

Vetting Experts

Beyond the Basics of Retaining Fire and Damages Experts in an Arson Case

By Cynthia Bernstiel and Dennis Medica



Hiring the right expert can mean the difference between winning or losing a high-stakes arson case. Experts in fire claims where arson is suspected can provide critical guidance and testimony on two key prongs of the arson triangle: proof of an incendiary fire and motive. Experts can also provide invaluable damages quantification assistance as well as unique insight and evidence into the insured's claim. Long before an arson case makes it to the courtroom, however, an insurance carrier must carefully examine a potential experts' credentials, knowledge, experience, and skills.

Need an Expert?

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, an expert is necessary. In every suspected arson case, hiring a skilled origin and cause expert early during the investigation is critical. An insurance carrier must be extremely cautious, however, to rely upon its origin and cause expert only in areas where he or she is qualified to testify. Juries are unforgiving when they perceive a carrier to be overreaching in terms of relying upon any expert who is rendering opinions outside his or her area of expertise.

If the facts of the claim warrant the retention of other experts, such as engineers or alarm experts, the carrier should hire all such experts. Clearly communicate with each potential expert to ensure that he is comfortable opining on the relevant issue at hand, and that he is qualified to render that opinion. In this day and age of courtroom television, juries expect that on each and every issue that requires scientific, technical, or other specialized knowledge, the carrier will have hired an expert to educate them on such issues.

Finding an Expert

The days of hiring the expert who your carrier has used for years are over, unless those experts have the up-to-date knowledge that courts are now requiring. Traditional word of mouth referrals are a great way to identify potential experts to put through a more rigorous vetting process. During this process, utilize all of your trusted contacts, including your attorney network (both inside and outside your organization/firm) and your clients' networks. A positive review from a trusted source who has personal experience with a tested potential expert is a solid starting point. Early identification of potential experts can also be accomplished through online searches of articles and publications, conference materials, and curriculum vitae.

Vetting and Selecting

If your expert was hired during the initial stages of an arson investigation cannot qualify as an expert or get his/her expert opinion admitted at trial years later, this can and will mean the end of the case. While it is tempting to hire the first person who appears to be the right fit for the case, only through a thorough vetting process can an insurance carrier's representative be assured that she has done everything to protect her carrier's interests from claim investigation through trial. Document the vetting process each step of the way, so in the event the expert's credentials are called into question down the road, you will be able to demonstrate the thoroughness of your research and the care taken in selecting that expert.

The CV

The first step in the vetting process is a thorough review and analysis of the expert's curriculum vitae. As a practical matter, the expert's CV will be his or her first impression to the opposing party, opposing expert, the court, and jury. Long before the expert will "go live" dur-

ing a deposition or at trial, her CV will be scrutinized by all parties. If the proposed expert's CV is not well organized, neat, free of typos, and easy to understand, serious consideration should be given to passing on that expert.

Social Media Presence

Since one of the very first things your opponent will do after learning the name of your expert will be to conduct a comprehensive review of that expert's social media presence, consider doing that yourself, before hiring a potential expert. Reviewing a

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potential expert's presence on LinkedIn, Facebook, Twitter, and carefully examining any other Google hits will go a long way to revealing any information of potential concern long before the expert's name is officially linked to your case.

Prior Reports

An insurance carrier should also request that a potential expert provide several exemplar reports for careful review and analysis. Like the expert's CV, his report will be a critical first look at his work product, which all parties will review long before the expert has the opportunity to testify. During your review of the potential expert's report, ask yourself:

- Are there any glaring errors, discrepancies, or contradictions?
- Does the report follow a systematic outline and, in the case of an origin and cause report, does the report follow the scientific method required by NFPA 1033 and 921?

- Are the reports "cookie cutter" or case specific?
- Do the witness interviews outlined in the report corroborate, contradict, or muddle the findings or the report?
- Does the expert's investigation and conclusion pass the common sense test?

When reviewing the potential expert's exemplar reports, put yourself in the shoes of receiving that report from your opponent and ask yourself whether, and to what extent, the report persuades you.

References

If you do not already know someone who has worked with a potential expert, ask the expert to identify several references. References can provide critical insight into not only the expert's performance during deposition and trial, but also into the quality (or lack thereof) of the potential expert's business practices. References can answer questions such as whether the potential expert was responsive to calls and emails, whether they made or missed key deadlines, and whether their billing was fair and accurate. Probing questions should be asked of any references provided, particularly since the potential expert will presumably only provide names of those with whom he believes he has had a positive prior interaction.

Other Sources

Does your expert publish or teach in the area of his or her expertise? If so — and this is certainly a good sign — obtain and review any published articles, and request the opportunity to review teaching materials. Also request that the potential expert provide you with transcripts of prior testimony both in depositions and in court. Review such testimony with a critical eye toward whether the expert was clear, persuasive, and responsive, and how he held up on cross-examination.

Face to Face

The importance of a potential expert's physical appearance and demeanor

cannot be understated. Even if an expert is the brightest and best report writer, if his or her appearance is unkempt or unprofessional, or his or her presentation is unpersuasive or uninspiring, he or she may not be able to serve the intended purpose — to capture the mind of the fact finder and educate him/her on critical issue(s) in the case. Consider giving the expert a dry run on explaining his areas of expertise.

If the expert's initial delivery seems overly complicated or technical, consider asking the expert to teach the topic to you like you are a second grader and see if the expert can explain a complicated issue in a simplified way. Evaluate how the expert handles being challenged. Does she get defensive and antagonistic, or does she handle challenging questions effectively and professionally?

Remember that during this process, you are stepping into the shoes of the fact finder. Ask yourself, is the potential expert likeable, understandable, persuasive, and credible? Only if the answers to each of these questions is “yes” will you have identified an expert who will be confident, and can effectively take your carrier through the investigation, discovery, and ultimately trial. If an in-person meeting is not realistic logistically, consider conducting a video interview so that you have the opportunity to see the expert during the interview and assess his or her appearance and presentation skills.

This in-person interview is also the perfect opportunity to ask the potential expert some key follow-up questions including:

- Have you ever been qualified as an expert in court (state/federal, number of times, etc.)?
- How many times have you been deposed?
- How many times have you testified in court?
- Have you ever faced a Daubert

challenge, and if so, what was the result?

- Have you ever been found not qualified to render an expert opinion in any proceeding?

From a practical perspective, this interview is also a great chance to ask the potential expert about his or her ability to meet critical deadlines and business/billing practices.

Fire/Arson Experts

The National Fire Protection Association (NFPA) has promulgated NFPA 1033 — the Standard for Professional Qualifications for Fire Investigators. NFPA 1033 is a mandatory standard that defines the duties, tasks, knowledge, skills, and performance evaluation criteria for the full range of investigation issues that may be encountered on the job of a fire investigator. Compliance with NFPA 1033 is mandatory — a fire investigator simply cannot try to justify her failure to follow NFPA 1033 or argue that it is just a guide. A potential origin and cause expert should be intimately familiar with NFPA 1033, and must have up-to-date basic knowledge of each and every one of the 16 topics listed in NFPA 1033.

Equally important is an origin and cause expert's knowledge of and compliance with NFPA 921: Guide for Fire and Explosion Investigations. While some investigators still try to argue that NFPA 921 is just a guide, courts nationwide have recognized that NFPA 921 offers a comprehensive, peer-reviewed, and detailed guide for fire investigation. Some courts have even gone so far as to call NFPA 921 a “definitive treatise” for fire investigation and have referred to the “universally accepted methodology of NFPA 921.” Importantly, NFPA 921 focuses on an investigator's methodology throughout the entirety of the origin and cause investigation, not just her conclusions. It is simply no longer good enough for a fire investigator to reach the “right” result, or

simply to state her result in the origin and cause report. Rather, an expert's report must clearly demonstrate his or her compliance with the methodology set forth in NFPA 921.

Damages Quantification Experts

In vetting potential experts who are certified public accountants (CPAs), it will be critical to assure that your expert can fully and completely describe the rules of professional conduct, which she must adhere to as a CPA. Such knowledge and related compliance is critical to avoiding any potential attempt to disqualify the CPA expert witness.

In performing damage analyses and preparing related expert testimony, CPAs are required to comply with long-standing professional guidance and standards. CPAs performing litigation services must comply with the general standards of the accounting profession contained in the AICPA Code of Professional Conduct (AICPA Code); relevant standards established by state boards of accountancy; and guidance in AICPA special reports, including AICPA Consulting Services Special Report 03-1: Litigation Services and Applicable Professional Standards (AICPA Special Report).

The Results

While the vetting process for potential experts is multi-faceted, tedious, and time-consuming, only through a vigorous and thorough vetting process will you be able to represent to your carrier that you have hired an expert with the requisite knowledge, skill, experience, training and/or education to testify credibly and competently and to prevent any surprises down the road during litigation. [LM](#)

Cynthia Bernstiel, Esq., is a Partner with Stewart, Bernstiel, Rebar & Smith. Dennis Medica is the Managing Director of Medica, LLC.