

HIRING AND PREPARING THE EXPERT WITNESS:
TIPS FOR SELECTING EXPERTS FOR LAND USE TRIALS

Julie A. Tappendorf¹

ANCEL, GLINK, DIAMOND, BUSH, DICIANNI & KRAFTHEFER, P.C.
140 South Dearborn Street. Sixth Floor
Chicago, Illinois 60603
(312) 782-7606
www.ancelglink.com
jtappendorf@ancelglink.com

Retaining a specialist to testify in a land use case can make the difference between winning or losing a case. An inexperienced or ill-prepared witness can unwittingly sabotage a case even when guided by a practiced trial attorney. The following outline is intended to provide practical guidance in deciding when to use an expert in a land use case, where to find an expert, and how to select the right expert witness.

I. When to Hire an Expert Witness

The initial determination in defending or prosecuting a land use case is whether you even need an expert witness. If you expect your adversary to produce expert testimony, then you should consult an expert in the same field for information and advice and to review and respond to the other side's expert opinion report, whether you decide to use the expert as a trial witness or not. Even if you do not use an expert at trial, you may need one to assist in the planning of your case. For example, an expert's unique insight can yield specific questions that can be posed to the opposing lawyer's expert witnesses.

Second, you need to consider what type of information you expect to elicit from an expert witness. This will assist you in identifying the areas of expertise for which you need expert testimony. For example, if you are defending a lawsuit challenging a municipal zoning decision as arbitrary and capricious, you may need a municipal planner to testify that the decision was based on good planning principles. If you are representing a property owner challenging a municipal rezoning of neighboring property, you may need an appraiser to testify as to the negative impact on your client's property values.

Third, your overall case budget is an important consideration in deciding when to retain an expert witness. To manage costs, it is important to work out a budget with an expert to properly anticipate the expert's involvement in each phase of the case and to ensure that the expert's fees fit within the overall case budget. Expert witness fees can be expensive, and often a "not to exceed" fee can be negotiated from the onset of the relationship to control future costs.

¹ Julie would like to thank John Murphy, a summer law clerk at Ancel Glink, for his assistance in researching and writing this article.

Finally, it is important not to wait too long to bring an authority on board. The earlier you hire your witness, the more time they have to become familiar with the details surrounding the case.

II. Where to Find an Expert Witness

Universities and trade organizations are an excellent and cost-effective source for locating expert witnesses, especially technical/scientific experts. Other sources of expert witnesses include directories and registries, professional organizations, conferences or continuing education classes, other attorneys, and client referrals. In some cases, a municipal attorney may be able to use “in-house” staff, including planners, engineers, and other municipal staff.

You can also consider using a professional expert witness search firm to assist in locating an expert witness. These search firms are particularly helpful when you are looking for an expert with a unique expertise.

III. How to Select the Right Expert Witness

A. Expert Witness Background

When reviewing the expert’s credentials, relevant considerations include, among others:

- Whether the expert has published in the field
- The level of postgraduate training
- Whether the person is certified in the particular specialty practiced
- The expert’s level of certification
- Whether the expert testified as an expert before
- If the expert has testified before, the number of times
- In what court the testimony was given
- Whether the expert has given any speeches or academic presentations
- Whether the expert has held any positions in professional organizations
- Whether the expert has written any treatises
- Whether the expert has testified before in the particular court in which the case is pending
- Whether the expert testified or was called to testify on behalf of the plaintiff or defendant²

Prior to hiring an expert, it is useful to review as much as is possible of the expert’s publications, presented papers, and other written materials and to explore the expert’s history as a testifying witness either in depositions or at trial. An expert who has published peer review professional journal articles, chapters in texts, or books will have a strong working knowledge of all

² PORDC §9.04

published opinions and counter opinions on the area in question. An expert witness who has published in peer reviewed publications gets the benefit of the jury understands that her research and opinions have been deemed worthy to publish.

However, it is equally important that your expert witness has *practical* experience because testimony based on theory can be easily discounted or challenged by opposing counsel or their expert. Expert witnesses who possess practitioner experience have an advantage in testifying before a jury because they routinely perform the very procedure or practice that is being questioned in the litigation.

Attorneys should be careful not to use the same experts every time. For instance, an engineer or planner who spends more time in the courtroom than practicing in their field may not be viewed favorably by the jury.

Finally, you should ask for references from your expert and follow up on them. Ask how well the expert performed at a deposition or at trial. It is also important to find out whether complaints have been logged against the expert and whether any suspensions, revocations, or other information bearing on the expert's credibility.

B. Communication Skills

In evaluating an expert as a possible witness, there are many personal factors that must be considered, including the expert's ability to communicate clearly, personality, and demeanor. An expert's appearance and general demeanor, age, personality, honesty, intelligence, and speaking ability should be weighed. In a jury trial, it is often the personality rather than the testimony of the expert that the jury remembers. If a jury has the impression that an expert is being patronizing, they may completely disregard his opinion. Similarly, the selection of an overly shy person as an expert should be avoided, as the jury may not credit his authority.

Trial lawyers must be sensitive to what their expert witnesses look and sound like in hope of having a messenger to which the jury can easily relate. Credibility and personal likeability are intertwined with the actual content of the message. Thus, the best qualified expert does not always mean the expert with the most degrees or certifications.

It is important to establish a dialogue with the jury and include them in the testimony. You should look for an expert who can testify as if it were a conversation with the jurors. Look for witnesses who use plain English and avoid jargon when ever possible, and for individuals who can connect quickly with the jury, because eventually every juror experiences information overload.

C. Attorney's Personal Experience with Expert

The first contact with an expert witness is usually over the telephone. This initial call should establish the expert's familiarity with the general subject matter and his or her experience with testifying in general. Next, the attorney should meet with the expert in person to ensure that the

expert will be an effective witness.³ This preliminary conference is probably the most important conference since the decision to use him as a witness is usually made then. The preliminary conference with the expert should take place as far in advance of the actual trial as possible. Furthermore, an early interview may save the money and time of both client and attorney because it could disclose information of which neither the client nor the attorney were previously aware. At this interview, you should ask about any history of complaints or claims filed against the expert and whether the expert has ever given an opinion, either at trial or otherwise, that would be considered inconsistent with the opinion you expect him or her to give in your case. At the outset, you should confirm with the expert that he or she will be available for preparation, depositions, and trial.

Both federal and state court rules govern the discoverability of an expert's work product, including drafts and notes. Most courts order that all communications with experts, as well as any draft reports or notes, are discoverable.

³ 983 PLI/Pat 293

A CHECKLIST FOR CHOOSING EXPERTS WHO SURVIVE LEGAL CHALLENGES⁴

- ✓ Does your expert have strong academic credentials? Is he recognized by his peers as someone who stands out — someone who has received awards, appointments, and other honors and distinctions?
- ✓ Does your expert have actual working experience with the *precise* issue or issues about which he or she will be testifying?
- ✓ Have you done your own independent research into your expert? Since your opponent might attempt to verify every claim on his CV, you should too.
- ✓ Have you attempted to find everything written by or about your expert to see if any of it will be inconsistent with your expert's testimony?
- ✓ Have you asked your expert for copies of previous depositions or trial testimony? Have you looked for them yourself?
- ✓ Have you tested the quality of your expert's written work to see whether it was peer-reviewed and appeared in reputable publications?
- ✓ Have you run a Lexis, Westlaw, Google, and social media search on your expert to see what you can find?
- ✓ Is your expert someone who will be able to communicate complex subjects to a jury?
- ✓ Have you personally met with your expert to judge his or her communication (and people) skills?

⁴ http://www.illinoistrialpractice.com/2005/08/selecting_expert.html