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Locating and Retaining An Expert Witness

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Locating and Retaining An Expert Witness

Overview of Presentation

- I. How Can an Expert Assist?
- II. Types of Experts
- III. Rules Governing Testifying Experts
- IV. Expert Qualities
- V. How do I Find an Expert?
- VI. Homework Prior to Retaining an Expert
- VII. Retention Agreement

Locating and Retaining An Expert Witness

I. How Can an Expert Assist?

Experts can help counsel:

- Understand technical issues in a matter.
- Evaluate a party's claims or defenses in a matter.
- Craft effective written discovery requests.
- Craft effective deposition outlines for opposing experts or fact witnesses.
- In rare instances, by explaining relevant foreign law.

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I. How Can an Expert Assist? -- Continued

Experts also can help counsel by providing:

- A written opinion to support or rebut claims or defenses.
- Testimony to assist the trier of fact (judge/jury) or influence a regulatory body (DOJ, SEC, other federal or state regulatory agencies).

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II. Types of Experts

- Consulting experts:
 - assist counsel regarding any technical issues in the matter;
 - advise counsel without generating any report or work product that is disclosed; and
 - do not need to be disclosed to opponent.

CAUTION: Although their work product generally is protected from discovery, if a consulting expert communicates with or assists a testifying expert, these communications may lose their privileged status.

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II. Types of Experts -- Continued

- Testifying experts:
 - help present the *prima facie* case, such as compliance with certain standards, causation, or damages;
 - render a written expert report or rebuttal report in order to aid in the potential settlement of the matter pre-trial;
 - explain technical issues to the judge or jury through testimony at trial;
 - explain technical issues to influence a regulatory body to take/or not take certain action.

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II. Types of Experts -- Continued

- Hybrid witnesses:
 - testifying experts with actual first-hand personal knowledge of the facts at issue in the case.
- Summary witnesses:
 - summarize complex evidence;
 - do not technically offer expert testimony but merely explain complex issues in a summary fashion (for example, in a complex accounting fraud prosecution, the government can provide a "summary" witness to walk through complex accounting transactions).

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III. Rules Governing Testifying Experts

- Federal Rules of Civil Procedure and the Federal Rules of Evidence govern expert testimony and disclosure.
- Although state rules may apply in certain cases, this presentation will focus on federal rules.
- Be sure to check state rules when applicable (many states follow federal rules but there are exceptions, for example, the *Daubert v. Frye* standard for when an expert can testify).

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III. Rules Governing Testifying Experts -- Continued

- Also check:
 - local rules of the federal district court;
 - presiding judge's individual rules;
 - standing orders;
 - case specific orders; and
 - case management or electronic case filing rules.

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III. Rules Governing Testifying Experts -- Continued

When to disclose experts:

- Testifying experts:
 - Federal Rule of Civil Procedure 26(a)(2)(D) governs the timing of expert disclosures absent a court order or a stipulated discovery protocol among the parties;
 - the parties must disclose their testifying experts at least 90 days prior to the trial date;

CAUTION: Normally the party with the burden of proof must disclose first.

- the parties must disclose their rebuttal experts within 30 days of the disclosure of the expert opinion they will be rebutting.

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III. Rules Governing Testifying Experts -- Continued

- Hybrid witnesses:
 - usually do not submit a written report;
 - still must disclose the subject matter, facts, and opinions on which they expect to testify at least 90 days prior to the trial date.

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III. Rules Governing Testifying Experts -- Continued

Expert disclosures:

- Are governed by Federal Rule of Civil Procedure 26(a)(2)(D) and Federal Rules of Evidence 702, 703, and 705.
- Must disclose the identity of any witness a party may use at trial to present evidence.
- Must be accompanied by a written report that the witness has prepared and signed.

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III. Rules Governing Testifying Experts -- Continued

An expert report must contain:

- A complete statement of all opinions the witness will express and the basis and reasons for them.
- The facts or data considered by the witness in forming his/her opinions.
- Any exhibits that will be used to summarize or support his/her opinions.
- The witness's qualifications, including a list of all publications authored in the previous 10 years.
- A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition.
- A statement of the compensation to be paid for the study and testimony in the case.

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III. Rules Governing Testifying Experts -- Continued

- Federal Rules of Evidence 702-705 outline the requirements for expert opinion and testimony. Under these rules, a witness must demonstrate their qualifications based on:
 - knowledge;
 - skill;
 - experience;
 - training; and
 - education.
- A witness will be allowed to testify as an expert only when:
 - his/her specialized knowledge is helpful to the judge or jury;
 - the testimony is based on sufficient facts or data; and
 - the principles and or methods utilized by the expert are reliable as applied to the facts of the case.

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IV. Testifying Expert Qualities

- Well regarded or recognized in a particular area.
- Impressive educational and work experience.
- Scholarly publications on the topic area.
- Previous consistent testimony.
- Qualified as an expert in this area by other courts.
- No statement or opinion contrary to the opinion to be rendered in this matter.
- No statement or opinion contrary to your other retained experts' opinions.
- Ability to explain complex matters in a manner that lay people on a jury will understand.
- Geographic appeal – location matters.
- Flexible but not breakable.
- Availability.

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V. How do I Find an Expert?

- Current stable of experts.
- Client's current stable of experts.
- Law firm colleagues.
- Colleagues at other firms.
- Law schools/professional schools/universities.
- Industry groups/trade publications.
- Available electronic databases/online expert witness directories.
- Consulting groups or vendors.

Locating and Retaining An Expert Witness

IV. Homework Prior to Retaining an Expert

Answer the following preliminary questions first:

- Who is the ultimate decider of the question the expert will testify about? Is it a judge, jury, or regulator?
- What is the specific expertise needed?
- What is the witness line-up? How will this particular expert fit into the line-up of fact witnesses or other experts?
- Is it more important for this particular expert to have practical experience or academic knowledge?

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IV. Homework Prior to Retaining an Expert -- Continued

Conduct thorough research of the potential expert's background by:

- Obtaining and reviewing the expert's current CV.
- Reviewing the expert's previous testimony.
- Researching any *Daubert* or other exclusion rulings (check online databases such as Westlaw's Profiler/Daubert Tracker).
- Obtaining available written reports/affidavits/deposition transcripts.
- Reviewing any publications/treatises/articles/blogs/speeches.
- Checking all social media/conducting an internet search.
- Contacting references/other counsel.

Locating and Retaining An Expert Witness

IV. Homework Prior to Retaining an Expert -- Continued

Conduct a thorough conflicts check by asking the following:

- Is the expert already retained by another party in the litigation?
- Was the expert interviewed (but not retained) by another party and received confidential information during the interview process?
- Is the expert retained by an adverse party in a separate litigation?
- Is the expert providing testimony against your client in another matter?
- Does the expert have any connection to an adverse party?
- Has any lawyer in your firm tried to exclude this expert's testimony in any matter? Cross-examined this expert?

Locating and Retaining An Expert Witness

IV. Homework Prior to Retaining an Expert -- Continued

Interview the expert and:

- Never hire an expert you have not seen.
- Do not provide any confidential information during the interview.
- Take care to remember that while public materials can be provided, a testifying expert may have to disclose what was reviewed.
- Flesh out:
 - compensation issues;
 - staffing concerns;
 - any potential bias/cross points; and
 - any availability issues.

Locating and Retaining An Expert Witness

IV. Homework Prior to Retaining an Expert -- Continued

- Confirm you have all available current information including the expert's:
 - CV;
 - reports;
 - transcripts;
 - publications; and
 - speeches.
- Confirm any licenses or certifications are current and any fees paid.
- Review any applicable protective orders.

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IV. Retention Agreement

The retention letter should:

- Be drafted with caution. Retention letters are almost always produced in litigation so be careful not to give your opponent easy cross points.
- Be between the law firm and the expert as the expert is being retained to assist counsel in the provision of legal services.
- Explicitly state that the client is liable for the expert fee payment, not the law firm.
- Describe the scope of expert engagement.

Locating and Retaining An Expert Witness

IV. Retention Agreement -- Continued

The retention letter also should set out the following:

- Compensation (including the expert's hourly rate, any support staff rates, and reimbursement costs. Ensure that the fee is never contingent).
- Billing (detailing who the invoices will be sent to, how often, how much information they will provide, and whether late fees will be charged).
- Confidentiality.
- Indemnification/liability limitations.

Locating and Retaining An Expert Witness

IV. Retention Agreement -- Continued

- Conflicts of interest (including an affirmative statement that the expert has run a conflicts check and determined no conflict exists).
- Document retention/destruction.
- Dispute resolution.
- Signatures.

Questions

Relevant Practical Law Resources

- Practice Note, Experts: Locating and Retaining an Expert
- Standard Document, Experts: Expert Retainer Agreement
- Experts: Locating an Expert Checklist
- Experts: Retaining an Expert Checklist
- Expert Toolkit

These resources are available with a free, no-obligation trial to Practical Law. Visit [Practicallaw.com](https://www.practicallaw.com) and request your free trial today.

About the Speakers



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Cathy Joyce is a capital partner in the firm's Chicago office and a member of the litigation department. She concentrates her practice on corporate internal investigations, the representation of clients in connection with SEC, PCAOB, and other regulatory investigations and enforcement actions, white-collar criminal defense, securities and ERISA class action defense, and complex commercial litigation. Ms. Joyce has considerable experience representing clients in the investigation and defense of matters involving allegations of accounting irregularities. She represents large accounting firms and auditors in numerous ongoing PCAOB and SEC investigations.

Ms. Joyce has represented corporations in grand jury and regulatory investigations involving allegations of healthcare fraud, RICO, mail fraud, wire fraud, insider trading, bank fraud, tax evasion, insurance fraud, and criminal environmental violations. In addition, Ms. Joyce has represented corporations, audit committees, and special board committees conducting investigations relating to allegations of accounting irregularities, mutual fund market timing, consumer privacy issues, stock option backdating, income tax evasion, and securities fraud. In the commercial context, Ms. Joyce has defended clients in securities fraud, professional malpractice, breach of fiduciary duty, contract, and ERISA stock drop class actions.

Ms. Joyce is also a registered certified public accountant and worked from 1983 to 1985 for the firm currently known as Deloitte.

Webinar Speaker, "Handling a PCAOB Investigation, Best Practices and Current Topics", American Law Institute CLE, March 12, 2015.

About the Speakers



Beth Tagliamonti joined Practical Law from Winston & Strawn LLP, where she was Of Counsel in the firm's litigation department. Previously she was an associate in the litigation group at Bryan Cave LLP.

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