

Best Practices: Five Critical Tasks to Thoroughly Vet Expert Witnesses

A LexisNexis® White Paper

Highlights

- From criminal cases to patent infringement and medical malpractice suits, expert witnesses are often essential actors in contemporary court proceedings. Yet it's not always clear what the best practices are for ensuring that those who provide guidance or testify are the right people for the role.
- Attorneys can start by taking a deep look into an expert's testimony, deposition and court report history, as well as his or her employment, education and licensing background. They should also examine abstracts of any scientific, technical or medical literature the expert has published.
- Further in-depth research into an expert's prior work should look for any significant inconsistencies that an attorney—or opposing counsel—could use to challenge the individual's credibility.
- Confirming details in an expert's CV or résumé, as well as reviewing any actions by professional associations or licensing boards and challenges to an expert's testimony in prior cases, is essential to spare an attorney from using an expert with a problematic history.
- Finally, attorneys should know if a potential expert has a special interest in a matter or a clear bias that could present a higher risk of the individual being challenged.

Introduction

Most of the people we now see in movie crowd scenes are not real. They aren't created with digital special effects, either. In fact, a popular alternative to human extras is to use plastic, **inflatable mannequins**¹—as many as 30,000 for some films—wearing masks along with an assortment of wigs, hats and other costume props for effect.

How's that for making a point about the value of seeing certain actors for what they truly are?

For many in the legal profession, that skill is important in all kinds of matters. But it's an especially critical requirement when vetting expert witnesses. From criminal cases to patent infringement and medical malpractice suits, they are often essential actors in contemporary court proceedings.

Yet it's not always clear what the best practices are for ensuring that those who provide guidance or testify are the right people for the role—or whether they can perform as effectively as one would hope.

Will they be persuasive in a case, or a liability?

To answer that question, attorneys need to ensure that they cover five critical tasks that are essential to thoroughly vetting potential expert witnesses.

Task #1: Access an Expert's Case History and Statements, Personal Background, Authored Articles and More

Attorneys should start by taking a deep look into an expert's testimony and deposition history, as well as his or her employment, education and licensing background. They should also examine court reports filed in previous cases and abstracts of any scientific, technical or medical literature the expert has published.

By doing all that, attorneys can determine if an expert for their case—or an opponent's expert—merits any red flags that would make challenging and/or discrediting the expert possible (for example, testimony was excluded in a previous case, or the individual has been repeatedly barred from testifying as an expert or does not carry required licenses or certifications).

Thorough research is also vital to prevent sanctions, retrials or future lawsuits against an attorney who fails to discover vital problematic information about an expert. To underscore that point, one needs only to watch the news or hear about retrials allowed and hundreds of thousands of dollars in sanctions awarded against attorneys who failed to discover and/or disclose that their experts had **misrepresented credentials**² or had failed to disclose that their certifications were expired.

Task #2: Detect Inconsistencies in an Expert's Prior Testimony

As a follow-up to the initial task, and to avoid the kind of missteps referred to above, attorneys should order testimonial history reports, as well as any relevant depositions and trial transcripts, for further in-depth research into an expert's work on similar cases. The purpose of pulling reports is to find any significant inconsistencies, such as the expert having previously made arguments that counter his or her current assertions. The existence of a substantial inconsistency can provide a solid basis for an attorney—or, again, opposing counsel—to challenge an expert's testimony, which can result in discrediting the expert and strengthening—or weakening—a party's case.

Task #3: Uncover Gaps or Discrepancies in an Expert's Background

Along with examining an expert's prior testimony, attorneys should verify that the information listed on an individual's CV or résumé is correct. Thoroughly vetting an expert's provided information can prevent an attorney from using an expert with a **problematic history**.³ It can also reveal gaps or discrepancies that can be used to **challenge or discredit an individual**.⁴

Task #4: Find Disciplinary Actions and Challenges Against the Expert

Building on the previous task, attorneys should also review any actions by professional associations or licensing boards and challenges to an expert's testimony in prior cases. Discovery of disciplinary actions often makes challenging and discrediting an expert much easier, particularly if the action is related to the issue currently being litigated.

Likewise, prior challenges to an expert's testimony often result in an expert being limited and/or excluded from testifying if the case at bar is similar to matters in which challenges against the expert were successful.

With the right tool at their disposal, attorneys can search specifically for previous gatekeeping challenges, such as Daubert and Frye hearings to exclude an expert's testimony. If research shows that an expert has repeatedly been challenged, attorneys can further inquire into the specifics of each challenge and potentially find similarities that allow them to raise challenges in their case, or find a new expert to avoid challenges altogether.

Ideally, that tool should also reveal disciplinary actions that are not easily discoverable through general Internet searching. An example is if the expert has been sanctioned in another state. Such results can further assist an attorney in getting an opposing expert's testimony limited and/or excluded.

Task #5: Identify an Expert's Bias Toward Plaintiff or Defense

Finally, attorneys should know if a potential expert has a special interest in a matter or a clear bias that could present a higher risk of the individual being challenged. Such information can also simplify challenging and discrediting an expert for the other side in a case.

Identifying a bias is relevant in any litigation involving expert witnesses, but it is particularly important in product liability suits, such as those related to tobacco or vehicle defects. Experts may have decades-long ties to the industries they are testifying for or against, which can skew their ability to give an unbiased expert opinion. The sooner an attorney has that information, the sooner he or she can act on it appropriately.

Conclusion

Studies indicate that attorneys spend on average 15 hours researching each expert witness involved in a case. To ensure that time is well spent—meaning that the information obtained is relevant, meaningful, complete and up to date—access to the right tools is necessary.

Those tools are available, and by taking advantage of them while performing five critical tasks, attorneys can do more to thoroughly vet expert witnesses—and improve their odds of winning.

The Solution for Legal Professionals

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1 "How Hollywood Creates Crowds Without CGI," *Twisted Sifter*, May 17, 2012, <http://twistedsifter.com/2012/05/using-inflatables-for-crowds-fill-stands/>.

2 Jonathan Ellis, "Disputed Degree Clouds Expert Witness: Ph.D. Claim of Sioux Falls Psychologist Who Often Testifies in Court Questioned," *Argus Leader*, August 3, 2013, <http://archive.argusleader.com/article/20130804/NEWS/308040019/Disputed-degree-clouds-expert-witness>.

3 Brett Hambright, "Doctor Called as Expert Witness in Drunk-Driving Trial Charged With Perjury," *Lancaster Online*, October 25, 2013, http://lancasteronline.com/news/doctor-called-as-expert-witness-in-drunk-driving-trial-charged/article_ce436099-bd4a-599a-8bd3-468bc0788547.html.

4 "Medical Expert Witness Arrested for Perjury," *Medical Justice Blog*, July 26, 2013, <http://blog.medicaljustice.com/medical-expert-witness-arrested-for-perjury/>.

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