

Why Expert Witnesses Are Key to Navigating Complex Litigation



Berkeley Research Group's Raymond Kolls and Jeffery Stec analyze why complex litigation will boom this year, the types of cases to expect, and how attorneys can best collaborate with expert witnesses.

Litigation today is more complex than ever before. Burgeoning consumer class actions, big tech antitrust matters, and high-stakes patent disputes involve more parties, data, and technically advanced issues. Emerging risk areas like ESG and crypto only add to the complexity.

Complex litigation is pervasive, particularly in the federal system. Multidistrict litigation now accounts for over 70% of the federal civil caseload.

Demand exceeds the jump in litigation spending, **according** to a recent survey of law-firm clients, with more than half of large firms increasing their litigation budgets. An economic downturn and heightened enforcement should lead to more lawsuits.

Litigators know that the complexity of class certification, liability, or damages issues makes complex cases expert-centric, and that modern expert witness work has moved beyond simply filing a report and testifying.

Expert firms are now essential for analyzing the vast data sets that are typical in complex matters, including by deploying advanced AI tools to complement quantitative analysis.

Unsurprisingly, the market for expert witness consulting services is projected to increase in 2023 by approximately 5%.

The following best practices for working with experts are distilled from specific experience with complex litigation matters. These tips apply generally to experts being used in litigation or advisory matters, whether experts are technical or scientific, or address quantitative, economic, accounting, or damages issues.

Early Planning

In complex litigation, a comprehensive expert witness or consulting plan should be developed as early as possible. This plan will help inform case deadlines, discovery, and overall budget expectations, while also framing substantive liability and damages issues.

For example, experts now commonly contribute to fact and expert discovery issues that help shape motion strategy in complex cases.

At many firms, these services are provided by the testifier, and by more junior, but experienced, experts who manage the matter and have a strong feel for relevant evidence and how to obtain it.

At BRG, for instance, these critical team members participate in specific development programs that train them on everything from privilege issues to testifying in mock depositions and mock trials. The use of junior experts early on in a case can add value while reducing overall costs.

While not every case requires early expert involvement, the costs of waiting can be steep. Case in point: Pharma multidistrict litigations, such as those ongoing in opioid matters, are characterized by numerous parties—but very few expert firms understand the complex data involved in these cases.

Early retention of experts can be key to obtain the right resource at the right time and avoid risk of being left out in the cold.

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Expert Firm Bench

In evaluating experts for complex cases, the individual expert's role should be evaluated relative to the firm's capabilities. Many fine experts work alone, or in smaller firms. There are contexts, however, where scale matters in complex cases, particularly where a case will be intensively litigated.

Class action cases, for instance, often rise or fall based on class determination. In these cases, counsel should inquire not only about the expert, but about the team, asking if sufficient expert staff is available and if they are familiar with class certification issues.

Staffing can be critical to containing costs, and to the team's ability to perform required analyses within often challenging deadlines.

Scale and One-Stop Shopping

Complex litigations are typically multi-party matters, at least on one if not both sides of the "v." Not all expert firms deal regularly with extensive multi-party cases.

Relatively few consulting firms have experience working on cases involving joint defense or common interest groups. They might be unaware, for example, that creative fee-sharing arrangements can be developed to spread the expense of common work to multiple parties.

Expert firms with scale also can bring value with their capacity to suggest multiple testifiers for a given matter. Firms with bench strength can also field expert teams where appropriate with separate experts to address discrete issues.

For example, a complex case may require one team to review reports submitted by adverse experts and a separate team for the testifier to develop their report. However, where all experts are at the same firm with a common privileged case manager, significant efficiencies can be realized by avoiding duplicative analysis.

As complex litigation continues to rise, so too will demand for expert witnesses.

Attorneys reviewing their 2023 dockets should start evaluating expert witness case strategy at the outset, and initiate retentions that can support their success in the year to come.

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