

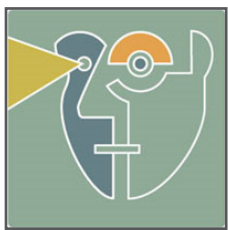


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## Expert Witnesses: When to Use Them, How to Find Them

By Cary Griffith

When Jan Conlin a partner with Robins, Kaplan, Miller & Ciresi first began practicing law, she thought she would have a career in the products liability and mass tort fields. But her firm landed some large intellectual property (IP) cases, and she was recruited to work on them. Her cases have dealt with everything from autofocus technology to postage meters to Web browsers. The cases involved huge amounts of detail, and the technologies at issue were created by teams of engineers with Ph.D.'s. How does Jan, a lawyer with a liberal arts background, prepare for these cases?



"You need to surround yourself with very good technical experts who can make sure you understand the technology."

IP law, personal injury, medical malpractice, and most other forms of litigation are on the rise. Because many of today's cases involve arcane facts or technical information, it's no wonder that

the use of expert witnesses is also growing.

The truth is ever since we stepped off the farm and walked into the cities, modern life has grown increasingly more complex and specialized. From the cars we drive to the food we eat to the ways in which we work and entertain ourselves, our use of everyday things builds on the cumulative intellectual efforts of our forebears and contemporaries.

For example, if a family happens to be traveling in an SUV whose tires are worn and one of them suddenly explodes, sending the car into a catastrophic skid, many questions must be answered. Who is responsible for the accident, possible injuries, or loss of life? How shall damages be apportioned, if at all? Indeed, is anyone to blame?

When a trial occurs over such an issue, and all sides try to affix responsibility on someone else. Some will argue that bad driving or the owner's negligent car maintenance caused the problem. Others will hold that the SUV's suspension or overall design was the key issue. Still others will point to alleged faulty tire construction and try and prove the tires had manufacturing and design flaws so minute but so dangerous that a crash of this type was practically inevitable.

Teasing out responsibility for this and other types of litigation is complicated. Given that few lawyers and fewer jurors can expect to be knowledgeable about the nuances of tire manufacturing, autofocus technology, or postage meters, it makes sense to hire and use appropriate experts. But in what

instances are experts allowed? Where can you find them? When do you use them? How much should you pay for them? And once you've added them to your team, what can you expect from them?

As long ago as 1971, the Wall Street Journal identified two important litigation trends. In an article entitled "Taking the Stand: Rising Use of Expert Witnesses Creates Controversy," (Wall St. J., Apr. 20, 1971, at 1, col. 1), the WSJ noted that the increasing use of scientific evidence is due to the continued development of science and technology and that the use of experts is controversial. Since then, the use of expert witnesses has risen, the controversy has continued, and courts have tried to refine how and when expert witnesses can be used.

Federal Rule of Evidence 702 states, in part, "If scientific, technical, or other specialized knowledge will assist the trier of fact. . . , a witness qualified as an expert. . . may testify thereto in the form of an opinion." The problem, of course, is that experts are hired by one side or another, implying their testimony could be influenced by those who pay their wages.

While Rule 702 makes the use of experts allowable, two subsequent U.S. Supreme Court decisions—in part trying to address some of the controversy surrounding the use of experts—sought to give courts broad leeway in determining when an expert can be used.

In *Daubert v Merrel Dow Pharmaceutical* (113 S.Ct 2786; 125 L. Ed.2d 469), the U.S. Supreme Court outlined the four basic standards lawyers must meet if they want to use an expert witness. Daubert's four standards include:

- The expert's theory or technique can be, or has been, tested;
- The theory or technique has been subjected to peer review and publication;



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- There are scientifically recognized standards controlling a technique's operation; and
- The technique or theory enjoys general acceptance within the relevant scientific community.

Apart from being properly credentialed, expert testimony must meet these standards.

In a subsequent case, *Kumho Tire Co. LTD v. Carmichael*, [526 U.S. 137 (1999)], the court extended and broadened the power of trial courts to determine whether or not an expert's testimony will be admissible.

If you are trying a case you believe would benefit from the use of an expert witness and you believe you can meet the Daubert standards, how can you find him or her?

"Most plaintiff attorneys call another attorney for recommendations," comments Captain Kirk Greiner, USCG (Ret.). Captain Greiner is both a lawyer and a maritime expert witness. Others with whom we spoke agreed.

"When I need [an expert], I find them by consulting other attorneys, first within the firm and then through organizations like the Kentucky Defense Council and the Defense Research Institute," says Philip C. Eschels, a member of the firm of Greenebaum Doll & McDonald, PLLC. Eschels has used experts for psychiatric examinations of plaintiffs in employment cases and to testify about a plaintiff's future damages.

Examine the case law and related legal literature, advises Robert B. Benowitz, B.S.E.E., J.D., and President of RMS Associates, Hospital Safety & Medical Equipment Experts. Benowitz is both a lawyer and an expert witness. He, and other lawyers and experts we interviewed, noted that many large cases involve similar facts and legal questions and mention or list the experts used in the trial. Sometimes local or state bar magazines will cover a case and mention the experts lawyers used to win their verdicts.

Other methods used to locate experts include the Internet and any one of several expert witness clearinghouses. Though the Internet was mentioned less frequently as a place to find an expert, its importance is increasing.

"We certainly do get some of our assignments from the Internet," comments Gary Markham, Chief Operating Officer for Rimkus Consulting Group, a company that specializes in selling and providing expertise. The company was founded in 1987 with five owners and three secretaries. Today, it boasts an employee population of "about 300 full-time employees, about two-thirds of whom are engineers and other professionals," explains Markham. Rimkus specializes in construction claims and disputes and often works with property law firms. They also work on toxic torts litigation, superfund cleanup, environmental work, and vehicle-accident reconstructions.

Expert witnesses usually work by the hour, so when they begin working on a case usually dictates how much they will cost. Of course the timing of the use of expert witnesses can involve much more than money.

Sometimes, Benowitz notes, "I'll be called by attorney A; and then a month, later I'm called by the opposing counsel. That will happen more frequently than you expect." If there is a well-known, highly respected expert in the field in which your litigation occurs, you may want to hire him or her first.

If the facts or technologies involved with a case are particularly complicated or scientific, it may make sense to get an expert involved early on in the process. Some lawyers, with little formal training in a particular subject, will need extra time to become knowledgeable. They will also need assistance in knowing what types of questions to ask. In this way, experts can often assist counsel with fashioning questions for interrogatories or depositions.

Once you decide on an expert witness, how much can you expect to pay? That depends. "My rate's \$175 per hour, plus \$250 per hour to testify," comments Captain Greiner USCG (Ret.).



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“Depending upon what it is, and what type of professional is required to work on it, we charge anywhere from \$100 to \$300 per hour,” adds Markham.

While expert witnesses may not be cheap, the right person on the right case at the right time could make the difference between winning and losing.

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