



Which Expert?

CHOOSING AN EXPERT WITNESS OR CONSULTANT...

By Susan Koss

During the litigation process, experts are extremely valuable sources of knowledge and assistance to attorneys.

Experts can be useful to counsel from the time before a Complaint is filed, and continuing all the way through trial. Essentially, there are two types of experts: the consultant and the expert witness. The consultant is retained by counsel to advise on case issues, but is not expected to provide testimony. Any documents created by the consultant may be protected by attorney-client privilege. The expert witness is retained to testify at trial and express an independent expert opinion. The expert witness holds a high degree of duty to present unbiased factual information or opinion, independent of the influence of the party or counsel who retained the expert's services. Documents created and relied upon by the expert witness are subject to discovery. In some cases, counsel may decide to designate the expert consultant as an expert witness at some point during the litigation process for various reasons specific to case strategy.

An expert witness provides credibility to both the client and counsel during litigation. Financial expert witnesses possess the skills required to undertake and perform the quantitative analyses necessary to develop the technical evidence required in complex, litigation cases. Effective expert witnesses are able to communicate their opinions to juries, or triers of fact, in an easily understandable manner. The expert witness can also rebut opposing expert's opinions and damage calculations.

Counsel may choose to hire a consultant who does not need to be designated and whose advice and guidance can be strictly confidential. Consultants are often hired to advise about the facts, issues, and strategy of the case. The work product will often include analyzing and discrediting the opposing expert's work, as well as examining the strengths and weaknesses of the client's case and how best to represent the financial facts at trial. Depending on the complexity and strategy of the case, counsel may decide that "two heads are better than one" and may hire a backup consultant to its own testifying expert. Finally, a consultant can also assist counsel by reviewing the work product of its own expert witness to identify shortcomings or strengths of the expert witness's report.

Many dynamics will impact the decision to hire a consultant and/or expert witness such as case strategy, cost and timing. However, it is vital to find the right expert(s) as early as possible in the case. Early retention allows counsel to obtain input on matters such as whether or not the value of the case is worth litigating, identification of key financial or economic issues, and potential settlement value. Also, expert advice can be critical in making the most of fact discovery and identifying issues to investigate in deposition. Lastly, early participation will benefit the expert by providing sufficient time to do appropriate research and analysis, and providing the opportunity to obtain the necessary data and information integral to the expert's opinion.

