

Featured Article

Expert Witness Research Tips

By Emily Ruzic



When it comes to expert witnesses, young lawyers can add tremendous value to their team through research into the background of both their own and the opposing party's experts. This research should be done as early as possible and continue to be updated as the case progresses. Items found in outside research on experts can have a significant effect on the outcome of your case. Here are some research areas to consider:

Criminal History

Imagine the sinking feeling of showing up at a deposition (or worse, at trial) to learn that your expert-witness accountant had a felony tax fraud conviction or the trucking expert had three recent DUIs. It is important to make these discoveries as early as possible. Consider running the expert's name through PACER and any relevant state court databases. Also, perform an internet search for news reports of any noteworthy incidents with the law. Along the same lines, it is also valuable to check any professional licensing organizations in the expert's field for disciplinary records. You will certainly want to know if the expert property appraiser was disciplined for performing unsupported appraisals.

Prior Engagements

Often expert disclosures only require that the expert initially share prior engagements "during the previous 4 years, [where] the witness testified as an expert at trial or by deposition." See, e.g., Fed. R. Civ. P. 26(a)(2)(B)(v). This leaves open the possibility that the expert provided an affidavit or formal report without testifying or that the witness gave unfortunate testimony more than four years ago. Subscription services such as Westlaw or Lexis allow parties to quickly learn of prior engagements. While full reports may not be available online, these searches can provide enough information to identify the lawyers who appeared in the prior case and whether you should consider reaching out to them to ask for any non-confidential prior materials. Consider visiting sites like CrossExam.com to obtain prior court transcripts involving experts. DRI's Expert Witness Database, which is free to DRI members, can be a valuable resource as well. It is not uncommon for experts to have

been retained dozens of times over their career and not always on the same side of a case. This leaves open the possibility for inconsistent testimony. For example, 10 years ago, the expert may have testified that it was proper to use a certain technique in a medical procedure, but now the expert wants to testify that that same technique is per se medical malpractice. Left unexplained, this change in testimony can cause problems for a case, so it is best to learn of any prior inconsistencies from the outset.

Prior Publications

As with engagements, the Federal Rules of Civil Procedure limit the time period for which an expert must disclose their past publications. See Fed. R. Civ. P. 26(a)(2)(B)(v) (requiring disclosure of any publications in the last 10 years). Further, some state courts do not require any disclosure of prior publications. Young lawyers who are savvy in searching academic databases such as JSTOR and HeinOnline can impress their team with hidden gems that may help discredit the opposing party's expert. Further, JSTOR can show whether the expert's academic works are regularly cited by other academics and can lead to other publications disproving the expert's theory.

Prior Motion History

Associates are essential in motion practice regarding experts. Daubert motions and motions in limine related to experts are commonplace. These motions can be bolstered if you can show that the expert is rarely allowed to testify. It is difficult, if not impossible, to search PACER or state court databases by expert name to learn about prior success. However, services such as LexMachina or WestlawEdge allow parties to search by expert name and quickly find out how many times an expert has been allowed to testify compared to how many times that person was excluded. These services can even show whether the expert has ever been ruled on by the judge in the current case or whether the judge generally refuses to allow expert testimony on a particular topic. Daubert Tracker is another resource to help ascertain the expert's prior admissions.

Personal Experiences

Being mindful of confidentiality issues and with the permission of the relationship attorney, it can be helpful to obtain firsthand experience and feedback from other attorneys who have worked with the expert in the past. The DRI Communities pages are a great way to obtain feedback from others in your practice area who may have used this expert in the past. Consider calling other lawyers, especially DRI members, who have appeared in your research as having had experience with the expert. Your own expert can also be a valuable source of personal knowledge on the opposing expert. There may be only a few true experts in a subject matter in a particular jurisdiction. Your expert may be able to recall a speech given by the opposing expert that contradicts the current testimony or can point you to a particular case where the expert took a contrary position.

CV Verification

Most experts will disclose their curriculum vitae or “CV” through discovery. A handy young lawyer will take steps to verify items listed on the CV. Any inaccuracies can be used to question the witness’s credibility at trial. Imagine a jury’s reaction to hearing that Phi Beta Kappa member expert went to a school without a Phi Beta Kappa chapter or that John Smith was named the “2004 Physics Professor of the Year” and not your expert, Joe Smith.

Social Media

Social media can provide valuable evidence to discredit the other side’s expert. If the expert is testifying that a reasonable person would never ride a bike without a helmet, photographs from the expert’s public Facebook page showing him riding without a helmet will be difficult to explain. Likewise, if a social media search reveals that the expert has regularly vacationed with the injured

person’s family since 10 years before the accident, you can use this evidence to insert doubt into the objectiveness of the witness. Along these lines, you should not limit yourself to only the expert’s pages. The expert may have put the appropriate privacy settings on her page, but her sibling’s page may have public photographs of the expert engaging in unflattering behavior.

General Internet Searches

Never underestimate the power of a Google search on the expert. You may discover positive things that your expert was too humble to share with you. You may also discover that the local newspaper regularly runs articles bashing the expert as untrustworthy. Simple internet searches, which are free, can result in discoveries that change the dynamics of a case.

Conclusion

The above list is not intended to provide an exclusive list of sources when researching your own and opposing expert witnesses. As your research develops, think hard about other avenues that may provide valuable insight. Remember that this research should not be done just one time and forgotten about. Instead, it should be continually updated as the case progresses. Happy researching!

Emily Ruzic is a commercial litigation associate in the Birmingham, AL office of Bradley Arant Boult Cummings LLP. She is a member of the DRI Young Lawyers Steering Committee, currently serving as Vice-Chair of the Expert Witness Subcommittee.

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