SERVING AS A RETAINED EXPERT WITNESS

THE SUCCESSFUL EXPERT EXPERIENCE: PRACTICAL TIPS FOR SERVING WELL AND GETTING PAID

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"Lawyers will always want an expert CPA witness who possesses the wisdom of Alan Greenspan, the litigation skills of Clarence Darrow, the charisma of John F. Kennedy, and the technical skills of Bill Gates." – Thomas French, Esq.

I. THE EXPERT ROLE

A.. Testimonial v. Non-Testimonial

1. Testimonial Experts are exactly that what they sound like: They are expected to testify at deposition and in court when required. As a threshold matter when they testify in court, they are first required to be an expert in the field(s) in which they are called to testify qualify when examined through questions by opposing counsel and the court. The process by which the court determines if a purported expert is qualified as an expert for testimonial purposes as to particular subject matter(s) through in-depth questioning of the proposed expert witness is called "*voir dire*." Generally, the work and opinions of testimonial experts are discoverable through interrogatories (written questions) and depositions (verbal questioning under oath) by the opposing side. The names and other information regarding these experts must be listed on the witness list or expert witness disclosure or the court may bar them from testifying.

2. Non-Testimonial Experts are retained and utilized by attorneys to investigate claims and theories, provide review of documents, facts or issues to the attorney for purposes of the case development and strategy formulation and provide opinions on particular issues.

These experts serve the role of litigation support, are not expected to testify and are not listed on the case witness list. Generally, the work and opinions of non-testimonial experts retained by one side are not discoverable by the opposing side unless the opposing side can establish very specific criteria.

B. Fact Witness v. "True" Expert Witness**:** When testifying, witnesses are generally expected to testify only based upon their personal knowledge, and are not allowed to give their mere opinions. Qualified expert witnesses are an exception to this general rule because they are allowed to provide their opinions on the meaning, import and impact of proffered facts. Many attorneys believe that a witness cannot be both a "fact" witness (one who is testifying based upon personal, firsthand knowledge of the facts) and a "true" expert witness (one who is providing opinions based upon facts that were provided to the expert but which he did not witness personally). It can be difficult to qualify a fact witness as having sufficient expertise to be authorized to provide his or her opinions. There are exceptions to many general rules. For example, an orthopedic surgeon who personally witnessed an accident that resulted in an injury should be able to testify and give his opinion about the cause, severity and resulting injury. Many attorneys will retain independent experts instead of relying upon persons who otherwise have sufficient expertise to serve as an expert because the jury may consider him biased or less credible than an independent expert.

II. TIPS FOR HAVING A SUCCESSFUL EXPERT ENGAGEMENT AND GETTING PAID FOR YOUR EXPERT SERVICES

A. Don't sprint before the starting gun fires. Some experts are most concerned about getting the work in the door than performing a proper intake process. Many problems that arise during an expert engagement (including having a client that does not want to pay you) can be avoided with sufficient attention to certain matters at the outset of the engagement.

B. Have a well drafted, signed retainer agreement before commencing work. Many expert witnesses begin an assignment without a signed, well-drafted retainer

agreement because the attorney will often call at the last minute with extreme urgency. Have a form retainer agreement ready that you can complete quickly and forward to the attorney to expedite the commencement of your work.

C. Define the scope of your work with specifics and ascertain the client's expectations from you. The biggest rifts are caused when expectations do not match reality. The expert believes that he is preparing a damage calculation for lost rent while the client (and maybe the attorney) believes that the expert is preparing an expert report for lost rent, damage to business reputation, attorney fees due from the other side, lack of marketability and other damages that the expert may have never heard of from the attorney. Know what you are to deliver before you start.

D. Never inflate your credentials. As an expert, your credentials will be subject to verification and investigation by an opposing team. If you inflate your credentials, it is very likely that your "puffing" will be exposed and likely at the most inopportune time (at deposition, in court). You should have recent and substantive experience in the area for which you are serving as an expert. Once your credibility is destroyed, then your entire worth as an expert is usually destroyed as well.

E. Determine what information you need for your analysis and do not rely solely upon what the attorney tells you. Some attorneys will attempt to limit what the expert sees in hopes that the expert will more easily issue a favorable opinion at a lesser cost. Other times, information will be inadvertently withheld. Don't fall into this trap. As an expert, you should have a list in mind (or better, on paper) of the specific materials that you need to receive and review before rendering your opinion. Look for gaps or obvious omissions in the materials provided. This approach protects you as the expert so that your opinion is not thrashed at a deposition or at trial. You will also be protecting the attorney and the client as a byproduct of your diligence because a case adrift without a credible expert if often lost.

F. Remember that you are an advocate for your opinion and methodology but not the case itself. You are retained to develop your analysis and opinion and not advocate for the client. Advocacy for the client is the attorney's job. You should tell the

truth directly and simply and try to avoid coloring the facts to fit the attorney's theory of the case. The case of *Daubert v Merrell Dow*, a landmark United States Supreme Court case regarding expert testimony, caused courts to focus less upon the expert's mere credentials and more upon the methodology applied by the expert. In other words, the court's inquiry is not focused as much upon whether the expert has enough experience or education, but rather upon how the expert applied that expertise to the facts of this case when rendering an opinion. This new focus more often exposes an expert's biases or attempts at advocacy. The court serves as a "gatekeeper" for expert testimony because it can be very powerful and case-determinative. The court will not allow expert testimony unless the expert is sufficiently qualified with education and experience and the expert developed his opinion through a proper application of his specialized knowledge to a given set of facts or assumptions in a manner that is scientifically reliable and would be sustained by peer review. Later cases have extended *Daubert* to non-scientific experts, such as accountants. The jury is the trier of the expert's credibility and can often "sniff out" if an expert is biased. An objective expert views the underlying data and applies his expertise unemotionally and without regard to how the attorney or client wishes him to do so.

G. Don't put too much in writing too soon (or maybe ever). If it's in writing, it can be had. Experts are human beings and like the rest of us. If an expert sees a weakness or error, or has a question, it is human nature to send off an email or a memo to the attorney or the client. If a report is not required, don't draft one. Only the court, by direct order or by inserting a requirement in a case scheduling order, can require an expert to prepare a written report (unless the case is pending in federal court where there are definitive expert report requirements). The opposing side can inquire about your analysis, investigation and opinion at deposition or by written questions to the client and attorney. However, as soon as you put any of your thoughts in writing, they may as well be carved into Mt. Rushmore. Pick up the phone and talk with the attorney instead of emailing. Although there are court rules about how much the other side can see of the expert's work, a rule of thumb is that if you write it, the other side can see it, because there are ways around most court rules.

H. Include a sufficient retainer in your retainer agreement and do not commence work before the retainer is paid. You should estimate the amount of work that it will take to get started on the engagement and collect at least that retainer to begin. For example, ask the attorney to estimate the amount of materials that you will be required to review initially (such as four banker boxes, etc.), and then estimate the amount of time that you will need to review those materials and multiply that time by your hourly rate. If there are four banker boxes and it will take you two hours each to review their contents at $300 per hour, plus two hours of analysis and communication with the attorney, your service will cost at least $3,000 at the outset. Do not skip this step and start the work without a retainer, or you may end up without being paid.

I. Consider an "evergreen" retainer or a "holding" retainer. There are different types of retainers that experts often use to protect their fee. An evergreen retainer is a retainer that the expert can bill against while the engagement is ongoing, but the client agrees to replenish the retainer to an agreed-upon level each month so that the retainer remains at that level. A holding retainer is a retainer that is held without deduction until the expert submits his final invoice. The holding retainer is then applied to the final invoice with any surplus refunded to the client. Both of these types of retainers will prevent the client from falling far behind in payment or jeopardizing the expert's fee.

J. Beware of certain expert witness referral service companies. There are many referral service companies that provide expert witness referrals to attorneys based upon subject matter areas. The referral companies contract with the expert witness to place the expert's credentials on their approved roster, and then recommend them to attorneys who seek an expert witness. There are many credible referral services but some are questionable. Some of these referral services require that the expert agree in their contract that the expert will only be paid when the referral service is paid by the attorney, and prohibit the expert from contacting the retaining attorney. An example is if the expert is retained through the referral service, and performs $10,000 worth of work and invoices the referral service. The referral service than informs the expert that the attorney will only pay $5,000 for the work as performed. The expert

becomes very dissatisfied and the referral service then underlines that the expert is limited to the payment received by the service and the expert cannot contact the attorney. The open question of course is whether the service was actually paid the $10,000 but then only pays the expert a percentage of $5,000, not $10,000. There is no method for the expert to verify the payments.

K. Avoid overly price sensitive retaining attorneys. Expert witnesses often end up beging stiffed on their bill or a large part of it when they are retained by attorneys who are overly "price sensitive." An attorney (just like any other client) is price sensitive if he complains about the retainer, needs time to pay the retainer (even a small one), restricts the work that the expert can do (micromanage) to hold the fees down, or the attorney says the case is small so the expert should hold down the bill. These are all bad signs for the expert. The attorney then will continue with limiting behaviors that can be very harmful. For example, the attorney may provide only very limited documents, such as excerpts of depositions. The expert's opinion is then questioned at a deposition and he is ripped to shreds because of materials that were not provided. The expert's reputation is damaged and often the attorney will then refuse to pay the expert by claiming that the expert's work was useless.

L. Avoid "rush" engagements. Many attorneys wait until after the last minute to retain necessary experts and are in a rush. This is dangerous territory for the expert because often the formalities of the engagement (retainer letter, retainer, scope of work, etc.) are overlooked due to time limitations and the rush. Only limited case documents are provided to the expert that diminishes the expert's knowledge of the case background. This situation exposes the expert to non-payment and other problems, such as having his opinion destroyed upon examination. Rush assignments should increase the retainer due, not diminish it. Experts should also bill much more often (weekly instead of monthly) on a matter that is nearing trial or conclusion.

If you follow these tips, you should have an improved and more effective experience as an expert witness, and find that you are paid in full more often.