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Five Mistakes Attorneys Make After Deciding To Hire An Expert

I try to stay as current as possible on developments in my little corner of the world and it struck me recently that not much new has been written on a subject that is so important to the financial lives of many people. Financial litigation is frequently complicated, expensive and usually there is a lot at risk. After working in the Banking Industry for more than 32 years, the last 20 or so of which acting as a turnaround specialist for “troubled” banks; I have had more than my fair share of working with debt resolution, loss mitigation, banking litigation, attorneys, depositions and court appearances. It was, in part, that very experience that caused me to begin consulting or testifying for attorneys on finance related matters.

Working with attorneys in recent years when I wasn’t a party to the litigation has been a real eye-opener. Before continuing, I have to add that the vast majority of attorneys in cases where I have been retained have been exceedingly bright, talented, knowledgeable and quick studies of what can sometimes be very complex financial transactions. The eye-opener part; however, has been some common mistakes they make in picking and utilizing an expert consultant or witness.

Picking The Right Expert

My focus, in this area, is on the background credentials of the expert. I assume that any expert retained by a law firm will make a good appearance and speak well enough. Today, more than at any other time, many cases are won or lost on the testimony of the expert witness. The real difference between an expert that will help make or break your case is the depth and diversity of the expert’s background within the industry involved in the litigation. I specialize in financial institution matters yet I have seen opposing counsel try to qualify CPA’s or mortgage brokers as their expert. While these people may be excellent at what they do; they have no understanding of what goes on inside a bank or finance company. Even a line employee of the institution (particularly a large institution) usually does not have the well-rounded experience of the overall enterprise or the administrative background to see and comprehend the big picture. An expert who does not have diverse administrative background may know how things are done because of habit, e.g. “someone told me to do it that way” or “we’ve always done it that way.” As a result, these people will not be convincing to a judge and jury; especially after a rigorous cross-examination. A convincing consultant or expert must be able to explain the logic or rationale of what was or was not done in easily understandable language.

Also, I understand that attorneys must ask certain questions of a potential expert for the obvious reasons; but the interpretation of the answers may be flawed. My favorite is “How many times have you testified at trial?” While I have handled my fair share of cases, very few have gone to trial and all have settled in my client’s favor; usually after submitting a report. My point here is that picking the right expert, not necessarily the one who has gone to court the most, can really help your case. Perhaps better questions to ask are “How many expert reports have you written?” and “How many of those cases resulted in a favorable settlement?” No expert can turn a case without merit into a winner; but the right expert can highlight the strong parts of your case with enough credibility to induce a favorable settlement.

Waiting Too Long To Hire An Expert

There are three ways that waiting too long to hire an expert hurts your cause. Probably the most unpleasant of these reminds me of the promo line for a local radio legal talk show — “this is where you call me on the telephone and I tell you that you have absolutely no case!” Seriously though, getting an early read on a case from a consultant/expert can save you a lot of aggravation and money.

Perhaps more important is the second reason which is the expert can *help you considerably to frame the issues*. A good expert has the industry experience to immediately spot where standards and practices have been violated and can explain why these departures are important for your case. They have also seen and participated in numerous similar

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cases so they can translate between breaches and causes of action. You may lose this very valuable assistance if an expert is not retained before a complaint is filed.

One of my favorites is being retained after the discovery period is closed. A good expert can tell you exactly where to look in the files to support your position. What may not seem important or relevant or simply not thought of can be very revealing for your case. Conversely, there are many document requests that may be informative; but, as a practical matter, will never be obtained. As an example in my individual area, regulatory examinations, though very revealing, will never be released.

Not Taking Your Expert To Depositions and Trial

To someone who knows the industry and its related hedge words, not taking your expert to depositions (or trial) can be really damaging. Very often, the subject of the examination will say something that, to the uninitiated, may sound logical and reasonable; but, the answer may have been carefully phrased and/or contain industry jargon that narrows or limits the response. An expert who is intimately familiar with the language of the trade can suggest questions to expose limiting language. Having your expert appear at trial only for their own testimony deprives you of your expert's opportunity to hear and dissect opposing testimony and perhaps suggest questions to be put to the other side. The result of this ability to probe carefully hedged answers can completely change the impressions intended to be left by the opposing side and, if a trial follows, reverse the impressions intended to be left by the opposition on a judge and jury.

Limiting The Information Given To Your Expert

Occasionally, an attorney will not give his expert all the information he has. Sometimes the attorney will discuss this information with their expert and both agree that it really would not add any value for the expert to review the information. If that is the case, then "no harm...no foul." If that isn't the case, you could be headed for disaster. If a document contains information unfavorable to your position and you don't show it to your expert; it's a safe bet that the other side will. Picture the scene where opposing counsel asks your expert, "*Mr., now that you've read this document; does that change your opinion?*" The major reason expert witness testimony is invaluable can be summed up in one word, credibility. If the expert loses credibility with a judge and/or jury; the result can be worse than if you had no expert at all. I was taught, early in my career, to never defend an untenable position.

Allow Sufficient Time

Give the expert enough advance notice that you will need his or her services. A well-reasoned, logical opinion needs to take into account a multitude of factors; some of which may not immediately come to mind. In many of the cases I have worked on, I was surprised that simply reflecting back on the facts caused me to remember additional facets which added to or solidified my opinion. In one recent case, the attorney I was working with was surprised to learn about certain industry customs that I had previously considered so mundane as to not be worthy of mentioning. This is sort of a bonus for plenty of advance warning and frequent communication.

If a report is required, I always like to read it over at least a few times to make sure the thoughts conveyed present all the pertinent facts in an "easy to read and understand" fashion. My past experience has been that a well-reasoned and well-organized opinion or report promotes settlement. A hurried expert analysis is usually flawed; allowing an opposing attorney to have a field day questioning a "rush job."

The attorney-expert team is critical to the successful litigation of complex cases. Experts must be objective; the expert's job is to vigorously search for facts and the truth. Selecting the right expert for your needs is no easy task, but diligent work with experienced trial counsel in the selection and preparation process pays invaluable dividends.^b

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^{1, 2} "My Kingdom for an Expert", By Michael B. Lee, Beime, Maynard & Parsons L.L.P.

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