

Drug Device and Biotechnology Section Newsletter

The Opioid Dilemma - Pain and Punishment

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Without regard to race, ethnicity, gender, age, geography, socio-economic or other demographic, the opioid crisis has grown to be the most inclusive health crisis in American history. And opioids now sit at the top of the agenda for state and federal regulators, legislators, prosecutors and civil litigants. As the media points blame at every stage of the vertical distribution chain; from manufacturers to distributors, dispensers, hospitals, healthcare providers, employers, and possibly even extending to payors, schools and municipalities, our panel will discuss where we are, how we got here and what steps should be taken towards a solution. We will peel back the veneer to expose the themes that comprise the claims to ensure that lawyers defending these claims are prepared to construct a cogent and compelling defense.

An interview with one of our section members – Marisa Trasatti

The following is an interview with an FDCC member, Marisa Trasatti, who shares her experience of moving from one firm to another as outside general counsel to a medical device company, and issues to consider when doing so

What are some of the unintended issues that tag along with being outside general counsel for a company, when considering joining a large national practice law firm? You started at one firm on June 9, 2017, and began at the next one on August 31, 2017 due to a conflict with a client for which you serve as General Counsel (“GC”). What lessons did you learn from this?

There are at least two (2) takeaways from this experience:

1. I am outside General Counsel to a dermatological laser company, Sciton, Inc., in Palo Alto, CA. This made me an appealing lateral hire, however, it is also brought a heightened need to vet conflicts even heavier than if I had been simply outside defense counsel. No piece of general counsel’s workload is transferable and therefore, no conflict is waivable. Therefore, on the front end, any firm considering a lateral hire who has one foot in the general counsel role and one foot in private practice, must consider actual conflicts, as well as future conflicts with: competitors, outsider investors and other interested individuals in the company such as Key Opinion Leaders, physician users, etc., secondary market or used device sellers, and most importantly, how the current work of the GC fits within the overall existing practice areas of the firm such that cross-claims and third-party issues do not rear their ugly heads. Keeping in mind that general counsel may oversee outside local counsel depending upon the company’s insurance scenario (SIR versus deductible), this adds yet another layer of vetting.

The best way to avoid a dilemma like the one that I experienced? Ask the lateral to present a “kill” list of company names, general types of companies that are adverse to the GC’s company, and perhaps individual names which must be flagged for actual or potential conflict purposes going forward. The GC’s company may have exiting contracts to do business with these entities or may just be aggressively positioned against these entities in the industry such that having proprietary information on a joint server (or even with a Chinese wall in place) poses a conflict. Additionally, the list should include “friends” of the company to which the law firm can never be adverse. As far as the law firm is concerned, a broader “ask” to the law firm’s lawyers must be attempted to assure there are no existing clients in the same or similar industry as the GC’s client. If there are such clients, then it is imperative that both sides know such relationship(s).

2. Second, and probably most importantly, this experience demonstrated first-hand how strong of a bond that Federation members enjoy. It is THAT BOND which made my relatively speedy transition possible, and also cordial. Federation lawyers rallied to re-home me provided their genuine support, professionalism, and collegiality. While our spiral wound roster provided a critical initial source of guidance for steering the ship, the personal touches from our members were unparalleled. FDCC is the best organization—BAR NONE—and in my opinion, no other professional organization can offer stronger friendship bonds amongst its members. Admissions Committee, you are hitting it out of the ball park as far as selecting members...please keep it up. FDCC leadership, thank you for teaching us fellowship and civility.

Did you reach out to FDCC members for help? Absolutely and they also reached out to me daily throughout the months of July and August. Rather than call those FDCC members out by name, the real learning here is that we stick together. Countless lawyers around the country, including the one interviewing me, went out of their way to call, text, and email to assure the transition was progressing and progressing hastily. That is the Federation way. An unwaivable conflict gave way to an unwavering bond that all FDCC lawyers share.

What assistance did they provide? They offered overwhelming support including phoning friends in Maryland; taking lead on joint FDCC projects; offering their staff to assist on projects and case assignments as a stop gap; setting up conference calls with their office managers to run through the practicalities of hanging out my own shingle. I have no doubt that the Federation is THE SINGLE BIGGEST REASON that this worked out the way it did, with long standing friendships preserved and new bonds forged.

Tips for Young Lawyers – How to Find the Right Expert

As a young lawyer, you may be asked to track down prospective experts. There are many places to look. Before embarking on your search, ask yourself what type of expert you are looking for:

Should the expert have a national reputation?

Should he or she be published?

Should he or she be a professor or instructor?

Should he or she have led a relevant professional association?

How many years of experience should he or she have?

What educational background are you looking for?

Do you need a professional expert?

 Do you prefer someone with little testifying experience?

 How much experience should he or she have in handling depositions?

How experienced should he or she be at testifying at trial?

How aggressive do you expect opposing counsel will be cross-examining him or her?

What skeletons in his or her closet are you willing to work with?

How much is your client willing to pay?

What technical issues will the expert need to tackle?

How broad a range of expertise are you looking for?

When looking for an expert, consider the following sources to mine for one:

1. **Google search.** Go online and search for the topic that you will need the expert to testify upon.
2. **Google Scholar.** Look up experts who have written on your topics.
3. **Local Universities.** Look up the faculty lists for local universities.
4. **The Ivies.** Look up the faculty lists for the premier universities.
5. **Expert Referral Services.** Study the lists of experts available on expert referral services.
6. **Bar Association lists.** Plaintiff and Defense Bar associations often provide lists of experts used and approved by their members.
7. **Colleagues.** Send an e-mail to colleagues requesting recommendations. Create a circle of other attorneys who ask one another for expert referrals. Make sure to make recommendations when you can, just as you will be asking for recommendations.
8. **Professional Associations.** Look for the professional associations that cater to the type of expert you are looking for. See who is heading or has previously led those organizations. The ones who have held leadership positions generally are more active in their field.
9. **Verdicts.** Do a search of jury verdicts to see which experts' names come up, particularly experts who appear repeatedly. What are the verdicts associated

with their testimony? In the cases they testified, were the results generally favorable for their clients?

When searching for an expert, remember that your goal is to find one that will resonate with the jury (even though most cases settle long before trial). Since your jurors are local, consider a local expert. Search through the faculty list at the local university, and search for someone who is published (demonstrates he's an expert), who teaches (shows that he is comfortable in front of others, teaching them about his expertise, as he will need to do with a jury) and has real world experience relevant to the issue central to your case. Being from Miami, an expert from the University of Miami or Florida International University may have a greater influence on a jury than someone from the Ivy Leagues. Often the expert you are looking for is in your own backyard.

When you have crafted your list of potential experts, take the time to pick up the phone and call them. Yes, you call them. Not a paralegal or a legal secretary. You. Who you hire as an expert can make or break your case, so take the time to become acquainted and comfortable with your choice. Before speaking with him, though, ask his office for a copy of his curriculum vitae. Review his C.V. closely, looking for the following:

1. Is he published? Are any of his texts or articles relevant to the issues in your case? If so, you need to review them. You can't have your expert taking a position in your case contrary to his prior writings. If his publications undermine your case theme, consider another expert.
2. If you're retaining a doctor, did he have to leave the country for medical school?
3. Has he ever held any leadership positions where he was elevated by his peers?
4. Has he received any honors or awards?
5. Does he hold any teaching positions? Is he still active in academia? Professors are accustomed to teaching and your expert will have to teach the jury about your case.
6. When's the last activity on his C.V.? If it's been years since he's written or spoken on a panel, he may not be up on the latest trends.
7. Does anything in the C.V. not feel right? Intuition is powerful. Ask the expert about your concerns. More and more, we read about heads of companies, coaches, and experts fibbing on their resumes, assuming no one will ever find out. Assume your opposing counsel will find out. Even if no one ever has, assume your opposing counsel will be the first. If anything causes you to raise an eyebrow – a degree from a certain university, a speaking engagement, an award – take the time to independently verify it.

In addition to reviewing his curriculum vitae, find everything you can about the expert online. Do a search of the following:

- Google
- Google Scholar
- Westlaw
- Expert's website
- Expert's blog
- LinkedIn
- Facebook
- Online articles
- Online comments on blogs or message boards
- Prior appellate opinions
- Prior affidavits filed by expert
- Online versions of his CV (compare to his current CV)
- Licensing boards
- Professional Associations
- Pacer
- Prior Depositions

Conduct the same investigation you would conduct on the other side's expert. Be assured, that once you disclose your expert, opposing counsel will do everything within his power to find the dirt on your expert. Find it first. Investigate any chinks in the expert's armor. You want to learn about them now, before you retain him, rather than hearing it for the first time at his deposition, or worse, at trial.

After you have reviewed the C.V. and done your online research, you are ready to interview the expert. There are two types of questions - the ones about his expertise and the ones about the skeletons in his closet. The ones about his expertise include:

1. How long have you practiced in ___ field?
2. What are your general opinions about topic ____?
3. So far, our case is based on _____ themes? What do you think about those themes?
4. We anticipate the other side will rely on _____ themes? What do you think about those themes?
5. The facts of the case are _____. Based on those facts, what was our client's responsibilities? What were the opposing party's responsibilities?
6. What are the applicable standards?
7. How familiar are you with the issues involved in our case?
8. How much do you charge?

9. How much do you anticipate charging in this case?

These questions are directed to gain an appreciation about the expert's expertise - how broad and deep it is and how applicable it is to your case – and to gain an appreciation regarding what his role will be in your case.

If you're comfortable with his expertise, then ask him the tough questions. You owe yourself and your client the duty to ask your prospective expert these questions. Be upfront with him. Let him know that you ask all your prospective experts some tough questions. You do not mean to offend him and he should not be offended. Let him know that you, someone you know or someone you read about had a bad experience with a seemingly qualified expert and because of that experience, you go through a thorough list of questions just to avoid any surprises. Your questions will help you find out the following that the expert neglected to tell you:

“I am a convicted felon.” Yes, your expert may have a criminal past. He may have been guilty of crimes that undermine his credibility. Ask him if he's ever been convicted, arraigned or arrested. And then do your online background search to confirm his answers.

“I am a person of interest in a federal investigation.” It is easy enough to find out if an expert is a convicted felon. But what if he is a yet-to-be-convicted-felon? Just ask him. And by the way, do Google searches for your experts, and check the websites for the local papers where they reside to see if they have received any negative press.

“I had a substance abuse issue.” Experts are human like the rest of us. They too can succumb to the temptations of alcohol and drugs. If it has affected their professional life, such concerns may have been flagged by their licensing board.

“I lied on my curriculum vitae.” Yes, sometimes experts fudge their resumes. And yes, they are naive, or arrogant or just plain dumb enough to think no one will find out. If your expert lied on his resume, his credibility is shot. Who is going to believe what he says about whether a given product is defective, when he lied about what degrees he earned or what course work he took? If there is anything that raises any red flags on his CV, ask him about it. And ask him the ultimate question, “Are there any issues on your CV I should be concerned about?”

“My professional license was suspended.” “So Mr. X, has your license ever been suspended, revoked, curtailed or been the subject of an investigation?” Just ask. Also, he may belong to a board, organization or association that keeps track of such suspensions and makes them available to the public. Take the time to look and confront the expert with what you find.

“I collapse like a deck of cards at trial.” There are experts, and then there are experts. There are those experts who look great on paper, but when they take the stand they wilt like a dandelion. You need to ask them how often they have testified at trial and the verdicts in those cases. Then ask for the attorneys who retained them in those cases and ask them how the expert performed on the stand.

“I have a bit of a temper.” Some experts are prima donnas. Some have short fuses. Some are temperamental. Some are impossible to get a hold of. You need to spend some time with your expert and gauge his personality. Is he going to be easy to work with or does he have an ego, personality or character flaw with which you will have to contend. Ask for references of other lawyers who have retained him and ask them how easy (or difficult) this expert was to work with.

“My opinions have changed.” Your expert may have already addressed the very issue central to your case in a prior case. In fact, he may have once held an opinion that is just the opposite of his opinion in your case. You need to ask him whether his opinions have changed or evolved and ask for the names of the cases where he tackled the same issue and get his report or deposition from that matter. Odds are opposing counsel is going to get his hands on that report or deposition.

“My opinions have been disqualified.” Find out if he has ever been the subject of a *Daubert* challenge, and if so, whether the challenge proved successful. Has a court ever limited or struck his opinions? Has a court ever stated he was unqualified? Has his opinions ever been the subject of a written opinion? Make sure to do a Westlaw search to see if any appellate decisions have criticized the expert.

“I don’t think you’re going to like that article I wrote.” You hire experts because they are leaders in their fields. As experts, they often have been published and have taken positions in the articles they have written. You need to ensure those positions are not contrary to yours. Ask him what articles he has written on your topic, review them and make sure they support, not undermine, your case.

“I cost a fortune.” On the front end, find out what the expert is going to cost. In fact, ask what he generally charges for cases such as yours. Be up front regarding what records you want him to review, what testing you want him to perform, whether you need a report and when you need it. After you’re honest with him about what you want, press him to be honest with you about what his final bill will be. Clients hate big expert bills, and juries are suspicious of them.

This is not an exhaustive list of tough topics. Some other tough questions to ask include:

1. Have you filed for foreclosure?
2. Have you filed for bankruptcy?
3. Have you ever been sued by a client?
4. Have you ever sued a client?
5. Have you ever been accused of sexual harassment? Discrimination?
6. Have you ever been fired?

Your expert is there to help your case, not undermine it, and nothing undermines your case more than an expert with a secret that affects his credentials or credibility. Take the time to ask the hard questions. You will be surprised how often you will come across an expert who is not what he seems to be and who can hurt your case with who

he really is. A little legwork can help you avoid retaining such an expert and retain the right one for you, your client and your case.

After you speak with the expert and are prepared to take the next step, ask for two to four references, other attorneys (both plaintiff and defense) who have retained his services. Call them, and ask them:

1. Is he easy to work with?
2. Is he arrogant?
3. Does he have any pet peeves?
4. How responsive is he? How responsive is his office?
5. How good of a witness is he at deposition? At trial?
6. How much was his total charge to you in your case?
7. Does he have any skeletons in his closet?
8. Where is he subject to impeachment?
9. Any issues with any of his licenses or certifications?
10. What did you like about him? What didn't you like about him?
11. Would you use him again?
12. Anything else you remember about him?

Track down prior depositions the expert has given, as well as prior trial testimony, and review it. How does he come across? What skeletons came out? What flaws were exposed? How did his opinions hold up under cross-examination? If your expert is hesitant to direct you to prior testimony, that may be a red flag.

The right expert can make your case. The wrong can break it. There is no such thing as too much due diligence when deciding upon an expert.