

FMA Workshop Session: *The Engineer as Testifying Expert*

Part 1: What is an Expert Witness?

Part 2: The Litigation Process

Part 3: Testimony Tips and Tricks

Part 4: The Litigation Support Business

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Initial Contact With the Expert

Questions to Ask

- Briefly get case background – what kinds of case is this?
- Who are the parties?
- Where is or where will the case be filed?
- What deadlines should you be aware of?
- What is the issue(s) that you will be asked to address?
- How much is in dispute?
- How many pages of documents will you be sent for your review?
- Have the other experts been selected yet and if so, who are they?
- Will a report and/or a deposition likely to be requested?
- What has counsel's experience been with these types of cases?
- Where did you get my name?

Retention of an Expert: General Comments

- In contracting for an expert, the attorney is acting as an agent for the client.
- It is the client (represented by the attorney) who remains ultimately responsible for the expert's fees and costs.
- An attorney may obligate himself/herself to pay the expert's fees and costs.
- Ethically, the attorney (or their law firm) retaining an expert on behalf of a client is obligated to see that the expert is paid for litigation-related services
- The compensation cannot be contingent upon the content of the expert's testimony or acceptance by the court as an expert witness

Retention of an Expert

The Contract: Contents

- Description of services to be performed by the expert, or fields of expertise to opine in
- The rate of compensation to be paid for the expert's services, including whether the fee will vary depending upon the services rendered (e.g., research, examination, travel, testimony, etc.)
- Whether advance payments or retainers are required and, if so, under what circumstances
- The handling of costs and expenses
- Cancellation terms and amounts
- The person or persons responsible for payment of those costs and fees

Retention of an Expert

The Contract: Fees

Expert Witness Standard Services \$??\$/Hour

Standard service fees include forensic engineering, case research, data analysis, product testing, facility or field evaluations, preparation of reports and attorney technical briefings.

Depositions and Court Appearances \$??\$/Hour (+\$)

XXXX hour minimum for court appearances and/or wait time.

Litigation Retainer Fee..... \$????/Case

A non-refundable retainer is due upon retention. (applied to final invoice?)

Travel Time..... \$??\$/Hour

Outside services and expenses (travel, meals, lodging and equipment expenses) are will be billed separately at cost +??%.

Retention of an Expert

The Contract: Common Issues

- **Getting purposefully conflicted out of the case.** Attorneys will “retain” you without committing to paying you anything. The purpose is to lock you up and prevent you from working for the other side.
Solution: Clause specifying non-refundable retainer.
- **Not getting paid.**
Solution: Clauses specifying that you must be paid in full before reports are issued or testimony is given. Additional clauses allowing for interest and attorneys’ fees; stating that the venue for the contract is in your local county; stating that retaining counsel is responsible for paying your deposition fees; stating that the contract is made with the law firm, not the attorney or the client; stating that you can withdraw if not paid.

The Discovery Process

- Discovery is pre-trial phase in which each party through civil procedures can request documents and other evidence from other parties; can extend for weeks or months
- You should work with the attorney to help in this process; Provide them with a “Wish List” of documents and data, if applicable
- Your emails or other correspondence is discoverable, so make sure that preliminary opinions, personal comments, strategies, etc. are not written down
- Only communicate substantive questions, comments and findings via phone call unless instructed otherwise
- Your publications and presentations are discoverable so make sure that they are not in contradiction to your opinions in the case and only keep draft versions as needed

Declarations and Affidavits

- Expert witnesses may be required to draft and sign a declaration or affidavit stating certain facts, their findings and/or their opinions in the case.
- Affidavits are written declarations made under oath usually certified by a notary public .
- You would normally be asked to write a declaration stating your opinions on the case and the reasons for your opinions. They are often used in connection with a motion (e.g., Motion for Summary Judgment, or MSJ)
- Your attorney will look at your drafts and make suggestions on improvements. They may also formalize it for submittal to the court.
- Don't change your statements if you feel they are already correct, even though your attorney may ask you to change/"bend" them
- Your line of questions given during your deposition will often follow, line-by-line, the statements you made in your declarations and affidavits.

The Expert Report

- An Expert Report can be produced, and in some jurisdictions is required. This document is wide ranging, depending on the needs of your client or the court.
- The Expert Report defines the issues, states your opinions and points out the short comings of the other side's argument.
- A report provides a more extensive statement of facts, research done, presentation of analyses and opinions arrived at than a declaration.
- A Federal case will require the submittal of an Expert Report in a very specific format.
- Amendments to the report that you produced can also be submitted.
- The Expert Report becomes evidence once submitted and is part of the court record

The Deposition

- A deposition is witness testimony given under oath and recorded by a court reporter for use in court at a later date. The opposing attorney questions you in real-time.
- It is usually taken at a mutually agreed upon location, usually the opposing attorney's office, but can be done via Webex.
- The person being deposed (questioned) is the deponent. Both side's experts are generally deposed (try to get the other side's experts to be deposed first).
- Attorneys from all sides can be in attendance and ask questions. The opposing side's experts can also be in attendance but can not directly ask questions.
- Copies of the deposition are made available to everyone after you have made corrections to the transcripts. Your trial testimony will only cover the material covered in your deposition, and nothing else.
- Your cross-examination at trial will usually stem from your answers given in your deposition.

Settling the Case

- Mediation
 - A procedure in which the parties discuss their case with the assistance of a trained impartial third person(s) who assists them in reaching a settlement. The mediator is a facilitator who has no power to render a resolution to the conflict.
 - An expert witness may be called upon to attend a mediation to make a presentation, to provide technical backup to their client or simply as a spectator.
- Arbitration
 - The process of bringing the case before a disinterested third party for resolution. The third party, an arbitrator, hears the evidence brought by both sides and makes a decision. Sometimes that decision is binding on the parties.
 - Expert witness testimony can be called for in an Arbitration, just like in a trial
- Trial
 - Two types of trial – Jury and Bench (solely before a judge).

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