

CHECKLIST FOR RETAINING A (potentially) TESTIFYING EXPERT WITNESS

- 1. Determine on what issue(s) an expert would be helpful in your case**
 - Think expansively, creatively, and consider multiple experts to work in conjunction or coordination.

- 2. Determine pool of potential experts**
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- 3. Call with potential experts (do not email!)**
 - Verbally share essential issues/facts of your case
 - o Be consistent among experts you are interviewing
 - o Do not hide bad facts
 - Ask what expert could do for you and BRAINSTORM possibilities for their work
 - Be clear about any limitations/expectations for their work
 - Ask expert substantive questions to gauge their ability to communicate clearly
 - Get list of what information expert would want and need if hired
 - o This can help frame a future discovery request even if you go with another expert.
 - Go over funding options/obstacles
 - o DO NOT sugar coat it.
 - o You do not want to waste your time on an expert you cannot afford
 - o Ask about “public defender” or pro bono rate(s)
 - Discuss expert’s communication & document retention policy in advance
 - If expert is still in contention, then schedule in-person or virtual meeting
 - Provide publicly available materials about your case before meeting (PC affidavit, complaint, etc.)

- 4. Investigate potential experts:**
 - Google the expert by name(s)
 - Do caselaw search for the expert by name(s)
 - Read articles authored by expert
 - Consult expert’s references – especially on similar cases/issues
 - If an academic, ask to observe a class
 - Review any available deposition and trial testimony

- 5. In person / virtual meeting with potential experts:**
 - Provide more detailed overview of case
 - o Use PC affidavit, charging document, if available
 - o Supplement verbally
 - o Highlight bad or inconvenient facts
 - o Do not create discovery by giving them your case theory in writing
 - Review CV together and ask about any discrepancies or open time periods

- Discuss note taking, record keeping, report writing, etc. AGAIN
- Assess appearance and demeanor
- Elicit experience and knowledge
- Have them explain complex concept in simple terms
- Assess EGO
- Ask for any trial or deposition transcripts from prior testimony

6. Ask about “skeletons in their closet” outright before retaining:

- Has the expert’s testimony been excluded/limited by a court?
- Has the expert ever failed to be qualified?
- Have expert’s opinions been subject of any written opinion?
- Has expert been opposed before to other side’s expert?
- Consider experts’ personal life - is there anything negative?
- Does the expert have any substance abuse issues?
- Is expert going through a contested divorce?
- Has the expert ever been a party in any litigation?
- Has the expert ever been sued by a client or former client?
- Has the expert ever been subject to any criminal proceedings?
- Has the expert ever been accused of breach of fiduciary duty?
- Has the expert ever been fired from any position?
- Has the expert ever been charged with sexual harassment?

7. Hire the expert – put some contract/funding in writing but know it is DISCOVERABLE

- Contract minimums
 - o Confidentiality – all of their review/work is work product unless released by you or your client.
 - o Money – address how, when, and caps of funding.
- Talk through staged work if you expect push-back from your funding source, what logical progression will be and how builds on each other.
- Discuss note taking, record keeping, report writing, etc. AGAIN
- Discuss professional best practices that you will hold opponent to and ensure your expert follows the same.
- Discuss having conversation about conclusions/work BEFORE the expert writes a report.

YOU ARE NOT DONE – now you have to work with your expert to gather necessary information, create report, and prepare them for testimony.

8. Review report drafts but only in person or on screen sharing tool

- Valuable no matter your level of experience:
 - If you are novice to topic – your review will ensure expert is communicating well at lay level of jury.
 - If you are well read on the topic – your review of report will allow you to assess strengths and weak points of expert’s conclusion(s).
- Review for typos – makes expert look stupid or lack of attention to detail if typos
- Keep audience for report in mind
 - Jury? Jury often does not see an expert’s report.
 - Opposition
 - Report will give notice of expert’s examination/evaluation
 - Report will explain expert’s opinion(s)
 - Facts relied upon
 - Methods used
 - Ultimate conclusion
 - Authorities relied upon
 - Judge
 - Report will allow judge to rule on evidentiary issues
 - Report will allow judge to assess whether any surprising material
 - CITATIONS are often the most important part of an expert report. Have expert ensure to cite everything that may become relevant.
- Ensure that all background digital data is scrubbed from report before disclosing it

9. Preparing for Deposition / Trial

- Help your expert to be at ease with the process by telling them what to expect. You want them to be able to focus on presenting their opinions.
 - Review logics of sleep and eating schedules as well as location details
 - Tailor timing of testimony to meet experts strengths
- Determine how polished/seasoned you want expert to appear at trial, be intentional
- Tell expert how to dress for depositions and trial.
 - Formality of dress may impact expert’s formality of speech, be deliberate
 - Remind expert to be professional, avoid jokes and to use respectful language
 - Remind expert to be friendly and aim for same demeanor in direct/cross
- Cross-examine your expert to test your case and prepare them
- Spend time directly before testimony (during trial) with your expert.
 - Update expert on what’s happened so far in trial.
 - Adapt strategy to what has happened so far in trial.
 - Create exhibits and analogies to convey in testimony
 - Final review of your direct examination outline
 - Do not give expert a copy
 - Do not over prepare expert, risk of coming off too polished/practiced