

When the Phone Rings ... Twelve Questions for Prospective Expert Witness Assignments

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Consultants and expert witnesses are more used to answering questions than asking them. When the phone rings, there may be an attorney or prospective client on the other end of the line. He or she poses questions to the consultant or expert, trying to gauge whether there is a good “fit” between the client’s needs and what the practitioner can offer in the way of experience and expertise.

After answering prospective clients’ questions, effective consultants and expert witnesses may have some queries of their own. In fact, they *should*. Here are 12 questions that can form the basis of an effective fact-gathering process which unearths aspects of a case to help the consultant and expert witness gauge the degree of fit:

(1) **What does the case involve?** This is a threshold question to assess whether the subject matter of the case falls within your area of expertise. If you are a nephrologist and the issue involves hematology, this is a tip-off that the caller may need a different expert. If you are an authority on agent errors and omissions but the case involves an underwriting mistake, it may not lodge in your “sweet spot.” Best for you to know this before investing time burrowing down fruitless rabbit trails. Or maybe the answer will confirm that the matter is well within your wheelhouse.

(2) **Do you represent the plaintiff or the defendant?** This can be useful to know if you are trying to “balance” your practice and representation between plaintiffs and defendants. If you can strike a balance, you better the odds against opposing counsel painting you as a biased gun for hire. For example, thus far my insurance claim practice in litigation support has been split almost evenly down the middle — half for policyholders and half for insurers. If you have a preference and comfort level in representing one particular side in your area of expertise, this question brings that factor to the surface, inviting you to weigh it when deciding whether the case is a good fit with your interests and expertise.

(3) **Who is the opposing party?** (Any conflict?) You can avoid wasting time if you find out up front that you have a conflict, or clear the decks for a possible retention by confirming that you don’t. As an example, I was recently approached about the possibility of serving as an expert witness concerning an insurance coverage dispute. The dispute was between a large medical device manufacturer and one of its excess insurers. I have never represented the medical company, but I do own shares of its stock. I disclosed this quickly to the inquiring attorneys. Neither they (nor I) feel it is a conflict, but I would rather have them make that call early on.

(4) **What is the key issue or issues for which you need an expert?** This is what I call framing the issue. Attorneys often do what I call a “data vomit,” spewing facts over the phone. Often, it is easy to lose sight of the forest for all the trees. Yes, you need an overview and a lay of the land. At some point — off the meter, of course — you may need to diplomatically ask counsel, “On what issue exactly might you need my opinion?”

This steers the attorney and the discussion to an outcome-oriented conclusion. You may find that the issue is outside of your realm of expertise. If so, best to know that now. Maybe you know of another expert who could be a better fit. Alternatively, you might find that the issue is right in your “sweet spot” of expertise. If you let counsel meander interminably, his or her need may not be clear. Do not be shy about asking, diplomatically.

(5) **What is the due date for the expert report?** Before saying “yes” to any assignment, it’s best to find out. It takes only one case coming in on Dec. 23 with an expert report deadline of Jan. 3 to teach you this lesson. This scenario befell me, and I still have memories of spending my Christmas “vacation” with multiple bankers’ boxes on an insurance excess coverage dispute. “Deck the halls with boughs of declaratory judgment actions, tra-la-la-la” No whining here — I willingly agreed to take the assignment.

In hindsight, though, my rate structure may have been different on the rationale that “rush jobs cost more” in any line of endeavor. Before agreeing to an engagement or quoting your hourly rate, find out how close you are to the due date and adjust your fee structure, and even your willingness to take the case, accordingly. As an aside, it is amazing to see the procrastination bent of many legal counsel. Scheduling orders typically set forth months in advance the dates for designating expert witness, the dates expert reports are due and so forth. Yet procrastination often rears its ugly head (or its ugly rear) among attorneys who scramble for an expert two weeks before they must designate names.

(6) **In what court or jurisdiction is this: State or Federal Court?** This may impact the speed of the docket, the caliber of the judge in the case, and the amount of leeway you will have in offering expert opinion.

(7) **Where are you in discovery?** Have any depositions been taken? Have they been completed? Has document production been finished or is it in progress? Is there any motion practice? Are you coming onto the scene at the beginning, middle or end-game of the pre-trial process?

(8) **Is this a rebuttal report?** Has the other side disclosed its experts? If you are being asked to provide a rebuttal report, odds are that there is already an opposing expert who has weighed in on the issue for which your view is being sought. There may be situations that present not an outright conflict, but a potentially awkward situation. If the opposing expert is a good friend, business colleague, mentor, etc., you may be uncomfortable in opposing him or her.

You may want to know the identity of the opposing expert before agreeing to take the case. Maybe the person has some business tie to you. Maybe she is a friend or mentor. Perhaps he is an industry guru whom you do not feel comfortable contradicting. Maybe he is a buffoon and you relish the chance to go head-to-head. It’s best to know up front before saying yes or no to the engagement.

(9) **Is there a trial date yet?** If so, when? This also gives you a sense of the expected pace and timeline of the case. This can be highly relevant, especially if you are in a busy phase and juggling many engagements. You may have conflicting trial dates on other cases, or be

scheduled for a deposition or attending a conference for which you have pre-registered. An imminent trial date may portend, “Fire Drill!” A futuristic or unset trial date may suggest that you will have ample time to analyze and digest the requisite materials without a crisis atmosphere. Some people thrive on crises; others have a hard time functioning effectively in this atmosphere. The proximity of the trial date may suggest the degree of “juggling” you may or may not have to do with other assignments and obligations.

(10) **How voluminous are the materials that need to be reviewed?** It may matter to you whether the answer is 200 pages or six bankers’ boxes. Again, consider the deadline for submitting expert reports in conjunction with the estimated amount of material to be reviewed. The relationship between these two may impact your interest and ability to take the case, especially if you are stretched thin juggling other commitments. Extensive document review under a tight time frame may impact your willingness to take the case, your ability to devote the needed time to it, and the pricing level you quote for the engagement.

(11) **When is it likely that expert depositions would be taken?** Have dates been set? If not, would my deposition likely be taken in the next 30 days? Sixty days? Ninety days? This can be handy to know in terms of your own preparation, especially in conjunction with the amount of documents or materials you may need to review on a given case. A compressed time frame may also impact your fee structure, based on the idea that rush jobs cost more and merit premium pricing. Ask if the court has entered a scheduling order and, if so, determine the deadlines for depositions.

(12) **How did you find me?** The answer can be valuable “intel” about your marketing and where you get the most bang for your promotional buck. Did the lawyer find you through a paid ad, a directory, an Internet listing, a Google search, by word of mouth? How? Keep track of how you get referrals. Consider beefing up your investment in those media. This question helps you fine-tune your business development efforts, though chances are you may want to have fishing lines in each of these marketing “ponds” to maximize the odds of getting calls.

This is not an exhaustive list, and some of these questions may be unnecessary, depending on what the prospective client covers in the initial discussions. Other consultants and experts may adapt this template to the needs of a particular case. Getting these questions out in the open and getting straight answers can help the expert make a fully informed decision about accepting a case and determining the appropriate pricing approach.