New York Law Journal

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ALM

Friday, July 14, 2006

News for Associates and Young Lawyers

Career Development

Retaining Expert Witnesses

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As discovery in a lawsuit progresses, a junior attorney may be directed to start preparing for a "battle of the experts." The phrase refers to the challenge of presenting a jury with expert reports and testimony more relevant, credible and compelling than that offered by the opposing party.

In many lawsuits, prevailing in the "battle of the experts" can mean the difference between winning or losing, may impact the quantum (if any) of damages recovered or lost, or can significantly alter the terms of a settlement. Often, a junior attorney is called on to identify a pool of qualified individuals who could potentially be offered as expert witnesses.

There are many available sources to check when attempting to identify expert witnesses. For starters, practicing attorneys within and outside your law firm can be helpful resources for collecting names of possible experts. In certain instances, the client for whom the experts are needed may be able to provide significant leads for finding appropriate individuals.

Professional and trade associations present another potential avenue for locating potential expert witnesses. And any number of expert consulting firms may, for a fee, be able to introduce you to individuals who have suitable expertise. But exercise care when seeking input from attorneys or others outside your firm and only seek the assistance of trusted individuals, associations and organizations. Care also must be used not to inadvertently disclose privileged information during these inquiries.

The academic world is an often called-up resource for locating potential expert witnesses, so devise targeted Internet searches of university Web sites aimed at identifying professors with backgrounds that might lend themselves to providing expert opinions. Similarly, literature searches can identify authors of journal articles or other scholarly publications who, through their writings, have demonstrated an expertise and interest in the field upon which expert opinions are sought.

After a potential pool of experts has been identified, the process of interviewing and evaluating the experts must begin. A conflict check should be the first order of business, both for your law firm and the potential experts. The importance of the conflict check cannot be overstated. You don't want to learn several months into the relationship—and after spending thousands of dollars in expert fees—that a conflict exists which necessitates termination of the expert, or worse yet, disqualification of your firm.

Beyond the procedural conflict, a substantive conflict check should be undertaken. A thorough review of each expert's background, published writings, experiences, biases, prior opinions and sworn testimony should be undertaken to insure that the opinions to be offered in the present case cannot be diminished by some other aspect of the expert's career.

Consideration should also be given to the witness' schedule considering the anticipated timetable for his work in the lawsuit. This means evaluating the amount of work necessary for the expert to form his opinions, the expert's availability to perform that work over a finite time period, and the timetable established by the court for expert disclosure and trial.

Careful study also should be made to determine whether the expert's professional experiences are generally sufficient to meet the threshold necessary for him to be qualified an expert by the court.

Finally—though it should go without saying—confirm both that the expert is prepared to offer the opinions needed by your client and that the expert's views rest upon a solid, widely accepted foundation.

Assuming the expert will testify, in most jurisdictions the communications between the attorney and the expert are not privileged and do not otherwise enjoy protection from disclosure. That means any document provided to the testifying expert will not be protected from disclosure, even an otherwise classic privileged document such as a confidential internal law office memo outlining legal analysis and legal strategy.

Similarly, confidential conversations an attorney has with an expert in furtherance of the retention are also not protected from disclosure. The overarching lesson here is that care and thought must be given in advance to communications—oral and written—between an attorney and a testifying expert witness.

Attention must be paid not only to th witness' relevant opinions but to important issues regarding effective oral presentation. The interviewing attorney should consider whether the expert has the ability to explain concepts in a non-technical manner that can be understood by jurors.

Attention should also be paid to the expert's ability to withstand and respond to aggressive cross-examination. You should believe the expert is someone capable of forcefully defending his position in response to a blistering cross-examination from opposing counsel, or from difficult questions posed by the court itself. If not, the individual probably should not be designated as an expert witness.

Thought must also be given to how the witness physically presents to the jury. Said another way, does the expert appear to fit the part? Does he appear to be the embodiment of the person a jury would expect to hear delivering the particular opinions at issue?

In sum, finding an appropriate expert should not be left to chance. Instead, develop a methodical plan for identifying appropriate individuals, conducting interviews and performing thorough background checks. This is a time-consuming project, so be aware of these demands and budget your time appropriately. Retention of an expert witness may have significant consequences for your client and your firm.

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