



The Basics of Expert Witness Retention and Disclosure

By Racheal A. Ross

Expert witnesses are an important part of many cases, but it can be daunting to know where to start. Even if you have a good grasp of the rules, finding an expert to retain can be just as puzzling. Here are the basics of both.

I. When an Expert Witness is Necessary

Jurors must rely upon their “everyday common sense and judgment as reasonable” people when making their findings of fact. Nev. Civ. J.I. 1.5 (2018). Since the jury is not comprised of experts, parties must hire witnesses to explain scientific or complicated facts and theories. An expert witness is necessary when, “scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue...” NRS 50.275. Expert witnesses are characterized by their “special knowledge, skill, experience, training or education” and may testify “to matters within the scope of such knowledge.” *Id.*

Common types of experts include economists, forensic accountants, and engineers. Any time a party needs to admit evidence outside the purview of a layperson, an expert should be retained. In civil cases, experts commonly testify on issues of causation, damages, and technical theories of liability. For instance, in a business case, a party may retain a forensic accountant to testify about fraud or business valuation. In an employment case, an economist may be retained to testify about the amount of past or future earning damages.

In negligence cases, physicians are the type of expert that most practitioners—and jurors—are familiar with. Physician experts are divided into retained experts and non-retained treating physician experts. NRCP 16.1(a)(2)(D). This means that a party who is receiving medical treatment germane to their case may designate their treat-

ing physician to testify on their behalf without disclosing a report. These treating physician experts often provide important testimony because they have both first-hand knowledge of the party and the qualifications to explain the medicine to the jury.

II. Disclosure Requirements for Expert Witnesses

Generally, parties are required to disclose their expert witnesses 90 days prior the close of discovery, but the deadline is ultimately controlled by the Court’s scheduling order. *See* NRCP 16.1(a)(2)(A); NRCP 16.1(a)(2)(E)(i)(a).

A. Retained Experts

Witnesses who are specially retained in a case to provide testimony have more stringent requirements for disclosure than non-retained treating physician experts. NRCP 16.1(a)(2)(B). A party must disclose the expert’s: name, written report, curriculum vitae, list of deposition or trial testimony given in the prior four years, list of publications authored in the prior ten years, fee schedule, and statement of compensation to be paid for the study and testimony in the case. NRCP 16.1(a)(2)(B)(i)–(vi). The report must include a complete statement of the expert’s opinions and the basis for the opinions, the facts or data considered in forming the opinions, and the exhibits which will be used to summarize or support the opinions. *Id.* These requirements modify NRS 50.305, which only requires disclosure of the facts and data an expert bases their opinion on if the judge so requires.

Retained experts enjoy a special privilege that non-retained experts do not—privilege for their communications with retaining counsel and their draft reports. NRCP 26(b)(4)(B)–(C). NRCP 26(b)(3) “protects communications between the party’s attorney and any witness required to pro-

vide a report . . . regardless of the form of the communications.” NRCP 26(b)(4)(C). However, communications which relate to the expert’s compensation, or which identify the assumptions, facts or data provided to the expert which were considered in forming the expert’s opinions are not protected by the privilege. NRCP 26(b)(4)(C)(i)–(iii). Likewise, any draft reports the expert authored before issuing his or her final report are not discoverable, regardless of the format of the draft. NRCP 26(b)(4)(B).

The rules also protect a party’s expert who is retained only as a consultant. NRCP 26(b)(4)(D) prohibits another party from discovering the “facts known or opinions held by an expert who has been retained” only as a trial or litigation consultant who is not called at the time of trial. However, if exceptional circumstances make it impracticable for an adverse party to obtain the facts and opinions known by the consultant, a court may order their disclosure. NRCP 26(a)(b)(4)(D)(ii). Additionally, a consultant who performs a Rule 35 mental or physical exam must disclose a copy of his or her report. NRCP 26(a)(b)(4)(D)(ii); NRCP 35(b)(1).

B. Non-Retained Experts

A party is not required to disclose any report of a non-retained treating physician expert witness. NRCP 16.1(a)(2)(D). However, parties are required to disclose the subject matter of the expert’s testimony, a summary of the facts and opinions the expected testimony, the qualifications of the witness, and the expert’s fee schedule. NRCP 16.1(a)(2)(D)(iii); NRCP 16.1(a)(2)(C). The disclosure must be made “to the extent practicable,” meaning “appropriate disclosure may include that the physician will testify in accordance with his or her medical chart, even if some records contained

therein were prepared by another healthcare provider.” NRCP 16.1(a)(2)(D)(iii).

Non-retained treating physicians may be disclosed and give testimony on behalf of the disclosing party. NRCP 16.1(a)(2)(D)(i). Treating physicians may also testify as to causation without providing a written report so long as the content of the physician’s testimony was disclosed and the expert does not consider materials outside the course and scope of the treatment provided to the patient. NRCP 16.1(a)(2)(D)(i)–(ii). If a non-retained expert is not identified at the time of the initial expert disclosure, generally the offering party is required to move to reopen the deadline. NRCP 16.1(a)(2)(F)(ii).

C. Disclosure Pitfalls to Avoid

One of the easiest pitfalls to avoid is untimely and incomplete disclosure of your witness. The Court issues discovery scheduling orders well in advance of the deadlines so the parties will usually have at least six months’ notice before their expert’s report is due. *See* NRCP 16(b). The best practice is to have your experts retained before you file your complaint. Ensure you get your experts all the materials they need for their report as soon as possible. Take your depositions early and send the transcripts and necessary disclosures to your expert as soon as you have them. Otherwise, you risk having an untimely and/or incomplete disclosure which can have serious consequences. *See* NRCP 37(c)(1)(A)–(C); *see also* NRCP 37(b)(1). The Court may limit the expert’s testimony or even strike them altogether which can have case-ending implications. *Id.*

Experts continued on page 32



RedPanda
SYSTEMS

Contact us for:

- Managed services
- Help desk support
- Cyber security
- Virtual CIO services
- Backups
- Cloud servers
- VOIP
- Fiber internet

RedPanda Systems

David Shultis, Partner

702-553-2500

dave@redpandasystems.com

<https://www.redpandasystems.com/business/>

Special offer for CCBA Members

RedPanda Systems can offer a **50% discount on the price of the first month or a 10% discount on monthly pricing for the first 6 months with a signed 1 year or longer contract for managed IT support services to current CCBA members.**



III. How to Find an Expert Witness

Lawyers who have practiced for many years in a particular area of law often have a list of experts they prefer to work with. But, for those just starting out there are a wealth of resources to find the right expert. These resources range from cost efficient—or even free—to those that will increase case costs and should be used wisely.

Many practitioners seek expert witnesses by simply conducting their own research. Legal database services offer products to assist you in these searches. You may find expert CVs and prior testimony transcripts this way. Typically, there is an extra cost for these types of searches depending on your subscription level to those sites. Regular search engines are still free and can be a quick and easy alternative to find what you need.

Another option is to search your local university for professors who may fit the bill. These experts have experience with public speaking which will be an asset during their testimony. Another benefit is that professors are used to “teaching” their subject matter to lay people and may be great at helping “teach” the jury about your facts and theories. Teachers often present as neutral and likeable witnesses—both are great qualities. If the professor does not have much testimony experience, you may want to ask them to sit in on a lecture or search for recordings on YouTube of their prior lectures to gauge their presentation skills. These witnesses may need additional preparation from you before they testify, so be sure to factor that into your analysis when retaining them.

One of most cost-efficient methods to find an expert witness is to increase your network of colleagues who practice in the same area of law as you. Typically, new lawyers can join practice area specific organizations at a reduced price for their first few years of practice. Most of these organizations host email list servers which connect their members. To take full advantage of the benefits of membership, practitioners should be active on these list servers. When you need an expert and do not know where to turn, send an email to the group asking for recommendations.

Be sure, however, to maintain the confidentiality of the case and the client to avoid running afoul of the ethical rules. It is best to send a description of the type of expert you need rather than sending a summary of your case’s facts. If there is a unique challenge, describe it without referencing case-specific facts. By asking for recommendations from others, you will hopefully get names of qualified experts who have experience with testifying in legal cases.

The value of this type of experience cannot be understood—testimony experience is a unique skill set all its own.

If your network of colleagues is unable to turn up any good recommendations, another useful resource can be expert referral services. These services assist you with finding experts by conducting local or national searches for qualified candidates. Many referral services have a pool of experts in various topics that are on standby for retention. A good referral service will vet the candidates and provide you with multiple options. Each referral service will have its own rules about contacting the expert and payment, so it is important to understand those rules up front to make sure the referral service is right for your client. Retention through this method may be pricier than finding an expert on your own. But, in cases where you need a unique type of expert, these services can provide you with valuable assistance. **G**

Racheal Ross is a Las Vegas native and UNLV Boyd School of Law graduate. She is a trial attorney at Panish Shea Ravipudi LLP, where her practice focuses on catastrophic injury, products liability, and wrongful death cases.



ARA SHIRINIAN
MEDIATION



**Helping Nevada
lawyers to settle
disputes and avoid
litigation for
over 20 years.**

Member, National Academy
of Distinguished Neutrals
Practice limited to ADR

Tel: (702) 496-4985

Fax: (702) 434-3650

E-mail: arashirinian@cox.net

www.arashirinianmediation.com

www.nadn.org/ara-shirinian

On-line Calendar Available