

## **Avoidable Bloodbath Trial or Deposition: The Prepared Attorney and Expert. A Strategic Guide**

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An Expert Witness with less than stellar credentials is low hanging fruit in deposition direct examination or cross-examination. Due diligence, however, is intended to help anticipate handling questions put to testifying experts—your own or the other guy's. This article can apply to any Expert Witness. Forensic Psychiatrist and Psychologist expert opinions are provided for exemplar purposes.

### **Due diligence is useless after the fact.**

Some information is available publicly regarding credentials and lawsuits in which the expert is a named party. Other is the result of elbow greased research and a clever eye to a report or CV. Reading between the lines is as helpful as reading the lines themselves.

- **Credentials, licensing**
- **Board-Certification**
- **Suspensions and even malpractice lawsuits are sometimes available.**
- **Disqualification from testimony.**
- **Unethical or sloppy practices. Worst, rather than Best.**

**Mitigation.** Mitigating a testimony bloodbath is multi-pronged, half thinking like opposing counsel and half thinking like an investigator after an alleged forger. Assume the forger is innocent. After all, it's the Constitution.

**Verifying Credentials.** Credential Verification or Badges are available from several Expert Directories or Referral services and take the weight off the attorney. Malpractice suits are reported by HealthGrades (missing lawsuits are not evidence of their absence, but the presence of such a suit can be valuable.) Lexis-Nexis is a further source.

**State Medical Boards** online have license lookup features. This is a good time to take a look at the expert's CV to ensure the State records back up what is claimed.

**CV Data-Mining.** The expert's CV is an Affidavit of sorts. It may report a sterling and true report of experience. On the other hand, something false might be stated. More often is simply out of date. The most common problem is the "little white lie" that exaggerates a title or scope of responsibilities. "Doctor, did you, in fact, supervise the Fellowship program? Was Supervisor your title?" "Did you select candidates for acceptance? No? Why did you refer to "Admissions Protocol" and how did you implement them?"

A sloppy CV is another opportunity for mitigation—ask the expert to review his or her CV with a fine-tooth comb and fix it before the expert is disclosed. For example, a doctor who was licensed in two states may have dropped one state now. Is it misleading or a mistake? I advise Experts to update their CV every time there is a change to any feature of their practice.

**Board-Certification.** In the case of Board-Certified doctors, verification is provided by the relevant Board. Psychiatrists and Neurologists are certified by the American Board of Psychiatry and Neurology. ABPN's "Verify-Cert" service will show if Board Certification is in good standing, has lapsed at any point, and when renewal testing is due.

**Disqualification from testimony.** Reports are available about if an expert was ever disqualified to testify. The reason why is worth the effort to look.

**Don't miss best practices.** An expert witness sullied by questionable or inept practices is vulnerable to surgical drill down on examination or cross. Most attorneys don't have a way to conduct due diligence about business practices, though credentials are easy enough. All the more reason to make a deposition count.

**Trial is a bad time to learn your expert works for a Hired Gun IME Mill and other dangerous waters.**

Performing your due diligence isn't limited to researching Board sanctions or license suspensions. You are paying a premium for the expert's pristine reputation. When I take a close look at an expert's CV *and* the expert's report, I watch for items that can be exploited during testimony. For example, a dodgy medical school, or an opinion reported which the expert is not qualified to address. Even operating on a

panel in a defense-weighted insurance IME mill can be a goldmine for the attorney seeking to discredit a medical expert as biased.

In one case, a Forensic Psychiatrist issued an oddly brief and vague report. I went online and began research. I found the doctor's Board Certification had expired almost 10 years earlier, though he was still licensed to practice medicine. Sanctions existed, and, on further research, I learned it was from prescribing pain medications to people who were not his patients, including a family member. In this case, the attorney had retained two experts in the field. It was my strong recommendation that they release the expert, remove them from the witness list, not produce the short report, and distance themselves from that expert as quickly as possible.

### **Having to file a last-minute *Motion in Limine* about your expert will take a hit to your trial budget.**

Opposing counsel's failure to file a *Motion in Limine* might be a boon to your case, if you know it will be a smart move. Similarly, imagine you've found a weakness in testimony listed above *in your own expert*, consider if it is germane to her or his testimony. If not, a *Motion in Limine* may be indicated and will restrict opposing counsel's ability to exploit that line of questioning.

We know a *Motion in Limine* is made to exclude lines of questioning about matters inapplicable to the case at hand. For example, a doctor whose treatment protocol includes a few methods that do not meet the Daubert standard, in a case where proper diagnosis of Depression is the focus of the expert's testimony may well call for a Motion in Limine. I live in Northern California where every doctor espouses "holistic healing," it seems. I cannot imagine "conversing" about that definition would be a fun conversation to have on the stand.

### **Don't ignore the expert's back office: especially billing staff.**

Staff of an attorney can make mistakes and so can staff of an Expert Witness. Claims against the Expert of suspicious billing or overcharging can be devastating to discredit the expert. Even the impression of such requires a little pre-trial planning.

A Forensic Psychiatrist I know had a very large bill. He had more than 20 binders of records to read (4" binders!). He knew a jury would gasp at his bill and assume he was greedy and his opinion was driven by profit. What did he do? He brought the

boxes and boxes of binders into the Courtroom. They sat under a table and served as a subtle but effective visual aide.

**Second Set of 20-20 Eyes.** When I review and research the reports, practices and professional behavior of a forensic psychiatrist or psychologist-or help select such a professional, **I watch for vulnerability to challenges and opinions diminished. Attorneys tell me there's no substitute** for the impartial legal-eagle-eye for inconsistencies and missteps.

### **Retaining the right expert.**

I consult with attorneys to avoid common mistakes, e.g., plaintiff's counsel retaining plaintiff's therapist as an Expert Witness or pursuing a psychologist to opine about medication they are unqualified to prescribe. When a potentially large award is on the table, nothing should be left to chance or there will be a dollar amount to be paid. When I help find appropriately qualified Experts and make recommendations, an attorney can mitigate potential problems. 30 years in the trenches in law and forensic psychiatry (not a lawyer or doctor—a case team member) has taught me there is an art to bolstering or discrediting an expert witness.