



Winning with Experts
Part 1—How to Pick
the Perfect Expert

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Picking the perfect expert for your case is no small task. The process requires time, energy, and money.

Identifying, Vetting, and Selecting Experts



When deciding whether to get a dog, a cat, or any other pet, most people consider various factors before making the commitment: Can I afford a pet? Do I have time to care for a pet? Will my partner agree to have a pet? What type



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technical the issues, the more likely an expert will be able to help. Next estimate the anticipated costs associated with hiring an expert. While an expert may constitute a significant expense, the expert's value will likely outweigh the cost. After informing your client regarding this cost-benefit analysis, your client will be able to make an informed decision regarding whether or not to hire an expert. Second, though it is not compulsory, it is advisable to hire your expert early. The primary benefit of hiring early is that there is a greater pool of experts from which to choose. This, of course, gives you a better chance of hiring the best expert for your case. Additionally, hiring an expert early in the litigation process will give you more time to develop your theory of the case with input from someone who is knowledgeable about the specific issue.

After you have consulted with your client and committed to conducting a thorough, yet efficient investigation, you are ready to begin the expert selection process. Following are suggestions and recommendations that will help you pick the perfect expert.

Identifying Potential Experts

Study the Subject Matter

Perhaps this is obvious but, without knowing anything about the subject matter, locating a qualified and effective expert will be a challenge. By researching the issues, you will learn what information you will need from an expert, and you may even find some potential candidates along the way. But *how* do you go about learning the subject matter? The possibilities are endless, but the following suggestions should get you started down the right path.

Search the Internet

The most obvious way to familiarize yourself with and learn about the subject matter of your case is through a broad internet search. A general search will likely provide helpful, basic information regarding the issue at hand. Having this baseline knowledge will then equip you with the information required to narrow your search and begin to seek out potential experts.

Review Topic-Specific Websites

Once you have conducted a broad internet search and have gained a basic under-

standing of the issue at hand, it may be helpful to consult a topic-specific website. For instance, the Blockchain Library (<https://blockchainlibrary.org>) provides specific information and additional resources on blockchain and cryptocurrencies. Likewise, there are sample contract documents and best practices for architects on the American Institute of Architects' (AIA) website (<https://www.aia.org>). Depending on the alleged problem, topic-specific websites may provide a helpful starting place for conducting research on, and gaining a better understanding of, the relevant issues.

Visit a Library

Libraries are an invaluable resource for learning the subject matter and locating an expert. Using a library's online catalog, you can usually find books, academic articles or journals, and other publications on specific topics or subjects. In addition, libraries often provide free access to databases blocked by paywalls. These databases are likely where you will find the vast majority of relevant academic publications.

After familiarizing yourself with the material, you may notice one or more recurring authors writing on the subject. These authors likely know a great deal about the subject matter and should be considered candidates for expert retention.

Join a Professional Association

Professional associations are another place where you can gain information on a specific subject matter. Even better, these associations usually consist of people who are interested in and knowledgeable about the area of practice for which the association exists. Thus, the association and the people who make up the association can be a valuable resource in identifying potential experts related to the association's purpose and practice.

Additionally, most state and local bar associations, as well as the American Bar Association, have specific sections for lawyers who practice or are interested in practicing in that particular area of law. These associations allow you to network with members of a particular industry or practice, as well as other lawyers, who may prove to be potential experts or who may introduce you to potential experts in the field.

of pet should I get? This process is very similar to the expert-selection process. There are a number of factors to consider before you hire an expert: Can I afford an expert? Do I need an expert? Will my client agree to hire an expert? What type of expert should I hire? This article will discuss identifying, vetting, and selecting experts and offer helpful guidance for each step.

Before diving into the expert-selection process, you should keep a couple preliminary issues in mind. First, when selecting an expert, it is imperative that you involve your client. To advise your client effectively, you must determine how much is at stake in the case. Then evaluate how much an expert will benefit your client's case. The more

One way—and arguably the best way—to find these professional associations is through the Associations Unlimited database. This database, which can be found through a basic internet search, provides basic information on a number of professional associations. The database catalog allows you to narrow your search based on subject, geographic location, and associa-

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tion name and allows you to find information on thousands of local, national, and international associations.

Determine Which Type of Expert Is Needed

After you have gained an adequate understanding of the subject matter, you will need to determine the type of expert needed in your case. There are two types of experts: consulting experts and testifying experts. Consulting experts do not testify, and their opinions and work product may be undiscoverable and protected from opposing counsel. On the other hand, testifying experts do testify, and their opinions and information that they relied on to reach their opinions are typically discoverable and available to opposing counsel.

Consulting Expert

It is important for an expert to be both knowledgeable and articulate. Unfortunately, some experts have the requisite experience but are simply not effective communicators. You may want to retain one of these experts as a consulting expert.

Consulting experts can help you formulate a strategy and defense and help analyze the opposing party's expert's opinions. Depending on the law in your jurisdiction, you may be allowed to convert your consulting expert into a testifying expert. If this is a possibility, you may want to wait until the case has progressed to designate your testifying experts.

Testifying Expert

To state the obvious, testifying experts are retained for the purpose of testifying at trial. Thus, if there is any chance that your case could go to trial, you will almost certainly want to retain a testifying expert. A testifying expert will help explain the issues and convince the judge or jury that your position is correct. A testifying witness must be confident and likeable and able to convey his or her opinion effectively. If you discover that your consulting witness is knowledgeable and articulate, you may decide to convert him or her to a testifying witness. On the other hand, if you find that your testifying expert will not make a good witness at trial, you may not be in a position to prevent him or her from testifying. Thus, it is imperative that a testifying witness be well informed on the particular subject matter and able to communicate his or her position effectively and persuasively.

Determine Which Category of Expert Is Best Suited

In addition to determining the type of expert that you will need, it is important to determine which category of expert will best suit your case, particularly if you will need a testifying expert. There are four basic categories of expert witnesses, largely based on their individual experiences and backgrounds: (1) professorial experts, (2) professional experts, (3) occasional experts, and (4) dual-role experts. In deciding which category of expert is best, you will need to consider the who and the what: who is listening to your expert and deciding the facts of the case, and what is the subject matter?

Professorial Experts

A “professorial” expert is an expert who is or was a part of academia. These experts are usually current or former instructors, and as such, they generally have the abil-

ity to convey dense and sometimes dry material effectively in a meaningful way. Ladd A. Hirsch, *A Pragmatic Approach to Retaining and Presenting Expert Witnesses: Picking All-Stars and Avoiding Busts* 1, 3, A.B.A. Sec. Litig. 2012 Annual Conf. (Apr. 18–20, 2012).

Benefits of Retaining a Professorial Expert

Professors are accustomed to keeping—or at the least, trying to keep—a group of people's attention, while at the same time, presenting material that is complicated or technical in a way that is understandable. This skill often makes professorial experts ideal candidates for expert witnesses.

In addition to their ability to explain the subject matter effectively, professorial experts are often effective writers. Thus, their written reports will likely be just as impressive as their testimony. They also often have access to their academic institution's other resources, such as graduate assistants who can help with research, and connections to other professors and academics who specialize in the same areas of study. Finally, professors are most likely to be highly educated, come from prestigious institutions, and have extensive backgrounds in researching a specific subject matter, thus making them an impressive expert witness.

Risks of Retaining a Professorial Expert

While there are many benefits to retaining a professorial expert, there are some risks as well. A spectacular résumé is usually a positive, but it could also be a negative. A professorial expert's credentials may isolate him or her from a jury, thereby rendering the expert's ability to convey the subject matter worthless. If the professorial expert cannot identify with a jury in some way, the jury may be less inclined to listen to what the expert has to say, even if the expert can make the subject matter interesting or appealing. In sum, a professorial expert's credentials could close a jury's ears before he or she even has a chance to speak.

Along the same lines, a professorial expert may lack “real-world” experience. This could adversely affect a jury's opinion of the expert, as well as create greater problems with his or her testimony. If a professorial expert has little to no real-world experience, the opposing coun-

sel may make a *Daubert* challenge to the expert's testimony. This could greatly limit the scope of the expert's testimony and affect the expert's ability to persuade the fact finder.

Another risk of retaining a professorial expert is that he or she potentially may lack experience in a litigation setting. For instance, a professorial expert may not

Whereas professorial experts are generally first and foremost academics, professional experts are first and foremost experts.

be accustomed to consulting with anyone before developing an opinion or to refraining from keeping notes or to creating drafts of work product. Such inexperience could prove detrimental because some or all of these documents may be discoverable by the opposing side.

Finally, a professorial expert may not be aware of the time demands associated with being an expert witness. While some professorial experts may be retired, others who are still working may see their role as a lecturer or researcher as more important and may not be willing to put in the time required to be an expert witness. Likewise, they may not appreciate the important role that they are being asked to play in a case and might not put the required effort into developing their opinions. In other words, though they have the intellectual ability needed to be an expert, their ultimate work product could be lacking because of their failure to put in the necessary time and effort.

Professional Experts

Whereas professorial experts are generally first and foremost academics, professional experts are first and foremost experts. Professional experts' primary job is testifying on subject areas about which they are uniquely qualified. Professional experts often work for firms whose pri-

mary business is providing experts to assist in litigation. These experts can be found to testify on almost any subject matter. There are numerous online resources that can help locate experts through directories and request forms. Additionally, professional experts can be found through various professional organizations such as DRI.

Benefits of Retaining a Professional Expert

The benefits of hiring a professional expert are obvious. Professional experts know what they are doing because they have done it before. They know the time commitment that is required to be an expert witness, and they know how to manage their resources to complete the necessary work. They are knowledgeable about the specific subject matter. Professional experts know how to communicate effectively because they have testified in front of judges and juries many times. They are familiar with the various concerns that are associated with litigation. They know how to communicate with attorneys. They know what is expected of an expert witness, and they know how to meet those expectations. When it comes to testifying as an expert, they are, in a word, professional.

Risks of Retaining a Professional Expert

Though hiring a professional expert witness has many benefits, there are a few notable risks. For one, professional experts are generally more expensive than professorial experts. Because being an expert witness is their primary occupation, professional experts can allocate a large portion of their time to completing the task at hand. To do this, professional experts usually have support staff that assist them, thus increasing the costs associated with the assignment. As previously noted, you should always consult with your client before retaining any expert witness. This is especially true when hiring a professional expert. Your client should be aware that although a professional expert may be more experienced and may be able to devote more time to your client's case, there are significant costs associated with hiring a professional expert.

Another risk of hiring a professional expert concerns the expert's prior work history. If it is true that a professional expert

has significant experience as an expert on a certain subject, then it will also likely be true that a professional expert has testified about matters in ways that may, in fact, negatively affect your case. The more experience a professional expert has, the more impeachable material opposing counsel may have on that expert. Likewise, a professional expert may have so much experience testifying for one side that his or her work history may raise a question of bias. For instance, if a professional expert is continually and exclusively retained to testify on behalf of defendants, then a jury may interpret that loyalty as unsupported bias on the part of the expert.

Before hiring a professional expert, you must conduct a thorough analysis of the expert's prior case history. In addition, take care to consider what is at stake in the case, compared to the cost of the expert.

Occasional Experts

An occasional expert is an expert who does not intend to become an expert. *Id.* at 5. Unlike a professional expert, he or she is not trained as an expert and does not set out to become an expert witness. Unlike the professorial expert, the occasional expert likely has significant real-world experience and practical knowledge related to the issues at hand. For example, in a construction-defect case involving rusted metal throughout a building, you may be more inclined to retain a painting subcontractor who has significant experience priming and painting metal than a chemistry professor who can merely explain the chemical reaction that occurs when air comes in contact with metal. The painting subcontractor would be an occasional expert. He or she did not intend to testify as an expert, and his or her primary qualifications consist of significant practical experience.

Benefits of Retaining an Occasional Expert

The occasional expert will likely enable a jury to relate to the expert very well. After all, the occasional expert has the real-world experience that the professorial expert lacks. The occasional expert also lacks the seemingly financial motive, which may be used against the professional expert. To a jury, the occasional expert is one who is knowledgeable and authentic. An

occasional expert has the requisite understanding of the subject matter from his or her years of experience. Oftentimes, these experts are highly effective in communicating their opinions to a jury because they are seen as sincere and genuine. Juries find occasional experts to be more believable because they appear to have less to gain, and in fact, they appear to have more to lose. Juries may feel that an occasional expert is so convinced of his or her opinion that the expert is willing to jeopardize his or her career to express his or her views.

Occasional experts are also more cost-effective than both professorial and professional experts. Because he or she is not an expert by trade, there is no staff to subsidize and billing rates in general are typically lower.

Risks of Retaining an Occasional Expert

Occasional experts generally do not advertise or promote themselves as experts, thus they can be hard to identify. Likewise, taking an adverse position to another member of the occasional expert's industry can be seen as professionally damaging. Consequently, if you do find a potential occasional expert, he or she may be hesitant, or even completely unwilling, to participate.

Once you find an occasional expert willing to help, there are other, associated concerns. While one of the benefits of an occasional expert is his or her apparent authenticity, due to lack of experience, this can also create a risk. For example, an occasional expert may not come across as assertive in his or her opinions regarding the case. Rather, he or she may appear to waiver in his or her position and seem to comply too much with the opposing side's position. Along those lines, he or she will likely have very little, if any, trial or trial preparation experience. While this is not necessarily disqualifying, it will require more work and guidance on the part of the attorney. Finally, an occasional expert will usually have little experience with litigation procedure and the applicable rules. This will also require more involvement for the attorney, which must be considered when deciding whether to retain an occasional expert.

Dual-Role Expert

The last category of expert is the dual-role expert. Generally, the dual-role expert is

the client's employee. David R. Erickson & Lindsay R. Grisé, *Best Practices—Working With Experts* 1, 4, A.B.A. Sec. Litig. Annual Conf. (Apr. 24–26, 2013). Often, a client will recommend an employee as an expert because the employee has significant practical experience regarding the present issue—in fact, the employee may be presently conducting work on the project at issue—and may have substantive knowledge regarding the case.

Benefits of Retaining a Dual-Role Expert

The main benefit of hiring a dual-role expert is all in the name: the expert has both the requisite knowledge of the subject matter and an understanding of the ongoing litigation. The expert's dual role has the potential to combine the best of all the experts. A dual-role expert has the knowledge of the material, similar to a professorial expert. A dual-role expert has the understanding of the litigation and the relevant issues at hand, similar to a professional expert. Finally, as a member of the industry, a dual-role expert has the sincerity and authenticity of an occasional expert.

Risks of Retaining a Dual-Role Expert

Of course, there are also risks associated with retaining a dual-role expert. You must consider how much work product, as an employee, the dual-role expert has already produced. Importantly, this could include emails exchanged with his or her boss, your client. Similarly, you must also consider whether the dual-role expert will be able to maintain the boundaries between his or her role as an expert and his or her role as an employee. If those lines are blurred, you could be required to produce more documents in discovery than would be typical. Likewise, such an expert's role as an employee—and prior involvement in the project—could become a liability on cross-examination.

Develop a List of Prospective Experts

Now that you have learned about the subject matter, determined what type of expert you will need, and considered what category of expert will be best, it is time to develop a list of prospective experts to vet and ultimately retain to work on your case. Michael Brennan *et al.*, *Select-*

ing and Retaining an Expert, in *Litigators on Experts* 1, 3–4 (Wendy Gerwick Couture & Allyson W. Haynes eds., 2011).

You likely discovered some experts during your initial review of the subject matter. For instance, you may have found potential experts in your initial library search. Likewise, you may have come across some experts while engaging in networking

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opportunities with your professional association. These are both excellent ways to identify potential experts. Other ways to identify and develop a list of potential experts are through university websites, verdict reports, expert witness directories, and referral companies.

College and University Websites

As an entire category of experts (the professorial expert) is composed primarily of members of the academic community, college and university websites are invaluable tools for developing your list of potential experts. An institution's own webpage will usually provide basic biographical information on a potential expert. In addition, schools occasionally promote their faculty by providing an additional webpage, advertising their qualifications and other relevant information.

Verdict and Settlement Reports

Verdict reports are another resource available to identify potential experts. These reports summarize judge or jury verdicts and contain almost all of the basic information of the case, including the final resolution and the experts involved in the case. You can use these reports to search for relevant claims and the experts involved in

those cases. Verdict reports are available through both Westlaw and LexisNexis, which are only available with paid subscriptions. However, there are some free verdict report databases available on the internet.

Directories and Referral Companies

Other resources to help identify and develop a list of potential experts are expert

Remember, your opposing counsel will be conducting his or her own research on your experts, thus it is crucial to find any potentially damaging or impeachable information before retaining any expert.

witness directories and referral companies. Expert witness referral companies allow you to search a list of experts and reach out to them independently. This service, though generally free for attorneys, may charge a listing fee for experts. These directories provide helpful information such as each expert's résumé and certain skill set, whether the expert usually testifies on behalf of a plaintiff or a defendant, and other information regarding lawsuits in which an expert has previously testified.

Expert witness referral companies seemingly take the guesswork out of hiring an expert witness. Rather than spending valuable time searching for an expert, these companies maintain databases of available expert witnesses. However, these referral companies may charge an additional fee for their services.

Vetting an Expert

Now that you have developed a list of potential experts, the next step is to investigate and evaluate each of them. This is arguably the most crucial step in the expert-selection process. An expert witness does

not help your case, and in fact may *hurt* your case, if he or she does not have the necessary credentials, if he or she lacks the requisite prior experience, or if he or she has questionable prior testimony. Remember, your opposing counsel will be conducting his or her own research on your experts, thus it is crucial to find any potentially damaging or impeachable information before retaining any expert.

Conduct Background Research

The first step in fully vetting any potential expert is to conduct a thorough background investigation. This involves researching and verifying the potential expert's (1) biographical information, (2) current participation in the field, (3) experience as an expert, (4) deposition and trial testimony, (5) public statements, (6) publications, and (7) public records.

Biographical Information

The first piece of information you will get for any potential expert will probably be his or her résumé. *Id.* at 6–7. This document might even be what prompted you to include the expert on your list in the first place. It is imperative to verify that the information on the résumé is correct, especially if this is the only information you have concerning the potential expert. To confirm the potential expert's credentials, you must verify that all claimed credentials are correct and look for discrepancies or gaps in the information that you collected.

Verify All Claimed Credentials

One of the most basic steps is to verify the expert's educational institutions. You can do this by making a simple phone call to the university's registrar's office. Alternatively, some schools may be listed on internet databases that verify things such as current enrollment, dates of attendance, and a degree or technical certificate. Clearly, verifying a potential expert's educational credentials is extremely important.

In addition to their educational background, some experts claim to be licensed in their particular field. Generally, states regulate professional licenses. Information regarding licensing can usually be found online for little to no cost. If not, contacting the licensing body directly is a simple way to verify an expert's certifica-

tion. When verifying a potential expert's certifications, be sure to look for any disciplinary actions, revocations, or reprimands that the expert may have received from the licensing board. This is precisely the information that your opposing counsel is looking for, especially if an expert was disciplined for acts of dishonesty. Obviously, evidence of professional misconduct can greatly damage your potential expert's credibility.

Lastly, it goes without saying, if an expert claims that he or she has written articles, books, or any other publications, confirm that the expert is in fact the author or co-author of the publications. After you have confirmed that the expert is the author, consider what other experts are saying about the potential expert's work to confirm that his or her opinions have not been credibly called into question.

Look for Discrepancies or Gaps

Once you have gathered and verified as much biographical information as possible regarding your potential expert, compare the information that you have collected from all sources. Specifically, look for any discrepancies or gaps in the information. Has any of this information changed over the years? Does the potential expert consistently include the same qualifications across all sources? Or do the qualifications and credentials differ, depending on where the information is from? Comparing the various sources will help to uncover any possible gaps or discrepancies.

Current Participation in the Field

Depending on the category of expert, current participation in the field may or may not be important. An occasional expert may not be required to maintain a certification or license, even though he or she has extensive practical experience. On the other hand, an expert may be retired or no longer practicing in the particular field. Again, current participation may be helpful, but it is not always required.

Prior Experience

Some witnesses have extensive experience serving as experts. If so, you should review all of the cases in which the expert previously testified on the relevant subject matter. While your expert will likely disclose

this information, you should verify that it is complete and accurate. To find these cases, you can search for the expert's name in one of the many expert databases available. One example of this type of database is Daubert Tracker, which maintains an archive of the "gatekeeping" history of expert witnesses.

You should also search the docket for relevant cases. Various court filings,

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such as dispositive motions and pre-trial pleadings, include deposition transcripts, reports, declarations, and résumés from the experts involved in the case. Depending on the jurisdiction and venue, many state court dockets can be found online. Federal case dockets can be found on the Public Access to Court Electronic Records (PACER). Additionally, online legal research services, such as Westlaw and LexisNexis, also provide useful information on expert witnesses.

Finally, verdict reports will aid you in vetting a potential expert's prior experience. If an expert has significant prior experience as a witness, reviewing verdict reports may reveal any potential bias or a tendency on the part of the expert to testify only for plaintiffs or defendants or for one particular attorney.

Deposition and Trial Testimony

Reviewing an expert's prior testimony will give you some indication about how an expert will be received by a judge or jury and how well the expert can communicate dense or complicated information. In addition, pay close attention to any prior testimony that may conflict with issues in your current case.

An expert's prior testimony may be found through online legal research serv-

ices, such as Westlaw and LexisNexis. In addition, DRI maintains an Expert Witness Database, with deposition and trial transcripts. Another option is to reach out to attorneys who have worked with your potential expert in the past. In addition to providing their opinion regarding the potential expert, these attorneys may also have deposition and trial transcripts to share.

Lastly, occasionally a video of an expert's previous testimony may be available on the internet on websites such as YouTube or Vimeo. If you are fortunate enough to find a video recording of a potential expert's testimony, you will be able to gauge his or her overall presentation and demeanor effectively.

Public Statements

Public statements that expert witnesses make outside the litigation setting may prove just as damaging to their credibility as statements made in court. Sources for information on an expert's public statements include online news articles, blogs and discussion boards, social media sites, and non-scientific or academic articles, as well as online legal research services, such as Westlaw or LexisNexis. Finally, as with prior testimony, video or audio recordings of a potential expert may be available online.

Publications

An expert's publications are another way to vet the expert. Depending on the category to which an expert belongs, there may be a vast selection of publications authored by the potential expert witness. For example, a professorial expert is likely required, or encouraged by, his or her academic institution to publish a number of articles or books every year. If your professorial expert has never published any material, it would be prudent to question why not. In contrast, an occasional expert has most likely never authored any material on the subject matter.

You should also review where your expert has primarily published. If the majority of your expert's publications are in the local newspaper, this will likely carry less weight and seem less reputable than a peer-reviewed journal.

In addition to the frequency and publication source, you must understand the contents of your expert's work. Be sure that

what your potential expert has published is consistent with the testimony that he or she will offer in court. Obviously, your expert discredits him- or herself if he or she has previously published work that is contrary to his or her testimony.

Public Records

Finally, public records may provide an excellent source of information on a potential expert witness. Both Westlaw and LexisNexis have a public records database that can be searched. These functions usually provide property data, criminal activity, employment history, and occasionally information on the professional licenses held. A search of public records may reveal a conflict of interest. Likewise, you may discover that a potential expert has been a party in multiple lawsuits. If you discover that your potential expert has engaged in criminal activity or has been sued previously, court records may be available online, depending on the jurisdiction. If they are unavailable, you can simply call the clerk of court's office to get this information. Of course, any sort of criminal activity will cause the opposing side (and the fact finder) to question an expert's credibility. Similarly, if an expert has been sued repeatedly, especially in a professional capacity, his or her level of expertise will likely be subject to cross-examination by the opposing side.

Meet with the Expert

After you have conducted a thorough background investigation, you must meet with your potential expert. Meeting with the expert face to face will allow you to evaluate the witness's appearance, presentation, and overall likeability. As previously discussed, an expert's value rests not only in his or her knowledge, but it also rests in his or her presentation of the subject matter as well.

Before the interview with a potential expert, you should send a carefully curated packet of litigation material for the expert to review. Remember, some or all of the information that the expert reviews may be subject to discovery. Thus, the litigation material should include only that material that is already in the public record, such as the pleadings and discovery responses. To avoid surprise, be sure to address in advance whether the expert will charge for reviewing this material.

When setting up and scheduling the interview, keep in mind how easy or difficult it is to work with the expert and schedule times to meet. If the initial interview is difficult to schedule, or if the expert is difficult to reach, consider how the expert's scheduling conflicts may affect the litigation process as the case proceeds. You do not want to spend unnecessary time managing your expert's schedule, while at the same time managing your client's case. On the other hand, if an expert has sufficiently reviewed the material and is accommodating in scheduling meetings, he or she will likely continue to be accommodating and diligent in completing other tasks.

At the outset, explain to the potential expert that the meeting, and everything discussed during it, should be kept confidential. You may wish to discourage the expert from taking notes, but it is not advisable to prohibit it. Further, encourage the potential expert to complete his or her analysis and investigation before producing any work product or formulating a final opinion. Initially, you should also advise the potential expert that his or her primary role will be to review the facts at issue and formulate an initial opinion. The expert should understand that he or she will be required to explain his or her opinion and educate you on the specific area, so that you may adequately advocate for your client.

As the meeting progresses, you should conduct the meeting as an initial interview. Following are some suggestions regarding specific areas to be covered.

Conflicts

One of first steps when conducting this initial meeting with a potential expert is to confirm that there are no conflicts. A conflict may arise if an expert has business dealings with the opposing party or opposing counsel, if the expert has been represented by the opposing counsel, or if the expert has previously consulted with, or given advice to, the opposing party. Practically speaking, a potential expert may be disqualified if he or she has previously taken a position adverse to the position he or she will take in your case.

Prior Disqualifications and Potential Conflicts

Discuss prior disqualifications with your potential expert. Specifically, you should

ask the potential expert whether he or she has been "Dauberted" in any trial or prohibited from testifying in court for any reason. If the expert was previously disqualified in another matter, discuss why and how the disqualification occurred. Depending on the answers the expert gives, you may want to reconsider hiring the expert for your case.

Fee Structure

One of the biggest points of discussion should be a potential expert's fee structure. You should discuss how much an expert charges, including the expert's staff rates, how he or she calculates travel time, depositions, and court appearances, and his or her billing frequency. Remember, the expert is prohibited from working on a contingency fee basis. This establishes a financial stake in the outcome of the case, which is obvious evidence of bias and violates many rules on professional responsibility and ethics. Typically, an expert's services are provided at an hourly or daily rate, which may depend on the activity being performed (*i.e.* investigation or preparation vs. deposition or trial testimony).

Availability

You also need to confirm that your expert is accessible and will be able to spend sufficient time on the case. Of course your expert should be available to testify during your trial, but your expert should also be open to meet with you or take your phone calls to discuss issues regarding the case. Finally, confirm that he or she will be free early in the litigation period to determine which documents and information will be needed to form his or her opinions and that he or she will have sufficient availability later in the process to formulate his or her opinions and write a report. Bernard Taylor *et al.*, *Best Practices—Working With Experts*, 1, 12 A.B.A. Sec. Litig. Annual Conf. (Apr. 24–26, 2013). You do not want to spend your time keeping your expert on task. Thus, this is important to confirm prior to hiring the expert.

Teaching Ability

As we have discussed, your expert witness must be able to convey the material to a fact finder in way that is understandable to the layperson. One way to gauge whether your

expert will be a good teacher is to invite someone who is unfamiliar with the subject matter to participate in the meeting and listen to the expert. Ask the expert to explain a technical concept and then gauge the person's response. Was the expert engaging? Did the expert keep the other person's attention? Did the expert use stories or analogies? These are all good indications

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that an expert will be able to adequately convey the necessary information.

Ability to Withstand Scrutiny

Your expert must be able to withstand scrutiny. It may be helpful to conduct a mock cross-examination during the meeting with the expert. If you do, observe how the expert receives criticism and challenges. Observe his or her body language. Does he or she consider the question? Does he or she get defensive? If he or she can defend her opinions without becoming defensive, he or she will likely do well on cross-examination.

Selecting the Best Expert

Once you have investigated several potential experts, it's time to decide which expert is best for your case. At this point, you should be well acquainted with the various experts' credentials and prepared to focus on the experts' skills that were demonstrated and observed during the vetting process.

Writing Ability

In addition to having the necessary credentials, an expert should be able to write well.

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Expert witnesses are often required to submit a written report, detailing their opinions and the methods used to reach those opinions. Thus, you want an expert who can write clearly, logically, and concisely, preventing the opposing side from finding flaws in his or her argument or opinion.

Communication Skills

If there is any chance that your expert will be required to testify in the case, you want an expert who has superb communication skills. For instance, you want an expert whose voice can be heard clearly but who does not shout. You want an expert who can maintain eye contact with the jury and also captivate their attention. And, perhaps most notably, you want an expert who is confident but does not come across as arrogant or boastful. If you followed the suggestions in this article, you observed an expert in your meeting and are equipped with the information needed to decide whether a particular expert will communicate effectively.

Ability to Survive a *Daubert* Challenge

An essential component of selecting the best expert is determining whether the expert will be able to survive a *Daubert* challenge. Obviously, in a case that depends on an expert's testimony, whether the testimony is admissible will be a primary concern. Before selecting your expert, review the *Daubert* decision, as well as any applicable state court cases, to determine the requirements for admissibility of expert opinions. You must be confident that a potential expert's anticipated opinions will be admissible in your jurisdiction.

Conclusion

Picking the perfect expert for your case is no small task. The process requires time, energy, and money, which are valuable commodities in the world of litigation. However, this task should not be taken lightly. As you now know, it is necessary to have a basic understanding of the material before identifying any potential expert witnesses. Equally important is the vetting process, through which you ensure that there are no conflict or credibility issues. Finally, after identifying and vetting numerous potential expert witnesses,

selecting the right expert should be clear, based on the expert's knowledge, communication skills, and credibility.

To come full circle on this part of the process, choosing the right pet can help you make friends, improve your quality of life, and provide additional health benefits. While selecting the right expert may not help you make friends or provide any immediate or long-term health benefits, it can significantly improve your quality of life by laying the groundwork for successfully working with the expert.

In Part 2 of this series, titled "How to Deal with the Designated Expert: Retaining and Working with Experts," we will discuss the next step in the process: retaining and working with experts. As you will see, communicating clearly and working closely with the expert will ensure that you have the best possible chance of winning your case. 