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A Horse To Ride: Finding Experts

by [Thomas W. Williamson](#)



During my 30-year tenure as a trial lawyer and member of VTLA locating and recruiting expert witnesses has been one of most important and rewarding tasks. No other aspect of case preparation affords the lawyer as much freedom as the retention of experts. The client, facts, venue and jury are in large measure thrust upon us with limited or no power of election. Lawyers pick their experts and the fortunes of a case will often rise or fall depending on the quality of the selected expert.

For this reason, careful thought and diligent work should be devoted to the task of seeking out and bringing on board experts. I start the work of finding experts even before I am retained on a case. When I read news stories or list serve postings, I strive to note and file away the names of persons who have expertise in areas involved in the types of cases I anticipate handling in the future. Such a "proactive" approach is particularly helpful in those instances where you need an expert immediately upon retention. Some examples of experts you may want to have "on call" are accident reconstructionists and cause and origin fire experts needed to investigate an incident before a change of condition of the critical evidence.

Fortunately, in most instances the selection of the expert need not be a snap decision. Time exists to locate and retain an expert with excellent credentials and an ability to communicate to a jury. I can deliberate and do the work necessary to find the right expert for the case.

Do your homework

I strive to familiarize myself with the scientific, medical or technical subject matter of the case immediately upon retention. This serves several purposes. I will be learning what type of expert I probably need. I will spot potential experts and sources of experts to contact in my search. Finally, when I find a potential expert who will speak with me, I can better understand any remarks the expert makes

about the case and hopefully have some sense as to whether the expert is giving me well informed and candid answers to my queries. My knowledge level is also going to be important to the experts. Experts like to work with winners and not fools. If an expert senses that the inquiring lawyer has no understanding of the subject matter, the expert is more likely to decline the proposed assignment.

My homework usually starts these days with Google. But it rarely stops there. I do literature searches. If it is a medical subject, I will run Medline searches, search databases of clinical guidelines and consensus positions and other specialized databases in such areas as toxicology and pharmacology. I always visit websites of organizations involved in the profession, trade or industry. I gather up membership directories and industry standards. Organizations such as the American National Standards Institute (“ANSI”) and National Fire Protection Association promulgate guidelines which I will download or order. I search the catalogs and databases of university libraries searching for texts which can either be checked out or ordered online (very often cheaper used copies are available) from Amazon and similar booksellers. I review databases of doctoral dissertations and conference papers obtaining copies of the documents germane to my inquiry.

All of the above source materials contain the names of potential experts and resources to refer me to potential experts. Most guidelines and standards include the names of committee members and consultants who participated in the preparation of the document.

I also go to university faculty websites. Most department websites describe the special areas of interest of the faculty member thus enabling you to quickly pick out the right person for the job in a given department. Recently, I needed a materials scientist who not only understood microwelding but also the effect of blood flow and physiological forces on metal inserted in the human vasculature. Five minutes on the website of M.I.T. produced such an expert who agreed to assist me.

Reviewing prior litigation

If you want an expert road tested in litigation, what better place to look than records of prior litigation. An invaluable resource is services such as Trialsmith, which give the user access to depositions and other testimony of experts. A deposition transcript will furnish you with a wealth of information about an expert including credentials, testimonial experience, biases and evidence of how an expert will perform when pressed by an opposing lawyer. Databases collecting pleadings and orders related to Daubert motions will identify potential experts and furnish great insight into the expert’s capabilities. Pacer, the online database of federal

litigation, can quickly inform you about federal cases involving your potential defendant or entities in the same industry as your potential defendant.

I will usually contact other lawyers about the expert discovered in prior litigation records. Invariably, I find my fellow VTLA and AAJ members extremely responsive to my request for information about the expert they previously retained or opposed.

Network, network, network

Finding an expert requires the tenacity of a telemarketer. You cannot be wounded by refusal. This is especially true when asking physicians to serve as an expert witness in medical malpractice litigation. I pose to each expert who declines the honor of working with me or who is not the right person for the job the question, “can you refer me to someone who may be able to help me?”

I also call upon my fellow lawyers. Lawyers who can help are not limited to my VTLA or AAJ comrades in arms. If I need a standard of care physician expert in a malpractice case, I may simply call a lawyer in another community and ask who he knows and respects. For example, the dental expert I used at the trial of *McMunn v. Tatum*¹ was located by calling a lawyer acquaintance in Virginia Beach who did not even handle malpractice cases. He was a golfer and I soon had on board an outstanding general dentist expert who played golf with the lawyer. I am not shy about asking my defense lawyer friends for the names of formidable experts they have encountered in litigation.

I frequently ask experts with whom I have worked in the past for referrals to experts. I have used numerous experts from one of America’s foremost academic medical centers whose provenance can be traced back to one expert from the institution with whom I worked some years ago. Being able to drop the name of a respected colleague helps clear the gatekeeper and get the busy physician on the phone. It also helps when they check you out with their colleague and find out that you timely pay your bills.

Using Services

I rarely use expert locator services. Some services will add a hefty layer of expense to the bills of the expert. In many instances, the service will recommend someone whose main qualification seems to be an eagerness to work as an expert but who is wanting in precise expertise on the subject at hand.

However, nurse legal consultants have afforded me invaluable assistance in finding medical experts. Some of the nurse consultants with whom I have worked are indefatigable detectives capable of performing meticulous chart reviews and tracking down well credentialed medical experts.

The profile of the perfect expert

As I go about my search, two overarching questions dominate my thinking. Will the judge qualify the expert and will the jury find the expert credible and likeable. Subsumed in the big questions are a number of sub-issues.

Does the expert have time for my case? No matter how impressive the credentials and wonderful the demeanor, if the expert is unable or unwilling to devote the time needed to learn the facts of the case, confer with you, give a deposition, prepare a Rule 26 report or interrogatory answer and come to court, the individual is not the right person for the job. Part of my initial questioning of the expert and queries made to other lawyers who have worked with him is will the expert do the necessary work. Don't find out the month before trial that your expert really does not do trials but is only willing to give a deposition.

An expert who, either due to arrogance or overwork, does not do the drudge work necessary to be factually fluent will crash in court. No better way for a cross examiner to take down an expert than to show the expert does not know the facts of the case. David Margolick, in his fascinating saga about the litigation arising out of the will of Seward Johnson, heir to the Johnson & Johnson fortune, regales the reader with a recounting of the expert testimony of Fred Plum, an esteemed neurologist and leading authority on coma:

Plum had trained an entire generation of doctors, who acknowledged he was a great teacher....But with all his responsibilities, Plum was spread extremely thin, and on rounds or in classes, some felt he did only what was necessary to get by. Many thought he was coasting on his reputation, although even when he was wrong, few dared correct him....

Plum deemed trials annoyances and did his best to avoid them...It was an attitude Graham [lawyer with firm retaining Plum] quickly diagnosed. Like everyone else (except, perhaps, Ann Landers) Graham found he had to schedule appointments with Plum far in advance, and even when they met, he was afraid to ask the doctor to review everything he needed to know. It is not a good thing for a lawyer to be afraid of his own witness. When the two men began preparing for court, Graham could not help but feel Plum had not done his homework.

Plum's trial performance validated Graham's misgivings. Here is a portion of Margolick's narrative of the cross examination of Plum:

Reilly [the cross examiner] quickly perceived, and exploited, Plum's ignorance. Had he read the testimony of John Peach of Mary Banks? Plum admitted that he

had not. Had he gone over the testimony of Martin Richards? No, Plum replied; who was Mr. Richards? How about Keith Wold? "I don't believe so, no. I don't remember the name, sir." Had he read Schilling's deposition? "No." Why not? It hadn't been provided to him. Hadn't he felt a responsibility, as a distinguished doctor, to be certain he knew all the relevant facts and let the chips fall where they may?... In only one respect had Plum outdone his rivals: his fees. He said he charged five hundred dollars an hour for work outside the courtroom, eight hundred dollars in it. The gallery buzzed, as if the Dow Industrial Average had just reached some previously unimaginable height... "Eight hundred dollars an hour?" Reilly repeated with his finely honed brand of spontaneous amazement. "Yes, sir," the unperturbed Plum replied. "I do everything I can do not to be in court."

Reilly asked the doctor if he'd seen Seward's last will, and the doctor admitted that he had not. Then how, Reilly snarled, could he have surmised that Seward had understood it? Plum replied that he had inferred it from his general familiarity with other aspects of his life.

"You just assumed that?" Reilly asked.

"Of course," Plum replied.

"Is that what you came down here for at eight hundred dollars an hour, to assumptions of this kind?" asked Reilly, addressing Plum with an irreverence that would have thrilled generations of medical residents. "Don't you think your opinion as to Mr. Johnson's comprehension of his will might be affected somewhat by whether it is a relatively simple, reasonably brief will, or whether it is very complex and complicated?"....

As Margolick succinctly concludes, "Plum, it turned out was a lemon."²

Does the expert have a conflict in testifying for your client? I do not simply mean a legalistic conflict such as the expert has already been consulted by an opposing party's counsel. I also refer to emotional or financial conflicts. In your initial discussions, share with the expert the identities of all the persons or entities who may be sued. Inform the expert with whom the potential defendant is affiliated. If the expert is going to get cold feet, I want it to be now and not thousands of dollars in bills later. Press the expert hard to see whether the expert has the intestinal fortitude to testify in public against a defendant who is a powerful force in the specialty or industry.

A few years ago, I did not inform an electro-

physiology expert that the defendant was a faculty colleague of a world renowned electrophysiologist whom the expert knew well. When this link became apparent to the expert in reviewing the depositions ultimately furnished to the expert, the expert's favorable opinion evaporated.

I strive to identify what will be the profile of an expert relatively immune to pressure discouraging the expert from rendering opinions for my client. I once represented a woman injured by a medical device used by interventional neuroradiologists, a small, tightly knit group of subspecialists. The manufacturer sponsored their conferences and provided much of the funds available for the research performed by the interventional neuroradiologists. Upon realizing this reality, I determined that I needed an expert who was nearing retirement and no longer focused on doing research and publishing to further the career but would still command respect. After many phone calls and emails, I ultimately located and retained a pioneer in the field who was in his sixties, extraordinarily bright and active and endowed with an iconoclastic personality. He spoke with authority and without fear of reprisal.

In constructing the profile, I reflect on what will be the opinion questions posed to the expert. Will it be standard of care, causation, custom of trade and industry or whether a product or premises were in a reasonably safe condition? An expert may be able to opine in court that something was unsafe but lack the qualifications to state what was the custom of a given industry. I therefore question the expert meticulously about his experience to satisfy myself that I can qualify the expert on the big questions at trial. In the context of Virginia medical malpractice litigation, the active clinical practice requirement, coupled with the certification requirements of expert review pre-service of a complaint, make it not merely prudent but mandatory to vet a potential standard of care expert at the threshold.³

Frequently, I wrestle with hiring an academic based expert versus someone engaged in the work in the field. Academics usually (but not always) have more discretionary time and usually (but not always) are comfortable communicating and teaching. On the other hand, the old saw "those who can do, those who cannot, teach" applies to some residents of academia. The bottom line is not to be guided by stereotypes but in each instance, assess with respect to this individual whether the person is qualified and is an effective communicator.

If the expert has written on the subject, my first reaction is great. My second reaction is to get copies of what he has written and think about how the publication can be used by a skillful cross examiner. I don't limit my scrutiny to the words of the expert but examine the footnotes and sources cited by the expert. The expert relied upon the sources in writing the text and a cross examiner can easily obtain a concession that cited sources are reliable.

Do I want an expert with litigation experience or a neophyte? A frequent flyer expert will always be open to attack by opposing counsel for the income earned from serving as an expert in litigation and as being biased if the testimony is predominantly for only side of the litigation equation. On the other hand, the experienced expert who understands the critical distinction between a possibility and reasonable degree of probability and has previously fielded all the trick questions is much less likely to disappoint when it comes time to testify.

The possible jury reaction varies from discipline to discipline. No eyebrows are raised by a forensic pathologist's frequent court appearances. If a neurosurgeon is spending more time in the courtroom testifying that other neurosurgeons violated the standard of care than the operating room, one wonders why.

Lawyers place a much greater weight on the number of legal cases in which the expert is involved and resulting income accruing to the expert than jurors. To jurors it is inside baseball. I recall a long and ultimately fruitless afternoon spent cross examining a defense maternal fetal medicine expert who had a far heavier case load than most lawyers. The witness happened to be one of the most prominent members of his specialty who had published a multitude of books and articles and been invited to lecture around the world. He blunted the "bias, interest" attack preemptively in direct examination by explaining how doctors around the world called and emailed him soliciting his advice on treating critically ill patients and when lawyers called, he was willing to share his opinions with them as well.

Juries are not shocked that doctors and engineers make a lot of money. As one prominent defense medical expert retorted when I revealed that he made a half million dollars a year for his legal work, "if a lawyer only made one hundred thousand dollars a year, he must not be a very good lawyer."

The answer of how much harm comes from an expert being a frequent testifier depends on how much the expert impresses the jury in other respects. A jury is unlikely to be troubled by the income and case load of an expert who is clearly highly regarded in his discipline and possesses outstanding professional credentials. The jury simply views the expert as a star who is highly sought after and consequently highly compensated. If the expert has mundane credentials, the danger of the bias, interest attack working is much higher.

Closing the deal

Once I find an expert I like and who is willing to work with me, I inquire about fees and then memorialize in some fashion the agreed upon fees. In this era of three hundred dollar an hour truck driving experts and fifteen hundred dollar an hour surgeons, failure to nail down the fees can be a costly error.

Then, I want to pay the expert a retainer unless the expert expressly declines. Napoleon observed that an army marches on its stomach. Experts testify on their wallets. One of the most satisfying feelings accompanying the filing of a complaint flows from knowledge that I have a well credentialed expert who is a true believer in my case committed to coming to court and testifying for my client. With some creativity, some old fashioned leg work and a dash of good luck, we can be armed with the confidence that we have a good horse to ride into battle in most of our cases.

Endnotes

1. 237 Va. 558, 379 S.E.2d 908 (1989).
2. Margolick, D., *Undue Influence: The Epic Battle For the Johnson & Johnson Fortune*, pp. 570-574 (1993).
3. See Va. Code §§8.01-581.20 and 8.01-20.1.

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