



Featured Articles

Expert Selection Is Advocacy

by Bradley K. Overcash and David E. Stovall



Westlaw Litigator®, everything in a single location. Online briefs, trial documents. ALR®. Forms. Jury Verdicts. Enhanced Cases. Expert Reports, Case Management tools and more.

DRI Resources



DRI Blog | FTD Archives | Legal News

Join the DRI Community



In The Whisper

The Chair's Corner: All for One and One for All

The Plaintiff's Virtual Diary, Not So Private After All? - Digging for Facebook Gold: Ethical and Admissibility Considerations of Social Networking Discovery

Expert Selection Is Advocacy

The Technology Committee Presents the iPad with a Litigation Twist

Young Lawyers Take to D.C. for Supreme Court Admission

Upcoming Seminars

Sign Up Your Summer Associates - 2011

Join us in Austin!

The Whisper Editors



"Never confuse movement with action." Ernest Hemingway in A.E. Hotcher, *Papa Hemingway: A Personal Memoir*, 1967.

Introduction

Expert witness selection must be engaged in from the perspective of a true advocate, and move beyond a mere item to cross off of the litigation checklist. To analogize with Ernest Hemingway's above quote, "movement" is identifying and retaining a legally sufficient expert for a lawsuit; "action" is parsing through the numerous potential experts to retain the one who will connect with the jury. Certainly, credentials are important, yet expert selection is an attorney's opportunity to move beyond the basic question of legal sufficiency and move into the realm of advocacy.

Regardless of the subject matter of a case, there are potential experts who possess the required academic pedigree and experience to surpass any challenge under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and its progeny and applicable civil rules. Since most expert selection is conducted in the early stages of litigation, it is tempting to rush the process and to retain any expert with the requisite credentials that is likely to be accepted by the court and to produce the testimony necessary to meet the requisite burden in the case. Given the important, if not critical, role of an expert witness at trial, attorneys should take advantage of the expert selection process, not only to find an expert who is well credentialed, but also to find an expert who may compellingly teach the party's position to the jury.

Critical Role of Experts

Once the trial court deems a witness as an expert in a particular subject area, he or she is equipped with a "tremendous power to influence a jury." Alford, Raley W., III, *The Biased Expert in Louisiana Tort Law: Existing Mechanisms of Control and Proposals for Change*, 61 La. L. Rev. 181-217, 184 (Fall 2000). Expert testimony can have a special impact on jury members of unequal

education and experience in the field in question. *Id.* This situation is apt to occur "because the expert testifies to matters beyond the knowledge of the jury . . . [and] the jury is ill-equipped to meaningfully evaluate the merits of the expert's opinion." *Id.* at 184.

The opportunity for advocacy in selecting experts is great, as juries are prone to accept an expert's opinions *carte blanche*. Typically, all parties will have experts with well developed credentials; however, a skilled attorney will select the expert who is able to identify with the jury and set forth his or her opinions more persuasively than the opposing expert. As an advocate, an attorney must select an expert while considering such persuasive factors as the expert's familiarity with the venue, ability to effectively teach using demonstrative exhibits, and ability to utilize descriptive language. These factors, *inter alia*, allow attorneys to move beyond the basic question of legal sufficiency and into the realm of advocacy.

For example, consider a case where the plaintiff's expert is intelligent but speaks in a way that jurors will not be able to understand. Perhaps the expert is not able to distill his or her knowledge to a level that laymen on the jury are able to comprehend. Imagine that the opposing party's expert has substantially similar credentials, yet he or she understands the venue where the case is pending and is skilled in maintaining his or her intellectual honesty while condensing complex information into an easily understood form. Thus, the information that is more easily understood will be more readily accepted by the jury.

Expert Effectiveness

The central purpose of representing a party in litigation is to advocate for the client's position. The selection of an expert is not a mechanical process wherein an attorney identifies the requisite qualifications and locates an expert with an impressive curriculum vitae. Rather, the expert selection process is better served by an advocate who carefully chooses an expert with the needed expertise and communication skills to impart his or her knowledge in a meaningful way.

Litigators devote a considerable amount of time and effort, sometimes with the help of hired consultants, attempting to craft the best questions for use in voir dire, to utilize strikes in the most advantageous way, and to take all reasonable steps to select the best jury for the client's position. Voir dire is an important part of the advocacy equation. The other side of the equation is choosing an expert to present testimony to the jury, which should be approached with equal vigor. "The expert witness is the only kind of witness who is permitted to reflect, opine, and pontificate in language as conclusory as he may wish. We give him the considerable license he enjoys because some facts are meaningful only in the context of these larger patterns of facts we call science." Allen, Ronald J. and Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 Nw. U.L. Rev. 1131, 1143 (Summer 1993) (internal citations omitted). Given that lay witnesses are

afforded little latitude when trying to testify as to conclusory opinions, selecting a capable expert is of paramount concern as experts are permitted to make such conclusions.

An expert's conclusory opinions must be properly based not only to avoid a legal challenge, but also to establish credibility and trust in the eyes of the jury. A qualified expert will be able to lay this foundation prior to stating his or her ultimate opinion to the jury. However, it is the obligation of the attorney to identify the proper expert to not only demonstrate his or her intellect and understanding on the subject, but to deliver an opinion that will resonate with jurors of unequal education and experience.

Move Beyond the Basics

Although expert persuasiveness is important, the first step must be to ensure that the expert will meet the basic requirements for experts in the applicable jurisdiction. In the Federal Rules of Evidence and in most state rules, Rule 702 controls along with *Daubert* and similar state case law. Once narrowing the pool of potential experts down to those who will almost certainly pass judicial muster, an attorney will then move into the areas addressed above.

In deciding upon what type of expert to retain, the options may not be as narrow as they seem. While some areas are legislatively or judicially limited to a certain type of expert, other areas may allow for greater freedom of thought. For example, in many jurisdictions, a nurse is not permitted to render an expert opinion regarding medical causation. See generally *Phillips v. Alamed Co., Inc.*, 588 So. 2d 463, 465 (Ala. 1991), and *Vaughn v. Miss. Baptist Med. Ctr.*, 20 So. 3d 645, 652 (Miss. 2009). In contrast, an expert may be qualified by "knowledge, skill, experience, training or education. . . ." Fed. R. Evid. 702. Therefore, an expert does not have to have a specific title to qualify in many types of cases. As an example, a construction worker with decades of experience and training, a licensed mechanical engineer, a safety consultant, and a building contractor are all potential experts that may "assist the trier of fact" in a hypothetical construction accident case. When there is a diverse pool of potential types of experts, such as above, an attorney must decide which type of expert will be fit his or her case. Under certain scenarios, a licensed mechanical engineer may prove more useful or persuasive than a safety consultant or vice versa. It is an opportunity for advocacy when looking beyond the initial, and perhaps obvious type of potential expert, in order to decide which expert type is the most appropriate.

Locating Potential Experts

It is best to consult all available sources when identifying potential experts for consideration. These include, but are not limited to, an attorney's colleagues in his or her firm, other trusted professionals, expert and professional consulting companies, state and local defense

organizations, and national defense organizations (such as DRI and the DRI Young Lawyers division). The larger the pool of potential qualified experts in a case, the greater options an attorney will have in selecting a compelling expert.

Conclusion

Expert selection is more than a mechanical process to be rapidly dispatched with early in the litigation. Rather, it should be a thoughtful process with the ultimate aim of selecting an expert that is qualified, persuasive, and effective. A prudent attorney will carefully select an expert to advance the ultimate purpose of obtaining a successful outcome to the litigation.

***Brad Overcash and David Stovall** are attorneys at Wilkins Tipton, P.A., with offices in Jackson and Greenville, Mississippi, Nashville, Tennessee, and Mobile, Alabama, and primarily practice in the area of defense litigation. They may be contacted at (601) 366-4343, or via email at bovercash@wilkinstipton.com and dstovall@wilkinstipton.com.*