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Expert Testimony: A Trial Lawyer's Checklist

How to ensure your expert is a gold mine, not a land mine

by Mark S. Adams

Winning or losing your case can pivot on expert testimony. Experts can also have a huge impact on a settlement. So why risk the outcome of a client's lawsuit on the performance of an expert witness? When it comes to making sure that experts are credible and their testimony is clear and delivered with confidence, preparation is the rule.

Selecting an Expert

Potential experts should be carefully vetted. How well do they know the subject matter and how well can they communicate it?

- ✓ Search for cases that mention your expert and check jury verdicts for hits; determine their role and the outcome of the lawsuits.
- ✓ Read articles written by the expert.
- ✓ Talk to others who have used the expert in a trial.
- ✓ Speak with the expert face-to-face to gauge their expertise and communication skills.
- ✓ Audit their curriculum vitae with them; make certain they are scrupulously honest and have not overstated their resume.
- ✓ Do an Internet search to see what comes up — many experts are impeached by careless comments that appear on the Internet.

Discuss the results of your investigation with your expert and see how they respond. Recommend they be very careful about what they post publicly from now on.

Engaging an Expert

Typically, experts are brought in during the last phase of litigation. They must, however, be provided adequate time to investigate, research, analyze and formulate their opinions.

- ✓ Give them a specific list of the issues and their anticipated tasks; from that, they should create a budget of their expected time and costs with realistic milestones.
- ✓ Keep a record of what you have provided to your expert, including background information and other key materials.

Preparing for Testifying

When your expert has formulated their opinions and is ready to testify, make sure you understand and are confident in their analysis.

- ✓ Have a consulting expert review the testifying expert's work before they are deposed. This is money well spent — a flawed analysis is a flawed analysis regardless of how it is delivered.
- ✓ Spend time cross-examining your expert, just as you would cross-examine the opposing expert. Both of you will learn a lot. (Even professional golfers take practice swings!)

Help your expert to be at ease with the process by telling them what to expect. You want them to be able to focus on presenting their opinions.

- ✓ Determine the appropriate level of preparation for the particular expert on the procedural aspects, and then guide them through the process. Not every expert is a seasoned, veteran witness.
- ✓ Tell them how to dress. Many depositions are videotaped, so they should dress at the deposition the way they will dress in open court.
- ✓ Remind them to be professional, and to feel comfortable shaking hands with opposing counsel or the opposing party. This demonstrates that they are testifying as an independent expert.
- ✓ Remind your expert to use respectful language and avoid jokes.

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Buyer Beware

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or otherwise negotiated Consent Orders or Decrees with other prominent hotel brands such as Ramada Ltd. (2010), Days Inns of America, Inc. (1999), Marriott International, Inc., Courtyard Management Corporation (1996), Motel 6 Operating LP (2004 and 2007) and Bass Hotels and Resorts (1998). In November 2010, the DOJ and Hilton Worldwide, Inc. entered into a 45-page "comprehensive precedent-setting agreement under the ADA that will make state-of-the-art accessibility changes to approximately 900 hotels nationwide."

What it means to hotel investors

The current legal landscape has created a new reality for investors. It is very possible for an investor, when purchasing a hotel or motel, to buy itself an ADA lawsuit. The property may contain architectural barriers that violate the ADA and may give rise to a private plaintiff lawsuit and/or a complaint to the DOJ that leads to a DOJ investigation. The policies and procedures of the hotel operation may also be in violation of the ADA. (Procedures would include items such as online and third-party reservations, how to deal with service animals or how to ensure that the number of guest rooms which must be fully accessible are available.) It is also possible the hotel may be currently under investigation by the DOJ, or is currently the subject of an ADA lawsuit. We are currently representing two buyers, including a foreclosure buyer, who inherited a DOJ Consent Order or investigation.

Moreover, substantial revisions to the Americans with Disabilities Act Accessibility Guidelines (ADAAG) were included in the DOJ's revised 2010 regulations that implement the ADA. These new regulations went into effect March 15, 2011 (with certain exceptions, and those go into effect on March 15, 2012). The new 2010 standards impose both technical requirements, (e.g. the specifications a property must meet to be fully accessible), and scoping requirements (e.g. the number of rooms or elements in a facility which must be fully accessible). It is possible that a hotel that has been in compliance with the ADA in the past, will not be in compliance in the near future.

It is imperative that an investor protect itself before completing a purchase transaction, by performing due diligence in this area. For example, if potential ADA violations exist, the investor can either require that the seller correct the problems as a condition of closing, obtain an estimate for the barrier removal and demand from the seller a credit in escrow or to reduce the purchase price accordingly. Prior to completing a purchase, the investor should consider performing due diligence in three broad areas:

- **Legal.** Determine whether the property is being investigated by the DOJ or if there are existing ADA lawsuits against the owner or operator;
- **Architectural.** Retain an ADA consultant to survey the property and determine whether architectural barriers exist; and
- **Operational.** Determine whether the hotel's operator has effective policies and procedures for serving disabled guests.

If the property is in California, the investor can also seek protection under California's 2009 Construction-Related Accessibility Standards Compliance Act which is designed to curb abusive ADA litigation through the Certified Access Specialist program (CASp). CASp enables businesses to go through a process to "certify" that their facilities meet state and federal accessibility standards. One benefit CASp offers is that business owners with certification have the option to stay or stop all construction-related ADA litigation initiated against them in state court, and instead proceed to mediation, making it possible to avoid expensive and lengthy proceedings that drive up legal fees. ■

Eudeen Y. Chang is of counsel in the Litigation Department of JMBM's Orange County office. He is well-versed in all aspects of litigation, from pre-lawsuit strategizing to trial, post-judgment collection and through appeal. He also serves as outside general counsel for a number of small and mid-sized companies and high net-worth individuals. Contact Eudeen at EChang@jmbm.com or 949.623.7232.

Expert Testimony

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- ✓ Tell experts to avoid filler words, as they weaken testimony and show doubt. Phrases that begin with, "I just..." or "As far as I know ..." are good examples of unconvincing opinions.
- ✓ Emphasize to novice expert witnesses that they must not volunteer information and answers to questions not asked. In a deposition, they are to tell the truth, and the whole truth, but only in answer to the pending question.
- ✓ Let your expert know that they are likely to face one of two deposition strategies: either the exhaustive examination which includes full on cross-examination, or a "laying in the weeds" examination that only covers the opinion and the basis for it, saving cross-examination for trial.

Direct Examination at Trial

- ✓ Emphasize that the expert's testimony should be clear, organized and logical.
- ✓ Suggest a strategy that they can use in presenting their opinion that is both complete and compelling, such as topical or chronological.
- ✓ Remind experts that sharing their passion for the subject matter is appropriate. The best experts are great educators.
- ✓ Tell the expert of the importance of eye contact.

Cross Examination at Trial

The expert is not likely to be given an opportunity to be a great teacher and communicator during cross-examination. Being cross-

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examined is stressful for even seasoned experts.

- ✓ Explain to your expert that they need to know their prior testimony exceedingly well. Opposing counsel, and opposing counsel's expert, will have read it several times!
- ✓ Advise them to think about their response carefully before they state it. Some of the most memorable testimony comes immediately after a thoughtful pause during cross-examination.
- ✓ Remind them it is best to use their own words in their answer, rather than adopting the words of the examiner.
- ✓ Give your expert a strategy for answering "yes" or "no" questions. The cross-examiner often tries to force the expert to respond with a simple yes or no, even when those answers cannot be an adequate response. If forced to do so, tell them to show their discomfort, and to be assured that you will clean it up on re-direct.
- ✓ Prepare them for the inflammatory questions. Tell your expert to stay poised and composed, to take their time in responding, and to be the most professional person in the room.
- ✓ Warn your expert of the rapid fire, machine gun questions. When faced with this approach, tell your expert to just stop talking and take control of the pace.
- ✓ Make it very clear to your expert: do not bluff. If they do not know the answer to a question, or they did not consider something, they should say so. Jurors appreciate and respect the honest ignorance of a few details.
- ✓ Let them know that body language is extremely important.
- ✓ Remind your expert that cross-examination is meant to test resolve and accuracy and that preparation is the key to demonstrating confidence and accurate responses.

It is not unusual for reasonable minds and reasonable experts to have a difference of opinion. Part of your expert's job is to reconcile the differences of opinion that they have with the opposing expert. That will tend to elevate them in the eyes of the jurors. ■

Mark S. Adams is a partner in the Litigation Department of JMBM's Orange County office. He focuses his practice on business litigation, including, contracts, products liability, corporate and partnership disputes, and hospitality litigation. He has wide-ranging trial experience in commercial disputes, including complex multi-party litigation and class actions. He has tried numerous cases in state courts, federal courts, and in domestic and international arbitrations. He has obtained two of California's annual 50 largest jury verdicts in the same year. Contact Mark at MarkAdams@jmbm.com or 949.623.7230.

Preserving A Nonsignatory's Right To Have The Court Determine Arbitrability *by Monica Q. Vu*

Under 9th Circuit and California law, a nonsignatory is entitled to have a court, not an arbitrator, determine whether they are required to arbitrate a dispute between signatories. However, since many arbitration rules authorize an arbitrator to determine whether an issue is subject to arbitration, many arbitrators believe they are empowered to determine whether a nonsignatory is subject to arbitration.

What do you do if your opponent tries to get the arbitrator to decide this issue and, for strategic reasons, you want the court to decide it instead?

The nonsignatory should object, making it clear they are contesting the arbitrator's jurisdiction and authority, and may also want to request that the arbitration proceed without them. They should file an action in the state or federal court that has jurisdiction and seek a determination of whether they can be compelled to arbitrate.

For example, if the basis for mandating arbitration is an alter ego theory, the court would have to analyze numerous alter ego factors to determine whether it exists; an arbitrator, on the other hand, may simply look at one or two factors and may be quicker and/or less thorough in finding alter ego.

> It is much better to be cautious earlier on than be forced to litigate an uphill battle over a motion to vacate later.

If the arbitrator still does not give up authority to compel the nonsignatory to arbitration, the nonsignatory should file a motion in a court with jurisdiction to stay the arbitration proceedings pending the court's determination. The need for such precaution arises from the limited grounds a nonsignatory will have to challenge an arbitration award already issued and waiting to be confirmed. It is much better to be cautious earlier on than be forced to fight an uphill battle over a motion to vacate later. ■

If you would like a copy of this article with citations, please send a request to cj3@jmbm.com.

Monica Q. Vu is of counsel in the Litigation Department of JMBM's Orange County office. She has a wide range of experience in general and commercial litigation including the prosecution and defense of contract disputes, real estate disputes, employment disputes and trade secret/unfair competition claims. Contact Monica at MVu@jmbm.com or 949.623.7233.