

# Daily Journal

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PERSPECTIVE

## ART OF THE TRIAL

# Experts

By Douglas J. Dixon

**M**ost trials today involve expert witnesses, and they can often make or break your case. The best expert witnesses are good communicators who can credibly explain and simplify complex, technical evidence and connect with jurors. The worst come across as arrogant, combative hired guns who bore and confuse jurors. So how can you retain the former, and avoid the latter?

Here are some considerations to keep in mind when selecting and retaining testifying experts.

### Do I need an expert?

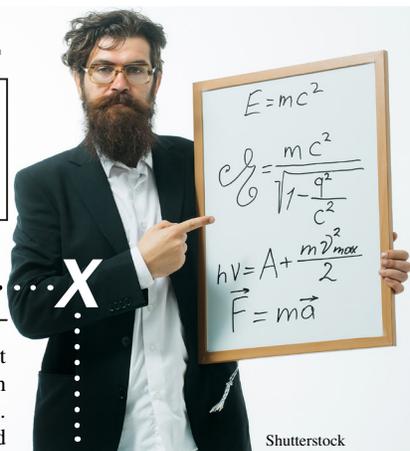
Does your case involve the interpretation of scientific or technical facts or data — e.g., did an alleged false statement cause a company's stock price to be artificially inflated? Does liability or the extent of harm turn on a particular scientific or technical analysis — e.g., does a product infringe a patent? Is the calculation of damages subject to dispute or more than a matter of simple arithmetic? Do your fact witnesses use a lot of technical jargon in answering your questions?

If the answer to any of these questions is “yes,” you probably need a testifying expert.

The use of experts at trial is not without limits. In federal court, an expert witness may testify only if his or her testimony will “help the trier of fact to understand the evidence or determine a fact in issue.” Fed. R. Evid. 702. Experts may not testify about matters within the “common knowledge” of the jurors. So if it's a question of whether the doctor amputated the left leg when it was the right that should've been amputated, you can't call an expert to explain the difference between left and right. But if it's a question of whether the leg should've been amputated at all, that's where expert testimony is appropriate.

### When should I start looking for experts?

As soon as possible. Starting your search early has several advantages — the pool of potential experts will be bigger



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**Does the expert have too much testifying experience? Jurors could perceive an expert with extensive experience as a hired gun willing to say anything for a price.**

and your opponent is less likely to be able to lock up the best experts. And once retained, you can — and should — take advantage of your expert's advice on topics ranging from the direction and development of discovery to the identification of case themes and key concepts to potential settlement value. In addition, early retention ensures that the expert has sufficient time to uncover and consider the most important evidence and data that will allow him or her to develop the most effective opinion.

### How do I find potential experts?

In some cases, your expert may have been chosen for you. It's the engineer who designed the car's brakes or the doctor who treated the patient's injuries.

More often, however, you have a choice.

Start by drawing upon your own experience and that of your client. Are there any experts with whom you or your client has worked in the past that you might use again? Turn to colleagues inside and outside your firm for recommendations. Scour the biographies and CVs of academics in the relevant field and authors of relevant publications. Consulting firms and expert search firms may also be helpful in locating potential experts. The dockets of cases involving issues similar to yours may also be useful.

### How do I choose the best expert?

Here are six things to keep in mind:

**Knowledgeable?** Jurors are impressed by degrees from well-known academic institutions, but actual hands-on experience is also important. Who can forget the scene from “My Cousin Vinny” when attorney Vinny Gambini called his unsuspecting fiancée Mona Lisa Vito to the stand to testify as an expert in “general automotive knowledge.” After conducting a brief voir dire — pronounced *vwahr die-yer* in the movie — that focused on Mona Lisa's automotive experience, the prosecutor withdrew his objection to Mona Lisa, and the judge permitted her to testify as an expert to a noticeably impressed jury. Investigate whether the expert has firsthand experience with the relevant field and issues in your case. The more specific the experience the better.

**Experienced?** Does the expert have prior testifying experience? It can take time to develop the skills necessary to become an effective testifying expert, and there's no substitute for experience. But, every expert witness has to start somewhere, and sometimes the best expert might be someone with the right set of expertise and skills — and a desire to learn — even if he or she has no prior testifying experience. You should also ask: Does the expert have *too much* testifying experience? Jurors could perceive an expert with extensive experience as a hired gun willing to say anything for a price.

**Available?** The best experts aren't always available. You and the expert should run conflict checks to ensure that the expert isn't working for your opponent or opposite your client in another case. Make sure the expert has adequate time and interest to devote to your case. Good experts often come at a high cost, so make sure that the expert's fees don't render him or her beyond your reach. Finally, many cases involve protective orders that may place limits on what an expert can do after accessing confidential information — e.g., prosecution bars in patent cases — so make sure your expert is willing to sign and abide by the terms of the protective order.

**Impartial?** Always review an expert's prior experience to ensure that he or she won't be susceptible to claims of bias. Does the expert seem to favor the plaintiff or the defendant? Does the expert always reach the same conclusion on a particular issue — e.g., the asserted patent is invalid or a manufacturing defect existed? Has the expert worked too frequently for your client or your firm?

**Good communicator?** Jurors pay more attention to an expert's ability to communicate than almost anything else. Expert witnesses should be articulate, confident (but not overly so), dynamic, poised, and unflappable. To find out if your expert possesses these qualities, investigate whether the expert has won any teaching awards, search YouTube for videos of your expert teaching or presenting, and perhaps most importantly, interview the expert, preferably in person. I once asked an expert I was interviewing what he liked least about expert witness work. His response immediately disqualified him: He said, “testifying”! At least he was honest.

**Red flags?** Evaluate whether your expert's credibility with jurors is susceptible to criticism for reasons unrelated to your case. Always run a background check on any expert you're considering. Confirm the credentials and degrees listed on the expert's CV. I've come across experts who claimed to have degrees for which they never completed the coursework. Research whether any court or tribunal has excluded or critiqued the expert's analysis or testimony, and check whether the expert has offered opinions in prior litigation that are at odds with your position. Call the expert's references, particularly those who have worked with the expert most recently. Finally, during the interview with the expert, ask whom he or she would recommend as an expert if he or she were unavailable. Not only is this a good way to discover other potential experts, but if the expert does not identify anyone else, it's a sign that he or she may lack confidence.

Successful trial lawyers not only have a thorough grounding in the applicable law governing experts, they know how to determine whether they need an expert, how to find the best expert, and perhaps most importantly, how jurors perceive experts. It's the unique alchemy of an impartial mind, rigorous intellect, and honest demeanor that will bring testimony to life, bolster your evidence and yes, help make your case.

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