



THE SEARCH FOR AN EFFECTIVE EXPERT: SAILING THE SEVEN C'S

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As a plaintiff's personal injury trial lawyer, I deal with expert witnesses on a daily basis. The search for an "effective" expert witness can be difficult at times. Although Christopher Columbus sailed the seven seas, I sail different "C's" in search of the effective expert witness. My seven C's are sometimes more difficult to navigate than the dangers Christopher Columbus encountered. While some of these C's appear simplistic, it is often difficult to find an expert witness that embodies all of these traits.

1. Credible

Seek out a **credible** expert witness. It often takes years for an expert to build his or her credibility but only one case to destroy it. How does an expert destroy his or her credibility? It starts when the expert gets involved with the wrong case. Find an expert who isn't afraid to give a negative review of a case. Experts do a disservice by accepting cases with questionable liability that they cannot really support. A good expert is selective when it comes to supporting cases.

Like it or not, an expert's credibility is always at issue. An easy way to gauge an expert's credibility is to examine the expert's believability. Make sure that the expert has not published or lectured on any topics that are inconsistent with the opinions he or she is giving in your case. Also, it is important to verify that the expert received all materials pertinent to your case. Many times, it is not what the expert reviewed but what he or she did *not* review that destroys credibility. It is critical that the jury believes your expert. If the expert is believable, you are on your way to a favorable result for your client.

It's always beneficial when first meeting an expert to set forth your expectations, the nature of the assignment, and the probable time commitments. Be leery of experts who accept assignments too quickly.

2. Competent

Obviously, you want an expert witness to be **competent**. Sounds like a no-brainer, but don't take competency for granted. The problem with many experts is that they get in trouble when they venture outside their "sandbox." Make sure your expert stays within his or her area of expertise, where he or she will be most effective. For example, in a medical malpractice case, a nursing expert will be most effective when circumscribing testimony to nursing issues. Once the nursing expert starts giving opinions outside his or her area of expertise, opposing counsel will challenge the expert's competency. This could potentially weaken the jury's view of your expert. It is important to ensure that your expert knows his or her role in your case and stays within it. Experts that opine outside their areas of expertise provide opposing counsel with tremendous advantages during cross-examination.

You should also thoroughly investigate whether your expert's opinions and/or the methodology or basis for the expert's opinions will hold up in court. For example, find out if the methodology used by the expert is contrary to published studies. Has the theory or technique been subject to peer review and/or publication? Is the expert's conclusion inconsistent with material testimony or evidence? Are the expert's theories based on generalized information and calculations? Are there flaws in the expert's investigative process? Does the expert have a particularly strong (or weak) curriculum vitae? Has the expert ever been barred or excluded in a case under *Daubert*? Has the expert been allowed to testify in other similar cases pursuant to *Daubert*? Does the expert have personal experience in this area of expertise? Did the expert test the theory? Is the technique used by the expert so new that there has not been time for applicable standards to be implemented?

There are a number of questions that you should ask a potential expert. It's beneficial to spend a "couple of dollars" up front to get answers to these questions rather than end up with a barred witness or without any expert testimony at

trial. An attorney's failure to ask these relevant questions is a recipe for disaster. Always have experts honestly define their true area of expertise.

3. Convincing

Expert witnesses should be **convincing** and persuasive. Think about having your expert step down from the witness box and use a chalk board. Experts who "teach" can be very effective with a jury.

Consider making a video of your expert prior to trial to identify quirks, fidgety behavior, and/or annoying habits. Like it or not, we all have some kind of negative characteristics, such as a nervous laugh, etc. Try to devise a strategy with your expert to avoid those negative behaviors while he or she is in front of the jury. When the jurors deliberate, you do not want them talking about how your expert fidgeted with a pen or looked up at the ceiling before every answer. Your expert should convince the jurors, not distract them with negative characteristics.

When making a video of your expert's deposition, make sure the expert knows that the deposition may be used a trial. This may influence an expert's attire. However, be mindful that it is beneficial to have live testimony at trial. In general, an expert more effectively convinces members of a jury when he or she is in front of them on the day of trial.

4. Confident

Experts should be **confident**. There is, however, a fine line between confidence and cockiness. Jurors expect confidence and despise cockiness. Have your expert look directly at the jurors and make eye contact. Counsel your expert to speak to the jurors, not over them.

Often, experts are confident during direct examination but do a terrible job on cross. Explain to your expert that cross-examination is not necessarily "adversarial examination." Your expert should maintain the same disposition on direct examination *and* cross-examination.

5. Caring

It is very important that your expert witness appears to be involved in your client's case because he or she **cares** about "righting a wrong." Jurors see through experts that get involved with cases for financial gain only. Effective experts show empathy while taking the time to educate the jury on how the defendant *should* have treated your client. Likewise, it is important that an expert testify honestly and make concessions when appropriate. If an expert does not know the answer to a particular question, he or she should say so.

Although an expert should show that he or she cares about righting any wrongdoing, direct your expert to avoid becoming an advocate for your client. The expert is there to provide opinions. It is the attorney's job to be an advocate.

6. Creative

Good experts take a **creative** approach to testifying. Experts who present information in a clear, coherent, and understandable fashion capture the fact-finder's interest. Make your expert an integral part of your trial team. Have the expert assist you with developing a theme for the case. Allow the expert to help you choose exhibits that effectively communicate that theme to the jury. Ask your expert to develop analogies to aid the jury in understanding complex issues.

7. Communicative

During a trial, jurors want someone to guide and teach team about the complex issues in a case. A jury's understanding of the issues directly depends on an expert's ability to **communicate** his or her opinions effectively.

The qualities that make someone a good dinner companion (e.g., personable, open, entertaining, engaging) also make a good expert witness on the stand. The jury should like your expert witness. Make sure your expert knows that he or she can show his or her true personality while testifying. Honest, polite, self-deprecating, and likeable experts win over jurors. Your expert should make every effort to avoid appearing condescending or arrogant.

Conclusion

Today, the expert witness' role is becoming increasingly more important in explaining complex issues to the trier of fact. Many times, a trial turns into a battle of the experts. Experts that embody these seven C's will be an effective part of your trial team. Often, if a jury sides with your expert at trial, it is because you contemplated the seven C's in selecting that expert and preparing him or her for trial.

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