

# Choosing an Expert Witness

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# **How to Verify the Background of Your Expert Witness and Your Opponents'**

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### **Introduction**

Experts are required in cases that involve scientific evidence. Civil and criminal cases that involve DNA evidence, engineering evidence, fiber analysis, medical standards, etc. normally involve the use of experts to explain the technical information that is normally beyond the jury or judge's experience. The courts have placed certain requirements on who can qualify as an expert and whether or not the expert's testimony will be presented to the trier of fact. As such, counsel will want to select a qualified individual who can meet and exceed standards for expertise. Given that both sides will be presenting competing expert views on issues raised in the case, it's paramount that the expert's credentials can withstand challenge and that his or her testimony will withstand the gatekeeping function performed by the judge under *Daubert* and its progeny.

Experts live and die by their credibility. Sometimes, however, experts shade their résumés or falsely claim certification, scholarship, professional affiliations, or experience. Discovering misstatements or omissions in any of these categories can result in the disqualification of the expert. If the misstatement is brought out at trial, the results can be devastating to the litigation.

### **I. Choosing an Expert**

#### ***Sources of Available Experts - The Internet***

The Internet offers a variety of choices for selecting an expert. There are, however, some basic elements to consider when evaluating expert witness service web sites. One is that editorial and business practices vary from site to site. Some sites require a fee for a successful referral. Others charge a subscription or a pay-for-use fee to the expert database. There are numerous sites which maintain databases of experts as one service of the site rather than as its primary business. Many individual expert and consulting services maintain promotional web sites. Understanding the context of how these sites operate will aid tremendously in matching an appropriate expert to the case as well as offering some method of investigation of the expert.

The greatest concern with any information available on the Internet is its veracity. Web sites will have varying editorial practices. There is no guarantee that the information appearing on any given site is either accurate or up-to-date. Better sites offer signals as to source of information and its timeliness. Bad as well as good information is often picked up by sites and

repeated without any form of verification. Consider the reputation or notoriety of the web site or source as one factor in evaluating available expert information. One technique is to verify information by cross-referencing it against known reliable sources.

### ***Referral services***

The better of these sites will be searchable by expert name, area of expertise, and location and other access points. The results of a search should include a detailed description of the expert, contact information, and, if possible, a résumé or CV that details trial and/or publication history. HGExperts.com (<http://www.hgexperts.com>) is a good example of this type of site. The main page acts as a portal to subject areas of expertise with links to relevant entries. Listings include contact information; summary details of expertise; pictures where available; links to a more detailed profile; and links to the expert's business or web site.

HGExperts has the requisite flexible search capabilities. You may search using keywords that can be limited to specific states or nationally. Search results give the same kind of information as does browsing. It is easy to identify potential expert candidates within the web site. HGExperts offers enough details about an expert to identify his or her area of expertise, but does not evaluate them. Experts pay to list themselves on this particular site.

HGExperts is part of the [HG.org](http://www.hg.org) web site, which is provided by Hieros Gamos, a worldwide directory of legal services. HG acts as a legal portal to many areas of law with links to many primary domestic and international legal resources. The site maintains a good reputation with web researchers. HGExperts is just one example of the many sites that offer expert listings. It is an example of a better site, not necessarily a model. Other expert sites are listed in Appendix A which follows the body of this handout.

### ***General web search***

Google or another search engine can certainly provide links to relevant expert witness sites. A broad search such as "expert witness" will return more than 5.4 million hits. You can distill these results by adding a keyword identifying the specific area of expertise. Still, the results will be in the thousands or more. No one will work through that many results, especially without any objective reference as to the quality of the results or individual experts.

The better strategy would be to search for "expert witness directory" and search for an expert that way. General Google or other search engines are more valuable when searching for a specific expert. As Google and the other search engines rank by relevancy, hits located in the first two or three pages will likely be the most useful. Google will place paid listings at the top of the first list of results. These are specifically marked as "Ads." That doesn't mean these sites aren't useful, just that they paid for the location of their listing.

The best strategy for selecting an expert candidate via the Internet and expert witness portals is to identify specific subject specialists and evaluate them against the combination of education, experience, fees, past litigation history, and other factors such as a client list. Rather than looking through every possible expert, set standards as to what characteristics would be

appropriate and winnow the results from there. Again, not every site or result will offer all of this information in the same place.

Note that search engines may not return complete results. Lists are sometimes kept in databases where the content is generated on the fly by initiating a search at that site. This type of content is not generally indexed because it is not in a form that is amenable to indexing by a search engine. Note that web content is generally in flux, which is why search engines update themselves so frequently. Some expert information that existed in the past may not be presently available.

Expert witness sites tend to act as nonexclusive agents for witnesses. An analogy to an expert witness dating service would not be far off. Expert rosters can be in the hundreds of thousands for some sites. They generally include a search mechanism by witness name, location, topic, and resumes and background information on the expert. Some sites charge for access to search results while others charge a fee only if the expert is retained.

### *Considerations in Evaluating Potential Experts*

Shop around for the specific expertise needed. Ask around. Colleagues may have had experience with an expert in other litigation. Speak to the potential expert about the issues in the case. They should be able to offer some guidance to the technical issues as they apply to both sides of the litigations. An expert is not someone hired to parrot a particular theory or opinion. Rather, their analysis can determine whether the technical facts can support the legal theories for finding liability (or guilt/innocence).

An expert candidate should be able to provide references. Hiring an expert has many of the same characteristics hiring an employee. Allow time to evaluate the possible choices.

Get an expert early on in the litigation. The expert should have enough time to establish the technical facts of the case. Coming up against deadlines imposed by discovery and other pre-trial procedure is not conducive to a good expert analysis. An expert's opinion is more likely to withstand challenges if the expert has sufficient time for thoughtful preparation.

Expert witnesses should have the background and expertise to speak on the specific issues raised in the litigation. That is to say, a generalist in a field may qualify as an expert, but may not be the *best* expert to present an opinion on an issue. Someone with more detailed knowledge of, and experienced with the specific issue at hand is more likely to be effective at testifying than a generalist.

Be prepared to give detailed information to the expert about the case. Make sure they are aware of all the case details. Withholding information can be the basis for a faulty opinion, and potentially, an ethics violation. An expert should be prepared to discuss what steps need to be taken to form an opinion, and what fees are involved.

## ***Background***

Expertise takes the form of education and experience. Selecting the right balance can be affected by the specific issue at hand in the litigation. An expert with less educational depth may still be a better choice if that person has extensive direct experience with the specific technical points at issue. Federal Rule of Evidence 702 and the associated comments allows for such a balance of understanding:

“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise....”

Check for local and state rules that track the Federal Rules of Evidence for similar qualifiers.

## ***Personality and Communication Skills***

A testifying expert will appear in court. Whether the trier of fact is a jury or a judge, the expert should be able to testify in a clear and personable manner. Someone who is technically brilliant but awkward in communicating will not make the best impression on the witness stand. This element of evaluating an expert will not come from a resume. However, examining the expert's track record in previous litigation can help make the determination as to who would make a potential expert witness for the current litigation. Conversations and meetings should also alert the attorney as to the expert's ability to make a good impression on the trier of fact.

## ***Ethics***

Consider the ethical aspects of hiring an expert. The testifying expert's notes, papers, and communications are not protected by the attorney-client privilege. Materials generated in the course of retaining a testifying expert are typically discoverable. With that in mind, an attorney can encourage an expert to keep their drafts and documented conclusions to a minimum. An attorney cannot ethically tell an expert to destroy or hide materials generated in the course of preparing a report or testimony. However, the real lesson here is that an expert with a tainted background will have potential credibility problems.

A work product expert operates under different considerations. These individuals are retained by the attorney to help expand the attorney's knowledge of technical aspects of the issues. They are not hired to testify and their communications with the attorney can be protected in most circumstances.

A lawyer should make sure that any expert has not had any past contacts with the client or attorney on the other side. These types of conflicts may disqualify the expert from participating in the case.

## ***Expert Opinion as Admissible Evidence***

The Supreme Court in the 1990s issued its “*Daubert*” trilogy of cases addressing the use of scientific evidence and the qualifying of experts in federal cases. These cases consist of *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), *General Electric v.*

*Joiner*, 522 U.S. 136, 118 S.Ct. 512 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 1174 (1999). Prior to *Daubert*, courts used the general acceptance test of *Frye v. U.S.*, 293 F.1013 (D.C. Cir. 1923). That is, any evidence based on scientific or technical issues had to have general acceptance within the scientific community.

The Federal Rules of Evidence came into effect on July 1, 1975 and added Rules 701 through 706 (Article VII of the Rules) governing Opinions and Expert Testimony. *Daubert* essentially said that the Federal Rules of Evidence superseded *Frye* and enunciated a four-part test for the admissibility of expert testimony under the Federal Rules.

Under *Daubert* the courts have a duty to make sure an expert's testimony is both relevant and reliable. Much of this is taken up with qualifying an expert at the trial through examination and cross-examination of the expert as to the background and experience, and the basis of the expert's opinion. Some of this is done through pre-trial discovery proceedings under Federal Rule of Civil Procedure 26(2), which sets parameters for what expert materials must be disclosed before trial. These include an expert's identity, a written report signed by the proffered expert, and unless the court orders otherwise, these disclosures must be made at least 90 days before the date set for trial. The written report must contain the statement of expert opinion and the basis for that opinion; the underlying data or information that the witness used to formulate that opinion; exhibits that will be used to demonstrate the opinion; the witness qualifications and the list of all publications authored in the previous 10 years; a list of all cases within the last four years where the witness testified at trial (including depositions) as an expert; and the amount of compensation to be received in the current case.

Whether a state uses *Daubert* or *Frye* as the basis to admit scientific evidence in court, the information required under FRCP 26(2) is a good baseline for measuring any expert's qualifications for offering an opinion.

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