

## **Working with Experts** by John Levy, Ph.D.

Experts are a part of everyday life for attorneys in many fields of litigation. Here are some observations about relating to experts written by a technology expert with over 20 years experience as an expert in patent, copyright, trade secret, breach of contract and (in one case) personal injury litigation.

### **Finding the right expert**

The first job is to find the right expert. Most attorneys will begin by searching the Web using Google or another search engine using keywords that describe the area of expertise needed. This kind of search will find the websites of individual experts and also the websites of agencies and registries of experts on the Web. All of these are good sources, and you should expect to find the same experts listed in multiple places when you have narrowed your search down to specific needs, such as for a patent case.

Many experts in related fields know each other. Therefore, it is a good strategy to ask an expert you have engaged before to help you find an expert in another area. The expert knows you and you know the expert, so you can expect referrals to similarly qualified individuals.

I happen to be a member of a network of over 70 experts in computer-related fields. This network is not accessible by web search, but if you ask any one of us to help you find an expert, we typically relay the request on to the network. Our primary purpose in networking is to share information about latest developments in our technical fields as they relate to patents and other intellectual property. Members of this network also are listed with agencies, so we are not trying to substitute for the agencies' services.

### **Characteristics of experts to look for**

There are four main characteristics of experts you should be watching for:

1. Knowledge and experience: You want your experts to have credentials in the required field, perhaps including academic degrees. You also want the expert to have experience working in the field in the time-frame of reference (for patents, this will be around the date of the patent application).
2. Experts should be articulate both in speaking and in writing. While it is often best for patent cases to have an expert who has NOT published a great deal, because such publications could provide material for opposing attorneys to question on cross-examination, you want your expert to be able to express himself or herself clearly when writing an expert report. Look for – or ask for – samples of the expert's writing. Pay attention to the expert's manner of speaking when you discuss your engagement on the phone.
3. Interaction style: While you are working with the expert to develop your case, you need the expert to be capable of the give-and-take of discussion around the strengths and weaknesses of your position. You will want your expert to listen to your suggestions for phrasing, without actually writing the expert report for the expert. Finally, you want your expert to be able to

anticipate the opposition's positions and responses, and to help you navigate the possibilities.

4. Finally, your expert should be presentable at deposition and trial. This requires that the expert go beyond specific expertise and be able to stand up to questioning as a calm and dignified witness. How do you determine this other than how they sound on the phone? Ask experts about public speaking experience, preferably beyond the classroom. You may also want to look for experts who are members of professional societies, and who subscribe to a code of ethics, such as the one propounded by the Forensic Expert Witness Association.

### **Engaging the expert**

Once you have decided to engage an expert for a case, arrange for a letter of engagement to be created promptly. If you don't have a standard letter, ask the expert to send one to you. Remember that many experts have regular inquiries about engaging them; if you delay too long in getting a letter to them, they may have taken on other obligations that will make meeting your time schedule problematical.

On the other hand, if you don't have an immediate use for the expert, don't engage him or her. Experts are aware that some unscrupulous attorneys will engage as many experts in the field as possible in order to keep the opposing side from engaging them. Then they let them sit on the shelf, so to speak. Attorneys who do this are talked about in the expert community and quickly become pariahs for the experts who can choose their cases – which are the experts you want most.

### **Interacting with the expert**

The law firm will often assign the youngest or least-experienced attorney on the litigation team to find experts. This is OK, so long as the expert has a chance to meet and to interact with the other attorneys on the team. The lead attorney on the case should always meet the expert at least once, and he or she should encourage the expert to ask questions of the senior attorneys. Knowledgeable experts will review the names of the attorneys working on the case and will look at case management rulings when those are publicly available, such as through the PACER system for the federal courts.

### **Instructing the expert**

Experts want you to tell them what you need. They also are willing to work within budget or time constraints that you give them. It's best to give the expert advance warning of deadlines so that there is sufficient time to review their preliminary findings before committing to an expert report. Personally, I like to review my draft report interactively with an attorney by projecting it on the wall while I read through it and edit it. While you can advise the expert on the legal implications of his or her words, don't expect an expert to adopt your preferred wording. Remember the expert has to defend the report as his or her own work.

### **Listening to the expert**

Often, an expert you engage can help you position your case better. If given access to sufficient background information, the expert may be able to suggest relevant

historical technology or documents, and may know of other experts who can help you with related aspects of the case. It is also a good idea for the lead attorney to check in with experts occasionally to test whether the expert is satisfied with the interactions with the attorney he or she is working with. Sometimes, good ideas from experts can get lost between the assigned "expert-handling" attorney and the case leader.

### **Paying the expert**

Experts expect to be paid promptly. Attorneys and law firms who fail to pay their experts promptly gain a reputation that spreads in the expert community. Even when payment delay is due to your client's delay, it is your own reputation that is tarnished by being a slow payer.

Here are "ratings" most experts would agree describe payment promptness:

Good: under 25 days

Average: 26-45 days

Poor: 46-90 days

Unacceptable: over 90 days

### **Networking with your experts**

Experts are professionals, as you are. Cultivate the experts you have worked with in the past; you may find that they can become sources of referrals for your firm.

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John Levy, Ph.D., is a consultant, teacher and expert in the field of computers and software. He has been engaged as an expert in over 30 cases and has consulted as a neutral expert for two Federal District Court judges. His website is <http://johnlevyexpert.com> and he can be reached at 415 663-1818 or [info@johnlevyexpert.com](mailto:info@johnlevyexpert.com)