

AVOIDING COMMON MISTAKES WHEN SELECTING AN EXPERT WITNESS

The following suggestions result from my experience serving as a witness, watching hundreds of other expert witnesses, and locating witnesses when serving as a confidential consultant. They are intended to help attorneys avoid common mistakes in selecting an expert witness.

Be careful when your potential expert witness is too quick to agree with your position. The expert should understand the opposing party's position and thoughtfully explain why it is incorrect. An expert who is too agreeable with your position may become too agreeable with an opponent who provides additional information. You are better off with an expert who will reach a conclusion more thoughtfully and then hold to that conclusion under pressure.

When possible, select someone who has previously been successful in witness work and is enthusiastic about doing it again. Serving as a witness is an unusual and rigorous job. Many people are not well suited to what is required. Let's face it: The first time we do anything, we are not likely to be very good at it. We fail; we get it wrong; we may even embarrass ourselves. The same thing is true when serving as an expert witness.

Test an expert's ability to provide short answers that are directly on point. Experts who regularly provide longer-than-necessary answers will get themselves and your case into trouble.

Select witnesses who can explain their craft to the people who will serve on your jury. Most experts primarily work with highly educated and motivated peers and students who have the basic vocabulary and education necessary to be conversant in a specialized field of study. These people are nothing like

your jury. Before employing an expert, test his or her ability to explain difficult concepts quickly in simple terms.

Identify people with energy and enthusiasm. The love that experts have for their field should be contagious. Experts should be quick to offer an illustration, chart, or analogy to enliven technical explanations. Don't presume that a candidate will become engaging and charismatic with your good coaching.

Gain a general understanding of the methodology that your proposed expert will use. Does it appeal to common sense? Inquire whether the methodology will meet the standards required of the *Daubert/Kumho* cases in federal court or the applicable state standard (*Kelly/Frye* in California).

Obtain only those experts who have the premiere credential in their field. Avoid the numerous nearly meaningless credentials that require little more than an application fee and a basic test that most people pass. Also troubling are credentials that are given based on a point system that provides credit for unrelated experience. In contrast, most noteworthy credentials require difficult tests, lengthy experience requirements, and peer evaluation.

Insist that your proposed expert and the expert's firm perform a comprehensive conflict check. This is particularly true of the large firms that have multiple service offerings. It is costly to learn of a conflict or contrary positions after you have committed yourself. A conflict could even disqualify you. I have replaced firms that have not been conscientious in this area, and I am always surprised when this basic inquiry is ignored.

Investigate writings of the expert you are considering. In some fields, regular publications are an indication of accepted expertise. But prior publications represent a minefield of potential conflicting positions or nuances that can be exploited by your opponent. Most jurors will quickly grasp the importance of a contradictory position. But since they do not live in the academic world, they will probably not care if the expert is publishing. It is difficult to predict the twists and turns of any litigation, so the safest course is to avoid a well-published expert.

The importance of all these issues requires that you begin your search for experts early. Your litigation plan should allow sufficient time 1) to identify the right expert, 2) for the expert to perform sufficient analysis (in the role as a confidential consultant) to know whether it will be helpful to your position, and 3) for you to alter your plan based on the consultant's preliminary conclusions.