

Marketing Your Professional Expertise to Attorneys

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When you see an expert testify in a legal case on TV and think “I could do that,” you may be right. Here’s what you need to know to become a litigation support consultant.

An expert witness is someone whose credentials of education and experience qualify him or her to evaluate data in a legal dispute and report findings. While “expert consulting” or “litigation support” expresses more accurately what such a person does, “expert witness” is the title generally used. The term is somewhat of a misnomer, since only a small percentage of cases that are filed progress to the deposition stage and even fewer to court testimony. Most cases settle out of court or the lawsuit is dropped, as the facts and the likelihood of success become clear. (The expert consultant should, nonetheless, prepare for possible deposition and court testimony.)

An expert engaged to work on a case generally begins by reviewing documents. These can include facts about the lawsuit, reports of the act or situation that occurred, and perhaps the text of previous testimony. It may involve a visit to a site, interviews with participants or witnesses, studying objects or substances, or performing tests or experiments.

The expert’s report of the investigation along with an opinion can be given orally to the hiring attorney and may be so requested. In most cases, however, a written report is submitted, and the quality of this report is critical. First, the expert’s opinions may determine the outcome of the case, and, second, if required to testify at a deposition or trial, he will have to withstand cross-examination about his conclusions and how he arrived at them.

This article is based on the author’s book, “The Expert Witness Marketing Book: How to Promote Your Forensic Practice in a Professional and Cost-Effective Manner,” published by Expert Communications, Clearwater, FL (2003).

The question the expert is directed to address is rarely the “Whodunit?” we see in film or even “Did he do it?,” but is instead a more complex question relating to how events occurred, likelihoods, etc. This is where the term “forensic” comes in. Common usage has caused us to think of the word as applying only to criminal cases. Two definitions of “forensic,” however, expand that application: (1) belonging to or used in the courts, and (2) relating to the application of scientific knowledge to legal problems.

Dan Poynter, a parachute and skydiving expert witness, contrasts lay witnesses and expert witnesses. As a technical witness, unlike an eyewitness, who may only tell what he saw, heard, felt or smelled, “you are allowed to express your *opinion* on any relevant issue falling within the scope of your expertise. It doesn’t matter that you weren’t there when it happened. You’re presumed to be an impartial, disinterested witness who is simply explaining why and how things happen.” (1)

Olen Brown, a microbiologist who retired as a medical educator and researcher at the Univ. of Missouri–Columbia and is an experienced expert witness, states “although attorney and expert are bound logically and ethically by similar guiding principles of justice, and can share the same goal for a given case, they have different paths they must ethically and logically follow to reach that goal in court: the expert *testifies* to facts, while the attorney *argues* the facts. The failure to appreciate and act appropriately on this simple difference is the reason for most non-effective court testimony.” (2)

What does an attorney look for in an expert witness?

Extensive education and experience in a particular field are what an attorney initially looks for in an expert witness. The extent of education required varies with the specialty. Expert witnesses range from a mechanic who didn't finish high school but has a great deal of hands-on experience in a particular area, to specialties in which one is expected to have earned a doctorate. An expert with a master's degree in a field in which many others have a doctor's degree might have unique training or experience that would qualify him to successfully oppose an expert with more advanced education.

Not only will an outstanding background qualify an expert to perform the work in the case, but it will also enable her to withstand attempts by the opposing attorney to cast doubt on her credibility. Consultants new to litigation support are sometimes unnerved at what they perceive as personal attacks upon their ability and character. With experience, they begin to take that aspect in stride.

Credentials and credibility in an expert witness have become paramount since 1993, when a ruling by the Supreme Court in *Daubert v. Merrell Dow Pharmaceutical* (3) effectively made the judge the gatekeeper as to the permissibility of evidence. Prior to the *Daubert* case, the deciding factor as to whether a scientific principle or discovery could be allowed as evidence was based on the 1923 case, *Frye v. United States* (4): that it "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." This previous ruling is referred to as the "Frye general acceptance test."

As a consequence of the *Daubert* ruling, the standard in federal court, as well as many other courts, is Rule 702 of the Federal Rules of Evidence: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

A person interested in becoming an expert witness should become familiar with these cases, as well as *Kumho Tire Company v. Patrick Carmichael* (5) and with Rules 702, 402, 703 and 706 of the Federal Rules of Evidence. An expert who is prepared to withstand questioning in what has become known as a "Daubert hearing" adds to his value as an expert witness. A "Daubert hearing" is convened when opposing counsel "asks the judge to exclude the expert's testimony for failure to comply with the requirements of *Daubert* and Federal Rule of Evidence 702 ... The expert will be questioned (out of the jury's presence) on the issue of his testimony" (6), particularly regarding the scientific methodology used in arriving at his opinion.

Effective communication — the ability to express oneself in writing and orally, whether in a private deposition or before a judge and possibly a jury in court — is vital. "... an expert ... must be able to communicate effectively and persuasively with the jury, avoiding jargon and 'talking down' to the jury, and constructing clear arguments out of often ab-

stract fact-sets" (7). Juries tend to be receptive to the testimony of a teacher or professor; therefore, teaching skills and experience are valuable credentials for an expert consultant.

Objectivity is critical to the success of an expert witness. She must reach her conclusions without bias, regardless of which side of the case has engaged her. An expert must never let an unethical attorney persuade her to bend the truth. Fortunately, this is not a frequent occurrence.

How is an expert witness paid?

Expert witnesses are paid, usually on an hourly basis, by the attorney and/or the attorney's client, and occasionally by the court. Experts from the professions are paid well for legal work. In most cases, they set hourly fees comparable to or slightly more than what they are paid in the course of their normal work. If an expert is already a consultant, his hourly rate will be established and he will simply add legal work to the services offered by his existing practice.

For someone new to self-employment, a standard formula used to set one's self-employed rate is to translate his current or former salary into an hourly rate and multiply by a factor of three or four. The exponential factor is to cover overhead expenses, benefits customarily paid by an employer, such as insurance premiums and the employer's part of Social Security, and downtime. The number should be high enough to include time spent on administrative matters and marketing, as well as for vacation, holidays, and possibly sick leave.

A common complaint of experts new to legal work is difficulty in collecting their fees, a problem experienced more frequently than when consulting to industry or academia. In almost every case, however, the expert failed to get the attorney's agreement to pay, beforehand, in writing, and/or he did not require a retainer prior to beginning work. Examples of contracts, engagement letters and fee schedules are available in many books written specifically for the expert witness (8). Forensic consulting work is not only a business, but is also one that most certainly should be conducted in a business-like manner.

What should you do to become an expert witness?

First, read books about expert consulting. Determine whether the intellectual stimulation, enjoyment of a challenge, and the pay would adequately compensate you for occasional, uncomfortable skirmishes with opposing counsel.

Attend an expert witness conference. Listen to experts, attorneys and judges discuss the various aspects of legal work.

Get your *curriculum vitae*, or resumé, in tip-top shape. It must be complete, up-to-date and well-formatted, with accurate spelling, punctuation and grammar, and it must be able to withstand legal cross-examination. Comprehensive expert witness books and conferences address this issue at length, because opposing counsel will examine the expert's c.v. in detail, attempting to find something that might impeach his credibility.

The fact that an expert witness must have a near-flawlessly composed c.v. is one of the basic differences in mar-

keting an expert witness practice versus any other type of consulting practice. The c.v. should be an account of one's professional life, presented as advantageously as possible, of course, but without embellishments that might draw criticism. Also, minor errors or inconsistencies that are otherwise essentially harmless could be highlighted as examples of carelessness or, worse, dishonesty, and thus could damage one's believability before the judge or the jury.

Marketing your expertise

The most effective legal marketing methods are those that are also effective for other professional practices — networking and referral. After conducting research to determine whether you would enjoy doing legal work, announce publicly that you are available. Inform business associates and friends, former employers and employees, professional vendors (such as your banker, accountant, doctor and broker), as well as family members and neighbors. A formal announcement printed in a legal publication or mailed is appropriate.

Attorneys' primary means of identifying experts is referrals. This remains constant even during cultural evolutions reflected in trends such as a decrease in print advertising and an increase in Internet advertising, as a reader profile study conducted for *Lawyers Weekly USA* (9) illustrates (table). This phenomenon is somewhat more pronounced in the legal field than in other professions.

Identify attorneys involved in cases related to your specialty. A convenient way to get acquainted with local attorneys is to attend a Continuing Legal Education (CLE) class especially for that law practice specialty. CLE classes are presented by bar associations and private providers, which can be identified through the bars.

Law schools also provide networking opportunities, as they sometimes hold industry-specific symposia. In addition, an experienced expert witness can volunteer to allow law students to practice their questioning and cross-examination skills.

After working on a few cases, most experts form opinions as to how the cases could have been handled more successfully had the attorneys done certain things, asked questions in a particular way, or deposed the opposing expert differently. Such viewpoints provide a basis for presentations to groups of attorneys. Speaking provides the opportunity not only to meet prospective legal clients, but also to showcase yourself as an expert and teacher.

These same insights can be written in an article and submitted to legal journals and periodicals. Such publicity is

more valuable than advertising. You can also write about your experiences (exercising discretion, of course) in the trade journals of your own profession. This makes your peers aware of this area of your practice and may lead to referrals.

Although direct mail introductions to attorneys have a relatively low rate of return, they can be effective when targeted to attorneys who practice in your particular field of expertise.

As an expert consultant, you can market your practice by creating a website for that purpose or by adding a litigation support page to the website for your primary practice. Moreover, for the expert with a narrow specialty or a unique subspecialty, creating a website with a thorough search engine optimization is the most effective way to market nationally or internationally.

An expert new to legal consulting or one with an unusual specialty should also consider registering with one or more legal referral agencies. The best-known service is the Technical Advisory Service for Attorneys (TASA). The methods of operation of referral services vary considerably — some charge the expert, others the attorney, and some both. If you plan to use a referral agency, research these services, read their contracts carefully, and obtain references.

Create a marketing plan

Begin by outlining a basic business plan, including client prospect identification, competition, fees and start-up costs. Then look at various options for communicating to prospective clients that you are available and qualified. Select a few of the following methods to get started:

- word-of-mouth (networking)
- publicity, such as articles and speeches
- professional announcements
- direct mail
- your own website
- expert witness directories (print and online)
- classified and/or display advertising
- expert witness referral services
- newsletters.

Is it acceptable for an expert witness to advertise his services? Expert witness advertising must be handled with care. Although some experts take the somewhat unrealistic viewpoint that advertising one's services to the legal community is always inappropriate, the reality is that for any type of business to occur, the buyer and the seller of the services must be made aware of each other. A skilled attorney may criticize an expert witness's advertising in an attempt to make the jury feel that he can be paid to testify in a particular way. The fact that one advertises, however, is not really the issue. Being viewed as a "hired gun" results, rather, from the prostituting of oneself by shaping the facts and opinions rendered to produce a desired conclusion.

Expert witnesses can advertise in legal journals and periodicals as long as the advertising is professional, conservative and in good taste. Beware of standard ad composition from an advertising agency accustomed to writing for the

Table. How attorneys locate expert witnesses

	1999	1994
Ask a fellow attorney for a referral	78%	77%
Consult legal publications for advertising	32%	41%
Search an expert directory on the Internet	30%	9%
Look through the Yellow Pages	5%	7%

Source: (9).

general consumer market. For example, the features/benefits aspect of composing an ad for the legal market differs from consumer advertising in that qualifications and quality of service should be emphasized, but possible outcomes should not be promoted or even alluded to.

Some experts feel that the term “expert witness” should not be used in advertising, and that “expert,” “expert consulting” or “litigation support” should be substituted. This is probably splitting hairs, but since one’s advertising is usually a part of *voir dire*, the issue illustrates the caution one should exercise in legal advertising. (*Voir dire* is the preliminary examination in court to determine whether potential jurors are qualified and suitable to serve and whether witnesses and expert witnesses are competent to testify.)

For resource information, look to books and professionals specializing in marketing professional services rather than following advice geared to product advertising or to reaching a general consumer audience. Keep in mind that your advertising can be shown to a jury. Consider your image and formulate your advertising in accordance with that image.

As in other industries, there are many advertising opportunities, and some are more cost-effective than others. Listing in print expert witness directories is an efficient way to inform large numbers of attorneys of an expert’s qualifications. A major benefit of listing in a directory is long shelf life — the publication is usually kept as a resource. Although all expert marketing is open to scrutiny, many experts consider a resumé listing in a print directory more acceptable than standard advertising, such as display

or classified advertising in a newspaper or magazine. Repetitive classified advertising in a legal publication can be effective, however, and often is reasonably priced. Display ads, which are primarily for image building, are more costly, and so are usually not run repetitively.

Internet expert witness directories have become quite popular with attorneys as a resource for locating expert witnesses. The most effective ones are single-purpose, offering only expert witnesses and not legal research or other attorney resources as well. The websites for Internet expert witness directories and referral services look similar. The difference between them is that a directory provides complete information so the attorney can contact the expert directly.

Expert witnesses should select advertising with multiple, frequent appearances or long retention value because the need for experts’ services is not impulse driven. We are all familiar with advertising effectively creating the need or desire for a product or service — we might not be in the market for a car until we see one that we really like. This can occur even with professional services. For example, we see an advertisement about leaving our heirs inadequate security and decide we need investment counseling or life insurance consulting. An attorney’s need for expert consulting, however, is not created by advertising, but by the attorney being engaged, either as plaintiff or defense counsel, to wage a lawsuit, which requires the services of an expert in a specific discipline. The expert witness must, therefore, make her name and qualifications as visible and well-known as possible and consistently repeat her message so that she comes to mind when needed and can be easily located.

Most expert witnesses advertise their services, first to obtain business, and then on an on-going basis to maintain visibility. They can create and maintain momentum, however, by communicating to the legal community through several different avenues, and referrals should ultimately become the primary source of business.

Providing litigation support and possibly deposition and court testimony can be a challenging and satisfying extension to a successful career. It can also become a profitable business. Along with your integrity and the quality of service you offer, marketing is the key element to developing a profitable business. You have dedicated your life to becoming an expert in your field. You simply need to convey the expertise that your education and experience have created and how your insight and understanding will be of value in legal proceedings.

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