

Winning Strategies: The Four Ps of Expert Witness Selection

by David Theodore Tirella



When any budding law school graduate embarks on his career, little is inherently known about the importance of expert witness selection. The dominant trend in law schools is to not commit academic resources to educating future trial lawyers about the process of hiring top-quality expert witnesses. Young trial lawyers, if fortunate, learn how to find, interview, and ultimately hire expert witnesses from senior associates or mentoring partners. Almost everyone else learns the craft of expert witness selection by direct experience.

Selecting the best possible expert witness is especially important in today's legal climate. A good expert can help build your case, but a great expert witness can also substantially undermine your opponent's case. Each party seeks to assemble its best team of expert witnesses to help educate the jury and then convince the jury of its position, all the time knowing that each individual expert will engage opposing counsel and the opposing party's corresponding expert. Judge Blue stated in *Centas vs. Naples Community Hospital*, 689 So.2d 302 (Fla. 2d DCA 1997): Even if expert testimony is cumulative, excluding such testimony is harmful because a medical malpractice case is always necessarily a battle of expert witnesses.

In this age of the "battle of the experts," selecting the best expert for the battle to come is a critical task of a trial lawyer.

Types of Experts

The type of expert witness to call is limited only by the imagination of the lawyer. The following list of categories is but a small fraction of the hundreds of different types of useful experts:

Medical Experts — Adult urologist; pediatric urologist; floor nurse; nurse supervisor; operating room tech; wound care nurse; operating room circulation nurse; critical care nurse; nutrition; environmental medicine; pediatrics; physical therapy; plastic reconstruction surgery; psychiatry; medical toxicology; pulmonary medicine; radiology; cardiology; pathology; oncology; hematology; neurology; critical care; emergency medicine; managed care; geriatrics; neuropsychology; family medicine; internal medicine; DNA; genetics; infectious diseases; osteopathic medicine; podiatry; surgery; pharmacology; ophthalmology; pain management; bullying; ear, nose, and throat; vocational rehabilitation; sex therapy; death and grieving; dermatology.

Criminal Experts — Police; security guards; handwriting; law enforcement policy and procedures; polygraph; hair/fibers; toxicology; medical examiner; serology; speed; DUI; human factors; accident reconstruction.

Business Experts — Banking; accounting; economist; marketing; small business; e-commerce; credit cards; insurance; real estate; consumer fraud; entrepreneurship; business management.

Engineering Experts — Chemical; electrical; mechanical; computer; aviation; systems; fluids; failure analysis; vibration; flight; ball bearings; wheelchairs; warranty; product recalls; warnings; auto accident reconstruction. Some experts are retained to help prepare a case before a lawsuit is filed, others are only hired to educate the jury about a specific issue, and some are hired to give opinions on liability, causation and damages. Over the years, extensive research has been written in the area of expert witness testimony, but little has been written about the practical aspects of selecting such witnesses in the first place.

A Four "P" Expert

After years of locating, interviewing, and personally hiring hundreds of authoritative expert witnesses, I now believe the process of selecting experts can be narrowed down to four simple questions. If all four questions can be answered in the

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affirmative, then the type of quality witness that will help advance any litigation case has been found. I refer to this type of exceptional expert witness as a “four P expert.” A “four P expert” is a person who has the following qualifications: The witness is a practitioner in his or her field of study; the witness is a professor in his or her field of study; the witness has published peer review articles, textbooks, or guidelines in his or her field of study; the witness presents well in front of a jury.

Practitioner — One Who Practices an Occupation, Profession, or Technique

The first “P” of a “four P expert” stands for practitioner. Dictionary.com defines a practitioner as “one who practices something, especially an occupation, profession, or technique.” Practitioners are engineers, technicians, physicians, surgeons, dentists, scientists, counselors, and hundreds of other jobs. Expert witnesses who possess practitioner experience have an advantage in testifying before a jury because they routinely perform the very procedure or practice that is being questioned in the litigation. A practitioner expert witness can look the jurors in the eye and confidently assure them that his or her opinions are correct. This confidence stems from the fact that the practitioner expert successfully performs the questioned procedure on a regular basis. An expert witness who has little or no hands-on experience can be vulnerable to cross examination, even if the expert has an impressive curriculum vitae. An expert witness with practitioner experience, on the other hand, can quiet critics, whether they are judge, jury, or opposing counsel contending that the expert is merely restating opinions he has only read about. Quite simply, there is no substitute for doing.

Published — One Who Has Been Published in Periodicals or Books

The second “P” of a “four P expert” stands for published. An expert who has published peer review professional journal articles, chapters in texts, or books will have a strong working knowledge of all published opinions and counter opinions on the area in question. A published expert witness can explain to a jury how his or her opinions agree or disagree with other national published experts. An expert witness who has published in peer review publications gets the benefit of the jury’s understanding that her research and opinions have been deemed worthy to publish for all the world to see. In short, this kind of witness has authority and veracity.

Professor — a Teacher or Instructor

The third “P” of a “four P expert” stands for professor. An expert witness with teaching experience, especially in the area in question, is a tremendous advantage. Virtually every civil law suit needs such a teaching witness to help explain the issues of liability, causation, and damages to the jury. Further, such a witness will be able to explain these issues and opinions in a clear and concise manner that is ideally suited for a courtroom presentation. Not all expert witnesses have such teaching experience, and hence may not be ideal for creating a teaching environment for the jury. Who is better qualified to teach a jury, than a quality teacher?

Presentation — a Lecture or Speech Set Forth for an Audience

The fourth “P” of a “four P expert” stands for presentation. Research tells us that for many individuals, the messenger is just as important as the message. If this research is accurate, then trial lawyers must be sensitive to what their expert witnesses look and sound like in hope of having a messenger to which the jury can easily relate. Credibility and personal likeability are intertwined with actual content of the message. If time is not an issue in the case, then a personal visit to any new potential expert witness is well worth the time and effort in order to ascertain how the expert presents. If time is short, then a current photograph and a curriculum vitae for your analysis before retaining an expert witness can be very helpful. Having a one-on-one meeting with the potential expert witness can help to resolve any potential issues that a jury might have with the witness. As we know, a picture is worth a thousand words.

Additional Support Indicating Need of Expertise

F.S. §766.102(5), titled “Medical negligence; expert,” provides additional support to the premise of application of the four Ps to expert witness selection. This section sets out the required qualifications for potential medical expert witnesses and touches on three of the four Ps: practitioner, professor, and research/publication. The statute provides:

(5) A person may not give expert testimony concerning the prevailing professional standard unless that person is a licensed health care provider and meets the following criteria:

(a) If the health care provider against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

1. Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; or specialize in a similar specialty that includes the evaluation, diagnosis, or

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- treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients; and
2. Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:
 - a. The active clinical practice of, or consulting with respect to, the same or similar specialty that includes the evaluation, diagnosis, and treatment of the medical condition that is the claim and have prior experience treating similar patients;
 - b. Instruction of students in an accredited health professional school or accredited clinical research program in the same or similar specialty; or
 - c. A clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same or similar specialty.

Conclusion

The selection of a superior expert witness is both an art and a science. It is partly systematic and analytical, yet also intuitive. In today's climate of tort reform, the rapidly increasing cost of litigation and potential liability for hiring questionable experts should motivate every trial lawyer to take an active role in locating, interviewing, and hiring expert witnesses for any type of case. The adage that practice makes perfect is certainly true in the selection of employing expert witnesses. Spending time with candidate experts, whether or not they are ultimately selected, is time well spent for the purposes of defining and refining your case. The major point here is to learn about the positive and negative factors of your case by and through expert witnesses as early as possible. By following the four Ps, trial attorneys have a method with which they can select the best possible expert witnesses with confidence.

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