



Early Case Assessment: Get Experts Involved From Day One

By Lisa Pierce Reisz, Esq. and David V. Dilenschneider Esq. Reprinted with permission.

Early case assessment. It's a hot phrase right now amongst litigators, and although it's been defined in many different ways, it essentially boils down to gathering information, conducting research, and performing other tasks early on in litigation, when it often matters most. Many litigators and their in-house counsel clients recognize that this process facilitates better decision-making with respect to whether and how to proceed with a case—ultimately resulting in more certainty and a reduction of costs.

But how does one go about conducting early case assessment without running up huge legal bills? Part of the answer lies in bringing a qualified expert witness on board at the outset of the case to help shape litigation strategy. Spending money on an expert early on may seem counterintuitive to saving money (yes, we recognize the sometimes significant expense involved in the

retention of experts), but in the long term, it usually makes sense. Oftentimes, the retention of an expert witness is almost an afterthought, done simply to meet a court-imposed deadline and conducted well after the pleadings have been filed, the issues have been framed, and discovery has commenced. But if expert retention is fast-forwarded to the initial stages of the case, better—and more informed—decisions can be made.

Retention of an expert during early case assessment may be a good strategic decision, regardless of whether you're representing a plaintiff or a defendant.¹

Precluding the Opposition

There's no reason to beat around the bush about the first tip: In lawsuits involving unique products or issues, retaining the most-qualified expert first

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Hamilton County Law Library

Hamilton County Courthouse
1000 Main Street,
Room 601
Cincinnati, OH 45202
T:513.946.5300
F:513.946.5252

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From the Director

Mary Jenkins, Law Librarian & Director

Ohio County Law Libraries Group Named Recipient of Prestigious Advocacy Award

The American Association of Law Libraries (AALL) named the County Law Libraries special interest group of the Ohio Regional Association of Law Libraries (ORALL) the 2010 recipient of the Robert L. Oakley Member Advocacy Award. The award recognizes a person or organization that has been an outstanding advocate and has contributed significantly to the AALL policy agenda at the federal, state, local, or international level. The Ohio county law libraries group was recognized for its long and ultimately successful effort to change a law that would have had a devastating impact on county law libraries. Mary Jenkins, chair of the ORALL County Law Libraries group and of the ORALL Government Relations Committee, accepted the award on behalf of all Ohio county law libraries at the AALL annual meeting in July.

WestlawNext

Wondering if and when the Law Library might have WestlawNext available? Thomson West representatives recently announced that they hope to have Westlaw Next patron access (the way users login here at the library) ready in *July 2011*. It won't be an automatic update; we will look at several factors as it becomes available: product features, user security, and cost. Remember that we do not offer "full" Westlaw here at this point; we use Lexis primarily. With Westlaw, we offer library users Am. Jur., ALR, federal practice & procedure, jury verdicts, Ohio and Kentucky practice materials, estate planning, Ohio municipal law, forms, and more. The WestlawNext interface is good. We'll switch to it when it's available if it seems worth it then.

Authenticated Online Legal Information

In the [February newsletter](#), I wrote about the need for authenticated and official online legal materials. A quick follow-up to that: The

National Conference of Commissioners on Uniform State Laws is in the process of drafting a uniform state law on authentication and preservation of state electronic legal materials. If that makes it through the process, including adoption here in Ohio, it will have a significant and positive impact on our ability to determine the origin and certification of government-produced legal information. Only four states currently guarantee by statute permanent public access to official online documents. Few states currently offer disclaimers explaining that online material is not certified as official. The American Association of Law Libraries seeks equitable and permanent public access to authentic legal information. As I consider the information needs of Hamilton County Law Library's users, I am concerned that official documents be in the public domain, that there are no restrictions on or charges for use, and that the material is available for the long haul, regardless of changes in format and technology. Digitized material, available online freely and easily, is great, obviously, but to be considered reliable for your purposes, you'll need to know that it's authoritative and unaltered.

E-Books

Digital books haven't hit the legal community yet in a big way although e-book collections are common in academic libraries. The Hamilton County Law Library offers some e-books now. See the Tech Tip in this issue. Look at the books available through Aspen when you login with your library subscriber ID. You'll see, for example, full-text online books on business law, personal injury, drunk driving defense, employment law, family law, and more. There are full-text books available through our Lexis, BNA, CCH, and Westlaw subscriptions, too. Generally, though, the major publishers are still sorting through concerns about digital rights management, content sharing, and devices.

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precludes the opposition from retaining that individual. Sure, most damages experts are interchangeable. But what about experts on flugelbinders?

If Sam Flotz is really the only one true expert on that product, it's imperative that you try to retain him first. Every litigator knows that the best, most-qualified, expert can positively affect the case by forcing a favorable settlement or swaying the jury at trial. It's imperative that, in such situations, you lock down the best expert.

Educating & Evaluating the Expert

The best candidate to serve as an expert for your case may not be one who is experienced in working within the legal system. In other words, he/she may never have served as an expert previously. By retaining that individual early, you'll have more time to educate him/her about the intricacies of testifying as an expert—especially the adversarial elements.

In addition, while educating and working with the expert, you'll give yourself more time to evaluate how he/she will be able to handle a deposition or a cross-examination. Oftentimes, the adversarial process of litigation can bring out the worst in an individual. If the individual you have retained gets flustered, "explodes" while discussing (trivial) matters, or tends to withdraw into a shell when pressed, you need to uncover that tendency early on, so you can decide whether to continue the relationship. Better that than to find it out during a deposition or cross examination.

Educating the Attorney

We both graduated from college with valuable degrees (Lisa from Harvard University, in government; David from the University of Notre Dame, in the Program of Liberal Studies), but neither degree truly prepared us for handling the technical aspects of representing clients in lawsuits involving complex products (e.g. mahogany wood, double thermal-paned, true divided light windows), certain medical conditions (e.g. depression), or unique situations (e.g. medical monitoring for groundwater contamination). Unless you have actual experience or education about such a matter, it's likely that you'll struggle absent in-depth training. And the longer that lack of knowledge exists, the more expensive it can be for a client. The hours spent with an expert at the outset of the case, learning details about the technology, the condition or the situation is time (and money) well spent. Certainly, that educational process will continue throughout the life of the case, but the more knowledge passed from the expert to you early on, the better.

Evaluating a Lawsuit's Merits

Is the lawsuit a slam-dunk winner or an outright dog? Some lawyers may be able to get a sense of the answer based on their own experience and knowledge and an analysis of the applicable facts and law. However—particularly in cases involving unique products and issues—having an additional, experienced viewpoint may make all the difference in evaluating whether a particular claim has merit and, ultimately, whether you should take on the case or decline.

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Assessing Technical Strengths and Weaknesses

If a lawsuit cannot be immediately deemed a winner or loser (even with the involvement of an appropriate expert), assessment of its technical strengths and weakness is crucial. This assessment, especially as it relates to the finer details of the matter, requires a working knowledge of the issues. Such knowledge might be conveyed to you by the retained expert. With such knowledge, you can commence development of your strategic planning and, of course, keep your client advised of the same.

Helping Frame the Issues

In conjunction with assessing technical strengths and weaknesses, an expert who is retained early on can help frame the issues, help spot where standards and practices have been violated, and explain why these departures are important in a case. Moreover, if the expert has sufficient time to assess the case thoroughly, he/she may be able to advise you on whether you need a different type of expert or an additional expert.

Determining the Nature and Extent of Damages

Just as the strengths/weaknesses and key issues of a lawsuit are important, so too are the nature and extent of damages that could be recovered. Hiring an economist early on may assist you in evaluating the nature and extent of the damages sustained by a claimant. For instance, a plaintiff's lawsuit, while strong on liability, may not be a fight you'll want to take on if the likelihood of a significant damages recovery is minimal. On the flip side, an early determination that the

case poses a multimillion-dollar risk of damages could necessitate advising the defendant to engage in settlement discussions sooner rather than later.

Assisting in Critical Preliminary Efforts

The nature of preliminary injunctions, class-action certifications, temporary restraining orders, and the like often screams out for the use of an expert. How can you argue the substantial likelihood of success on the merits, numerosity, and commonality, etc.—especially as those issues relate to more complicated matters—without guidance from an experienced expert?

Ms. Reisz is a partner in the Vorys Columbus office and a member of the health care group.

Subscriber benefits

Are you familiar with the many benefits included in your subscription to the Hamilton County Law Library? By joining the library, you can:

Access: to databases, including **LexisNexis**, **Shepards'**, **CCH**, **Hein Online**, and over 70 **Aspen /LOISLaw** treatises in 16 substantive areas

Connect: to the wireless network throughout the Law Library, videoconferencing capabilities, and 5 conference rooms, equipped with speaker phones, are available to our subscribers

Learn: Free CLE opportunities offered throughout the year: Visit our Law Library Subscriber Services page to find out more. <http://www.hamilton-co.org/cinlawlib/services.html>

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The Law Library will continue to add device-neutral e-books, primarily through publishers' interfaces for now, until the device and format issues are more settled. While some publishers think that attorneys aren't excited about online books, some of our users have been very relieved to discover well-respected treatises like Wigmore on Evidence online after library hours.

Mobile Legal Apps

If you haven't already downloaded these apps, take a look at Fastcase (free to our subscribers but you need to login into the library's site first), Nolo's Legal Dictionary, Black's Law Dictionary (\$50), Red Laser (to keep a list of books you want to read, for example), The Gavel, and Evernote or Dragon Dictation for keeping notes and lists. Are you interested in offering a mobile-friendly website for your firm or business? You can create mobile site plug-in tools using [Drupal](#) or [Wordpress](#) or you can outsource your mobile site development to a firm like [Boopsie](#). What functions of the Hamilton County Law Library would you like to have more easily accessible via your mobile device? [Let me know](#).

Locating and Using Expert Witnesses

By Glenna Herald

The following is a smattering of the resources we offer to help you easily locate and effectively use expert witness testimony for your complex cases.

Electronic Resources

National Directory of Expert Witnesses

This free online directory "...[I]ncludes over 2,000 expert listings from across the nation in over 400 categories of technical, scientific,

and medical expertise." This database allows searchers to browse by topic or search by keyword. You can access this database here: <http://www.national-experts.com/online.html>

Westlaw Jury Verdicts—National

In addition to summarizing jury verdicts, judgements, and settlements, this database offers information on expert witnesses. It allows you to search for expert witnesses by name, a handy way to check up on the expert's ability to persuade. You can access this database from the library's computer lab.

Print Resources

Deposing and Examining Doctors

By Kim Patrick Hart

Kim Patrick Hart writes, "Some defense doctors try to intimidate you during their depositions. They pretend they don't understand what you are asking, state that you have misused medical terms, and suggest that you do not have an accurate grasp of human anatomy. To be effective despite this gamesmanship, you must know the underlying medicine and have a game plan." This set promises to offer you just that, by providing strategies for questioning medical experts during depositions and at trial.

Qualifying & Attacking Expert Witnesses

By Robert C. Clifford

This publication offers practitioners suggestions on choosing the right expert witness, strategies for questioning opposing counsel's expert witnesses, and pre and post deposition checklists. The checklists and forms included in this publication are available via CD-Rom so you can manipulate them from your desktop. If you have any questions about using these resources, please ask. We are happy to help.

Aspen / CCH / Loislaw treatises available remotely to subscribers!

By Julie Koehne, Systems Librarian

Bankruptcy Law Library:

- CCH Bankruptcy Case Reporter
- *Ginsburg & Martin on Bankruptcy*
- *Bankruptcy Litigation & Practice: A Practitioner's Guide*
- *Bankruptcy Litigation Manual*
- *LoPucki & Mirick on Strategies for Creditors in Bankruptcy Proceedings*
- *Advanced Chapter 11 Bankruptcy Practice*
- *Ordin on Contesting Confirmation and Tax Planning for Troubled Corporations*

Elder Law Library:

- *Elder Law Forms Manual*
- *Elder Law Answer Book*
- *Social Security & Medicare Answer Book*
- *Representing the Elderly Client*

Estate Planning Law Library:

- *Practical Guide to Estate Planning*
- *Multistate Guide to Estate Planning*
- *Estate & Gift Tax Handbook and Estate Retirement Planning Answer Book*

Family Law Library:

- Drafting Prenuptial Agreements
- Property Division in Divorce Proceedings: A Fifty State Guide
- Valuation Strategies in Divorce
- Valuing Specific Assets in Divorce
- Value of Pensions in Divorce
- Qualified Domestic Relations Order Handbook
- Child Support Guidelines: Interpretation & Application
- Psychological Experts in Divorce Actions
- American Journal of Family Law

Evidence Law Library:

- *Wigmore on Evidence*
- *Scientific Evidence and Experts Handbook*
- *Destruction of Evidence and Evidence: Practice*

Business Practice Law Library:

- *Choosing the Right Business Entity*
- *Limited Liability Company & Partnership Answer Book*
- *Drafting Limited Liability Company Operating Agreements*
- *S Corporation Taxation Guide*
- *Financing Start-Ups*

Construction Law Library:

- *Construction Disputes: Practice Guide with Forms*
- *Fifty State Construction Lien and Bond Law*
- *Construction Law Handbook*
- *Alternative Clauses to Standard Construction Contracts*

Employment Discrimination Law Library:

- *Representing Plaintiffs in Title VII Actions*
- *Civil Rights Act of 1991 (Civil Rights in the Workplace)*
- *Americans with Disabilities Act Handbook*
- *Sexual Harassment in the Workplace*
 - *Employment Discrimination Law & Practice and Employee Relations Law Journal*

General Litigation Library:

- *Discovery Practice*
- *Electronic Discovery*
- *Deposition Handbook*
- *Jury Selection*
- *Malingering & Deception in Litigation*
- *Motion Practice*
- *Witness Preparation*
- *Evidence: Practice Under the Rules*
- *Judgment Enforcement*
- *The Expert Witness Update*

Aspen's Internet Law and E-Commerce Law Library:

- Law of the Internet
- Drafting Internet Agreements
- Scott on Multimedia Law
- Computer & Internet Lawyer
- Law of Electronic Commerce
- Internet and Technology Law Desk Reference

Product Liability Law Library:

- *Product Liability Case Digest*
- *Malingering & Deception in Litigation*
- *Product Liability Desk Reference*
- *Product Warnings*
- *Defects and Hazard*
- *Scientific Evidence and Experts Handbook*

Limited Liability Company Library:

- *Drafting Limited Liability Company Operating Agreements*
- *Federal & State Taxation of Limited Liability Companies and State Limited Liability Company and Partnership Laws*

Personal Injury Law Library:

- *Medical Records Review*
- *Stedman's Medical Dictionary*
- *Tort Law Desk Reference: A Fifty State Compendium*
- *Personal Injury: Forms and Procedures*
- *Understanding the AMA Guides in Workers' Compensation*
- *Expert Witness Update and Malingering and Deception in Litigation*

Real Estate Law Library:

- *State-by-State Guide to Commercial Real Estate Leases*
- *Commercial Real Estate Transactions Handbook*
- *Commercial Real Estate Leases*
- *Law of Title Insurance*
- *Law of Real Estate Brokers and Environmental Liability*
- *Real Property Transactions: Law & Practice*

Free seminar: Low Cost/No Cost Public Records Searching

On Thursday, August 19, Mary Lynn Wagner, Director of Information Resources at Keating Muething & Klekamp, will present low cost/no cost strategies for effectively investigating jurors, locating witnesses, and vetting experts.

What: Low Cost/No Cost Public Records Searching

Why: Attend this session to learn more about FREE and low cost resources to help verify information on jurors, witnesses, and experts.

When: Thursday, August 19 @ 12:30

Where: Hamilton County Law Library Boardroom

How: Call 513.946.5300 to register



Fastcase News

Mobile Apps

Did you know your Fastcase member benefit is now mobile? You can search cases and statutes on your iPhone and iPad for free. To download the free app, visit www.fastcase.com/iPhone or www.fastcase.com/iPad.

Forecite

Take your research to the next level with Fastcase Forecite. Forecite enhances search results including documents that do not contain one of your search terms, but may be relevant because they are cited by many of the search results that do contain all of your search terms. For Forecite tips and a video tutorial, visit <http://www.fastcase.com/fastcase-forecite>. This feature is unique to Fastcase and free to you as a subscriber to the Hamilton County Law Library. Login to your Fastcase account at <http://www.hamilton-co.org/cinlawlib/intra/login.asp> to get started.

August 2010 Law Library Newsletter

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Hamilton County Law Library
Hamilton County Courthouse
1000 Main Street, Room 601
Cincinnati, OH 45202