

The Care and Feeding of an Expert Witness

Watch Out, They May Bite!

By Julie B. Negovan, Esq. and Josh M. Greenbaum, Esq.

Imagine you have been sued for damages because there was a mix-up in the shop drawing approval process, and a project ran late. You in return have asserted claims in the case against the project manager to recover the fees they refused to pay. One of the first things your lawyer will likely advise is to hire an expert witness. While it is likely that your lawyer will have someone in mind, you should be prepared to ask questions about any recommendation because an expert witness can make or break your case.

Why You Need an Expert

Experts fulfill very important technical roles in lawsuits. Their testimony can establish *causation* and *damages*. Particularly in construction cases, where the ordinary juror has little idea of what causes project delays and how those delays cause damages, expert testimony is key to helping the jury understand these issues. Even where the issues will be presented to an arbitration panel, expert testimony on causation and damages is helpful.

In addition to bolstering your case, expert testimony is often required by law to establish

some elements of a case. For example: You are in a case where you are claiming that another professional, perhaps an architect, did something wrong that caused you harm. An expert is *required* to testify that the architect's actions were wrong, or a breach of the standard of care.

Finally, an expert can help your lawyer better understand technical aspects of your case. If you have been sued because someone was hurt during a structural collapse, the expert will investigate the cause of the collapse. He will then work with your lawyer to formulate a theory on the cause of the collapse that helps exculpate you and inculcate others.

Choosing an Expert

Experts come in all shapes, sizes and walks of life. Yours should be a professional, not just because he has expertise in a technical area but also because he is a pro at testifying. Testifying in a legal proceeding, whether at a trial or an arbitration proceeding, is a skill that is honed after much practice. It requires a certain amount of teaching ability, a confidence in the technicalities of the specialized area, and an ability to handle cross examination.

Many times, professors make good experts. They have qualifications in highly technical fields that tend to impress jurors and arbiters alike. They are usually good teachers and have the patience to deal with cross examination. Industry experts, such as leaders in trade organizations, those who write articles in trade magazines, or who lead industry groups can also make good experts. They have day-to-day experience in the industry that is highly persuasive to a jury and to arbitrators. They may require help in translating the technicalities of their expertise to make it understandable to the jury. And, if they don't have testifying experience, they will require help in handling cross examination. Then there are professional expert witnesses who really do nothing but "litigation support." The advantage of hiring a professional expert witness is that they will be good at communicating the technicalities to a jury and they will have experience in handling cross examination. Sometimes, however, they have trouble convincing the jury that they are more than a hired gun.

Successfully Handling Your Expert

No matter whether you hire a professor, an industry leader or a professional expert, it is critical that you feed the expert accurate information in order for him or her to formulate their opinions. In a delay case, for example, it is important for the expert to have access to the CPM schedules and any change orders affecting the schedule, as well as any other information that may bear on delay in the project. If your expert is providing opinions on damages, it is important to provide him with as much information as possible concerning your finances, like overhead, profit and margins, as well as any special costs for extended conditions, such as increased labor costs.





It is also important to provide the expert with information that is detrimental to your claims. You may be hesitant to provide this information, but assume that your adversaries have it and will surely use it in cross examination. If your expert is not prepared to address the bad information, your case could blow up during his testimony. Your expert will be asked, on the stand, in cross examination, to evaluate the new information and whether it affects his opinion. This is when your expert may bite and say that the new information changes his opinion to your detriment. Even if your expert handles the surprise well, your adversary will argue to the jury that you hid information. The jury will assume that you did so because it was bad for you, despite your expert's efforts to handle it well.

In addition to feeding your expert all the important information (the good, the bad and the ugly), you must find out from your expert how he has testified in prior cases. If your expert is going to testify that a certain method must be used to calculate delay damages for overhead expenses, you should know if he has testified previously that a different method is the correct way to calculate such damages. It is very important to know about this before the expert testifies. Otherwise, it will be brought out in cross examination and his testimony will do more harm than good.

Once you find an expert that you like, you may want to keep him and use him again and

again. That may be tempting, but you should beware that keeping a "stabled" expert can lead to a perception that he is nothing more than your mouthpiece.

While you may feel that any expert testimony should bolster your case since you are in the right, the reality is that without careful selection and successful handling, your expert could be used against you. On the bright side, the same techniques can be used to turn your adversary's expert in your favor. ■

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