Selecting an Expert Witness

Introduction

Weiner K. Heisenberg’s Uncertainty Principle articulates an odd aspect of Quantum Mechanics. In a Quantum Mechanical world, one cannot predict where an atomic particle will be with 100% certainty. One can only speak in terms of probabilities. It’s possible that an atom will be at some location 99% of the time, but 1% of the time it will be somewhere else. A consequence of the Uncertainty Principle is that particles, from a common sense perspective, can appear in places where they have no right to be. This notion of uncertainty has some interesting consequences in terms of Quantum Mechanics, but fortunately doesn’t have to apply in the selection of a legal consultant or expert witness.

There are 4 selection rules to consider when selecting an expert witness:

1. Is an expert needed?
2. What will be the expert’s assignment?
3. At what point, and for how long will the expert be required?
4. How much are you willing to spend for a legal consultant and/or expert witness support?

Like most elementary rules, expert witness selection rules may interact with one another from time-to-time and each could be in conflict with the others. Any one of the rules may be of more importance than another, depending on the specific situation confronting the rule follower. This White Paper is intended to provide guidelines and analysis for the expert witness and legal consultant selection process. It calls attention to the selection of subject matter experts for disputes that involve high technology issues, with an emphasis on intellectual property disputes.

Do I Need an Expert?

High technology disputes are likely to raise the question, “What is this case all about?” rather than “Do I need an expert?” In high technology cases, attorneys usually sense that an expert will be required, but may not know what type of expert is needed. In high technology cases, an expert should be engaged immediately before any filings, and certainly before discovery commences.

Besides helping the attorney determine the nature of the case or defense, there are three other typical uses for experts, (i) assisting with the discovery process, (ii) supporting trial preparation, and (iii) testifying at trial. Thus, early in the litigation process it becomes important to determine whether both a background consultant and/or a testifying expert are needed. Work product considerations must determine if it is prudent to engage a single expert for both functions.
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The selection process is comprised of myriad elements, analogous to hiring a key employee. Deciding on the right expert can be a time consuming procedure that is often left to the last minute, sometimes only days before the disclosure of experts is ordered by the court. Waiting to engage an expert can drastically reduce the universe of available talent from which a selection can be made. Conversely, selecting an expert witness early in the life of a lawsuit not only provides the optimum in variety, it also permits the subject matter experts' know-how to be used for interrogatory support, deposition of fact witnesses and preparing for the deposition of opposing experts. In particular, a dispute involving high technology issues necessitates engaging an expert as early as possible to help decipher complex technical issues.

Finding the Right Expert

Understanding the variety of skills required for expert witness support can be as important as selecting the right expert for each area of specialization. Complex high technology litigation requires that the explicit needs for expert witness support he determined, to the extent possible, before the selection process can begin. If, for example, the dispute involves an electronic product failure, the attorney must determine what specific elements of the product require expert support. An expert in power supply design is substantially different from an expert in microcomputer control or one with expertise in embedded software. If the precise nature of the skill set required is not clearly understood, it can be helpful to enlist the services of an expert witness referral firm like the Silicon Valley Expert Witness Group, Inc. that provides expert witness services to help attorneys determine exactly what expertise is required to meet the needs of their case.

Expert witness candidates can be found from a variety of sources. The most obvious choice is an expert previously used by the attorney’s firm. Another source is fellow members of local bar associations, MCLE classes, and other professional groups. Colleges and universities are a good resource for expert witnesses. State bar associations and independent publishers print annual directories of expert witnesses that address most major markets in the United States. The explosion of the World Wide Web has greatly changed the process through which one can locate expert witness support. The most expeditious method of locating a high technology expert is to rely on the expertise of a firm like the Silicon Valley Expert Witness Group, Inc., who maintain a proprietary Registry of Consultants. The Registry of Consultants is comprised of expert witnesses with top-level expertise in areas of high technology. Members are industry practitioners and academics with high academic achievement and decades of hands-on experience concentrated in the major technological disciplines.

Consultant’s Expertise

Obviously, having a selection of experts in any given subject from which to choose would be the ideal situation. Regardless of the number of candidates available, the process of making the right choice doesn’t change. Normally, consultants considered to
be generalists do not make the most suitable expert witnesses. The archetypical “World Class” candidate will have the following credentials:

1. Advanced degree
2. Two or more decades of relevant professional experience
3. Publications in the relevant area of expertise
4. Membership in industry associations
5. Patents issued in the relevant area of expertise
6. Testimonial experience in the specific area of expertise required.

Unfortunately, individuals that meet these criteria are exceptional individuals and frequently hard to find. Consequently, the list of a candidate expert's preferred attributes must be prioritized to correspond with the needs of the matter for which consultation or testimony services is required.

Educational background can be supplemented with several years of hands-on experience in the specific area of expertise required. There may only be a few individuals with graduate degrees and decades of experience in the area of interest, while there may be hundreds of potential experts with bachelor degrees or no college experience that have the requisite industry experience to qualify as an expert witness.

The decision of selecting an expert with industry or academic experience is dictated by the case requirement for an expert with hands-on experience, or one with a theoretical academic approach. Disputes litigated in the federal courts now have their own set of rules. In *Daubert v. Merrell Dow Pharmaceutical*, the Ninth Circuit harshly criticized experts who had no prior “hands-on” experience with the scientific or technological issues on which they are asked to opine. Daubert brings a new dimension to the selection and preparation of expert witnesses for cases involving scientific evidence. The Ninth Circuit's decision was the first judicially expressed reservation about the so-called “hired gun” stigma that clings to many professional and full-time expert witnesses. Jurors have expressed these same reservations for some time.

A well-published expert, typically one from academia or a research organization, presents the proverbial double-edged sword. The content of an expert's publications are a potential source of concern as well as a demonstration of practiced expertise. Care must be taken in the selection process to ensure that the opinions objectively reached by the expert in support of the attorney's position is not undermined by prior publications. In short, the most qualified expert must have demonstrated mastery of the relevant subject matter and be able to defend their qualifications in court.

**Hazards in the Selection Process**

One should avoid candidates who are clearly inexperienced and unable to articulate their ideas clearly. Attorneys should keep away from verbose candidates who could easily give too much information during deposition or under cross-examination. Shun the
expert who is an advocate of your client's position from the beginning before all the evidence has been reviewed. The best experts are objective in their research and will formulate an independent opinion. Keep in mind that even if the expert you select cannot agree with your position, that fact alone is worth the expert’s fees, because weaknesses in your case surface early in the litigation process. Credentials are critical. The opposing attorney will challenge your expert's credentials and do everything possible to limit the expert’s area of expertise. Scientists and other members of the high technology community are inherently problem solvers. As a result, when they are under oath, technologists subject to the clever hypotheticals offered by opposing counsel could inadvertently damage their opinion. Thus, a candidate with prior testimonial or other experience in adversarial circumstances is highly desirable.

The Interview

It is a cost-effective practice to conduct the initial interview with candidate experts over the telephone. Obtain the candidates curricula vitae (CV) prior to the interview. Candidates lacking prior litigation support experience may not have prepared a resume that contains the detail required for voir dire. The combination of the consultant’s CV and a telephone interview should produce the following information:

1. Chronological list of employment history with details regarding duties, responsibilities and achievements.
2. Educational background including degrees, major, colleges or universities attended, graduation date, thesis topics and other relevant information.
3. Relevant professional experience that may supplement or enhance the experience gained through employment history.
4. List of patents, including patent number; title and issue date.
5. List of publications, including books, chapters in books, articles, and conference presentations, with full bibliographical data.
6. Professional affiliations and awards including membership in trade or scientific associations and certifications, e.g., Professional Engineer, member, IEEE, etc.
7. Litigation support experience listing case titles, testimonial subject matter, engaging law firm, supervising attorney and disposition of the case.

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After completing the telephone interview of suitable candidates, a preliminary selection can likely be made of those candidates you wish to interview in person. Clearly, the visceral reaction to the candidate's persona, demeanor and appearance are critical inputs to the selection process, regardless of the candidate's credentials. During the face-to-face interview it’s important to achieve the following:

1. Challenge the candidate's credibility
2. To the extent possible, test reactions to a stressful situation
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3. Analyze the expert's ability to articulate personal viewpoints in an understandable way. This is a critically important ability, especially when technical issues are involved in a dispute that the judge and jury might have trouble comprehending.
4. Test the expert's skill in developing analogies and metaphors to explain, in lay terms, complex technical issues important to your litigation.

Conclusion

You don't have to be the originator of the Uncertainty Principle to know that any litigation guarantees more than it's share of uncertainty. However, you can do yourself a big favor and vastly reduce the uncertainty of your case by an early and perceptive engagement of the right expert.

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