

# WINNING WITH FINANCIAL EXPERTS

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# Finding the Right Expert Witness

✦ INTERVIEWING & SELECTING  
THE EXPERT WITNESS



✦ IVORY TOWER VS. PRACTITIONER?

✦ GETTING THE EXPERT INVOLVED EARLY



# Best Ways to Locate Experts

- Consult colleagues and peers
- Talk to the client and the client's other outside counsel
- Ask trusted consultants on other matters
- As a last resort, consult public databases

# Criteria to Consider in an Expert Witness

## Easily verifiable criteria

- Does the witness have adequate professional qualifications?
- Does the witness have impressive education, licenses, affiliations, etc.?
- Can the expert be deemed to be independent?
- Does the witness participate in continuing industry training?
- Has the witness worked for industry trade bodies/regulators?
- Does the witness maintain an active role in the industry?



# Criteria to Consider in an Expert Witness

## Other important issues to consider

- Does the witness look and sound credible?
- How savvy is the witness on the stand?
- Can the witness hold up under cross examination?
- Has the witness ever had his or her opinions and work product scrutinized and attacked before?
- Does the witness have gray hair (and is that necessary or helpful?)



# Criteria to Consider in an Expert Witness

Consideration of fees is an important factor in retaining an expert witness

FEEES

- More expensive is not always better, but, it can be and often ends that way
- Fees may be a strong indicator of experience, credentials, abilities and stature
- Some factors when considering fees
  - The degree of knowledge, learning, or skill required
  - The uniqueness of the expert's qualifications
  - The amount charged by similarly situated experts
  - The impact of scheduling difficulties or other commitments

# Conduct a Thorough Background Check

## Wise words from a veteran trial attorney:



“Do the due diligence necessary to avoid surprise. Do the same with your adversary’s expert so that you can inflict humiliating surprise.”

# Conduct a Thorough Background Check

## Ask for permission to verify credentials

- Check education, degrees, and professional affiliations
- Check publications and speaking engagements

## Determine the expert's involvement in prior litigation

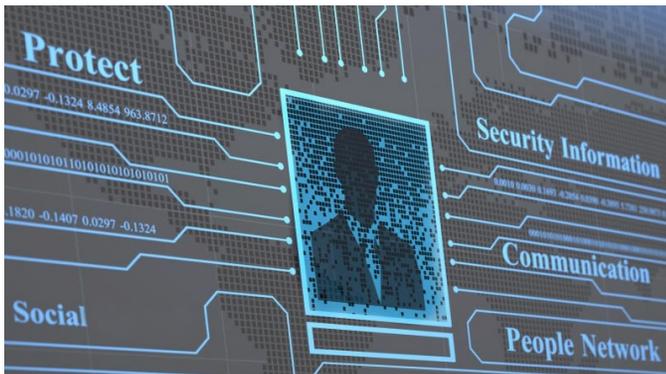


- Who were the parties and attorneys?
- What was the nature of the claims?
- For whom did the expert testify?
- What were his or her opinions?

# Conduct a Thorough Background Check

Research public databases (e.g., Westlaw)  
and utilize Google

- Search for prior appearances, publications not identified
- Identify any professional discipline or legal trouble
- Avoid any surprises



## Check all references

- Check any references provided
- Also check references not provided
- Contact attorneys on prior retentions

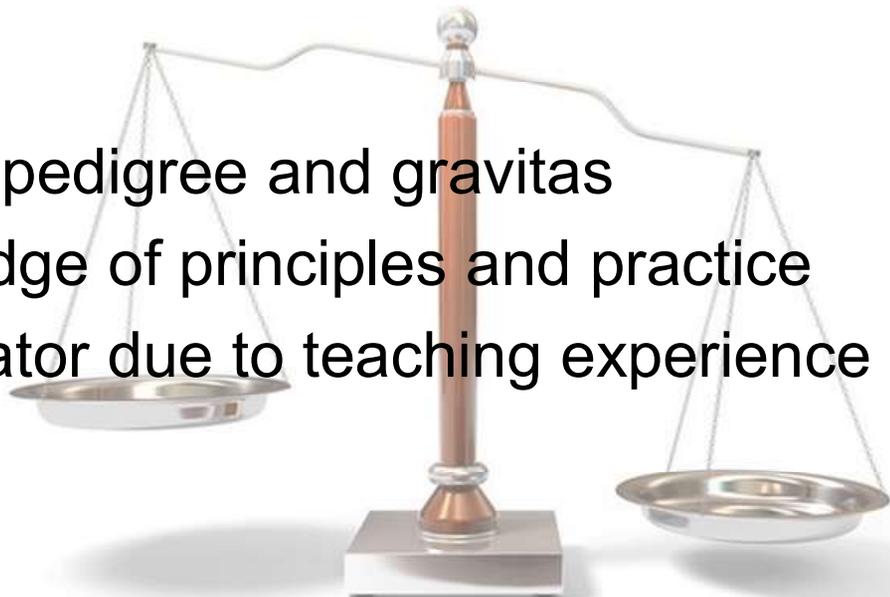
# Ivory Tower vs. Practitioner: Pros and Cons

## Ivory Tower Pros

- Impressive professional pedigree and gravitas
- Broad and deep knowledge of principles and practice
- Likely strong communicator due to teaching experience

## Ivory Tower Cons

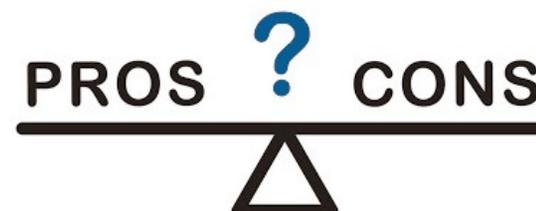
- Knowledge and practical experience may be outdated
- Likely has not exercised professional judgment recently



# Ivory Tower vs. Practitioner: Pros and Cons

## Practitioner Pros

- Relevant and current hands-on industry experience
- Likely more accessible than Ivory Tower type
- May carry more credibility with jury



## Practitioner Cons

- Time and availability may be more limited
- May lack pedigree that comes from teaching and publishing

# Do Not Postpone Your Decision to Retain an Expert Witness

The sooner the expert is on the case the quicker they become thoroughly familiar with critical facts. The advantage:



- The expert can reveal elements of your case that you may not have considered earlier
- The expert should be able to give you an objective and detailed analysis of both the strengths and vulnerabilities you face specific to the area of expertise
- Avoid the risk of being unable to retain the best candidate for your case

# Do Not Postpone Your Decision to Retain an Expert Witness



- Gathering adequate evidence necessary to support and solidify the basis for the expert's opinions
- Supplying technical knowledge and input into scientific, technical and other specialized underpinnings of the case to guide strategy
- Developing themes to pursue in fact discovery as well as with the other parties' experts

# Do Not Postpone Your Decision to Retain an Expert Witness

The Court finds that Plaintiffs did not give Defendants adequate notice in their original timely complaint that they intended to bring suit on their substantive claims . . . .

Plaintiffs have not pointed to any language in the initial complaints that would have provided the notice required for these claims, which first appeared in the November 18, 2002 Amended Complaint, to relate back to the original timely pleading for statute-of-limitations purposes.

*IN RE ALCATEL SECURITIES LITIGATION* 382 F.Supp.2d 528 (2005).

# Working With the Testifying Expert to Create the Report

## **The federal rules contemplate that attorneys may assist the expert in preparing his or her report**

- Experts may need guidance in organizing the report to meet legal requirements of substantive law or procedural rules
- See Federal Rule of Civil Procedure 26(a)(2), Advisory Committee Notes (1993) (“Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed.”)

## **However, the expert should be encouraged to do his/her own work**

- The expert should not rely extensively on staff and/or attorneys
- The expert should drill down into the facts and documents
- The expert should take a bottom up approach instead of a cloud level bottom-cloud-level, top-down approach

# Why a Financial Expert?



- ✦ THE NUMEROUS USES OF A FINANCIAL EXPERT
- ✦ THE BENEFITS OF A FINANCIAL EXPERT

# The Numerous Uses of a Financial Expert

Financial experts can serve integral roles in a wide variety of matters:

## Damage Calculations

- Partnership or shareholder disputes
- Lost profits calculations
- Wrongful termination
- Estate matters
- Negligence
- Misappropriation
- Business interruption
- Patent and copyright disputes

## Professional Liability

- Accountant liability
- Audit investigations



# The Benefits of a Financial Expert

## Valuations

- Buyouts
- Dissolution or sale of business
- Divorce

## Violations of federal securities laws

- Financial statement misstatements, inadequate disclosures and restatements
- Claims of auditor misstatement under Section 10(b) of 1934 Securities Exchange Act

## Other

- Fraud and financial investigations
- Regulatory inquiries
- M&A due diligence
- Whistleblower allegations
- Receiver and trustee monitoring
- Consulting expert



# Speakers



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