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A P U B L I C A T I O N O F T H E A M E R I C A N B A R A S S O C I A T I O N Y O U N G L A W Y E R S D I V I S I O N

Handling Experts

By Rain Levy Minns-Fink

Choosing the right expert witnesses for your case can be crucial to its success, but even the best experts, if mishandled, can leave your case in critical condition. Here are some suggestions for handling experts well.

Internet Issues. Before you file your expert witness designation, conduct background research on prospective expert witnesses. Remember to check Web archives, such as www.archive.org, that retain snapshots of numerous Web sites over time. Moreover, what your experts may say online after you retain them is of equal importance. Emphasize to your experts that until the trial is over they should avoid any online discussions of general topics related to the case and review their publicity and advertising. For instance, if one of your experts advertises on experts.com, gains 90% of his income by testifying for defendants in the healthcare industry, and is testifying for the defendant in such a case, you might want to caution him about providing fewer details in the advertisement. Opposing counsel may discover your expert's potential bias problem anyway, but you can avoid advertising it.

Paper Trails. Be very careful about what you or your expert put in writing. An expert is like an open book. Opposing counsel has a right to ask for (and get!) correspondence between you and your expert. Consequently, caution your expert and be very clear about the types of written communications that will occur. For instance, you do not want your expert to be deposed by an opposing counsel who questions him about every discrepancy between the expert's preliminary opinions and expert report. Some lawyers even refuse to communicate by e-mail to avoid any careless mistakes.

Inadvertent Public Speaking. Your conver-

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Handling Experts

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sations with an expert are not private. Opposing counsel may learn about these conversations through discovery or at trial. Further, be wary of conversations when an expert begins with "Just between us, do you really believe . . . [your client's position]?" An expert should be relying on his expertise and the facts in the case, not on your opinions or beliefs. You do not want to find yourself in the middle of trial with an expert explaining to the jury that he knows your client was mentally incompetent because *you* said so rather than because he is a clinical psychologist.

One simple way to give an expert the basic background on a case is to provide copies of both the petition/complaint and answer. If you do so, give both parties' initial filings to avoid an accusation that you attempted to bias your expert.

Courtesy. Always be polite, prompt in returning phone calls, candid, and considerate of your expert's other employment. These actions

demonstrate that you value your expert's opinions and respect his time. Your attitude will also reflect on your client. While you should not expect good behavior to influence your expert, a lack of courtesy may work to undermine your efforts to present your client in an honest (but favorable) light.

Rain Minns-Fink practices complex commercial litigation at the law firm of Bickel & Brewer in Dallas.



READY RESOURCES

Preparing Witnesses, Second Edition. 2004. PC #515-0295. General Practice, Solo & Small Firm Section.

Examining Witnesses, Second Edition. 2003. PC #531-0329. Litigation Section.

Expert Witnesses. 1992. PC #531-0079. Litigation Section.

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