Northway Wealth Advisors

The Quest For a "Winning" Expert Witness

By Daniel M. (Dan) FitzPatrick, JD, TEP, MCIT

Anyone following the case of Massachusetts v. Karen Read (who isn't?) will be familiar with the concept of expert witnesses and their often-contrasting opinions on substantive matters of significance in civil and criminal trials. In many instances, the outcome of a case can hinge on the result of these "battles of the experts," when the trier of fact (judge or jury) finds the opinions of one expert more credible and helpful than the other. Resolution of the case usually represents a "win" for one party or the other; but does it follow that a win for the party on whose behalf an expert offers his or her opinion can or should be considered a "win" for the expert? And how do counsel and their clients find "winning" experts to assist them with their cases?

What is an expert witness?

Permit me some definitional background:[1]

> An expert witness is a person with specialized knowledge, skills, education, or experience in a particular field who is called upon to provide their expertise in legal proceedings to assist the court [or jury] with understanding complex technical or scientific issues. Each party selects their own expert witness, and those experts are usually paid a fee for their consultation and their testimony.
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> A person who is designated as an expert witness must be qualified on the subject of their testimony. See Federal Rule of Evidence 702. The court serves as a "gatekeeper" to screen out experts who are unqualified, their expertise is irrelevant to the facts at issue, or their methods are unreliable. Usually, the court will determine the admissibility of an expert witness' testimony in a pre-trial hearing.
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> The U.S. Supreme Court established the standard for expert testimony admissibility in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).* In this case, the Court established guidelines for determining the admissibility of expert witness testimony. These factors to be considered are:
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> 1. Whether the technique or theory in question can be and has been tested;
> 2. Whether it has been subjected to publication and peer review;
> 3. Its known or potential error rate;
> 4. The existence and maintenance of standards controlling its operation; and
> 5. Whether it has attracted widespread acceptance within a relevant scientific community.
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> This is known as the *Daubert* standard. Most state courts follow this gatekeeping standard. These criteria intend to prevent unreliable or otherwise "junk science" from being heard as evidence in an expert's substantive testimony.
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> Generally speaking, those who qualify as experts may testify about their conclusions so long as their analysis is scientifically sound, is helpful without usurping the role of the judge or jury, and is based on their background and experience.

[1] Summary courtesy of the Cornell Law School Legal Information Institute -- https://www.law.cornell.edu/wex/expert_witness (condensed, with internal citations omitted).

> In federal court, experts must prepare a report summarizing their analysis and conclusions, and share the report with all other parties. This allows other parties to effectively cross-examine the expert.
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> Experts may be designated by a party as "testifying" or "non-testifying." The distinction lies in their roles and the extent to which they participate in a legal case. While testifying experts provide testimony during trial, the non-testifying expert primarily works in an advisory capacity, offering consultation and support during pre-trial preparations.

Note that the purpose of an expert's testimony is *to assist the court or jury in understanding complex or technical issues with which they might not otherwise be familiar* and which are material to the proper resolution of the case. The expert is not, and should not attempt to be, an advocate for either side; he or she is expected to provide their honest opinion based upon the facts and circumstances relevant to the particular case, as informed by their personal education, knowledge and experience. It thus is sometimes said that the expert's true allegiance should be to the facts of the particular case and the integrity of their views with respect thereto.

The role of compensation

"But," you might ask, "doesn't the fact that an expert is compensated for their service by one of the parties to a case pose an inherent conflict that potentially can compromise the independence of their views and undermine their credibility as trustworthy providers of relevant and reliable information useful to the court or jury in deciding the case?"

A perfectly fair question, the best answer to which I believe is the following: as with all professionals, experts deserve to be compensated for their time and expertise, and the level of that compensation can vary significantly depending on the expert's background, experience and level of expertise, and the relative availability of others with sufficient expertise in the relevant subject matter. Occasionally, opposing counsel will seek to draw attention to an expert's compensation – particularly where the expert's hourly rate or gross fees charged to date could appear high to the court or jury – in an attempt to impeach the credibility of the expert's opinions as "bought and paid for." I have witnessed this tactic (and been subjected to it) many times; my experience is that it almost always falls flat with its intended audience. Judges and juries make up their own minds with respect to how much weight they will give to an expert's opinion, and the relative cost thereof to the litigating parties generates little shock or sympathy.

The "hired gun" issue

It is not at all uncommon for the experts hired by adverse parties to differ in their opinions of the factual record of a case; in fact, that is often the rule rather than the exception. This can give rise to a perception that their opinions were influenced by their retention, or that they were selected and retained based upon the expectation that they would give a particular opinion. This perception deserves a little "unpacking."

First, reasonable people can and do differ, honestly and with integrity, in their opinions. After all, our opinions are formed and influenced by our unique personal experiences and world view. One expert's subject matter expertise may be narrow but deep, while another's may be wide but shallow, and yet another's may be both wide and deep. Disagreement can be expected and should not be assumed to be evidence of partisan bias. In the end, it is up to the trier of fact to evaluate and determine which of the conflicting opinions to base its decision upon.

Second, I believe it is a bit naïve to think that litigating parties would not seek to find, retain and put forward experts whose opinions could be helpful to their position and arguments in their case. Very often, parties will engage an expert witness on a consulting basis in order to evaluate the strengths and weaknesses of their underlying case, and help formulate a presentation of that case that might be the strongest and most persuasive to the trier of fact. In many cases, that expert is ultimately disclosed and put forward as a testifying witness; however, if that expert's opinions would not be helpful to the party's argument, or if there should be any concern about the expert's ability to withstand a *Daubert* challenge or aggressive cross examination, the expert is simply not put forward as a testifying witness.

Finally, opposing counsel will often inquire about the expert's previous cases and their relative percentage split between testifying on behalf of the plaintiff or defendant, using any significant overweighting in either direction to suggest bias or status as a "hired gun." While I suppose an equal 50/50 split would most easily be perceived as "unbiased," I personally do not believe that overweighting, even significant overweighting, necessarily deserves an assumption of bias. My experience has been that counsel for either party will regularly reach out and request a preliminary "interview" call in which they share high-level information on their case and ask for the expert's preliminary views. Not surprisingly, and consistent with the discussion above, if they believe that the expert's initial views would not be helpful to their case, that expert is not engaged. As a result, any overweighting in the expert's case history could reasonably be considered the result of counsel's bias, not the expert's!

What qualifies someone to be a subject matter expert for purposes of litigation?

As noted above, an expert witness in federal court must have specialized knowledge, education, training, and experience in the relevant field. The expert may be asked to offer his or her opinions "to a reasonable degree of certainty," a phrase surprisingly without formal definition or even legal significance which can be interpreted as meaning that the expert's opinion must be supported by the evidence and not speculative. Moreover, the expert's opinion is generally expected to be consistent with accepted standards within the relevant field. Such standards may be objective, as in the case of scientific testimony, or they may be somewhat subjective in other cases; for example, when I offer opinions regarding a trustee or executor's conduct, I make reference to my understanding of "custom and practice" in the fiduciary industry based upon my personal experience and familiarity with that industry. In order to provide the trier of fact with some sense of how that experience could be relevant to the issue at hand, I typically include the following language in my reports immediately following a summary of my work history:

> Through these roles, I have gained significant experience managing and supervising all aspects of personal trust and estate administration and related fiduciary investment management. I am familiar with the wide variety of estate planning and wealth transfer strategies utilized in the high- and ultra-high-net-worth client market, and the corporate and trust structures used in their implementation. I am familiar with the issues and challenges involved in implementing those strategies and operating those structures, particularly with respect to exercising fiduciary discretion in challenging circumstances.
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> I believe that this experience has provided me with a perspective that can be particularly useful to the trier of fact in fiduciary-related litigation proceedings. Unlike academic experts who often opine as to theory and ideal-world standards, or attorneys and others who devise estate plans and draft the operative documents, I have had personal responsibility for directing the real-life implementation of those plans, under the terms of those documents, as influenced by those theories, in adherence to those standards as embodied in relevant statutes and as explained and discussed in multiple treatises, and in the context of the customs and practices then prevailing in the fiduciary industry. I also enjoy a perspective beyond that of a fiduciary new business executive, trust officer or chief fiduciary officer

> in that I have served as a senior business leader/executive with profit and loss responsibility for fiduciary activities accountable to the board of directors and management of the various entities with which I have been employed, which include some of the most highly regulated and well-regarded financial firms in the world.
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> A list of my publications and cases in which I have served as an expert on trust and fiduciary matters is included in my attached *curriculum vitae*.
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> I offer the opinions expressed herein to a reasonable degree of professional certainty. In reaching these opinions, I have relied upon my education, training, and experience in the wealth management industry. I have also relied upon facts and data of a type reasonably relied upon by experts in my field. While I have a law degree and am a licensed attorney, the opinions offered in this report are not my legal interpretations of governing law or trust instrument requirements. Rather, I am offering my opinions of standard practice in the fiduciary industry based upon my personal and professional experience as a trustee and executor. My professional experience includes 30+ years in the private banking, fiduciary and wealth management industry generally, and 20+ years of direct management and oversight experience in the establishment, operation, risk management, personnel management, administration, P&L management and strategic direction for personal trust and estate administration businesses. I have worked at, for and with federal banks, state banks, and trust companies both large and small, overseeing billions of dollars' worth of fiduciary assets in thousands of accounts administered by hundreds of fiduciary professionals in the United States and abroad.
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> I have also considered the various authorities and references contained in the body of this report, as well as the information listed in Exhibit [X] to this report. I reserve the right to amend, revise or expand upon the same based on additional evidence, pleadings or other material brought to my attention, by Plaintiff or Defendants, after the date of this report. This report is to be used for the specific purposes of this proceeding and is not to be used for any other purpose without my express written consent.

Where can one find suitable experts?

Once counsel has a clear idea of the expertise they need, how do they go about finding the right expert for their case? Unfortunately, there is no simple answer to that question. Online research tools do exist, but they each have their limitations, and no single source exists to bring all of the information together.[2] As a result, most counsel continue to rely on word-of-mouth and industry referrals to find experts. Popular search engines such as Google, Bing, Yahoo, etc. can be useful initial resources, but queries should be precisely tailored and it is important to note that results may be inaccurate, prioritized, paid, or otherwise manipulated. Expert witness directories and referral companies maintain databases of professionals available for expert witness assignments which may be accessed, often for a fee. Verdict reports (summaries of lawsuits that have either been tried to decision by a judge or jury, or settled non-confidentially) can be especially helpful, as they usually contain the "topic" or subject matter concerned, the court, the judge, the parties, the attorneys, a brief summary of the facts, the "result" of the case (i.e., who won), and a listing of the experts who were engaged by the various parties. There is no central depository for jury verdicts, but websites such as Zarin's Jury Verdict Review (findverdicts.netlify.app/) and VerdictSearch (www.law.com/verdictsearch/) offer paid access, and almost all jury verdict publishers license their content to LexisNexis and/or Thomson Reuters. College and university websites can be helpful for finding academically-oriented experts, and professional association

[2] For an excellent exposition of various sources of information useful for identifying and evaluating expert witnesses (which provided much of the information summarized in this section), *see* JurisPro Expert Witness Directory White Paper, "Finding and Researching Experts and Their Testimony," by Jim Robinson, David Dilenschneider, Myles Levin, Nathan Aaron Rosen (Fourth Edition – March 2018), https://www.jurispro.com/ExpertWitnessWhitePaper. References contained herein to specific service providers are for illustrative purposes only and do not represent, nor should they be interpreted as, any endorsement or recommendation on my part of such providers.

websites can be particularly useful for identifying experts with practical experience in specific fields or topics (the Associations Unlimited Database – www.gale.com/c/associations-unlimited -- contains information on over 465,000 organizations).

Once a pool of potential experts is identified, counsel and their consultants must vet each one for credibility and suitability. This is best done prior to interviewing prospective experts. Generally, this vetting involves the following steps:

1. Finding and verifying the expert's claimed credentials

   The expert's personal website, publications, and social media presence (LinkedIn, Facebook, X, Instagram, Substack, etc.), along with expert witness directories, are often among the first resources used in vetting potential expert witnesses. Educational degrees, licenses and specialty certifications can be confirmed by contacting the issuing entities or via search services such as the National Student Clearinghouse (www.studentclearinghouse.org) or Search Systems (www.publicrecords.searchsystems.net), and any disciplinary history can be obtained from the relevant regulatory authority or via expert research services such as LexisNexis' Expert Research on-Demand (www.lexisnexis.com/experts-on-demand) and Thomson Reuter's Expert Witness Profiler (www.thomsonreuters.com/en-us/help/westlaw-edge/searching/research-expert-witnesses).

2. Uncovering case-related information

   In addition to simply running the expert's name through a database of court dockets and opinions, or the verdict reports described above, counsel can utilize the Daubert Tracker (www.DaubertTracker.com), which creates reports summarizing opinions that address the admissibility of expert witness testimony. These reports include, among other things, the expert's name (which the opinion may not mention), area(s) of expertise, and whether or not the expert's testimony was admissible and relied upon.

3. Reviewing the expert's past testimony, reports, law review and bar journal articles

   Pursuant to the Federal Rules of Civil Procedure (Rule 26(a)(2)(B)), experts in federal cases are generally required to submit a report containing:

   (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
   (ii) the facts or data considered by the witness in forming them;
   (iii) any exhibits that will be used to summarize or support them;
   (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
   (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
   (vi) a statement of compensation to be paid for the study and testimony in the case.

   These reports, along with transcripts of an expert's testimony, may be available (for a fee) to attorneys who are members of the Defense Research Institute (www.dri.org) or the AAJ Exchange (www.justice.org/member-groups/litigation-groups/attorneys-information-exchange-group-aieg), or through the commercial TrialSmith document database (www.trialsmith.com). In addition, law review and bar journal articles often quote or cite

to experts' cases or other works, and may even discuss their testimony. They can usually be accessed via commercial services such as LexisNexis (www.lexisnexis.com), Thomson Reuters (legal.thomsonreuters.com) and HeinOnline (home.heinonline.org/).

Causality

Notwithstanding the importance of expert testimony in complex litigation, it is rarely the case that an expert's opinion is the sole determinant of a party's success in a lawsuit, and a party may lose for other reasons notwithstanding an expert's most brilliant and convincing testimony. Accordingly, a simple "won/loss" analysis of an expert's case history does not, to my mind, represent an accurate evaluation of an expert's success in making positive contributions to the process of dispute resolution. So what should be the objective measure of an expert's successful contribution to the judicial process?

A modest suggestion

With the above as background, I offer the suggestion that *the true test of the value of an expert's opinion is whether the trier of fact accepted it as reliable and specifically relied upon it when reaching its dispositive decision in the case*. But I must admit that even that test may fail to provide a comprehensive, fair and representative picture of an expert's effectiveness, for a number of reasons.

First, in my experience, most civil cases settle without proceeding to litigation, the fact of settlement and the terms of resolution are usually not disclosed publicly, and confidentiality agreements limit or prevent further discovery. Second, because jury deliberations are expected to be kept secret in order to protect the integrity of the judicial process and shield jurors from public pressure or unwelcome scrutiny after the verdict, it generally is not possible to find out what if any role an expert's opinion played in those deliberations. Third, even in those cases that go to trial and result in a written and published opinion, judges do not always identify the degree to which an expert's opinion influenced their ruling. As a result, it is only in those somewhat rare instances where a court specifically identifies its rejection of or reliance upon a particular expert's opinion that is possible to characterize that case as a "winner" or "loser" for the expert.

Following is a recent example of that last category, taken from the opinion of the U.S District for the Northern District of California in the case of *Emerson v. Northern Trust Company*:[3]

> Defendant next argues that their fees are consistent with market rates. As an initial matter, the court in *Banks*[4] held that charging a separate fee for tax preparation is consistent with customs and practices for trustees in California because tax preparation is an "extraordinary service" that warrants separate compensation.
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> This practice is also consistent with the findings of Defendant's expert Daniel FitzPatrick, who surveyed the fees of other institutional trustees and found that most charge a separate fee for tax return preparation. Expert Report of Daniel M. FitzPatrick ("FitzPatrick Rep."), ¶ 36. FitzPatrick examined eighteen fee

[3] *Emerson v. Northern Trust Corporation et al*, No. 23-cv-00241-TLT (N.D. Cal. April 16, 2025), pp. 11:16-12:16; the entire opinion can be accessed at https://www.linkedin.com/feed/update/urn:li:activity:7336767267520569344/. Note that, though never subject to a *Daubert* challenge, this testimony was nevertheless picked up by the Daubert Tracker and listed with the "disposition" comment of: "Testimony was sufficient for the grant of summary judgment."

[4] *Banks v. N. Tr. Corp.*, No. CV 16-9141-JFW (JCX), 2020 WL 1062144 (C.D. Cal. Mar. 5, 2020), *aff'd*, No. 20-55297, 2021 WL 3465763 (9th Cir. Aug. 6, 2021), a case in which I also participated as an expert witness.

schedules published by other bank trustees. *Id.* Of the eighteen bank trustees, fourteen charged a separate tax preparation fee, *id.* ¶¶ 46−51, and nine implemented a similar fee structure as Defendant, applying a base tax preparation fee with a separate charge for additional fees, *id.* ¶¶ 38–39.

FitzPatrick argues that because the fee structure of bank trustees varies, the most apt comparison of the tax preparation fees is in the context of the total fees. Ultimately, bank trustees are responsible for the reasonableness of the overall level of charges to a trust, however structured or computed. FitzPatrick Rep. ¶¶ 43–44. Viewing the tax preparation fees publicly available, nine bank trustees have tax preparation base fee of $350 to $1,000. *Id.* ¶ 47. Defendant's tax preparation fee is on the high end of fees charged at $1,000—tied with one of its competitors. *Id.* However, when viewing the tax preparation fee in the context of the administration fee rate, the minimum annual fee, and the annual cost, Defendant's fees for irrevocable trusts fall within the median. *Id.*

The Court finds that Defendant's practice of charging a separate tax preparation fee is consistent with the custom of the industry. Further, the Court agrees with Defendant that, given the variety in fee schedules charged by bank trustees, a more apt comparison of tax preparation fees is in the context of the total fee. Defendant's separate tax preparation fee, while on the higher end of the industry comparisons, is also consistent with the custom of the industry when considered in the context of the total fees. The Court finds that the custom factor weighs in favor of reasonableness.

Timing – When should counsel engage an expert witness?

The simple answer to that question is: as soon as possible once the need for expert assistance is identified. The advantages of early engagement include:

- Secure availability: Experienced experts are often in high demand and have busy schedules; engaging them early increases the chances that they will be available when needed for reports and trial dates, and reduces the chances that they may be hired away by another party or otherwise conflicted out of assisting with counsel's case.
- Thorough report preparation: Experts need sufficient time to review materials, conduct analysis and carefully prepare a well-reasoned and supported report, all of which are facilitated by early engagement.
- Enhanced case strategy: Experts can provide valuable input and strategic advice and support early in the case, including assistance with deposition questions and defense.

Conclusion

It can be quite a challenge to find the right expert for a case, particularly when time is of the essence. Unfortunately, until such time as there exists a U.S. News & World Report-style public ranking of expert witnesses (which realistically may not be feasible), counsel and their clients must continue to rely on expert directories, word-of-mouth, and industry referrals in order to identify and evaluate "winning" expert witnesses, aided wherever available by searches of written opinions in cases relevant to their need. The search can be hard work, but the value added by an appropriately qualified and experienced expert can make the difference between litigation success and failure.

 Dan FitzPatrick is an attorney and global wealth management professional with decades of executive leadership experience across premier financial institutions including JP Morgan, Goldman Sachs, Citigroup, and BNY Mellon. He is the founder and president of Northway Wealth Advisors, LLC (DBA Northway Fiduciary Advisors), a boutique fiduciary advisory firm serving high-net-worth individuals, families, and their related entities. FitzPatrick is a seasoned expert in fiduciary services, having served as trustee, executor, and testifying expert witness in numerous federal and state cases. He is a Master Certified Independent Trustee and a registered Trust and Estate Practitioner. Dan can be contacted at dfitzpatrick@northwayfiduciary.com.