

Expert Advice: Practical Tips for the First Meeting with Your Expert

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INTRODUCTION

Deadlines for expert designations and reports can approach quickly when you're entrenched in litigation, so you should determine early on whether you need to retain an expert, the purpose of the expert's retention, and the type of expert you need. If you have not worked with an expert on a particular issue before, it will take time to find the "right" person – one with the knowledge, expertise, and skill for your case, who is also persuasive, reputable, available, and affordable. By finding an expert early on, you will benefit from the expert's advice and counsel from the start and avoid potential pitfalls in the litigation. But, once you have found the right expert, you need to have your first meeting and be properly prepared. Whether this is your first "first meeting" with an expert, or your fiftieth, this article will provide you with some practical tips for preparing for that meeting and avoiding potential problems with your expert that could arise later in the litigation.

1. Review Your Expert's Resume & Publications

Your first step – or one of your first steps – in preparing for the initial meeting with your expert is to conduct a thorough and critical review of her resume and publications. The expert's professional background is the foundation for whether or not she will be persuasive to the fact finder (and qualified by the court in your case). Federal Rule of Civil Procedure 26(a)(2)(B)(iv) allows other parties to discover a testifying expert's resume and publications for the previous ten years, so familiarizing yourself with a potential expert's body of work and professional background, which may come under attack by the other side, is essential. Exploring these issues and potential areas of cross-examination now can prevent you from wasting time, effort, and money on working with an expert whom you later find to be unsuitable because of susceptibility to effective attacks on her background.

2. Independently Check Your Expert's Background

Because anyone can look good on paper, be sure to go beyond the expert's resume. While an expert's professional pedigrees can be persuasive in and of themselves, it is more important that your expert has the requisite expertise and knowledge in the area you need to support your case and the credibility to testify, if necessary. Moreover, "extraneous" issues can also impact her credibility. As such, you will want to dig further into the background of any expert that you may hire, knowing full well that the other side will try to uncover any fact to discredit her.

First, even though such problems are rare, you should run a criminal background check on your expert to discover any events that would negatively influence her credibility. At your meeting, you should be prepared to ask further questions about arrests, and the like, that usually do not show up on a background search. It is much better to know about these embarrassing issues now than learn about them for the first time when the opposing attorney is deposing your expert. Although these matters are generally irrelevant, they need to be handled carefully. If they are relevant, you know that this expert is probably not the right one to retain for the long run.

Second, you should also find out the other cases in which your expert has testified (at trial or by deposition) and for which side. This information is discoverable by the other party under Federal Rule of Civil Procedure 26(a)(2)(B)(v), so you need to learn about it first. Ask the expert for a list of such matters before you meet so that you can be prepared to inquire about these engagements and experiences.

Third, it is important to know whether your potential expert has faced previous *Daubert* challenges and the result of such challenges. Again, ask in advance and, to the extent you can, review the public records on these matters.

Finally, you should try to get a feel from public sources for the general reputation of any expert you intend to use – whether that person has the status as a “hired gun,” whether the expert is considered reputable, and whether the expert is reliable and easy to work with.

3. Send Your Expert the Live Pleadings in Advance of Your Meeting

Before your first meeting, you will want to send your expert a copy of all the current pleadings in your case and any discovery requests and/or responses that may relate to her testimony. Ask your expert to review these materials before your first meeting, so she is up to speed on the background of your case. That way, you can spend time at your first meeting answering any specific questions your expert may have about the case and discussing the opinions that you will need from your expert. She will also be prepared to help you understand her relevant background and experiences vis à vis your matter. Be sure to advise your expert not to write any notes (including highlighting) on or about the pleadings, as those notes may be discoverable. *See* FED. R. CIV. P. 26(a)(2)(B)(ii).

4. Send Your Expert Information on any Known Opposing Expert Before Your First Meeting

In addition to the live pleadings, you should send your own expert any information you receive about opposing experts (as appropriate). Remember that transmitting this information may be discoverable. Such information to send her may include the opposing expert’s resume and bibliography, disclosures, and/or expert report. Save any general information that you may be able to learn about the opposing expert from word of mouth and other informal sources until your meeting. This type of information is not only helpful because it lets your expert know who she is up against, but it also helps your expert understand the other side’s strategy and help you pinpoint the weaknesses in their expert’s qualifications or opinions. Moreover, the participants in a particular field of expertise may be limited. Accordingly, your expert could have some helpful information to provide to you about the opposition’s expert.

5. Determine What Opinions You Need from Your Expert Before You Meet

Once you have chosen a potential expert, you should begin thinking more specifically about the issues in your case that will require expert support and whether you will need the expert to testify, consult, or

both. While most experts are initially retained as consulting experts for discovery purposes, you should nevertheless have a good idea what role your expert will ultimately play in your case and define the specific areas in which you need the expert *before* your first meeting. The following questions can help you narrow the purposes for which you retain your expert:

- Will the expert present evidence at trial?
- Will the expert write a report?
- Will the expert be an integral part of your trial team?
- Will the expert assist you in drafting or responding to discovery?
- Will the expert assist you at the deposition of an opposing expert?
- Will the expert educate you on the area of her expertise?
- Will the expert perform tests and experiments?
- Will the expert assist you in analyzing the positions of the other side?

See ROBERT C. CLIFFORD, *QUALIFYING & ATTACKING EXPERT WITNESSES* § 102 (5th Ed. 1993).

Be ready to discuss your specific needs, but as a general rule, you should not make a hard and fast decision on whether the expert will testify until after you have worked together further. Initial retention as a “consulting only” expert is wise even if you anticipate you will likely also need testimony from the expert.

6. Determine What Information You Do and Do Not Want to Reveal to Your Expert at Your Meeting

You will want to give your expert all the broad facts of your case, an understanding of the legal issues, and any pertinent information about the opposing side, including information relating to its position and experts. You also need to clearly instruct your expert on the issues on which you need her expertise and the role the expert will play. That said, there is some information you may not want to give your own expert, particularly a testifying expert or even one who only *potentially* will testify. Any information a testifying expert “considers” in forming her opinions is discoverable. FED. R. CIV. P. 26(a)(2)(B)(ii). Thus, if you take notes about or make an outline of the issues on which you need your expert to opine, you will likely not want to show or give those notes to your expert, as they – your work product – would arguably be “considered” by the expert. FED. R. CIV. P. 26(a)(2)(B)(ii). Moreover, you may not want to provide any information that you may have received from one of your other experts, if you have more than one, particularly any consulting expert, and you definitely do not want to share any privileged information. Take great care, though, in withholding “bad facts” from your expert. There generally is a time, place, and means for sharing those with her, but the time should not be at the time of her testimony (deposition or otherwise) through cross-examination by opposing counsel.

7. Be Prepared to Discuss Document Creation and Retention Issues.

Because Federal Rule of Civil Procedure 26(a)(2) currently allows for discovery of drafts of expert reports and notes created for the report (as do the procedural rules of many states), it is vital to limit your expert’s creation of documents. The last thing you want is an expert draft that reaches an erroneous conclusion to come to the attention of the other side. Therefore, you should prohibit your expert from preparing any draft without your consent and from sharing any draft opinion, report, or notes with any other person without your consent. In essence, the fewer drafts and notes, the better.

That said, your expert will most likely make notes at some point in the litigation. You should discuss whether your expert is willing to ensure that all notebooks or individual pages of notes should bear a legend such as: “THESE NOTES ARE INCOMPLETE AND HAVE BEEN PREPARED FOR PERSONAL USE ONLY. NO ONE MAY RELY ON THEM FOR ANY PURPOSE. ALL VIEWS ARE SUBJECT TO CHANGE AS ADDITIONAL INFORMATION BECOMES AVAILABLE OR IS CLARIFIED.” While this type of disclaimer (which can also be placed on draft reports) is not bullet-proof, it could give you a means to counteract effective cross-examination of your expert on a draft since Federal Rule of Evidence 106 (the rule of completeness) would allow you to read the disclaimers to a jury if the draft were put into issue. See Gregory P. Joseph, *Engaging Experts* (2008) available at <http://www.josephnyc.com/articles/viewarticle.php?24>.

8. Prepare an Engagement Letter to Take to Your First Meeting

Before you meet with your potential expert, you will want to draft an engagement or retainer letter establishing the specifics of the relationship. The engagement letter is an important tool for controlling your relationship with your expert, and it should not be overlooked. Remember, however, it will in all likelihood be discoverable by the other side; consequently, careful attention should be paid to its contents and you probably should not give it to the expert until it is final. For an excellent discussion of engagement letters with experts, see Gregory P. Joseph, *Engaging Experts* (2008) available at <http://www.josephnyc.com/articles/viewarticle.php?24>, which includes some of the tips mentioned in this section. The engagement letter most likely should address the following items, and all of these should be explored and refined at your first meeting:

- Scope of work. You should describe the work to be performed by your expert – i.e., whether the expert will provide litigation support, strategy, testimony, or simply consult. As previously noted, most of the time experts are initially retained as consulting experts since their work product is not discoverable and you may not know at the start if you need a testifying expert or you may discover down the road that another expert would be better for your case.
- Confidentiality. You should instruct the expert to keep confidential all information obtained in connection with the litigation and that such information will only be used in connection with the expert’s engagement by you on behalf of your client. You should also instruct the expert to keep her retention by you confidential unless and until she is identified in court papers as a testifying expert. This helps avoid a subpoena being prematurely served on your expert prior to the time she has been designated as a testifying expert.
- Conflicts. A term of your engagement should be that your expert is prohibited from consulting for or otherwise representing any other person or entity with an interest adverse to your client’s interests in, concerning, or arising out of the pending litigation in the future.
- Document Retention. You should clearly state your policy – and that expected of your expert – with regard to document retention. That is, you should require the expert to retain a copy of all hard copy and electronic documents, particularly e-mail, that she generates, receives, or consults during her retention as an expert. Moreover, you should maintain a copy of all documents sent to or received from your expert, as well as a copy and log of all documents reviewed by your expert, in case there is an issue with respect to what the expert “considered” under Federal Rule of Civil Procedure 26(a)(2)(B)(ii).
- Fees. Clarify now and record in your engagement letter the expert’s fees, including her hourly rate, and what she charges for travel time. Be sure you have clarified who is responsible for

paying invoices (your firm or the client), when payment is due, treatment of late payments, and whether a retainer is required.

9. Assess Your Expert's Demeanor, Likeability, and Testifying Potential at Your First Meeting

Now you are finally ready to meet with your expert. Throughout the meeting, you should observe your expert's demeanor. Even the most educated and successful individuals may lack the skills and/or personality to persuasively testify or effectively consult. Here are a few questions to consider as you first meet with your potential expert:

- Does the expert look professional?
- Does the expert seem organized?
- Is the expert articulate?
- Does the expert explain things in a way that are easy to understand?
- Is the expert personable?
- Does the expert seem confident, without being arrogant?
- Does your expert seem patient and calm?
- Is the expert interested in your case?
- Has the expert adequately prepared for your meeting?

When talking with your expert, it's important to not only look for qualities that indicate she would be persuasive at testifying but also that she will dedicate the necessary time and attention to your case. No matter how big or small your case may be, you want to make sure that your expert will be accessible, meet deadlines, and adhere to the ground rules you set.

10. Establish the Ground Rules at Your Meeting

As indicated, you will want to discuss your expectations with respect to confidentiality, retention of documents, drafting and note taking, and sharing information with other persons. You will also want to establish the scope of work – that is, what you need from your expert – and any related deadlines (including internal deadlines). Also, let your expert know the best way to communicate with you (e.g., in person or via telephone, but generally not by email). Finally, you should let your expert know that you expect her to be readily accessible upon reasonable notice. By establishing your ground rules at the outset, you have a better chance of avoiding a later misunderstanding with your expert.

CONCLUSION

If you've never worked with an expert before, it can seem like a daunting task to find the right person and communicate effectively. Even if you've worked with many experts during your career, you need to carefully plan your first meeting to avoid the pitfalls that can be unwittingly set in motion at the outset of this relationship. These practical tips should help you to fully prepare to meet with your expert and get your relationship off on the right foot from the outset.

ABOUT THE AUTHOR

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