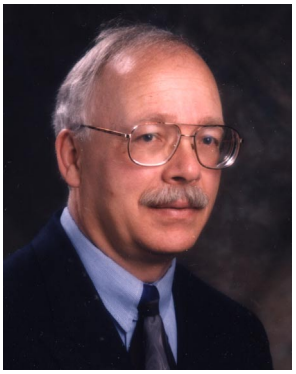
Are You in Need of an Expert?



by Wolf H. Koch, PhD

DURING THE LAST SIX YEARS, I HAVE BEEN PART of much litigation covering accidents at service stations, equipment liability, product releases, and patents involving fiberglass tank and piping construction, leak detection technology, and all aspects of vapor recovery equipment. In the process, I have learned much about our legal system and the use of experts in litigation. The following should assist potential users of experts in the petroleum equipment sector and the oil industry in choosing experts and effectively manage their use, as well as help potential experts in deciding if this work is right for them.

While this article is not designed to dispense legal advice, it mentions provisions in the Federal Rules of Evidence and Federal Rules of Civil Procedure, as they apply to experts and their use in litigation. Obviously, individual jurisdictions have their own rules; many follow federal guidelines.

Why expert witnesses

Two types of witnesses generally testify during trial, the fact and expert witnesses. The former are allowed to represent facts, such as eyewitnesses in an accident. They are restricted from presenting opinions or hearsay information. The expert witness, on the other hand, may reach conclusions and opinions on the basis of prior experience, education and circumstances surrounding the conflict.

Rule 702 of the Federal Rules of Evidence provides that if specialized knowledge is necessary to assist the trier of facts in understanding evidence or facts, a witness qualified as an expert by virtue of knowledge, experience, training or education may testify by providing appropriate opinions. The trier of facts is normally the jury; it may also be the judge in bench trials.

Attorneys of the Plaintiff or Defendant may retain an expert witness. Rule 706 also provides for court-appointed experts. Most accident, product liability and patent cases are sufficiently complex to require the use of an expert. When one side retains experts, the other side will generally retain one for practical and tactical reasons: to explain their view to the jury.

Does the expert represent the client?

One of the most misunderstood aspects of expert witness work is that the expert is expected to be impartial and objective. Unlike the attorney, who retains the expert and who needs to be an advocate for his cause, the expert should refrain from advocacy and provide objective input designed to reduce complex issues into easily understood concepts. From that perspective, it may be desirable to have one court-appointed expert rather than two opposing experts.

While many contacts in industry and professional organizations have called me during the course of litigation, I always advise potential clients that I need to work with their attorneys rather than in a direct relationship. The rules of evidence provide that information used by experts in reaching opinions be inquired into by opposing attorneys. Communications between experts and clients are thus not protected. Some work between attorney and experts may, however, be privileged under attorney work product rules.

In spite of the availability of some protection of information under the attorney work product rules, many attorneys I have worked with over the years have suggested that I enter into any contractual agreements with their client rather than their firm. It is not until after a discussion of the rules of evidence that they favor an agreement directly with my company.

Working with plaintiffs or defendants

Most patent litigation involves two companies fighting over potential infringement of a patent; working for either party has little consequence on the reputation of an expert as long as the testimony is objective and fair. On the other hand, product liability and accident litigation often involves individuals fighting corporations. In order to maintain a reputation of being objective, it is important for the expert to represent either party when requested. Every deposition and trial I have attended has included questions from opposing attorneys regarding my balance of defense versus plaintiff cases.

A difficulty in working with plaintiff's attorneys is that they will have developed a theory of the accident that advances their trial strategy and are now looking for experts to elucidate that theory. When the

actual facts do not lead to an appropriate opinion by the expert, the expert needs to reject participation in the case and the attorney must be willing to pay for services rendered up to that point.

One important consideration in accepting a case should be a review of past cases and publications to ensure that there are no inconsistencies between the past work and possible conclusions in the current case. A Protective Order restricts access to trial documents, as is the case in most patent litigation. Without a Protective Order, experts' reports, affidavits, testimony and other documents from previous trials are generally available to the opposing attorneys. Rule 26 of the Federal Rules for Civil Procedures requires the expert to disclose all publications for the last 10 years and all cases in which the expert has testified during the previous four years.

Why become an expert witness

Expert witness work is interesting, challenging and, at times, exciting. In patent litigation challenges are often in the intricate technical details. Accidents and product liability cases include investigations into how equipment failed, how a fire started, or how someone used (or misused) equipment: investigations into the causes and origin of the mishap. Each case deals with new facts and circumstances, resulting in continued learning for the expert.

Since the great majority of cases are settled or disposed of through legal maneuvering such as summary judgments, input from experts can take many forms. While I have mentioned investigations and evaluations above, client's attorneys often retain me to educate them on technical details of a case.

Requirements for a successful expert

Opinions on what makes a successful expert are not uniform. Professional experts, those who derive most of their livelihood from working with plaintiff's attorneys, will probably argue that total billable hours are a measure of success. Generally they have little experience with the specific subject, but qualify as experts on the basis of education and professional registration. They are often individuals who violate one important rule of successful consulting: The Law of Raspberry Jam (G. Weinberg, The Secrets of Consulting, Dorset Home Publishing, 1985). The law simply states: the wider you spread it the thinner it gets.

The most important requirement of a successful expert should be limiting one's case work to areas of expertise, making sure that the raspberry jam does not get spread too thin. In addition, the expert should be actively working in the field, teaching, publishing, and otherwise advancing the technology. Finally, technical competence, good communication and interpersonal skills and patience are a must.

Retired or former employees, while they may excel in the above areas, lack one very important aspect of being an expert witness for their former employer: a jury will seldom consider them to be impartial or objective, especially if they are still affiliated with the former organization in any way financially.

Having overcome the hurdles mentioned above, the final and most important challenge for the expert occurs prior to the trial. Every one of my past cases that has progressed to this stage has resulted in a challenge of my qualifications as an expert by the opposing attorneys. The judge, who will qualify or disqualify the expert, disposes of such challenges.

The most bizarre case in my experience involved a challenge in federal court during a patent case. When my attorney-client prevailed and I was qualified as an expert, the defendant admitted infringement, eliminating the need for my testimony and reducing the trial to a determination of whether the infringement was willful.

Remuneration of experts

While attorneys may represent plaintiffs on a contingency and share in a future judgment, experts are prohibited from entering into such arrangements. The reasons are obvious: impartiality and objectivity of the expert are questionable if payment for services depends on the outcome of the trial. Moreover, Rule 26 of the Federal Rules of Civil Procedure also requires a full disclosure of the expert's compensation.

With the requirements for disclosure, I have seen much data on expert compensation. One practice appears to be prevalent: many experts charge for their time at different rates for consulting than for depositions and testimony. While the latter are generally much more stressful than the evaluation of data and formulation of opinions, I believe the practice of multi-tiered fees may be viewed negatively by a jury. Dan Poynter in his Expert Witness Handbook (Para Publishing, 1997) mentioned that the practice might lead the jury to view the expert as selling testimony at a premium price.

Resources for the expert

Most professional associations sponsor periodic short courses in how to be an expert witness. In particular, the Society for Automotive Engineers offers the course on a regular basis and also publishes books such as W. Lux's The Engineer in the Courtroom (1995). The National Forensic Center hosts an annual National Conference of Expert Witnesses, Litigation Consultants, and Attorneys. I have attended the last two conferences and found them to be worthwhile. In addition, the Center publishes an extensive list of reference works for experts and attorneys, and periodically updates a compilation of expert's fees in all areas of expertise.

These courses and conferences should be considered not only by experts, but also by corporate litigation managers, executives, or by anyone giving depositions and providing testimony at trial. Familiarity with the applicable rules can be helpful in managing areas such as document retention. Finally, learning guidelines of testifying and dealing with opposing attorneys increase the effectiveness of the expert and the corporate manager.

Wolf Koch *is founder and President of Technology Resources International, Inc. in Batavia, IL. providing consulting services in technology evaluation, development and testing, and litigation and expert witness support. He is a frequent contributor to this publication and can be reached at wolfkoch@t-r-i.com.*