IDENTIFYING, LOCATING AND PREPARING EXPERTS

The following is an attempt to summarize suggestions about how to best locate and make effective use of experts. Much of this information was taken from an outline that Julia Leighton (Public Defender Service in Washington D.C.) and I prepared for a clinic in which we prepared experts to testify and attempted to educate experts about how to effectively work with criminal defense lawyers. This summary is not comprehensive and may not apply to all situations. It is intended to be used as a guide primarily for cases in which the expert will be the focus of the defense, but the suggestions are useful in any case in which you will call an expert to testify. Discovery-related issues and concerns regarding what to give your expert or what not to give your expert are beyond the scope of this article. This guide may also help you prepare to cross-examine a prosecution expert. Much of the content of this article comes from lessons learned through mistakes I have made.

The goal is to present effective expert testimony: testimony from an unbiased expert with specific expertise in the relevant subject. Expertise is demonstrated, in part, by an ability to talk knowledgeably about the research and the literature. Such an expert has not changed positions on the basis of the questions asked or the case, but only upon new research or further developments in the field.

I. Locating the Appropriate Expert

We have many resources available to us in this office. I maintain a list of experts that is always expanding and being updated. I also try to keep relevant information about experts that has been provided to me by lawyers in the office. There are also many other experienced, knowledgeable lawyers who have worked with numerous experts during their careers in the office. The PDNET, is a good place to go to seek information from the lawyers in our office. The internet is another good place to locate experts. However, keep in mind that the internet is a starting place. If you identify an expert from a search on the net, you should fully research the expert you locate. This includes "googling" the expert, running his or her name through LEXIS or WESTLAW to see if the expert is mentioned in any published decisions, or perhaps checking "Verdicts and Settlements" on Lexis to get names of lawyers who have used the expert. Finally, we are extremely lucky to live in Los Angeles, a city with a large number of universities, which are wonderful sources for experts.

II. Where to Begin Once You Have Located an Expert

I suggest that the first thing you do is obtain a CV (curriculum vitae) from the expert. Then you will need to vet the CV. What do I mean? Check out the expert's web page to see if it has any inappropriate material on it. Attempt to determine whether the expert has any past criminal convictions. Assess the expert's receipt of funding from the defense versus prosecution, business interests, academic appointments and grant sources. Assess the expert's objectivity as demonstrated by attendance at defense versus prosecution conferences, and assess the expert's organizational, academic and personal affiliations - defense versus prosecution. Finally, be prepared to discuss any problem areas with the expert when you meet

him/her.

Why take the above steps? In a courtroom, the relevant issue for a judge and for jurors is as much about bias as it is about science, and as much about appearance as it is about science. In a courtroom, it is all about credibility - which side is deemed more credible, which side is to be believed, which expert's testimony should be credited. Jurors and judges may not understand the science, but in a courtroom, they are the sole determiners of who to believe and who to credit. Any fact that tends to show that an expert might have a bias in favor of one view or one side is admissible evidence. In other words, the expert's past fee arrangements, business interests and organizational affiliations are potentially fair game for cross-examination. Expert witnesses are often viewed with skepticism by judges and juries. The perception that an expert witnesses' testimony may be purchased is a prevalent attitude among lay jurors. Keep in mind that an expert can be discredited during his or her testimony if opposing counsel (1) can expose an apparent bias by the expert for one side, (2) can expose a lack of expertise in a specific area, and/or (3) can expose unexplained or unexplainable changes in the expert's opinion over time.

III. Meet With the Expert

Before even considering having an expert appointed, meet with him/her in person. It is important to meet with the expert to be able to see what the expert looks like and how the expert relates to you. Most experts will be happy to give you 30-45 minutes of their time. This will give you an opportunity to see the expert and also to get an idea about what the expert thinks about your issue. Finally, you will be able to ask the expert if he/she has any "baggage" about which you should be aware. This should be done in every case and as delicately as possible.

IV. Preparing an Expert to Testify

Before calling an expert to testify, it is important to collect and review all relevant articles, book chapters, letters, abstracts and publicly-presented PowerPoints written by the expert, and to categorize them by field. Assess the expert's education, categorize it by field and ask the expert how many times he/she has been qualified in the area of expertise relevant to your case. Review the expert's CV for areas of expertise and gaps in expertise. Talk with the expert about the areas in which you want to qualify him/her as an expert, and ask him/her the types of questions that will be asked on voir dire by the opposing lawyer, if permitted.

You should review all the expert's articles related to the opinion he/she will render. Review prior transcripts related to the opinion to be rendered. Review all prior affidavits related to the opinion. Talk with the expert about the basis of his/her opinion. What data, scientific articles and/or scientific research supports the expert's view? Talk with the expert about which articles and what research contradicts his/her opinion. Why don't those articles or research affect his/her opinion?

It is important to only attempt to qualify the expert in areas in which he/she is "expert." A psychologist, John Briere, suggests: "Remember the acronym HELP which stands for honesty, evenhandedness, **limit expertise** and preparation." In order to effectively prepare

your expert to testify, you will need to know who will testify for the prosecution and who else you will call as an expert. Make sure to inform the expert of the areas that you will ask of the other experts.

There are a number of tasks the expert must do before he/she testifies. The expert should develop an opinion based on science - i.e. on research in the field of study and the views of credible peer-reviewed work by (and conversations with) others. The expert must know the literature and know what he/she has said in the past (the exact wording) regarding the relevant subject matter. If the expert's views have changed, the expert should tell you this and be prepared to explain the basis for the change in his/her opinion.

Any opinion should be grounded in good science. Good science should be published in the peer-reviewed literature and should be supported by other scientists. Very few experts are of sufficient reputation to be an "expert of one." Experts must know the literature and the research and be able to back up their opinions with those of other respected scientists, particularly those who all scientists would agree are world-renowned in the topic at issue.

Lawyers should explain and discuss the following with all experts regardless of their experience in testifying: The expert must know whether his/her involvement in the case is confidential, with whom the expert may discuss involvement in the case, issues relating to the case and what the expert's response should be if he/she receives a communication from anyone about the case. An expert may not present information pertaining to a particular case, even if the case is not specifically identified, at a meeting, in publications, to the media or on email listserves without explicit permission from the attorney. The lawyer should be prepared to answer the following questions: Can the expert communicate with the lawyer via email or in writing while working on this case? Should the expert prepare any reports, make notations? What materials can the expert rely on while testifying (notes, reports, etc.)? What materials should the expert bring to court? The expert should be informed that information should never be disclosed by him/her to the other side. The exchange of information should always be done by the lawyers. The expert should also be advised that before creating any documents, the expert should confer with the lawyer to ensure that such documents accurately and completely reflect the expert's opinion. (See "Nuts and Bolts" by Terri Towery in the August issue of the PDQ for a more detailed discussion of issues regarding "draft reports".)

You should explain and discuss with the expert the background, experience and practice of the particular judge hearing the case, the background, experience and practice of the prosecutor, and the make-up and sensibilities of the jurors.

You should explain leading versus direct questions and how to respond when objections are raised. You should also discuss how to respond if the questioner cuts the expert's answer off, and how to respond if the questioner does not permit the expert to explain an answer. Finally, you should have a discussion with your expert regarding attire, demeanor and the use of humor in the courtroom. While there are some occasions where humor may be appropriate, the expert must recognize that, in general, the court is not a place for humor, informal language or off-handed remarks.

Effective preparation takes time. Both the lawyer and the expert must plan accordingly. Assess how much time it will take the expert to complete his/her review of the information. Add several hours that will allow you to discuss the issues in the case with the expert. Add several more hours to go over the anticipated direct examination and to discuss likely lines of cross-examination. Be sure that the initial court order for appointment realistically anticipates this time. Obtain supplemental funds as needed and make sure that your experts does not exceed the funds provided by the orders. Be sure to assist your expert with billing and payment through PACE management. This will help assure that the expert will be willing to help you or another member of the office on a future case.