

Best Practices for Finding & Vetting Experts in Civil Litigation



• BartlitBeck_{LLP}

Sundeep K. (Rob) Addy

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PROCESS OVERVIEW





IDENTIFYING EXPERTS

TYPES OF EXPERTS

▶ Consulting

- Less expensive
- Better for unknown tasks
- Prevent other side from hiring
- Keeps your strategy secret

▶ Testifying

- Opinions must be disclosed
- Will be deposed, testify at trial
- Subject to *Daubert* Challenge
- Can be retained or unretained

TESTIFYING EXPERTS: RETAINED OR NOT?

Fed. R. Civ. P. 26(a)(2)

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one **retained or specially employed** to provide expert testimony in the case or **one whose duties as the party's employee** regularly involve giving expert testimony.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

- (i) **the subject matter** on which the witness is expected to present evidence under Federal Rule of Evidence [702](#), [703](#), or [705](#); and
- (ii) a **summary of the facts and opinions** to which the witness is expected to testify.

THE "COMPANY" EXPERT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Based on his knowledge, experience and expertise with licensing and distribution in the seed industry, Mr. Glenn will opine that Pioneer's PROaccess program does not grant a license or sublicense to Herculex® or any germplasm as those terms are used and understood in the

Based on his knowledge, experience and expertise with licensing and distribution in the seed industry, Mr. Glenn will opine that Pioneer's PROaccess program does not grant a license or sublicense to Herculex® or any germplasm as those terms are used and understood in the industry.

production, germplasm, breeding choices, and other factors to distinguishing licenses or sublicenses from distribution agreements.

Pioneer Hi-Bred International, Inc.

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TYPES OF EXPERTS

The Rookie	The Semi-Pro	The Professional
<ul style="list-style-type: none">• First time expert• Will require most hand-holding• Least expensive• High risk/high reward	<ul style="list-style-type: none">• Professor with a side-gig• Usually has a smaller support staff• Can be less flexible• Often more credible	<ul style="list-style-type: none">• 100% consulting/ testifying work• Larger support staff• “Black box”• Hired gun

IDENTIFYING EXPERTS: PRACTICAL TIPS



Start with your client – find out who they know



Learn to search scientific publication databases (Medline, JSTOR)



For professors, look for recipients of prestigious teaching awards or review student evaluations



Become a subject matter expert yourself



Use search firms sparingly

SPECIAL CONSIDERATIONS: PROFESSIONAL EXPERT FIRMS



ANALYSIS
GROUP



F T ITM
CONSULTING

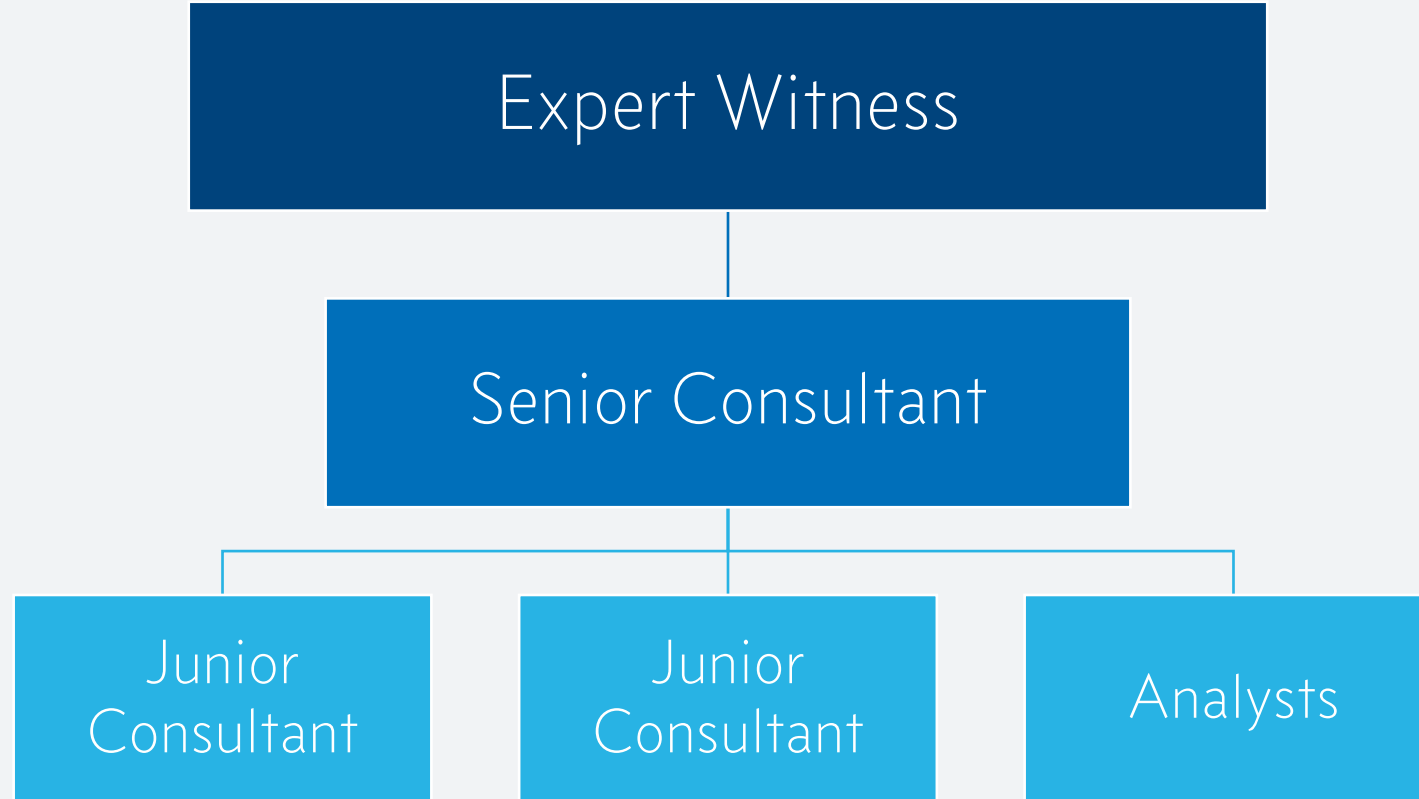


ALVAREZ & MARSAL



BRG

SPECIAL CONSIDERATIONS: PROFESSIONAL EXPERT FIRMS





VETTING EXPERTS

In general, communications with consulting and testifying experts are protected, but there are important exceptions.

EXCEPTIONS FOR CONSULTING EXPERTS

Fed. R. Civ. P. 26(b)(4)(D)

- “as provided in Rule 35(b)” (physical/mental examinations)
- “exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means”

EXCEPTIONS FOR TESTIFYING EXPERTS

Fed R. Civ. P. 26(b)(4)

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), **regardless of the form of the communications**, except to the extent that the communications:

- (i) relate to **compensation** for the expert's study or testimony;
- (ii) identify **facts or data** that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify **assumptions** that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

EXPERT WITNESSES: CONFLICTS & ETHICAL CONCERNS

- ▶ Expert witnesses are not subject to the same conflicts rules that attorneys are
- ▶ Consulting firms will often take a much more aggressive approach to dealing with conflicts
- ▶ *English Feedlot, Inc. v. Norden Laboratories, Inc.*, 833 F. Supp. 1498, 1501 (D.Colo.1993)
 - “Federal courts have the inherent power to disqualify expert witnesses to protect the integrity of the adversary process, protect privileges that otherwise might be breached, and promote public confidence in the legal system.”
 - Disqualification is warranted where the party seeking it can show (1) a confidential relationship with the expert and (2) disclosure of confidential information to the expert that is relevant to the instant litigation.
 - The party seeking to disqualify an expert bears the burden of proof.

VETTING QUALIFICATIONS

- ▶ Verifying qualifications is an important part of the vetting process
- ▶ Often, it is the small embellishments that will get an expert into trouble



Dr. M. Ray Perryman
President and CEO

B.S. Mathematics
Baylor University

Ph.D. Economics
Rice University

Hon.D.Sc.
International Institute for Advanced Studies

"The most quoted man in Texas"
— *Texas Monthly*

"The unofficial state economist"
— *The New York Times*

"A world class scholar"
— *Business Week*

"The state's pre-eminent economist and a barbecue
connoisseur"
— *The Dallas Morning News*

"Among hundreds of prestigious awards and recognitions, Dr. Perryman was named Outstanding Young Person of the World for Business and Economic Innovation in 1987, received the Lifetime Achievement Award from the Systems Research Foundation in 1992, was designated Texan of the Year by the Texas Legislative Conference in 2012, received the Baylor University Distinguished Service Medal in 2013, was inducted into the Texas Leadership Hall of Fame in 2014, received the Cesar E. Chavez Conscience Builders Award in 2016 for his humanitarian efforts, and in 2018 was named the Most Dynamic Economic Researcher in the US by Global Business Insights."



HIRING

MAKING THE FINAL DECISION

Commercial Success Experts

	Jerry Hausman	Joel Hay	Phil Beutel	Richard Frank	Bob Ohsfeldt	Chris Velturo
Current Position						
Education						
Hourly Rate						
Prior Hatch-Waxman Experience						
Pros						
Cons						
Notes						

RETENTION AGREEMENTS

- ▶ Retention agreement should be between expert and client, not law firm
- ▶ Contingency fees should be avoided
 - *Hiland Hills Townhome Owners Ass'n v. Owners Ins. Co.*, No. 17-cv-01773, 2022 WL 2198262 (D. Colo. Feb. 8, 2022) (Krieger, J.)
 - Courts are split: *Tagatz* (7th Cir.) permits juries to assess credibility; *Accrued Fin. Servs.* (4th Cir.) say contingency is grounds to disqualify witness.
 - Tenth Circuit has not addressed
 - Colorado ethical rules say it is improper to pay any witness contingent fee. Colo. R. Prof'l Cond. 3.4(b), cmt. [3].
 - BUT Colorado courts do not have a per se exclusion for experts who are compensated on contingency
 - Court in *Hiland Hills* said it would use a Rule 403 framework

ONBOARD & BUDGETING

- ▶ Important to set budgeting goals at the outset of the engagement
 - Larger shops can provide up front budget and monthly updates
- ▶ Onboarding: Amount of access to provide for discovery materials
- ▶ Come up with a plan at the outset to draft the report
 - Will expert do first draft, or will it be a joint effort with attorney?
- ▶ Don't be afraid to push back on excessive bills

SUMMARY OF BEST PRACTICES

Identification

- Establish your expert needs
- Decide which type of expert you want (rookie, semi-pro, pro)
- Don't forget company experts
- Cast a wide net, think outside of the box

Vetting

- Be mindful that some communications could be discovered
- Press your expert for information on potential conflicts of interest
- Qualifications: Trust but verify.
- Don't overlook the small stuff

Hiring

- Make sure written agreements are clear on scope, payment, and who is doing the retention
- Avoid contingencies
- Budget at the beginning, and hold your expert to their estimates