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Selecting an Expert

“An expert knows all the right answers — if you ask the right questions.” — Levi Strauss

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Strauss was close. When retaining a potential expert, asking the right questions at the outset of the retention process will lead to an opinion you can use to help determine the relative strengths and weaknesses of the claim. The opinion may not be the “right”

answer in terms of defending the case, but it will help determine the direction the claim should take: trial or settlement.

But the questions to be asked are not just questions to ask the expert. Claims professionals must ask themselves some questions even before the expert is retained. The first question is basic: What kind of expert do we need? While the question seems simple on its face, in reality the answer may be harder than it appears at first blush.

Local statutes may play a role in the determination. For example, in Michigan medical malpractice actions, statutes related to experts require the qualifications of a defense expert to match that of the defendant doctor. A case involving a board-certified orthopedic surgeon defendant will need a board-certified orthopedic surgery expert, not just a general surgeon who occasionally performs such surgeries.

Even if there is no specific statutory requirement related to the expert, the facts of the case may point to the need of one or more different types of experts being required. If the case involves an auto accident, the known facts of the accident may suggest the need for experts in fields as diverse as accident reconstruction, human factors, warnings or even sleep cycles. Whether or not you have the right field is often a question you can address with the potential expert during that first discussion.

Claims professionals must also ask whether or not the retained expert is going to be asked to testify, or just consult on the case. If the proposed expert is going to be limited to providing advice “behind the scenes,” then the expert may not need some of the qualities that will be discussed here. The value of the non-testifying expert should not be discounted. Such experts can be a valuable resource in providing a focus on what issues are really key to the investigation and in helping determine what other types of experts may be required in discovery and eventually trial. Plus, in most jurisdictions, the identity of such an expert does not need to be disclosed to the other side. The non-testifying witness can feel free to give unfettered opinions on the subject at hand.

Having determined what kind of expert is needed, claims professionals must now go about finding an expert. If the subject matter is relatively common: e.g., an accident reconstructionist or economist, claims professionals most likely have a data bank of experts that they or their counsel have utilized in cases before. Claims professionals should not be afraid of using this list. There is often a fear of using the same specific witness in many different cases. Will the repeated use of the expert result in the witness being portrayed as a “hired gun” in general or for the carrier in particular?

While certainly a rational concern, it should not be an overriding one in selecting the expert. An experienced witness who is comfortable on the stand, both on direct examination and on cross-examination is invaluable. This factor alone may offset the concern of overuse. Moreover, the plaintiff's expert is most likely no babe in the woods. Juries understand that each side in the litigation retains its own experts and expect that each side's expert will support that point of view. Juries decide which expert to follow based on if the expert's opinion is understandable and makes sense within the context of the case.

As for the expert's fees, a good expert easily dispels the "hired gun" attack. When a cardiology expert was once attacked about the amount of expert fees he had charged in cases over the course of a year, he dispelled it with two simple sentences: "I work hard. I support my church and community and I charge for my time just as you do counselor." The plaintiff's attorney was forced to turn to the substantive areas of the case.

None of this is to say that it can't be overdone. If the expert is retained in dozens of cases by the same carrier and gets a substantial percentage of his income from a single source, the expert will go from being viewed as a retained but "independent" expert to the dreaded "hired gun." The best way to avoid that problem is to have several experts with whom claims professionals are comfortable and rotate cases between them. Experts will drop out of the rotation by attrition and others will move in to take their place.

If the field in which the expert is needed is more esoteric, and claims professionals do not have a specific expert in the field in their database, then the next question is where to look for an expert? Depending upon the type of case and the kind of expert needed, one of the best sources for finding a good expert can be the client itself. Especially in professional liability cases, the client often knows the best people in the field and which people serve as experts. Plus, in such cases, you'll want to consult with the client on expert retention to avoid inadvertently hiring their best friend or worst professional enemy.

Other sources for experts include colleagues both within the company and from other insurers. Universities are another good source. Even if you are not looking for an academic-type expert, the professors within the department often know who the leading experts are within the commercial side of the discipline and can point you in the right direction. And, of course, the Internet is an excellent starting place to begin to narrow the search.

A short word on expert referral services is in order. Although many claims professionals regard them with disdain because of the perception that they are plaintiff-oriented, the use of such services should not be ruled out. Especially in cases involving an obscure field, they can save an inordinate amount of time in helping narrow the search for an expert. They do come at a literal cost, however, as such services are not free.

Having located a putative expert, claims professionals now must begin the vetting process. This begins with obtaining a copy of the expert's curriculum vitae. The CV should be reviewed with an eye toward information such as the university attended, the type of degree(s) received, and membership in appropriate professional associations. If an expert with real world experience is needed or desired, the jobs that the expert has held are obviously important. It does no one any good to retain an expert with an engineering degree if he has spent most of his career in sales. Where the expert has worked can be equally important. Was the expert an employee of your client's direct competitor? Or did he work for your client at one time? If so, you may need to direct your search elsewhere.

The publications listed on the expert's CV should also be noted. Has the expert published on the specific subject matter at hand? Having published on the subject may be a blessing or a curse. If there is a long list of publications that lend support to the defense proposition being advanced, this will lend credence to his testimony. However, papers taking a contrary position, even in part, are problematic. Picture how the cross-examination of such an expert will go when his written words are blown up and displayed to the jury. While there is often a perfectly justifiable reason for such a position (usually different facts), having to explain it to a jury is often awkward.

Once claims professionals have reviewed the CV, give the expert a call. During this initial call, claims professionals should explain to the potential expert what kind of expert they are looking for and ask if the witness would be comfortable testifying or opining on that subject matter. If they are, claims professionals should tell the expert who the parties to the litigation are so that a conflict check can be done. Such a conflict check might be necessary not only for the individual expert, but also within the organization or entity for whom the expert works.

Potential experts should be asked about their previous experience as an expert, if any. How many times have they been retained? Were they a testifying expert or consulting? What was the split between plaintiff and defense cases? How many times have they testified at deposition? How many times at trial? If the experts have served as witnesses in federal cases, ask for the list of cases they would have prepared about their prior service. And ask about the experts' own experiences as a defendant. While the fact that the expert was a defendant may not be admissible, the claims professional will want to ensure that there is no paper trail of prior deposition or trial testimony on the same subject.

If the expert has never testified before or is very inexperienced, claims professionals will need to make a call as to how they think the expert will testify. Can the expert "teach" the subject matter to the jury? Often, whether or not an expert has the requisite presence can only be felt through meeting the expert in person. A face-to-face meeting will let you know if the experts can make eye contact. If they can't look you in the eye during a meeting, they are not going to be able to look a jury in its collective eye under the stress of a trial. It will also help ascertain whether or not the expert has any personal quirks that may distract from the message. An engineer may be highly qualified and knowledgeable, but you are not going to want to learn about that Mike Tyson-like facial tattoo on the day of trial.

Finally, talk about fees. Sure you need to know the hourly rate. But just as important is the amount of time that the expert thinks it will take to do the task at hand. A lower hourly rate done at an inefficient pace does no one any good. If there are concerns, don't be afraid to set a reasonable upper limit. Tell the expert that if it looks like he needs to go over the budgeted figure he should get in touch with you. If he balks at this, you are probably going to want to look elsewhere anyway since it sounds like he's more concerned with fees than with doing a good job. Find out about trial fees and expenses. A full-day rate or half-day? Does the expert require a first-class ticket and a suite at the Ritz Carlton? If so, better to know at the outset than having this discussion on the week before he is scheduled to testify.

Asking these questions will help claims professionals find the right answers. It may not lead to a no-cause in every case, but it will help shape an efficient and cost-effective resolution of most claims.

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