that you can secure the exclusion of an opposing expert simply by showing the expert to be a professional witness. As one court put it: "The fact that a person spends substantially all of her time consulting with attorneys and testifying in trials is not a disqualification."<sup>7</sup>

In one extreme case, a trial court excluded a plaintiff's medical expert who in the preceding 16 years had testified 800 times (that's about once a week), taking the plaintiff's side in all but two of the cases. The court of appeals reversed, explaining: "For litigants to have access to experts, it may be necessary for some experts to concentrate on litigation."<sup>8</sup>

It does not necessarily discredit an expert before a jury to portray the individual as a professional witness. A jury is just as likely to believe that the expert must really know what he's talking about if he's been accepted as an expert witness in court hundreds of times and makes a good living at it.

One of the reasons lawyers dispense the professional witness tag with such vitriol is that they know

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such experts can be formidable adversaries. A professional expert witness understands the drill. The expert generally knows exactly what sort of source materials are needed to form a plausible opinion, and such experts work quickly.

Such experts do not create unfortunate handwritten notes that can later be used for impeachment. Such experts have their Rule 26 expert credentials on their computers. Such experts are conversant with *Daubert* jurisprudence. Because the expert may well give more depositions in a year than many litigators take, he or she has seen all the examination techniques known to the profession and is not easily trapped in damaging admissions.

And, if the expert has made a career out of expert witness work, he or she is likely to be a skillful performer in the courtroom. The expert will speak with great confidence and authority even when the underpinnings of the expert's opinion are shaky.

Still, cautious litigators are usually right to avoid drawing their own experts from the ranks of the professional witness. A full-time expert witness may know not to create a paper trail of notes and drafts leading up to testimony in a given case.

However, all that testimony in all of those cases adds up to its own paper trail, which can come back to haunt the expert in any number of ways. Many experts deliberately do not retain previous reports and transcripts so the materials will not be discoverable, forcing opposing attorneys to chase them down from numerous other sources. But that also means the experts do not have access to what they wrote and said before.

In later cases, these experts can unwittingly contradict positions they took in earlier ones. Online

resources make it easier than ever before for attorneys to locate experts' prior testimony and use it for impeachment.

The reality is that most professional expert witnesses run a volume business. In their efforts to juggle a large number of cases, they sometimes cut corners and make mistakes. Those problems are not unique to professional experts.

Additionally, the fact that an expert makes a living testifying in lawsuits creates an unhelpful—even if not fatal—bit of baggage. This is especially true if the expert works frequently with the lawyer in question.

If you are opposing such an expert, you can convey the following points to the jury to undermine the expert's image as a neutral, wise person:

- The expert depends for his or her livelihood on securing engagements in lawsuits.
- The expert's ability to attract repeat business depends on making clients—and lawyers—happy.
- Given the lawyer's status as a loyal customer, the expert has ample incentive to come up with the opinions the lawyer needs, regardless of what a dispassionate analysis may show.

Nevertheless, retaining a professional expert witness is sometimes the best approach—for example, retaining an experienced analyst who specializes in calculating damages in litigation. The analyst's testimony in past cases is probably not relevant. This is because the prevailing fact pattern is different but the proper methodology and informational inputs for the calculations will be fairly clear.

Chances are, too, that the other side's damages expert will also have quite a bit of testifying experience, so your expert's status as a professional witness is unlikely to raise eyebrows.

## THE VALUE OF AN EXPERT WITNESS

Although a litigator has to deal with the fact witnesses that fate sends his way, the selection of experts presents seemingly limitless avenues for creativity. Is there a gap in your factual story? Plug it with an expert. Does the dispute take place within a regulated industry? Hire a former regulator to explain that your client acted responsibly. Do you lack fact witnesses to testify about events that took place decades ago? Retain a historian to review the record and opine about what happened.



In large cases, it is not unheard of for one side to designate 20 or more experts. However, in most such cases, the trial lawyer will wisely not call all of the experts to testify.

The conventional explanation for the proliferation of experts is that the issues in litigation are increasingly complex, requiring expert consultation. Although that may be part of it, much of the explanation has to do also with the psychology of litigators and their clients.

When some things are beyond control (like the identity and quality of fact witnesses), it is human nature to focus on the things that can be controlled (like experts). In addition, it is very difficult to know how effective expert witnesses really are.

Many trial lawyers have had the experience of putting on a highly credentialed, articulate expert who clearly made his points on direct and sailed through cross-examination. Then the lawyer hears from jurors after trial that they felt the expert was too slick, and they disregarded his entire testimony.

Even if jurors are persuaded by an expert's testimony, they are unlikely to say so. People like to believe that they arrive at conclusions by their own reasoning, not by following what some expert says. By definition, expert testimony deals with matters that are beyond the ken of the layperson. Therefore, jurors have great difficulty playing back the expert's reasoning when asked to explain the rationale for their decision.

Jurors are more likely to focus on some ostensibly telling actual detail ("the plaintiff was healthy enough to go hiking last month") than on the basis offered by the expert ("the defendant's chemical, although injurious to mice at high doses, is not harmful to humans at low doses"). This is true even if the expert's testimony swayed them at some level.

Because of this uncertainty regarding the impact that experts actually have, trial lawyers seem to err on the side of designating and calling too many expert witnesses.

The evidence rules by design are liberal in allowing expert testimony. As long as lawyers and their clients are willing to pay experts to write reports and come to court, there will be experts eager to do so.

Experts represent a significant portion of the high cost of litigation. Lawyers and their clients can reduce these costs (1) by reining in their creative impulses and (2) by declining to retain marginal or wholly unnecessary experts.

Such a move stands to reduce the direct costs associated with the experts' fees. In addition, such

a move will reduce the indirect costs of time the lawyer spends educating the experts, shepherding them through the report and deposition process, and defending any *Daubert* motions that may be leveled against them.

By eliminating the expert clutter that characterizes cases these days, it may also serve to highlight the importance of the experts who remain.

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Notes:

1. Fed. R. Evid. 701.
2. Fed. R. Evid. 704(a).
3. See *Tuf Racings Prods., Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) (the notion that *Daubert* “requires particular credentials for an expert witness is radically unsound”).
4. See *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 855 (3d Cir. 1990) (Ph.D. toxicologist qualified to testify about cause of plaintiff's physician injuries; *Haggerty v. Upjohn Co.*, 950 F. Supp. 1160, 1168 n.6 (S.D. Fla. 1996) (“an expert need not be a medical doctor . . . to render opinions relevant to causation”). (Exceptions arise in medical malpractice cases where, as a matter of state substantive law, an expert may be required to possess a particular type of medical license to testify about the applicable standard of care. See, e.g., *Legg v. Chopra*, 286 F.3d 286 (6th Cir. 2002).)
5. *Exum v. Gen. Elec. Co.*, 819 F.2d 1158, 1163 (D.C. Cir. 1987) (Rule 702 “does not require the expert to have personal familiarity with the subject of his testimony”).
6. For a celebrated example of the latter situation, see *In re Brand Names Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 788 (7th Cir. 1999), which upheld the exclusion of expert testimony by a Nobel Prize-winning economist because it rested on factual assumptions that were contrary to the undisputed record.
7. *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1233 (5th Cir. 1986).
8. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 754 (3d Cir. 1994).

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