

VETTING THE EXPERT---YOURS AND THEIRS

Too often an attorney will retain an expert on the advice of another attorney or based on a limited amount of time spent searching for the expert. The most important part of the process of selecting the expert comes, hopefully before a dime has been paid to the expert, or at least within a very short time after contact is made. That process is the vetting of the expert.

For many, if not most of the readership, what I am saying is “old hat”, and just a part of their daily routine. Perhaps I can reach the younger, less experienced trial lawyer, and provide some beneficial information.

In my practice, the vetting starts with the potential expert’s CV, and more important, a list of all cases in which she has testified. The list must contain the type of case and the name of the lawyer by whom the expert was retained. Once these two documents are in your hands the vetting process begins.

Let’s start with the CV and assume the potential expert says she is board certified. If you have any doubt about that claim, call the specialty board and verify that the expert is board certified. The last thing you need is to learn that after you have designated the expert is to hear at her deposition that she has lied. If that happens, hope to have a friendly judge who will let you substitute another expert. Some CVs sometimes just don’t look right. It takes many years of looking at

them and understanding them, but it is a talent that must be developed. Check the dates on the CV against what the expert claims to have obtained. I once saw a CV where the expert claimed to have achieved his boards in orthopedic surgery three years after he obtained his MD. Either he got special dispensation from the Pope, or was presenting a phony CV. As it turned out it was neither. There was a typographical error which was corrected and the expert was pretty good.

Assuming the potential expert has published peer reviewed articles in her field of expertise, look for any article that comes close to a discussion of the subject matter of the law suit. Then, get it and read it. If the author does not support your side of the case in the article(s), you may want to look for another expert because the defense will find and read the same article.

Next, look at the list of cases in which the expert has testified. Did the expert testify in cases similar to yours? If so, get on the phone and call the lawyer who retained the expert. First, have a very candid conversation with the lawyer and be prepared to ask some very pointed questions. How much did he charge? Was his time spent efficiently, or was he submitting bills for “too much” time? Was he prompt? Was he accessible? Describe his appearance. Was he amenable to being “coached”? And by being coached, I mean, would he listen to suggestions? Would he read medical literature supplied to him? Did he have any quirky habits that would distract from his testimony? Did the jury like him?

After this discussion, have the lawyer send you a copy of any transcript of the potential expert’s testimony. Do this especially if you

find a case similar to yours where the expert has testified. If you have been in practice for any length of time at all, you have been faced with the defense counsel's cross examination of your expert and the question begins, "Have you ever testified....?" You know what is coming, and it probably is no good, unless you have done your work and the expert has read the deposition and has a perfectly plausible response to whatever is the question. Don't ever think for a minute that defense counsel will not have every deposition given by your expert.

I wish I could say that I always do what I am next to advise, but I do not. I believe that meeting the potential expert in person is invaluable. I have come to trust my instincts after reading all I can about the expert and talking to other lawyers who have used the expert, and unless I just don't feel right, I bypass the face to face meeting. But, if my gut says otherwise, I most likely will get on a plane or get in my car and go have a chat.

Finally, you must come to terms on fees. I have seen too many experts go hog wild and spend time doing things I have not authorized nor of which I need done. If in doubt, I let the expert know that I will provide the medical literature for her to review. I will be responsible for preparation of any timeline to assist the expert. Does, the expert charge the same amount for telephone conversations or reading email messages as she does for review of medical records? Then, there is the issue of a contract that some experts want signed. Be careful. Some of these contracts have expiration dates. A few years ago I signed one which provided that the expert would receive \$10,000.00 for one day of testimony. Time came for trial. The contract had expired and now the fee was \$15,000.00 a day. I will never hire him again, and I will not execute a contract with an expiration date. In fact, I now tend to shy

away from experts who require a contract. Why? Not sure, just a gut feeling about them. To me, they are saying, "I don't trust you." Beware of the potential expert who begins the conversation by telling you how much money to send him before he starts working. If money seems to be number one on his list, I get nervous.

One must also vet defense experts in much the same way as we do our own. As I write this article I am in the process of settling a medical malpractice case in which my client's colon was perforated during a routine, screening colonoscopy. Wait, you say, is not that a known complication? The answer is "yes" and "no". In my case the defense expert says in his report that my client was injured due to a known complication not caused by negligence. Remember, I said this was a routine, screening colonoscopy. I obtained the list of cases for the defense expert. Gold!!! He has testified in at least three other such cases, all for the plaintiff. In one of them he testified there are only two situations in which a colon perforation is acceptable. One, is in the removal of a large lesion or polyp, and the other is when the patient has diverticulitis. My client had neither. I took a chance and told defense counsel she had better read the deposition. Within a few days the settlement offer was increased by 50%. Had the defense vetted their expert, I might be looking to having to try this case.

The medical malpractice listservs of AAJ and KsAJ are absolutely the best resources available for obtaining information about potential experts, and our colleagues do not hold back when describing experts. I have seen them called "crooked", "scumbags", "money grubbers", and some other not so complimentary things.

A well vetted expert will save time, money, embarrassment and give you a better shot at winning. I believe that experts do not necessarily win for you at trial, but they can, and often do, at deposition. If a very biased defense lawyer is impressed by your expert, that feeling is going

to be passed on to the insurance carrier and will often lead to settlement.

Finally a word about experts obtained from expert witness services. I must admit that I have used such experts, but not since the AAJ medical malpractice listserv was established. There are some good experts who allow their names to be given to lawyers by the services, but the hassle of having to defend them is just not worth it to me. No time in the trial of a case should have to be taken up with a series of questions explaining how I obtained the services of my expert. Remember, our credibility with the jury at the start of the trial is zero, so why give them any fodder for making it worse.

Going to trial with an expert that has not been completely vetted can and most likely will be a disaster, depending on how much baggage she carries into the court room. As with every aspect of your lawsuit, getting the best expert can be summed up in three words—preparation, preparation, preparation.