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Expert witnesses and legal support staff

HOW DO I FIND THOSE EXPERTS? WHICH DOCUMENTS CAN I SEND THEM? A PRIMER FOR LEGAL SUPPORT STAFF ON HOW TO SUPPORT USE OF EXPERTS

When to consult with and/or retain an expert is usually left to the discretion of the attorney. However, knowledgeable and motivated paralegals and support staff can be incredible assets to any winning litigation team by knowing when to suggest earlier retention of experts; knowing what type of expert to recommend; knowing where to find a good expert; and knowing what materials to send and what *not* to send to your experts.

Look to the damages

Deciding when to hire an expert can be determined by many factors. First and foremost is the extent of your client's injuries – the damages. This will usually be the most important factor in determining whether to incur the costs of bringing in an expert early or at all.

If you are working on a slip-and-fall case where the client has only sustained soft tissue injuries, you are not going to

run out and retain an accident reconstruction or biomechanical expert. Instead, you might refer that client to a chiropractor or an orthopedist for treatment, and that expert, as a treater, can then testify for you (if needed) down the road at a relatively low cost. However, if you have a client with a significant injury, it may be quite advantageous to hire experts early in the case.

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For instance, if your client has been diagnosed with a traumatic brain injury, you are going to want evaluation by a neurologist as early as possible so that a detailed 3T MRI can be performed to determine damaged areas of the brain which are often more easily detectable earlier rather than later. That medical expert may also identify additional experts that are needed to more comprehensively diagnose, evaluate and work-up the TBI injury. For instance, a neurologist may suggest that a neuropsychological evaluation is warranted to identify cognitive deficits that will increase the value of your client's case.

In that same vein, if you have a client with a significant back, joint, or limb injury that has or will require surgery, you may want to get an orthopedic surgeon involved early in the case to provide more definitive opinions on the diagnosis, progression of the injury, reasonableness and effectiveness of the treatment, and future needs. That expert can also recommend other needed experts like pain management specialists, physical therapists, and prosthetists (in the case of limb amputations).

On cases involving significant emotional injuries, such as child molestation, the early involvement of a skilled psychiatrist or psychologist not only allows the expert to gain a better understanding of the extent of the injuries, but it can help diffuse any claim by the defense that the plaintiff's failure to seek earlier treatment was the cause of the client's prolonged suffering. It can also be extremely beneficial to the client who often needs immediate care and treatment for PTSD, anxiety and depression.

In short, if the damages warrant it, it is better to get an expert involved sooner rather than later, because experts can be incredibly important in helping develop a litigation strategy and guiding your case. With damage experts, the early involvement of an expert may also eliminate or diminish the defense argument that postponed evaluation and/or treatment indicates that the plaintiff was not as injured as badly as claimed at trial.

Liability experts can be crucial

Another important factor in determining whether to get experts involved early is whether liability is going to be hotly contested, or whether there is a concern that important evidence will be lost, altered or destroyed by waiting.

In a dangerous condition case, it can be vital to get a liability expert out to the scene early to evaluate the conditions as close in time to the incident as possible. After all, physical conditions at the scene can and often do change after any significant injury.

For example, if someone is killed in an intersection, a traffic engineer or accident reconstructionist can document, record and evaluate the conditions before sightline obstructions are removed, signal phasing is changed, new signage is installed, new traffic signs/signals erected, and/or skid marks fade. These experts can also be vital in helping the attorney determine a theory of liability and who should be named in the lawsuit.

If a governmental entity is a potential defendant, the plaintiff only has six months from the date of the accident to file a government tort claim. The failure to meet that deadline may very well foreclose your client from ever being able to recover. Thus, time is of the essence in determining if you have a valid claim against a governmental entity, like Caltrans.

A final factor in deciding whether to hire an expert early is whether there are a limited number of experts in a particular area. For example, if you are dealing with a unique issue like school safety or management of a concert venue or some other finite or obscure area, it is often better to tie down an expert early to both assist you in your case and prevent the other side from retaining them before you can.

What types of experts do I need?

The experts you may need depend on the type of case you have. However, they can be grouped into two general categories; liability experts and damage experts. Liability experts will help you

prove why the incident occurred and who is at fault for your client's injuries. Damage experts will help you prove the type and extent of injuries and damages your client sustained.

For example, in motor vehicle, mass transit, and construction accident cases, accident reconstruction experts can be incredibly valuable in analyzing the evidence and determining why and how an accident occurred. In dangerous roadway cases, traffic engineers can help identify design defects, construction defects, and code violations. In cases involving generally hazardous conditions, safety engineers can help pinpoint specific causes and identify violations of applicable codes, regulations and ordinances. In products liability cases, engineers can perform testing to determine how and why a product failed as well as the manufacturer of any defective component parts. In medical malpractice cases, nursing home cases, police shooting case, molestation cases, and any case involving the breach of a standard of care, an expert familiar with how people are expected to conduct themselves in a particular field is crucial to winning your case.

In terms of damages, a medical professional that specializes in the type of injury your client sustained is vital. In cases where your client has sustained multiple injuries, it is often valuable to retain a rehabilitation and physical medicine doctor to act as the "quarterback" for all your medical specialists.

In a catastrophic-injury case, where your client is going to require a variety of future medical care, a life-care planner can be an invaluable resource to both quantify that loss and help put together a damages team.

In cases where your client has sustained severe emotional injuries (like PTSD), a good psychiatrist or psychologist is needed. If your client's injuries have affected his/her ability to earn a living, a vocational-rehabilitation expert can help you prove your case.

Finally, anytime you are dealing with having to evaluate complicated economic damages or future economic losses that

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need to be reduced to present value, you are going to want a forensic economist.

How do I find the right expert?

You can determine which experts may be worth recommending to the attorney by researching notable verdicts in similar cases. You can use Westlaw, Lexis, VerdictSearch or JuryVerdictAlert.com to review verdicts and see which experts were successful; you can talk to attorneys or support staff from other firms to determine which experts they like to use. You can employ an expert locating service, several of which advertise in Advocate. It is often said, but not often emphasized enough, that a little initiative goes a long way. By putting in the extra effort, you can help ensure your success, the attorney's success and the success of the firm.

Here are a few of the many tools to identify good, effective experts.

• *Prior cases within your own firm*

Many firms keep a running list of the experts they have used in prior cases. If your firm has not started that practice, it is extremely useful and one that you can spearhead in your firm.

• *Recommendations from trusted experts*

Your experts can be tremendous assets in identifying other experts to complement their testimony and help make up a winning expert team. Often, equally valuable are the people behind the experts; like their office managers, case managers, and assistants. They can provide valuable insight and recommendations if only asked.

• *Recommendations from trusted attorneys and paralegals*

If you have not already done so, reach out and network with attorneys or support staff in successful law firms. Call upon those contacts to help you find experienced experts that have helped their firms achieve success and would be willing to do the same when they call on you.

• *CAALA List Serve*

If you have access to CAALA's List Serve, use it! It is amazing how much valuable information you can learn from the many people that share information and ideas on that service.

• *Verdict Reports*

Often the best indicator of future success is past results. Look at published verdicts and settlements to see which experts were part of a winning team in prior cases. Here are just a few of those sources:

- Westlaw (<https://westlaw.com>)
- Jury Verdict Alert (<https://www.juryverdictalert.com>)
- VerdictSearch.com
- *National search companies*

There are companies that specialize in helping you identify, locate and retain experts in specific areas around the country. These companies can be especially effective when you have a unique need or set of facts. Here are a couple sources:

- <https://www.almexperts.com>
- <https://www.forensisgroup.com>
- <https://www.tasanet.com>
- <https://www.theexpertinstitute.com>

What documents should I send and not send to an expert?

You now have your expert team, so what documents should you send and, equally important, *not* send to the experts? This is an extremely important question in terms of making sure the expert has the resources needed to form a proper foundation for any opinions; in maintaining the firm's litigation strategy; and in controlling expert costs – which can get quite steep if not regulated.

If you have any question about what should or should not be sent to an expert, let the attorney make the decision. It is always better to learn the attorney's preference before a document is sent rather than after. Once a document is received and reviewed by an expert, it is too late! That document has become discoverable by the other side and will likely be produced at the expert's deposition. It can prove embarrassing if an unintended document suddenly appears at an expert's deposition or, worse yet, it can undermine the entire case.

Generally, send your liability experts documents that will help them determine how and why the accident or incident occurred; send your damage experts documents that prove how and to what extent your client has been injured by the accident or incident.

Make sure your experts get the documents that have already been produced or obtained by the other side. For liability, these would usually include things like the police report, coroner's report, incident reports, scene photographs and videos, and deposition transcripts from the plaintiff, the defendant, and anyone at the scene (e.g., witnesses, law enforcement, paramedics, etc.).

For damages, these would usually include the paramedic report, medical records, medical bills, radiology, injury photographs and videos, and deposition transcripts *with exhibits* for the plaintiff and others familiar with your client's injuries and damages (e.g., treating doctors, friends, family members, etc.). Further, always make sure your experts have a copy of your expert designation and all reports and deposition transcripts from the corresponding experts that were retained by the other side.

Keep a *detailed and up-to-date* inventory of all documents that have been sent to each expert and when each document was sent. When transmitting the documents to the expert, your cover letter should be as vague as possible (e.g., "Enclosed herein for your review are additional documents in this case."). Correspondence that is too detailed, explanatory or fact specific can be used by the other side to suggest that the expert was coached or manipulated by the attorney's office and that the opinions offered are really those of the hiring attorney. Any discussions with the expert regarding facts, allegations or opinions should be discussed *verbally* with the expert and not put in writing.

Never send your experts documents that have not been produced or received in discovery unless first authorized by the handling attorney. This would include things like the client's draft discovery responses; your client's income tax records; recorded witness statements; day-in-the-life videos; your client's social media posts; photographs not produced in discovery; attorney notes and research; preliminary reports from your experts; internal firm communication about the

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case; correspondence with and information from non-designated experts; and correspondence with your client.

Pre-deposition

At least two weeks before an expert is deposed, call the expert and verbally go through your detailed document inventory to assure that the expert has received and reviewed the items previously sent. Also, inquire whether there are any additional documents and materials the expert needs. Finally, in keeping with the new requirements under the California Code of Civil Procedure, make sure you get a complete copy of the expert's file far enough in advance of the expert's deposition to assure that the attorney has time to review it before it is turned over to the other side (the required three business days before the deposition).

Pre-trial

Finally, well in advance of trial, make sure that your experts have reviewed and made any changes to their deposition transcripts and that the other side has been notified of those changes in writing. Also, make sure that your experts have been provided with the deposition transcripts of the opposing experts. Finally, ask your experts if there is any demonstrative evidence (for example, exhibit boards by medical illustrators) that they need at trial to help explain opinions to the jury.

Conclusion

By understanding when expert witnesses are needed, how to find them and how to support them, you will make yourself an invaluable member of your firm's litigation team and help ensure a successful settlement or verdict for your client.

Robert Clayton is a partner at Taylor & Ring in Manhattan Beach. He has successfully represented clients in catastrophic personal injury actions in both state and federal court. His practice areas include serious personal injury; wrongful death; sexual abuse; products liability; motor vehicle and mass transit accidents; scalding/burns; assault and battery of customers by security guards; and premises liability actions involving dangerous conditions on public and private property. He is a graduate of California State University, Northridge where he was the recipient of the Jenniellen Ferguson Memorial Award for academic excellence. He graduated from Loyola Law School, Los Angeles where he served as the Managing Editor of the Loyola Entertainment Law Journal. Robert spent the first six years of his legal career working for insurance defense firms.

