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How To Choose The Best Product Liability Expert

Law360, New York (June 23, 2009) -- Albert Einstein once said "[I]f a man spent 15 minutes a day on a certain subject, he could become an expert within a year." If that's the case, then why do we need independent experts?

Regardless of our knowledge and background, attorneys cannot testify in most cases. As advocates, we do not want to testify. Experts, however, can provide needed objectivity and a "reality check" by serving as sounding boards and helping to evaluate cases. They explain technical points, how things work and how one may win a case.

Experts are "super witnesses." Only an expert, despite not having any personal knowledge about the accident itself, can offer opinions as to what happened, why it happened, what caused it and what might have been done differently.

Moreover, expert testimony is required by most courts. Cases now may require the most qualified expert that the case can support. As the U.S. Supreme Court stated in Weisgram v. Marley, 528 U.S. 440 (2000), in the era after Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993), it is hard to understand why a litigant would do anything other than take its best shot at the technical aspects of a case, including hiring an appropriate and well-prepared expert.

OK, so experts are a necessity. But how do we get the most out of the expert inquiry?

When to Acquire an Expert

Begin with the trial in mind. Retain your experts early. No attorney should or can properly or practically evaluate a case until he or she has decided if expert testimony is necessary. Be proactive to identify the need for expert witnesses. Exercise your duty as litigation counsel to evaluate the matter fully and completely at the earliest available opportunity.

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Choosing the Right Expert

Picture a three-legged stool. One leg rests on the issues involved and what experts are needed to support those issues. The second leg rests on the appropriate qualifications, knowledge and experience of the expert on the relevant subject matter. The third leg is fairly planted in the trial skills, communication skills and experience of the expert. The right expert provides all three.

Consideration of Case Issues

The first step in any case is to consider the legal and technical issues involved and what disciplines those issues require. What proof requirements are involved and what expert disciplines are needed to address them?

Prior to filing, a plaintiff must consider upfront the experts needed to support the technical issues and nuances of a case. What issues require specialized knowledge, skill or experience to best present the matter to a jury?

The defense benefits because most of the issues are framed by the allegations and theories of the plaintiff's case. However, the defense should perform an independent evaluation to determine what types of experts are needed. Plaintiff's counsel may not have framed all issues.

In fact, by the time discovery is complete, the trial may turn on different issues than originally anticipated by the pleadings. The defense must anticipate issues that may not be apparent in the initial pleadings.[1]

What Disciplines Are Needed for the Issues Involved?

Allegations will vary, but many times (e.g., product cases) they are not new and have been at issue in previous litigation. If the allegations are unfamiliar to you personally, get in touch with counsel handling similar cases. Look at jury verdict databases and organizational databases. If a particular expert was used previously, determining the success of the expert will dictate whether you may want to retain him or her.

Determine quickly whether the allegations are new or unique. From the plaintiff's perspective, look for similar matters. For the defense, this can be determined in the initial consultation with the client. Determining whether the allegations are new or unique is imperative to the potential success of the case. No attorney wants to be the first to set bad precedents with experts unfamiliar to a given area.

Both sides also need to determine the "number" of experts a case can support. Typically, the number of experts retained is governed by the issues and disciplines needed. For the defense, it may also depend on how many (and specifically whom) the plaintiff has retained.

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Generally, defendants have a relatively small timeframe to designate defense experts after plaintiff's designation. Whether the defense experts already retained can handle all issues that the plaintiff's expert covers requires immediate discussion with all experts on the defense team.

Budgetary Considerations

Expert fees are significant. Technical proof needs can overwhelm a $10,000 or even a $10 million injury case, so the potential verdict of a case must be considered. The plaintiff must evaluate the technical proof requirements from an economic standpoint before even taking the case.

Economics are also a factor to the defense. Client and counsel should discuss early in the case the economics and develop a course of action. Statistically beginning with the end in mind means the "finish line" may not be a trial — it may be mediation or resolution.

All things being equal, the expert's monetary compensation should not be the overriding factor in the expert's retention. Rather, the expert's qualifications, experience and ability to communicate effectively with a jury should control.

Where Do You Find the Expert Who Fits the Issues?

Sadly, no "Expert Superstore" exists. If you have not dealt with experts in the area before, a good start is checking out experts in other cases for both the discipline at issue or for referrals. The case may have been investigated before your suit and some experts may already be on board.

For "new territories," referrals from other attorneys and consultation with other experts are often the best sources. Be sure to do your own homework and ask the referring attorneys for specifics on how they retained the expert, the length of the expert's involvement, whether they were able to observe the expert's demeanor and testimonial acumen, the strengths and weaknesses of the expert and to give recommended expectations.

Several referral services can match experts to cases. Consider expert referral services only as first step — do not skip your own due diligence.

Sources:

— Prior case — Client referral — Experts investigating incident prior to suit — Relevant industry publications, industry standards or governmental standards (review publications to determine experts) — University faculty — Counsel in other cases — Referral from experts in similar fields — Organizational and industry meetings and databases (both legal and general industry) — Case and verdict reports — Expert

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referral sources — Media coverage — The Web (be very careful, here, and only if expert can be vetted through many of the points above)

Qualifications of Your Expert

Anticipate a challenge to your expert before the trial. Motions to exclude or curtail an expert's opinions are commonplace. One must ensure that experts meet the rigors for courtroom testimony.

Federal Rule of Evidence 702, as interpreted by Daubert v. Merrell Dow, 509 U.S. 579 (1993), established landmark standards for admitting expert testimony.[2]

Under Daubert, expert testimony must meet three tests: (1) the expert must be qualified and possess special expertise, (2) the testimony must be reliable (meaning the expert's opinion must be based on scientific methods and procedures as opposed to subjective belief or unsupported speculation), and (3) the opinions must "fit" the case, i.e., must be relevant and assist the trier of fact.

The courts examine a variety of factors to determine the second prong of reliability and methodology regarding expert testimony. Calhoun v. Yamaha Motor Corp. U.S.A., 350 F.3d 316, 321 (3rd Cir. 2003). The factors include:

— whether the method contains a testable hypothesis — whether the method has been reviewed by the expert's peers — the method's known or potential rate of error — the existence of standards related to the method — whether the method is generally accepted — the relationship of the technique to other established reliable methods — the expert's qualifications — the method's utility in non-judicial applications

The Supreme Court broadened this holding to not only scientific knowledge but also to "technical" and "other specialized" knowledge. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

Rule 702, Daubert and the cases that have followed have increased motion practice and hearings surrounding experts and their ability to testify.[3] Some cases involve extensive expert discovery and days of qualifications hearings," or "Daubert hearings." How each court applies Daubert and/or Frye standards creates a patchwork quilt of procedures and varying degrees of scrutiny. The intricacies and details of how any particular court applies these standards in a given case will determine the acceptance or rejection of experts. The point: Expect your experts' qualifications and methodology to be tested.

Technical Qualification vs. Experience — As a practical matter, technical qualifications without any experience leaves a void. On the other hand, significant experience without technical qualifications creates qualification difficulties. Usually, as case complexity increases, so does the need for someone with technical qualifications and significant experience in the area.

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Even if the expert is preeminent and clearly sufficiently educated and experienced, the failure to properly test or conduct a proper methodology may doom your case. See, e.g., Rosen v. Ciba-Geigy Corp., 78 F.3d 316 (7th Cir. 1996). A court may simply conclude “that there is simply too great an analytical gap between the data and the opinion proffered.” General Electric v. Joiner, 522 U.S. 136; 118 S. Ct 512; 139 L. Ed. 2d 508 (1997).

However, once the court “qualifies” an expert, does the expert’s pedigree really matter? Many believe the battle of the experts is won by the Ph.D. over the B.S.[4] While in a close case, credentials may “break the tie,” jury research supports that in the vast majority of cases, credentials are not the key factor in believability or credibility of the expert. The ability to speak clearly, organize thoughts and educate — without patronizing — carries more weight than the location of the degree obtained.

Background Check — This step (often perilously ignored) must be done. Always perform some sort of double-check on an expert’s resume — at least a quick web search and email request for any relevant information from colleagues and expert references.

Never take an expert’s résumé for granted. Not surprisingly, experts fail to catch flaws in their own resumes. They may fail to remove organizations to which they no longer belong or fail to update employment.

If one can establish that an expert has been less than candid on the résumé, it can destroy the expert’s credibility. If it is your expert, you do not want to be on the receiving end of a courthouse “gotcha” moment.[5]

Organizational Database Check — Lists are maintained by various professional legal organizations. We have found professional organization databases to be reliable sources because they are the byproduct of lawyers who have encountered the expert.

Private for-profit referral organizations also exist that feature experts. They may be fine, decent sources but understand these sources have a profit motivation.

Personal Reference Check — In addition to formal professional background check, one should use all the personal references one can, especially with a new expert. Clients, former counsel who have used the expert, or even experts who have been involved in cases with the other expert are sources for information. Whether reviewing your own expert or looking into the background of an opposing expert, these sources are invaluable.

Effective Trial Presentation

The Face-to-Face Meeting - Frankly, no substitute exists. The best way to explain to the expert exactly what you need and what the case is really about is face-to-face. What are your first thoughts and conclusions when you meet the expert in person? Most experts

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are only on the stand for a short time. Your first impressions are likely the same as jurors. Take notes of any potential issues and address possible negative impressions in a positive and constructive manner.

People Skills — In general, assess an expert's people skills. One wants not only a stellar technician, but also a friendly, positive, inquisitive, problem solving, supportive and willing expert with ideas and strategy on how to best communicate with the opposing side, the judge or the jury. People like friendly, positive and affirmative individuals. An expert who is only negative about the opposing theories is not extremely beneficial.

You want a teacher that questions the reasons why something occurred, questions the other side's theories and explains matters simply. Jury research shows jurors prefer experts that are educators — not advocates.

While the expert *must* speak with conviction and confidence, leave the advocacy to the attorneys. Experts should be cautioned against being an educator on direct and turning into an advocate on cross. Experts have to be seen by the jury in the most neutral light possible as to their loyalty without a stated agenda.

Communication Skills — Despite what some may say, experts really are people, too.[6] Experts are the ones who testify. Their ability to communicate with a wide range of people is essential. This is more than "people skills." Even the friendliest, most positive person may not effectively communicate ideas.

Can your experts provide examples, real world analogies, tests, and visuals? Can they run simple, real world experiments? Can they provide real world explanations like "Bill Nye," "MythBusters" or "Bob Vila"? Can they supply concrete examples when explaining technical work or theories? When you ask, "Please explain that to the jury," the expert who can pull examples from his or her own pocket has the necessary communication skills.

Conclusion

The bottom line: Almost any case today requires one (or often more) experts. Start by figuring out all of the issues, then by finding the most qualified expert with experience that synchronizes with the subject matter. Getting your expert(s) involved as quickly as possible sets the best foundation for leveling your case on solid ground. All the while, one must consider both the economics of the case as well as your legal burden when choosing the appropriate expert.

In the end, consider where you are, what audience you are playing to, and what expert(s) play best to your audience. Then you, your case, and more importantly, your client, will be into the best position possible.

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[1] Hopefully, you were sitting down for that revelation.

[2] More about Daubert and its progeny can be found in our book, Expert Witnesses: Motor Vehicle and Accident Reconstruction Cases, 2008-2009, (Curran, Jeff and Meaders, Kurt) Copyright (c) 2008 Thompson Reuters/West.

[3] Usually these are motivated by legitimate reasons, but often they are filed to obtain some mythical “litigious advantage.” In actuality, when the motions are not colorable, no real advantage is obtained as it tends to polarize both sides, making resolution less possible and the case more expensive. Unless the motion is patently frivolous, however, no real recourse exists. So, get used to seeing the motions, but resist filing “tit-for-tat” motions regardless of what the other side does.

[4] If you know what we mean.

[5] You know — the kind of things all lawyers at the courthouse seem to know right after it happens and talk about for years. You do not want to be the one that causes the group to stop talking when you walk up.

[6] The debate is still on about attorneys.

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