

Retaining a Business Resumption Planning Expert Witness (Part 2 of 2)



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It may seem wrong, but it's a fact: In court, being believable is more important than being knowledgeable. Leo A. Wrobel and Sharon M. Wrobel conclude their series on choosing an expert witness by examining traits that are as important as subject expertise, but much less objective

In part 1 of this series, we stated that while lawyers are important in any legal action, expert witnesses also play a major role in the U.S. judicial system. In fact, expert testimony presented in the course of a legal proceeding can significantly enhance the prospects of plaintiffs or defendants, and radically change the course of a case. Both plaintiffs and defendants make extensive use of expert witness testimony, so engaging the right expert is no small matter. This article imparts additional tips to ensure that you're successful

Part 1 explained that one of the foremost factors in choosing an expert witness is his or her ability to digest and assimilate complex technical facts, draw a conclusion, and present it in an understandable way to non-technical people. In addition to knowledge, an expert witness must possess a number of other desirable characteristics. This article concludes this series with a discussion of these other traits of success for a potential expert witness, what you'll be expected to pay for the expert's services, and what to do if you are called to deliver expert testimony

Communications Skills

Besides knowledge and "book smarts," there are many other things to consider when selecting or retaining an expert witness. For example, what if your expert cannot communicate his or her knowledge to a non-technical judge or jury? What if he's an exceedingly poor public speaker? What if he freezes under the pressure of an intimidating lawyer under cross-examination? What if the judge or jury simply doesn't like your witness? Any one or more of these negative traits can prejudice your case

If there's a possibility that you could be called as an expert witness in the future, or if you want to offer these services, do everything you can to hone your communication skills. Join Toastmasters, accept public speaking engagements, lead high-pressure meetings within your organization. Such experience can keep you from freezing under pressure in the potentially hostile venue of the court. (Any of these steps can also enhance your professional career in other ways.)

If you're looking for an expert witness, obviously you must check out the person's background, experience, degrees, licenses, certifications, employment history, and so on. If he or she has previously testified for other organizations or law firms, get details and references you particularly want to know about the expert's ability to communicate to an arbitration panel, judge, or jury

From a review of the potential candidate's background, you can pick up on a few indicators of ability to communicate

- Is the potential witness well known on the speaking circuit? That's an indication that she's accustomed to speaking in front of large crowds
- Has she assisted law firms in the past? Chances are that she's comfortable under the pressure of the courtroom.
- Is her work published? If so, she knows how to organize a pattern of thoughts into coherent and concise conclusions.
- Does her job description specify an executive management consultant position? Look at this as an indicator of ability to communicate with executives

The last point above might seem to contradict what we said earlier. A good witness must be able to "dumb down"

technical details for the sake of non-technical judges or juries. But your executives, legal department, or both will probably have to approve expenditures for hiring the expert witness, as these kind of resources are pricey. The ideal candidate will be able to present information in *any* forum for your upper-level staff as well as in the courtroom.

Once the candidate has passed this first hurdle, interview her by phone or in person. Again, pay particular attention to her ability to communicate her expertise. If you're satisfied with her abilities in this area, look for the other traits discussed in the rest of this article.

Personality

Whether an expert has previously testified in front of a jury or judge isn't as critical an element as is his or her professional experience and credibility. An expert witness not only must be professionally competent; he or she must have a congenial personality. Like it or not, all kinds of dynamics are in play in the courtroom, and only a fraction of them pertain to the actual merits of the case. A judge or jury that doesn't like a witness will develop an unfavorable impression of him or her that could prejudice the whole case. In addition to knowledge and communications skills, which we've already discussed, a judge or jury will home in on a few key things and therefore you should as well.

- Trustworthiness
- Honesty
- Humble and earnest demeanor
- Credibility

Let's consider each of these traits in a little more detail.

Trustworthiness

It's difficult to measure trustworthiness. But it's possible for a potential expert witness to exhibit the *impression* of trustworthiness. One component of this impression is reputation. For example, your witness might be well known, and therefore a judge or jury might be at ease with taking the expert's testimony at face value.

Extracurricular activities might come into play here. A recognized celebrity, such as a former professional athlete (say from the Dallas Cowboys or New York Giants) might just be noteworthy enough to be believable, even if this aspect of the person's life is tangential at best to his or her purpose for testifying. What is this person an elected official? That could be a plus or a minus, depending on the circumstances. Is he or she well known for volunteer work or philanthropy? If so, work that fact into the biography included in any pre-filed testimony.

It's vital that you understand the importance of working with your lawyer at this stage. A good trial lawyer knows the kinds of traits to present, and may even know the judge personally if the legal action is brought locally. In our experience, it's wise to consider the "home field advantage" when choosing lawyers. Lawyer friends speak of being "home teamed" when having to try a case in a distant jurisdiction, where opposing counsel knows the judge and surroundings better than they do. What's true for lawyers is also true for expert witnesses.

Honesty, Humbleness, and "Open" Demeanor

We place these factors together for a number of reasons. First, it's virtually impossible for you to know absolutely whether a potential witness is honest. As we stated earlier, however, *perception* is a primary consideration in the courtroom. Being perceived as honest is accomplished in large part by exhibiting attitudes characterized as "humble and earnest."

In general, people which includes judges and juries don't like to feel bombarded by someone's expertise, because that makes them feel less intelligent. Effective witnesses can project expertise and authority on a subject without "showing off" or making their audience feel belittled. Your witness should seem humble and folksy, yet at the same time firm and sure of himself and his conclusions. You should be able to get a sense of his general demeanor during the interview process.

Credibility

All of the previously mentioned traits contribute to this desirable trait. While an expert's opinions must be reliable,

your expert's opinions must also be believable. Any conclusions must be based on generally acceptable standards in the appropriate profession or field. Proof may come from offering up treatises on the subject, publishing articles in trade journals, or the testimony of peers. However, more than simply citing standards, experts must also be able to fill the gaps between the facts they're examining and the resulting conclusions. An expert must be able to explain precisely why, under his or her methodology, an apple is not a pear.

It's not sufficient simply to make the connection, say, between the building damage and the tornado, or a critical data loss with a mishandled backup process. An effective expert witness must be able to show a well-reasoned basis for making that connection. If the expert is unable to prove that his theory is accepted in the field, or if he is unable to connect the given facts with his conclusion through common-sense reasoning, the judge may not even permit your expert to testify.

The expert should be a person who is truly able to give the judge or jury a crash course on the subject, in an engaging way that *holds their attention*. The best experts almost consider the courtroom to be their classroom. That's why experts who frequently stump the lecture circuit can be in high demand. These people have the skill to pass along what may be very technical information in common, ordinary, everyday terms without talking down to their audience. More importantly, they're able to show how an understanding of the subject matter applies to the dispute at hand.

What Do Expert Witnesses Charge?

For all of the reasons we've discussed, these experts are generally expensive to retain. Expert witnesses can charge whatever the market will bear for someone with their field of expertise. A typical business resumption planner with the requisite skills we've described for an expert witness may testify for up to \$300 per hour, whereas a nationally known figure may command an hourly fee of \$1,000 or more.

Interestingly, how well known an individual is may not always be the most critical factor. In fact, some studies have suggested that jurors are actually more likely to trust experts who testify infrequently and non-professionally, particularly as opposed to "professional witnesses," for example, who are employed full-time in a large corporation. Consider the following exchange:

Q: What is your professional background and the purpose for your testimony?

A: My name is William Jones. I have been employed by The Big Electric Company as a systems engineer since 1986. The purpose of my testimony is to refute the testimony of Jane Smith and her claims of environmental contamination against The Big Electric Company.

Can you see the obvious problem? The jury assumes that this expert will not "bite the hand that feeds him." This assumption automatically makes him less credible.

Many large companies actually own standalone "professional services" firms. A suit filed against AT&T, for example, as a general rule is taken up by a company called AT&T Services Corporation. AT&T Services Corporation actually sends employees (even non-lawyers) to special schools to learn how to be compelling witnesses in disputes and litigation.

A standalone "services" company presumably insulates its parent company from many kinds of litigation and, to some extent, from investigations of oversight bodies and regulatory agencies. Of course, AT&T isn't the only corporation that employs services corporations, but it has refined the concept to a art form with regard to fending off litigation and other unwanted scrutiny.

For all these reasons, if you're looking for an expert and you work for a large company (particularly one that may be unpopular, such as a utility, hazardous waste company, taxing authority, etc.), you should probably consider an outside expert witness. Talk to your lawyer.

In the final analysis, fees should really be of secondary concern when selecting an expert witness. Hiring an expert probably wouldn't even be considered if the importance and value of the case didn't far outweigh the expert's fees. You also don't want to send high-priced legal counsel into a contentious case naked and unprepared. With this in mind, make sure that your expert has the ability to communicate with lawyers.

As we said earlier, we're not lawyers, but rather management consultants. A good consultant communicates in a manner that's appropriate for his or her audience. For instance, if we're communicating with systems programmers

we use flowcharts, because that's how programmers are accustomed to working. If we're working with executives, we use PowerPoint slideshows or GANTT charts. When we communicate with lawyers, we draft (but don't file) pleading documents, which make it easier for lawyers to understand highly technical topics. Because the attorneys get to see the arguments in a form closer to what the judge will see, it helps them to better compute their chances of success. By styling the technical issue as a pleading, we "dumb it down," explain it better and communicate it better. The critical skills we've suggested to you in this series

Okay, so who pays this expert? Some state statutes require or allow the defeated defendant to pay the plaintiff's expert's fees. That's good for you, although obviously you have to win, and until that time you'll probably have to pay the expert up front. After a successful conclusion to the case, your attorney will make the appropriate filings with the court to collect reimbursement. Talk to your attorney. In addition, depending upon whether the case is in federal or state court, other rules guide the payment of certain expert fees

CAUTION

Avoid hiring experts who offer their services on a contingency basis; juries tend to doubt the testimony of experts who get paid only if the case is won

Finding or Becoming an Expert Witness

Experts can be found in virtually any field. Some advertise in trade journals or legal publications. Others gain their reputation by word of mouth. Websites exist that are devoted to expert witnesses as well as witness bureaus which operate much like a speakers' bureau, offering up experts for virtually any type of case. ([TC International Consulting](#) is one good example.)

A word of caution: There are no systems in place to assure that expert witnesses are competent. No registration or regulation governs expert witnesses, although some professional organizations offer education, training, and ethical guidelines. It's the responsibility of the hiring party to make sure that the witness is competent as an expert. Unlike the situation with lawyers, if your expert witness turns out to be incompetent, nothing comparable to a Bar Association exists to which you can report the person

Summary

While everyone hopes to avoid litigation, that possibility hangs unseen as the "800-pound gorilla in the room" as the main reason for any contingency, business resumption, or disaster recovery plan. The reasons for which a corporation can be sued are almost as numerous as corporations themselves. Whether our organization is a bank stockbroker, utility company, telecom service provider, health care provider or any company with more than 10 employees, as a rule, you need a contingency plan. Even with the best of plans, your organization can still be sued

In today's courtroom, the ruling on a case often boils down to which party had the better expert witness. One thing is certain: If one side hires an expert, the other side will also. Hence, we have the inevitable battle of experts that is common in all kinds of litigation today. The most successful expert witness not only has a level of knowledge that is unsurpassed in his or her profession, but also the appearance of objectivity, earnestness, and charisma to convey that expertise to non-technical persons

We hope that this series has been helpful in identifying elements that can influence juries and win trials. If you keep the tips from this series in mind, you should be able to find and retain the perfect witness to help maintain the well-being of your organization

In our next article, we'll consider the perspectives of being an expert witness from the other side of the witness stand lawyers.

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