

Best Practices for Choosing and Using Experts

Richik Sarkar, Esq.
McDonald Hopkins LLC
600 Superior Avenue, East, Suite 2100
Cleveland, OH 44114
(216) 430-2009
rsarkar@mcdonaldhopkins.com

How to Know When You Need an Expert

- Litigation strategy
- Client's goals and objectives
- Stage of the proceedings
- Costs of the expert compared with the benefits hoped to be gained through his or her testimony

An Expert Can Be Necessary to the Defense of the Case

- To assist the jury in deliberations or to educate the judge in a bench trial
- To facilitate settlement negotiations
- To support or oppose a motion for summary judgment
- To refute the opposing party's expert
- To quantify damages

Selecting the Right Expert for Your Case

Consulting Experts

- Retained in confidence
- Work product, advice and opinions are not discoverable
- Useful for testing theories, data and analyses
- Invaluable in framing discovery requests to the other side

Testifying Experts

- Methodology, opinions and credentials must be disclosed
- Likely to be subject to a pretrial deposition
- Communications between the party's attorney and expert may be discoverable
- Can be effectively used to defeat class certification, as ammunition for a motion for summary judgment and to present complex liability and damages issues at trial

Criteria to Consider in Selecting Your Expert

- Education and experience
- Attitude
- Availability/accessibility
- Staff
- Venue

Additional Criteria to Consider in Selecting Your Expert

- In-house company employee
- Expert with substantial testifying experience
- Expert with substantial subject-matter experience but little to no testifying experience

Using Experts Effectively

- Retain early
- Give expert access to relevant documents
- Involve expert in discovery
- Include expert in legal strategy

Guiding an Expert in the Preparation of a Report

- Expert report drafts are not discoverable
- However,
 - Do not want to give experts their opinions
 - Do not want to appear to be the expert’s “handler” and risk court order that certain work product is discoverable

Instead, Attorneys Should

- Discuss:
 - Format
 - Assumptions
 - Content
 - Language
 - Opinions
- Fix:
 - Typographical errors
 - But do not make wholesale or substantive changes

Avoiding *Daubert* Issues

- Conduct a background check
- Evaluate the expert witness's credentials, experience in the field and past testimony in other litigation
- Evaluate the scope and reliability of the expert's testimony

Prepping an Expert for Deposition

- Familiarize the expert with deposition procedures and the purpose of objections
- Make sure the expert knows the players and counsel's habits and idiosyncrasies
- Anticipate questions by other side, including "money" questions
- Make sure the expert is familiar with his CV and expert report
- Ask your expert to identify any areas of concern and address them

Using Experts to Assist Corporate Investigations and Complex Litigation

Key Experts

- Economists and accountants
- Computer forensics
- Experienced licensed investigators, especially with experience in foreign jurisdictions
- Experts with subject-matter expertise

Situations Where The Use of an Expert as Part of a Corporate Investigation Might Arise

- As soon as the company suspects it has a problem
- As part of a compliance program
- In response to an anonymous caller alleging fraud
- In response to a subpoena from a government agency

Potential Pitfalls

- Unintentional attorney-client relationships
- Potential conflicts of interest
- Compromising the integrity of the investigation

Conclusion

- Expert testimony can be a critical part of litigation strategy
- It is important to know:
 - When experts are most valuable
 - Best practices in how to select them
 - How most effectively to use them