

# Expert Witnesses: Who They Are and How to Vet Them

By Michael D. White



**I**N SIDNEY LUMET'S POWERFUL 1982 COURTROOM drama *The Verdict*, alcoholic, down-on-his-luck Boston lawyer Frank Galvin is presented with the case of his life. Approached by the family of a woman left in a coma by a botched operation, Galvin must face one of the largest, most established law firms in town and their clients, a highly-regarded hospital and two famous surgeons accused of malpractice.

He takes the case, hoping for a quick-and-easy settlement. But, over time, Galvin becomes emotionally involved and turns down a sizable offer. At trial, with pressure mounting, he enlists the help of a physician from a small Midwestern women's hospital to support his belief that the surgeons' arrogance and incompetence led to his client's death.

Ultimately, Galvin, portrayed by the late Paul Newman, wins the case after an emotional closing argument that convinces the jury to find unanimously for his client. Galvin's personal and professional life is salvaged, due in no small part to a hastily-arranged, unlikely expert witness who succinctly laid out the basics for the jury, laying the groundwork for a generous verdict.

## 702 Legal Requirements

In federal court, the legal requirements for an expert witness are straightforward. Federal Rule of Evidence 702 requires expert witnesses to have "knowledge, skill, experience, training, or education" which will "help the trier of fact to understand the evidence or to determine a fact in issue."

According to Rule 702, an expert "may testify in the form of an opinion or otherwise" if the "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case."

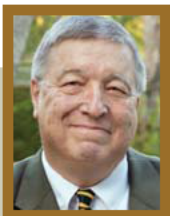
## Vetting an Expert

When evaluating a potential expert witness, says Agoura Hills' attorney Steven Effres, the most important thing is to "find someone who is not only well-qualified, but credible and believable."

Effres' experience spans 34 years litigating catastrophic injury and wrongful death cases, virtually every one of which has involved issues of liability and required input from an expert witness. Finding an expert witness, he says, "has evolved over the years because of the internet, which has replaced the face-to-face referral process so common in the past."

Now, says Effres, "lawyers across the country readily share information on individuals in virtually any and all areas of expertise."

All in all, he says, "it's a lot easier now to find qualified, capable experts to address issues in the broadest possible variety of cases. Engineers, economists, forensic accountants, architects, industrial safety specialists, even certified auto mechanics and specialists in the most arcane fields, can lend credibility and weight to a case, no matter how complex it might be."



**Michael D. White** is editor of *Valley Lawyer* magazine. He is the author of four published books and has worked in business journalism for more than 35 years. Before joining the staff of the SFVBA, he worked as Web Content Editor for the Los Angeles County Metropolitan Transportation Authority. He can be reached at michael@sfvba.org.

## Physician-Assisted Roadblocks

There are experts “to support viability, experts to address causation, and those who can address issues of damages,” says Effres. “Then there are damage experts, primarily doctors, who can address issues of medical treatment. Whether a surgeon, internist or a cardiologist, it all hinges on whether their expertise is effectively communicated and breaks down the issues in a way that can be understood by the twelve people in the jury box.”

Often, says Effres, “there are experts who we’ve gone to in the past that we go back to again because we know they’re well-qualified to address certain issue. In a catastrophic injury case, for example, it might be the treating physicians because they have the hands-on experience with the patient, while, in a death case, it might be someone who can address the issues of illness over the period of time leading up to the death.”

Sometimes, though, he adds, treating physicians aren’t comfortable getting involved in the legal process because of time constraints on their workload. “I’ve worked with many treating physicians where, if they have time restraints, we can take their deposition, videotape it and use it at trial. We’ll do that in certain circumstances because that’s far better than them not being able to testify at all because of their professional commitments.”

It’s challenging, though, to have a physician testify against another physician. “Often, the doctor who is best able to assess whether the harm was caused by malpractice or negligence may be a physician who treated the patient subsequent to the malpractice,” says Effres.

“Many times, in surgery for example, they’ll see smoking gun evidence that will support the malpractice suit, but if they have either a direct or indirect relationship with the doctor accused of malpractice, they refuse to get involved because of the political ramifications of testifying against another doctor who may practice at the same hospital.”

According to Effres, sometimes medical facilities or hospitals won’t allow a treating physician to speak with a patient’s attorney in any legal action. “To me that’s mind-boggling because one of the first things doctors learn in medical school is the Hippocratic Oath’s pledge to ‘Do No Harm.’ I see that a lot around the country and that’s why for years, often times, lawyers would have to go outside the immediate venue to find an expert that was willing to address an issue of malpractice. It’s a shame that if a doctor familiar with the episode were to testify, he’d be looked at as a turncoat because what that does is put the interests of protecting another physician ahead of the harm done a patient.”

## Family Law Experts: An Advocate for the Client

Another area of practice where experts are routinely called to provide insights and share their expertise is family law. Prepping for any case calls for “careful study of depositions or

trial testimony to see how the expert’s done in the courtroom,” says Vanessa Nellis, a family law attorney with Lewitt Hackman firm in Encino.

“That pre-trial preparation is critical,” she says. “We look for somebody who’s testified before on the specific issue at hand. Check their credentials, make sure they’re qualified, and make sure the expert you work with stacks up well against the opposing expert witness. You’ll want someone who is a genuine expert, not someone with just a general knowledge of the area in question.”

“In most of our cases we use experts either for the evaluation of real property when we need an appraiser to testify as to the value of property if it goes to trial or to give us a report that we use at a settlement conference,” says Nellis.

“We also use forensic accountants in most cases because they can value a business, determine escrow issues for support purposes, and, occasionally, if we know there’s going to be a tracing issue where somebody has separate property and it gets comingled, we’re going to need an expert to trace it all back to the separate property source,” she adds.

Certified Public Accountant Michael Krycler is a partner in the accounting, litigation and consulting firm of Krycler, Ervin, Taubman & Kaminsky in Sherman Oaks. The company has specialized in family law, business appraisals

and litigation, and personal injury and fraud matters since the 1980s.

Accountants are “a staple of civil litigation,” says Krycler. “Unless there are custody issues, in reality, they deal with the core of the issue—the equitable portioning of money and property.”

The term forensic accountant, he says, “is a generic title as certainly some of the assignments we handle are forensic in nature,” alluding to a current case his office is handling that involves unreported income.

“We’re looking for the true income as I think everyone is familiar with the fact that tax returns aren’t always a correct and true reporting of income. Not just cash and unreported sales; it can be that expenses are overstated. That’s where we come in.”

Property and money issues aside, many family law cases take on a melancholy human side, particularly when issues of child custody are raised. Terri Asanovich is a licensed family therapist and counselor and has served as an expert witness in scores of family law cases, most involving children and the often delicate issues of custody, visitation, and other parental rights.

“I’m basically an advocate,” she says. “I have to be able to feel that I can support the person’s cause, otherwise I can’t work on the case. I’ll review facts and documents and determine if I can get behind whatever the issue is that being put forward.”

It’s vital “to get a sense of the lawyer and clarify what I will or will not testify to.”

Developing that “sense” also means “sometimes having to share things that may not be beneficial to their client. I can also meet with the client to learn more about their position and their issues and then go to the attorney and give them my impressions and what can and can’t be highlighted in court.”

Though experienced at testifying in court, Asanovich is most often involved in pre-trial evaluation of the individuals who will be involved in and impacted by the court’s ultimate decision.

“A lot of time is invested in doing background work as the expert witness and consulting roles often mesh,” says Asanovich. “I’ve actually found over the years that a lot of people don’t share certain things and pertinent facts with their attorneys because they think they’re not important or perhaps the attorney hasn’t thought to ask about it. I often get information from a client that the attorney had no idea even existed.”

According to attorney Steven Effres, “It all boils down to demeanor, hands-on, practical or theoretical experience, a passionate belief in the subject, and, most importantly, unassailable credibility because, when all is said and done, it’s the judge or the twelve folks on the jury who will be making the final decision.” 