

# Tips for Finding and Vetting Expert Witnesses

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Regardless of your litigation practice area, the time will come when you are in need of an expert witness. Needing an expert usually means you have encountered issues that require specialized knowledge, and often in a field you have not had to deal with before. Given the world of information and potential resources now available, the task of identifying a credible, qualified expert can be daunting. This is especially so given that your expert's ultimate opinion often is the critical component to establish your case, or to refute the opposing party's case. So, where do you begin? Undoubtedly, there are many methods for researching, identifying, vetting, and ultimately retaining an expert. This article proposes a method for doing so both efficiently and effectively.

## Finding the Right Expert for Your Case

Locating the best expert for your case takes both creativity and diligence. The search for your expert should be done as early as possible. This is because it can take some time to locate and retain the right expert. Experts, like attorneys, are very busy, and the expert may not get back to you right away. Also, you may connect with someone who seems like a good fit for your case, but after speaking with the expert, you may realize that he or she does not have the right qualifications.

It may be tempting to start your search for an expert on the Internet. However, this is generally not the most efficient way to find an expert. Internet searches can be time consuming, and you may not locate an expert with the precise qualifications that are tailored to the needs of your case.

One of the best ways to find an expert is through other attorneys who have experience with experts who may fit the bill. Start by asking attorneys at your firm, but broaden your search if need be. If you are a member of a group of lawyers, such as the American Bar Association, Inns of Court, or American Association for Justice, try reaching out to an attorney with a similar practice area within that group. Listservs are another avenue to find experts through other attorneys. Listservs are typically keyword searchable, or you can post your own request for an expert to the group. Colleagues usually respond and will share their experiences with the expert. You may be surprised how helpful an attorney, even one you have never met, can be when it comes to finding an expert. For example, in one case, contact with the plaintiff's attorney listed in a published case that grappled with similar issues yielded not only expert recommendations but also the experts' curricula vitae and relevant deposition testimony from that case. Starting from scratch with an expert can be painful and expensive—having another attorney to consult with who can refer you to a good expert and tell you what to expect is extremely beneficial.

Similar to consulting with other attorneys to find an expert, your client may be an excellent resource for locating an expert. He or she may be familiar with the respected experts in the field, and may also know who the quacks are. Talk to your client. You may find a wealth of information about potential experts.

Another efficient way to find a good expert is to become knowledgeable about the subject area and determine who the authoritative experts are in the field. While researching your case, be mindful of the authors of pertinent articles. An author who is particularly versed in the topic may be a good match for your case. In medical malpractice cases, in particular, databases of medical literature can help identify particularly helpful articles, the authors and editors of which may be good consulting or testifying experts. Similarly, if there are pertinent guidelines or standards that apply to your case, the editor or lead author of the guideline or standard may be a good choice as an expert. Industry leaders are often involved as a team in drafting code provisions or industry standards. Contact the editors of the

relevant provision or standard to see whether they might be willing to serve as an expert in your case.

A legal research database search for cases similar to your case including the search term “expert” may yield cases where an expert is mentioned. Finding an expert who has opined in a similar case also makes it more likely that the expert will be a good fit for your case. Often, if expert testimony is discussed in the case, you can assess whether that expert has the appropriate qualifications. These types of searches can be very helpful because you can determine at the beginning of your search whether the expert’s qualifications have been challenged.

There are numerous expert services available to an attorney to select an expert. However, these services can be expensive. Further, professional experts suffer from potential credibility issues because they may not really practice in the field. A witness who primarily works in the relevant specialty and does consulting work on a part-time basis will not be subject to the same criticism. Not all expert witnesses found through a service are professional witnesses, and use of these services can be beneficial. However, if a service is used, it is important to first learn how the expert allocates his or her professional time, and to be mindful of the challenges ahead if the expert is a professional witness.

#### Tips for Finding an Expert:

- Start early
- Ask other attorneys
- Ask your client
- Become well-versed in the subject area and learn who is respected in the field

#### Proper Vetting of Experts

Once you have identified potential expert witnesses for your case, you should vet those experts thoroughly to determine the right one for you. Lawyers generally have very little control over who the fact witnesses will be and often are faced with less than ideal options to obtain good testimony. Choosing an expert provides an opportunity to pick the best person to provide helpful testimony. Thus, you should exercise both discretion and control in choosing an expert witness who will be the most effective for your case.

Vetting experts has two purposes. First, you want to make sure that your expert is a “good” one—in other words, that a judge or jury will consider this person to be a qualified, credible witness and be willing to accept his or her opinion. Second, you want to discover any potential weaknesses or other issues that opposing counsel may use in an attempt to discredit your expert. In performing this due diligence, it is vital to uncover any potential biases, discrepancies, or other actions or information that may impact a fact finder’s willingness to accept your expert’s opinion. Once you have this information, you may conclude that the expert is worth retaining, or you may conclude that the expert’s background or experience is too risky for your case. In either event, you need to have the knowledge in the first instance.

Typically, one of the first steps in vetting a potential expert witness is to ensure there are no conflicts of interest with any party in the case. It would be very difficult to overcome an expert’s affiliation with some entity or individual with a stake in your case if you were to discover this after you make your expert disclosure. While an expert should automatically assess a new matter for conflicts, it may be worth asking for written confirmation from the expert.

Assuming there are no conflicts, an attorney should carefully review the expert’s credentials. By undertaking this analysis, you not only are checking the expert’s qualifications for relevance to your case (and the weight and credibility they provide to this potential expert’s testimony), but also are confirming that the background information you have is accurate and complete. Needless to say, it is imperative that an expert’s curriculum vitae is accurate. This can typically be completed through Internet research, although contacting universities

or other relevant institutions that the expert has identified may be appropriate depending on the case.

As part of your analysis of the expert's credentials, you may also run a search to determine what information is available in the public domain. With the advent of social media, blogging, and various other Internet publication avenues, it is important to understand what your expert may have said publicly in the past. It is especially important to understand if your expert has taken a position that relates at all to the opinion he or she will provide in your case and whether any publicly available information undermines the expert's credibility as a witness. While one would hope an expert would disclose information that may impact his or her credibility, this is not always the case. As with nearly all things in litigation, it is better to know any damaging information—such as previous disciplinary decisions or loss of a license—up front rather than while your key expert witness is being cross-examined.

Another way to vet a potential expert is to review the expert's publications. It is important to know if the expert has published anything relevant to the issues in your case and, more importantly, whether the expert has published anything that contradicts the position needed for your case. While these are the obvious issues to look for, the analysis should go beyond this to explore whether any published work, theory, or opinion of your expert has been discredited in any way. While previously discredited testimony may not go directly to the opinion or topic in your case, you should at least be aware of any issue that may potentially impact your expert's credibility. Similarly, a review of the expert's previous testimony is a good way to obtain information on your expert. Just some of the information that may be obtained through this review includes the topics covered (how broad a scope this person is claiming to be an expert on), the side the expert typically supports (always the plaintiff? always the defendant?), and the expert's previous testimonial experience. While none of this—or even the absence of previous testimony—would likely serve to disqualify an expert in and of itself, it certainly is relevant information to know.

Meeting the potential expert—face to face if at all possible—is invaluable. This meeting serves two distinct purposes. Perhaps more importantly, a meeting provides you with the ability to assess the expert purely as a potential witness to determine how this person will be perceived by the fact finder. It may be that this expert has astounding credentials and on paper is a highly qualified expert in the precise relevant field you require. However, if this person simply does not come across as a good witness—whatever the reason—then the expert's credentials may have very little effect on the outcome of the case and the expert may hurt your case more than help it.

Second, meeting the expert also provides the opportunity to obtain information that may not be either readily ascertainable from an expert's curriculum vitae or otherwise available. For example, while the expert may have provided a variety of cases where he or she has acted as an expert, you may wish to explore in what capacity the expert acted (which can be especially important if the expert acted only in a consulting role and thus was not asked to provide an opinion that would be easier to spot in the public domain) and how often the expert has actually been called upon to provide deposition testimony, write a report, or provide live trial testimony. You may also wish to explore the expert's previous experience with facts of cases that seem similar to yours and the positions the expert took in those cases. Of course, this also provides you with the ability to, in real time, assess the expert's working knowledge of the area of claimed expertise.

Another way to vet a potential expert is to contact counsel in cases in which the expert has been retained previously. While the expert will likely have chosen specific references, do not limit yourself to contacting those people. A review of disclosed cases and a quick docket search can give you a wealth of resources with firsthand knowledge about the expert candidate—from both a retaining attorney's and an opposing counsel's perspectives. In my experience, counsel has been more than willing to discuss experiences with an expert, both good and bad. There may also be court orders that are relevant to your expert, such as previous *Daubert*-related motions or other motions to disqualify the expert that may come to light by reviewing these previous cases.

#### Tips for Vetting an Expert:

- Evaluate conflicts early

- Verify the expert's credentials
- Read what the expert has written or stated about the subject matter on which you are retaining him or her
- Meet the expert
- Talk to attorneys who have previously retained the expert

## Conclusion

Identifying an expert witness can seem like an overwhelming task filled with potential pitfalls and rabbit holes. It can also feel like an exercise in futile wheel spinning. However, by taking an organized approach, leveraging available resources, and knowing what questions to ask, finding and retaining an expert can be done efficiently and effectively.

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