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Expert Witness: Love Them. Hate Them. Become One?

In the A/E world, the phrase 'expert witness' (hereafter 'Expert') can bring to mind many thoughts. Some pleasant, some unpleasant, depending on the memory. Many of us have been involved in disputes where we thought the so-called Expert was anything but an expert. Perhaps their credentials were lacking. Possibly their investigation, which led to their Expert conclusions, was shoddy or incomplete. For whatever reason, their Expert opinion was wrong.

There are many well-respected Experts with excellent backgrounds resulting from their experience, education, judgment, and demeanor. That doesn't mean the Expert cannot be wrong, they are human, like the rest of us, and are fallible. Some Experts will say almost anything their client wishes them to say, for the right price. These might be called Hired Guns, or even more derogatory epithets. There are those Experts whose opinions are not for sale. To paraphrase the late, great Yogi Berra, these Experts call 'em as they see 'em. Regardless of competency, many individuals make an excellent living from selling their expert witness services. Just do an internet search, and you will find thousands of Experts in any discipline.

So, what makes an Expert different than an ordinary witness? An ordinary witness usually has firsthand knowledge of something about the matter. An ordinary witness could be a contractor, an owner's rep, a laborer, or anyone else who has personal knowledge of some issue involved in the dispute. The Expert, on the other hand, does not base their testimony on firsthand knowledge. The Expert examines the problem from the perspective of an unrelated third party.

The Expert is usually retained by legal counsel retained by one of the parties to a dispute. A judge or an arbitrator must rule that a witness is qualified as an Expert. To make this determination, the judge/arbitrator examines the educational background, credentials, experience, certifications, research, and other indicators of supposed expertise. This is not always a slam dunk for the Expert. While not commonplace, it is sometimes found that the claimed 'Expert' has fudged their resume or some other aspect of their background to seek qualification. It also happens on occasions that the judge/arbitrator rules that the background information provided does not qualify that person as an Expert. Or, on occasion, the judge/arbitrator rules that the Expert is relying on unreliable or unproven scientific methods, flawed reasoning, and the like. In other words, junk science.

It is very common that the demeanor of the Expert, in other words, how they come off to the judge/arbitrator or juror, is the key factor in the success or failure of the Expert. Are they believable? Are they likeable? Do they remind you of your kindly minister, professor, grandfather, or grandmother who always seemed to know the answer to life's questions? The most unqualified Expert can, if they come off well, make up for the poorest investigation or most asinine conclusion.

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Managing the expert witness process requires careful planning, effective communication, and adherence to established legal standards and procedures. It's crucial to select the right expert, prepare them thoroughly, and ensure their testimony is clear, concise, and relevant to the case. Effective management also includes understanding the expert's role, managing their time and resources effectively, and preparing for potential challenges that may arise during depositions and trials.

If you are a party to a dispute and your legal counsel retains an Expert, you should never sit back and let your lawyer control this entire process. You must provide your input to your lawyer. It is your reputation on the line, so never abandon this aspect of a dispute to your lawyer. See if you can poke holes in the background of your Expert. Try to poke holes in their investigation and conclusions. The party opposing you is certainly going to try to do these things, so you should do the same ahead of time.

Honest, qualified Experts are always in demand. If you are comfortable providing your opinion and facing pushback or someone questioning your conclusions, consider trying to offer Expert testimony. Talk to your legal counsel, who has represented you before. Talk to your professional liability agent. Discuss the benefits and drawbacks with others offering expert testimony. Providing expert witness services can be a rewarding and lucrative endeavor, but it comes with a unique set of benefits and risks that potential experts should carefully consider.

Benefits

- **Significant income potential:** Expert witnesses often command high hourly rates, which can be a substantial source of income. Depending on the field of specialization and experience, an expert witness can typically earn between \$500 and \$ 1,000 per hour on average. Considering a typical case might require at least 10 hours of work, this translates to a considerable amount of money.
- **Intellectual stimulation and continued learning:** Analyzing complex cases and preparing detailed reports can be intellectually challenging and provide opportunities for continuous learning and professional development. Examining mistakes made by others, especially in fields such as medicine, can also serve as a valuable learning experience that can improve one's practice.
- **Career opportunities beyond traditional roles:** Expert witnessing can provide an alternative career path, particularly for those nearing retirement, as it allows individuals to leverage their extensive experience and knowledge in a less physically demanding capacity.
- **Making a difference in legal proceedings:** Expert witnesses play a crucial role in ensuring fair and just outcomes in legal cases by providing objective, fact-based information that can clarify complex issues

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for judges and juries. Their testimony can be instrumental in shaping the outcome of lawsuits, particularly in technical or scientific cases.

- Flexibility and remote work possibilities: Much of the work involved in expert witnessing, such as reviewing documents and preparing reports, can often be done remotely from a home office, offering a degree of flexibility.

Risks

- Heightened scrutiny and challenges to credibility: Expert witnesses will inevitably have their credentials, methods, and objectivity scrutinized and challenged by opposing parties. Maintaining an objective and unbiased stance, even when findings don't favor the hiring party, is critical to maintaining credibility.
- Potential for legal liability: Historically, expert witnesses enjoyed immunity from civil lawsuits related to their testimony. However, this immunity has eroded, and experts may now face legal action for negligence in forming or presenting opinions, ethical violations, or biased/unsubstantiated testimony.
- Disciplinary actions and reputational harm: Engaging in unethical conduct, providing misleading testimony, or misrepresenting credentials can lead to disciplinary actions from professional organizations and state licensing boards. A poor performance in court or disciplinary action can also damage an expert's professional reputation and future opportunities.
- Time commitment and pressure: Expert witnessing can be time-consuming, requiring significant effort for research, report writing, preparation for depositions, and court appearances. The pressure to perform well under cross-examination and the adversarial nature of legal proceedings can be emotionally taxing.
- Potential for conflicts of interest: Experts must be careful to avoid situations where personal, professional, or financial relationships could be perceived as compromising their objectivity and impartiality.
- Impact on personal life and privacy: Expert witnesses may face questions about their personal life and finances during legal proceedings. Being the subject of public record requests can also be time-consuming and stressful.

It is essential for aspiring expert witnesses to thoroughly understand these benefits and risks before embarking with this type of work. Consulting with experienced legal counsel and reviewing relevant professional standards

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and guidelines can help mitigate potential risks and ensure an ethical and successful experience as an expert witness.