



Prep for Success: Expert Selection, Preparation, and Ethical Collaboration

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Best Practices in Retaining Experts

Identifying and Vetting Potential Experts

- **Determine Need:** Define the specific technical or scientific issues that require expert testimony.
- **Locate Experts:**
 - Internal referrals
 - Industry referrals and trusted listservs
 - Retained Experts
 - Verdict Search
 - Expert databases

Identifying and Vetting Potential Experts

Vetting Process:

- Review Curriculum Vitae (CV) for relevant experience and accolades, e.g., board certifications.
- Check for conflicts of interest.
- Investigate previous testimony, publications, and deposition history.
- Confirm licenses and certifications are current.
- Ask for a testimony sheet.

Identifying and Vetting Potential Experts



A **Federal Rule of Civil Procedure 26(a)(2)(B)** expert report is a mandatory written document for retained witnesses, detailing their opinions, data considered, exhibits, qualifications, compensation, and a **four-year list of prior deposition/trial testimony**.

Strategic Alignment & Corporate Risk

Vetting for Integrity and Alignment

- **Defining the In-House Need:** Identify specific technical or scientific issues that require external expertise to support corporate legal strategy.
- **Conflict of Interest Audit:** From an in-house standpoint, it is critical to ensure potential experts have no conflicts with the company, its subsidiaries, or opposing counsel.
- **Select the Methodology Wisely:** Select experts who utilize objective, sound methodology to maintain credibility and protect the company's reputation in court.
- **Deep-Dive Vetting:** In-house teams should audit an expert's past testimony, publications, and deposition history to ensure their positions remain consistent with corporate interests.

Initial Contact & Retention

Initial Call (Phone, not Email): Conduct preliminary, confidential discussions to evaluate the expert's suitability and opinions before formal engagement.

Drafting the Retention Agreement:

- **Scope of Work:** Clearly define the scope (e.g., consulting only vs. testifying).
- **Compensation:** Detail hourly rates and reimbursement costs, ensuring fees are not contingent on the outcome.
- **Confidentiality:** Include strong confidentiality clauses.
- **Client Responsibility:** Explicitly state the client is liable for fees.

Protecting Privilege: Structure the agreement between the law firm and the expert to maintain attorney-client privilege and work product protection.

Consulting vs. Testifying Experts

In California, consulting experts, hired solely to advise counsel, generally enjoy qualified work product protection (i.e., not absolute privilege) for their communications, opinions, and reports under [Code of Civil Procedure § 2018.030\(b\)](#).

Benefits of Retaining Consulting Experts

- Liability, causation or damages are complex.
- Evaluate the perspective that your opposing counsel might bring to the case.
- Test your defenses.

Vetting experts, who might become testifying witnesses, lose this privilege, making their notes, reports, and communications with counsel discoverable. Work product protects attorney-expert communications in preparation for trial, but this protection fails if the consultant transitions to a testifying role.

Best Practices

To protect work product, keep consulting experts and testifying experts separate to avoid “cross-contamination,” where privileged consulting work becomes discoverable through the testifying expert.



Ethical and Professional Collaboration

Fees and Compensation

- Cannot be contingent on the outcome of the case (Cal. Rules of Prof. Conduct 7-107(C)).

Attorney-Expert Communication

- Communications, including draft reports, may be discoverable.

Drafting Reports

- The expert must hold the final opinion, not the attorney.

Conflicts of Interest

- Ensuring the expert has no conflict with the opposing party or Counsel.

Ethical Considerations

Avoid “Hired Gun” Syndrome: Ensure the expert’s opinions are objective and based on sound methodology (Daubert/Frye standards).

- Ask what percentage of the time the expert is hired by the defense vs. plaintiff.
- Ask what percentage of the time the expert has testified on behalf of the defense vs. the plaintiff .

Disclosure Rules:

- Understand that retention letters and communications with experts may be subject to production in litigation.

Duty of Candor:

- Avoid manipulating information provided to the expert, which can violate Rules of Professional Conduct (RPC 3.4(b).)

Managing the Expert Relationship

Efficiency, Privilege, and Budgetary Control

- **Early Use of Consulting Experts:** Retain consultants early for complex issues like liability or causation to test defenses and evaluate opposing perspectives.
- **Protecting Privilege:** In-house counsel must keep consulting and testifying experts separate to avoid "cross-contamination" that could make privileged work discoverable.
- **Retention Agreement Essentials:** Structure agreements between the law firm and the expert to maintain attorney-client privilege while clearly stating the client is liable for fees.
- **Ethical Compensation:** Ensure all fee structures are transparent and never contingent on the case outcome, adhering to professional conduct rules.

Effective Use in Litigation

- **Deposition Strategy:** Prepare the expert for deposition, ensuring they understand the scope of their opinions.
- Make sure to avoid duplicate expert testimony when retaining multiple experts to avoid an expert from being excluded at trial.

Withdrawing an Expert

Strategic Risks:

Be cautious when considering to withdraw an expert or not call the expert at trial. Attempting to hide an expert who gave unfavorable testimony (“turned south”) often fails because the deposition record already exists, and the opposing side can often still leverage it.

TIP:

To avoid this, it is critical to properly vet experts and review their reports and likely testimony before the formal disclosure deadline, as withdrawing them afterward is rarely effective in concealing their opinions.

Damage Control!

Once an expert has been formally designated and has testified at a deposition, they generally cannot be easily “withdrawn” to prevent the opposing party from using their testimony or potentially calling them at trial, as it is often considered too late to “put the cat back in the bag.”

While a party may try to switch an expert to a “non-testifying” status, courts often rule that the expert's deposition testimony remains discoverable and usable, as the Initial Disclosures makes their opinions fair game.



Considerations When Withdrawing an Expert

- **Once an expert is designated as testifying expert, that expert's work will generally be discoverable.** See *Williamson v. Superior Ct.* (1978) 21 Cal.3d 829, 834-35 (finding good cause to invade the conditional work product protection when an expert is expected to testify as opposed to serving as a non-testifying expert).
- **If a designated expert has not yet been deposed, an attorney can withdraw the expert and retain them as a consultant.** See *Shooker v. Superior Court* (2003) 111 Cal.App.4th 923 (expert witness designation may be withdrawn prior to disclosure of privileged material or testimony to avoid waiver of privilege).
- **Noticed motion is not required to withdraw disclosed expert. A party can withdraw previously designated expert for tactical reasons and retain as consultant and opposing counsel cannot contact the consultant.** (*County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647.)
- **However, a party cannot suppress evidence where expert was intended to testify as a retained expert but the expert was later withdrawn pursuant to an illegal bargain between the machine manufacturer and the tire company to suppress evidence. Nothing underlying the work product doctrine justified the conduct in this case.** (*Williamson v. Superior Court* (1978) 21 Cal.3d 829.)

Strategic Disclosure and Damage Control

Navigating the Point of No Return

- **The Disclosure Deadline:** In-house teams must review all reports and likely testimony *before* formal disclosure, as the expert's work generally becomes discoverable once designated.
- **Tactical Withdrawal:** If an expert must be pulled, in-house counsel should act before any privileged material is disclosed or testimony is given to avoid a waiver of privilege.
- **Streamlining Testimony:** Manage resources effectively by avoiding duplicate expert testimony, which risks court exclusion and unnecessary corporate expense.

Key Takeaways

- Invest in early preparation and identify the experts you anticipating retaining.
- Meticulously vet prior testimony, experience, and referrals.
- Ensure the expert's file is clean and organized.
- Partner with your expert but maintain professional distance.
- If an expert should be withdrawn do so before the expert testifies or discloses privileged information.

Questions?



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