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TIPS FROM THE EXPERTS: GETTING THE MOST OUT OF YOUR EXPERTS

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Law firms increasingly rely on outside experts in litigation. As this practice becomes commonplace from class certification to liability to damages, attorneys look for best practices in working effectively with experts. Managing the costs of selecting experts and working with them through testimony can be especially daunting in large cases involving multiple experts or complex discovery processes.

Over many years of supporting experts in litigation and serving as experts ourselves, we have developed principles and practices that enable us to manage the process efficiently and help our clients derive maximum value. In this article, we share some guidelines and tips for getting the most out of your experts, from the outset of the project through trial testimony. While it may not be possible (or practical) to follow all of these suggestions for all cases, doing so to the extent possible can be a great help.

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Getting Started

***Plan ahead when considering experts*.** Some cases may benefit from multiple testifying experts. Start by considering anticipated phases of the case (class certification, liability, damages) when determining the scope of your expert needs. Breadth of consulting support can help you avoid retraining a new support team when new experts are added. For larger litigation, identifying an expert early will lessen the risk of losing the expert's services to another party in the litigation.

Most academic experts have teaching and research duties that can restrict the time they have available for consulting activities. The more senior academics often teach one semester per year. Identifying this period in advance, and working around it by utilizing the summer and other non-teaching periods, will maximize the expert's availability for your needs.

Set a reasonable schedule. Whenever possible, work with the opposing side to provide experts enough time to perform their analyses and write their reports. Leaving only a few weeks for rebuttal reports and depositions can result in rushed work – and though plaintiffs often prefer a tight schedule, both plaintiffs and defendants benefit from having time to respond properly.

Because clients often want to review reports prior to filing, experts must complete their reports well in advance of the actual deadline. Depending on the complexity of the report, up to two weeks may be needed for auditing to ensure an error-free analysis and preparation of backup material. Planning to substantially complete the report several weeks prior to the deadline will leave sufficient time for you to review it, for your expert to address client comments, and for the expert's support team to resolve last-minute concerns, audit the report, and complete backup material.

Include expert costs in your budget. Consulting and testifying experts can be significant expenses, and you should ensure from the outset that your budget includes line items for this purpose. In all cases, agreeing early on a scope of tasks and requesting regular updates is the best way to avoid surprises and manage costs. Mid-course changes as well as last-minute rushes are costly. If it is not initially clear which tasks are to be completed, hiring consulting experts may help to bring focus to the right topics once the issues are better understood. In large cases with significant ramp-up costs, you can minimize the costs associated with document management, learning curves, and coordination among testifying experts by relying on consulting experts for all phases of the engagement, with testifying experts assigned to specific tasks.

Agree up front on what is discoverable. Judicial rulings on discoverability remain in flux. Given the uncertainty of this environment, agreement with the opposing parties on document discoverability will result in clearer testimony and reduced costs as the process is streamlined. For example, you might agree not to produce draft reports and to limit discovery to material "relied upon" rather than merely "considered" by the testifying expert. In the absence of such agreement, careful document management including emails and voice mails (which are now often digital files similar to emails) will avoid confusion as well as lengthy and expensive e-discovery.

Plan ahead when drafting confidentiality/protective orders. Confidentiality/protective orders (CPOs) take many forms. In their most extreme, but not uncommon, incarnation, CPOs must be signed by every individual working on the team (expert and support staff alike) and must be sent to the other side for approval. Such an arrangement has several drawbacks. First, it requires you to disclose your experts (testifying and consulting) and support team long before expert reports are due. In addition, it creates delay and coordination costs that are often burdensome and can slow the process at critical times (e.g., when auditing must be completed quickly and requires additional "fresh eyes" to review statistical programs and exhibits). A convenient way to proceed is to have the CPOs require signatures from one representative per entity, rather than every member of the team, though this approach must be balanced against the value of knowing the size of the opposing group.

Working with the Experts and the Client

Manage information flow. When massive amounts of documents and facts are involved, it is tempting to restrict the amount of information flowing to experts. However, because the expert is independent and must consider all relevant information, such an approach can backfire, leading to surprises in deposition or testimony and potential amendments to a report. Providing access to all documents and fact

witnesses while assisting the expert in the selection of relevant documents is the safer way to proceed, and can be done efficiently. Costs can be minimized by relying on those working under the expert's direct supervision (and at lower rates). Such staff can pre-screen client personnel for discussions with the expert, review documents, and develop factual summaries that consist of quoted excerpts and are devoid of opinion.

Manage documents. On smaller cases, sending all documentation to the experts and spending time reviewing the materials with them is often most efficient. On the other hand, ten boxes of documents accompanied by a two-sentence cover note – something we've experienced – is not an effective way to proceed. On the largest cases, direct access to the document management system is by far the best way to manage the process effectively.

In one recent case, the law firm we were working with installed its proprietary document management system and database program on our computers to provide us with electronic access to all documents. In real time, we could query the fully text-searchable database for documents or keywords. This saved considerable time and money (and trees) despite the initial investment. If such a system cannot be made available to the expert, try at least to provide documents in a searchable format on CDs.

Designate an attorney to communicate with the experts. In large cases, designating a point person whose responsibilities include communicating with the experts avoids unnecessary work and ensures coordination of expert research and legal strategy.

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The point person should be quantitatively skilled and have some decision-making authority or direct access to a senior case manager.

Agree on an outline and define the scope of the analysis. In some cases a significant initial stumbling block is defining the question or questions you want the experts to address. Choosing the right questions and establishing the scope of the analysis have obvious implications for your budget; they are also relevant to determining how many experts you retain. Experts may be helpful in guiding you on which questions they think they can answer. Expect the outline to change over time, but ensure that the experts do not stray from their area of expertise. While experts should provide the most rigorous analysis of the facts of the case, they should also know when certain matters are better addressed by other witnesses, be they fact witnesses or experts in other areas.

Experts can often help attorneys better define the questions that will advance their case, as well. From an expert's standpoint, the goal is to define questions that are sufficiently narrow to fall within his or her specialty, while also being broad enough to be useful to the client. Some experts are comfortable defining an expansive scope of research, whereas others prefer defining a narrow scope. Equally important as defining the questions effectively is defining them early. The experts and their support team should discuss the questions as soon as practicable, and the attorneys should provide their insights to get the team headed in the right direction with the right information. This significantly reduces the likelihood of spending time on research that ultimately does not become part of the expert's opinion.

Ensure an effective audit process. Extensive work goes into producing reports in litigation. The case team supporting the experts should have an audit process in place that ensures that all analyses were performed correctly and that factual statements can be verified from original source documents. In addition, the audit process should make certain that no information in the report is the result of only one person's input or review.

Making Testimony Effective

Ensure testimony is based on science. Contrary to what many believe, expert testimony in litigation is not always based on rigorous quantitative analysis of the data involved in a case. Too often, we have seen experts provide analysis that does not scientifically demonstrate the validity of their claims.

For example, we were recently contacted by a lawyer seeking an industry expert who could opine on the impact that a particular song on a CD had in influencing sales of that CD. We stressed that the question should be addressed in a scientifically rigorous way, and therefore the client decided to retain an economist. The plaintiff side retained an industry expert who formulated an opinion based solely on her experience, not on science. Her testimony was stricken on a Daubert challenge and, consequently, the plaintiff could not present damages testimony at trial.

In other instances, an analysis can appear to be based on science when it actually is not. For example, we worked on a case that involved understanding the causes of increased use of a particular drug. The opposing expert asserted that the increased use of the drug in question was due to its improved quality. He attempted to prove this theory by demonstrating increased usage with a model showing changes in consumption patterns of certain drugs. In reality, however, the increase in usage of the drug was driven by the increased percentage of people treated in long-term Medicaid facilities who were eligible for drugs on formulary. The drug in question was on Medicaid's formulary, and the increased number of qualified patients led to an upsurge in its use. The data demonstrated that the increase in consumption had nothing to do with the quality of the drug, contrary to the expert's claims. His analysis is an example of testimony that looks like science, but isn't; rather, it is correlation without causation.

We are all too often surprised by attorneys who cross-examine experts on theoretical areas of their expertise. You are unlikely, for example, to win a debate on the intricacies of GAAP with an accounting professor.

Strive for an objective tone on direct and cross examination. Otherwise strong experts sometimes may fail to present their testimony in a professional manner. On direct examination, they are friendly and expansive with the attorney, but on cross examination, they clam up or become adversarial. This change in tone (or even body language) can create an impression that the expert is a "hired gun" rather than an independent and objective authority.

Attorneys should help experts to convey objectivity when they testify. In practice, this means that experts should answer questions – on both direct and cross examination – in a way that conveys they are helping the fact finder to understand their opinion fully. There is no reason for experts to change their demeanor when responding to direct or cross examination, thereby reminding the court that they were hired by one of the parties and not the other.

Don't challenge opposing experts on their turf. We are all too often surprised by attorneys who cross-examine experts on theoretical areas of their expertise. You are unlikely, for example, to win a debate on the intricacies of GAAP with an accounting professor. The attorney should stay focused on how the expert's research and opinion are grounded in the facts of the case. Working in advance with your experts and support team can help you develop an effective cross-examination strategy for your opponent's technical analyses.

Conclusion

Optimizing the work of experts in litigation involves putting in place a series of steps and processes from initial planning at the outset of the case to supporting testimony at trial. The practices described above are important not only because they can enhance the work of the experts and improve the attorneys' chances of success: they are also crucial to effective budget and time management. By combining thoughtful planning to save time and reduce costs with practical knowledge of what makes testimony effective, you can leverage your experts' skills to best serve your clients.●

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