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The Double "D"s of Expert Witnesses

By Hillary A. Frommer

Due Diligence — this is the most important aspect when dealing with expert witnesses. Retaining a testifying expert typically starts with identifying the leaders in the particular area at issue in the case. From that initial research you find scholarly writings and publications by that expert and identify other cases in which the individual has testified as an expert witness. While highly pertinent, this information merely scratches the surface. There is much more you need to learn about your proposed expert. Although not exhaustive, the following steps should be considered by every lawyer when retaining testifying expert witnesses.

- Identify whether the individual historically testifies only for one side (plaintiff or defendant);
- Identify whether the expert has had any affiliation (professional or personal) with the opposing party, his attorneys, or his expert witness;
- Read everything the expert has written on the subject at issue in the case;
- Identify whether the expert has ever proffered an opinion that is contrary to the one he intends to offer at trial, and discuss those prior opinions with the expert;
- Identify whether the individual has ever been precluded from testifying as an expert or otherwise has been the subject of a *Daubert* or *Frye* challenge;
- Read the expert's trial testimony and deposition testimony (if possible) in other cases involving similar issues;
- Read prior expert reports written by that expert on the subject at issue;
- Read written decisions which address or discuss the expert, his testimony, or his opinion;
- Discuss the expert's entire professional background and experience in depth, including any gaps in employment;
- Perform social media searches of your expert, including Google, YouTube, Facebook, and LinkedIn; and
- Ask the expert the tough questions, such as whether he has ever been arrested or convicted of a crime, or professionally disciplined in any way.

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Through this due diligence, you can ensure not only that you have retained and designated the most appropriate testifying expert witness for the particular case, but also that the expert will be prepared for a thorough cross-examination at trial. Rest assured that if you are doing your due diligence, so too is your adversary.

Too often, however, lawyers and/or parties wait until the last minute to retain a testifying expert, and thus, lose the opportunity to conduct this important and time consuming, due diligence. This could have damaging effects on the case, especially if the expert's testimony is critical to establishing liability or damages. Consider the following hypothetical.

You represent a plaintiff who experienced headaches after he had a motor vehicle accident. The plaintiff sued the driver of the other vehicle in State Supreme Court, claiming that he was responsible for the accident, which caused the headaches. Believing that the case will settle before trial and concerned about the costs, you do not retain a testifying expert until after discovery was completed and trial is imminent. You then quickly identify an expert neurologist who, you learn from colleagues, is the head of neurology at a reputable hospital, has testified as an expert witness before, and has published articles over the years concerning headaches. You scan the expert's curriculum vitae, have a brief telephone discussion with him about the case, perform a conflict check, and then engage the expert. After reviewing most of the discovery,[1] the expert tells you that he is prepared to testify that, to a degree of medical certainty, the motor vehicle accident caused the plaintiff's headaches.

In preparing the expert for trial, you focus primarily on his direct testimony. You do not prepare extensively for cross-examination because you know that the expert has testified before, and he tells you that he can handle the "tough questions" on cross-examination.

On your case in chief, the expert testifies as to his professional experience, credentials, scholarly writings, his opinion that the accident caused the plaintiff's headaches, and the basis for that opinion. During cross-examination, the defense attorney shows the expert an article published 15 years earlier in the Journal of the American Medical Association (JAMA), in which your expert opined that the particular headaches the plaintiff experienced are not caused by the type of head trauma experienced in a car accident. The expert concedes that he co-authored the article and that JAMA is a reputable and authoritative publication. The article is admitted into evidence, and the jury now hears from the expert himself, that he had an opinion that was directly contrary to the one he now offers.[2] The expert also concedes that he has not published anything else on that issue, or ever retracted that opinion. The expert then reveals that his co-author is a neurologist professionally affiliated with the defendant's expert neurologist (who of course will opine that the crash did not cause the plaintiff's medical problems), and that he had a "falling out" with him years ago, and has disliked him ever since.

While you try to rehabilitate the expert on redirect, the damage has been done. However, with due diligence, you could have avoided that damaging and effective impeachment. You should have discovered that JAMA article and discussed it with the expert. You could have taken the proverbial "wind out of the defendant's sails" by introducing the article during your direct examination and have the expert cogently explain why he changed his opinion. On the other hand, you may have retained a different expert altogether if due diligence leads to you concluding that the article is too problematic and the expert cannot explain to your satisfaction why he

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(Continued)
changed his opinion 15 years later. Due diligence also would have revealed the expert's prior business relationship with the defendant's expert, and which also may have played a role in your decision to retain him in the first place.

But you didn't do any of those things. And now you look at the jury and wonder, do they believe your expert, or do they think that he is simply a hired gun who will say anything to settle an old score?

Is this an extreme hypothetical? Perhaps. Can it happen? Yes. Can it be avoided? Absolutely. How? The Double Ds.

Note: Hillary A. Frommer is counsel in Farrell Fritz's Estate Litigation Department. She focuses her practice in litigation, primarily estate matters including contested probate proceedings and contested accounting proceedings. She has extensive trial and appellate experience in both federal and state courts. Ms. Frommer also represents large and small businesses, financial institutions and individuals in complex business disputes, including shareholder and partnership disputes, employment disputes and other commercial matters.

1. It is critical that the lawyer gives the expert all of the discovery, and not pre-select that discovery which the lawyer believes is important for the expert to form his opinion.

2. An article can be used for impeachment so long as the expert admits that it is authoritative (*see, e.g.*, *Brown v Speaker*, 2008 NY Slip Op 32184 [Sup Ct, NY County 2008]; *Fridovich v Meinhardt*, 247 AD2d 791 [2d Dept 1998]).