

Confer With a Consultant ASAP — Not When It's Too Late

BY DR. ART ECKSTAT



Knowing when you need critical information concerning your case is the secret sauce that often determines success or failure. The traditional timing of deciding when to contact a consultant or expert witness can cause you to fail to prevail when you should have won.

You know how important just one word or comma can be in a legal proceeding. Albert Einstein said, “I don’t need to know everything; I just need to know where to find it, when I need it.” What is critical to your success as an attorney is “to know where to find it” **and when you need it.**

In my experience, and in the experience of most other experts I’ve talked to over the years, the typical initial expert contact from an attorney occurs at some point after complaints have been filed and the attorney is seeking expert support for their position. This practice often results in losing or underperforming cases, costing you time, money, lost opportunity — and possibly getting a reputation as someone who need not be feared or respected. There is also an associated reduction in the ability to obtain future business.

The expert community complains within about the inefficiency and the poor results of this practice. This article is about how and why conferring with a consultant upfront will benefit attorneys, consultants, experts and your clients who are seeking and deserve justice.

Avoid Accepting the Losing Cases

Not conferring with a consultant early can result in the acceptance of unwinnable cases. You may not be aware of something critical that a consultant could either immediately see or advise you to investigate further. A good story doesn’t necessarily mean it’s a good case. In contingency fee cases, you are left with the loss of your investments of time, money and lost opportunity. Regardless of the fee structure, you’re left with damage to your reputation. Successes lead to referrals. Failures lead to just the opposite.

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Know Who to Sue

The practice of filing complaints against anybody who could have been involved — spray and pray — can hurt you and your case in many ways. Naming multiple defendants who aren't actually at fault or negligent involves wasted time and resources. More important, it invites finger-pointing, obfuscation and unnecessary delays.

A more effective practice is conferring with a consultant upfront to determine who the actual or most likely at-fault party or parties are. This also allows including information in a complaint about why other parties wouldn't be at fault. Such statements can head off denials or delaying tactics.

Confirmation Bias Can Kill Your Case

“I've got this; it's just like”

Failure to identify the actual problem and blaming something that can be shown to not be the problem will most likely result in losing your case. At best, it will result in a much lower settlement amount.

I was initially contacted in a wrongful death case “just as a formality” to confirm that the situation was the same as a known problem that was already the subject of a recall. A quick examination — of photographs alone — revealed that the situation wasn't the same. A completely different failure had resulted in the same catastrophic end result. A complaint alleging the previously known defect as being the cause of this particular failure and death would have been a loser.

Craft Winning Complaints

A properly crafted complaint is much more likely to result in an earlier resolution for a higher amount. It is essential that you file a complaint that is technically accurate. Among other things, it demonstrates that you already know the right story.

Overlooking or misinterpreting a crucial piece of evidence can result in leaving you or your client — or both — with nothing for their losses. A consultant may spot a possible technical problem or concern that you wouldn't be expected to see on your own. Depending on the situation, other specialized experts may be required at this time. If the consultant doesn't have the specific knowledge that may be required to define the problem, he or she can advise you to seek appropriate subject experts now, rather than when it's too late. An upfront consultation can prevent days, weeks, months and even years passing before discovering that you have filed an inappropriate or ineffective claim.

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Does Evidence Support the Claim?

I was retained as an expert in a matter where a person fired a freshly loaded shotgun that had been stored in a closet. With the first shot, the barrel burst in front of the barrel chamber. The complainant suffered damage to his face, eyes and arm. The retaining attorney had already filed complaints against both the shotgun and ammunition manufacturers before consulting with me.

Upon examining just photographs of the fired shotgun shell and shotgun, it was apparent that there had been something in the shotgun barrel chamber that had prevented the shotgun shell from fully expanding when fired. The resulting excessive pressure is what caused the shotgun barrel to burst. The shotgun owner subsequently admitted he had cleaned the shotgun

before storing it and had not looked down the barrel to make sure it was clear before storing or loading it.

I mentioned before that a good story doesn't necessarily mean a good case, and that was true here. All the time and resources that had been expended on the fruitless pursuit of the shotgun and ammunition manufacturers would have been prevented with an upfront consultation. And this kind of experience is not unique to personal injury situations.

Avoid Fishing Expeditions

All too often, discovery interrogatories are fishing expeditions. They convey the message, "I don't really know what happened, so I'm asking you all these questions in the hope that you will somehow hand me the smoking gun. Furthermore, if you fail to provide the information I need, or bury critical information among irrelevant or misleading information, I might not catch it."

This surely isn't the message you want to send.

Wouldn't you much rather send a message that says, "I already know the right story, and the responses to these interrogatories are simply to get you to document the facts of the matter."

Do you really know what the right story is? You're familiar with the expression that we often don't know what we don't know. What can be even worse is believing what you think you know — and proceeding based on what isn't so.

Conferring with a consultant prior to and while crafting and examining the responses to interrogatories can be very beneficial. **Targeted interrogatories demonstrate that you have a command of both the legal and technical matters involved in your case.**

Avoid False-Economy Choices

The traditional thinking is, “I don’t need an expert yet” or “I can’t afford to engage an expert right away.” Consider this: Just the opposite may be true.

Waiting until you think you need to confer with an expert is often the single biggest reason for investing in a losing or underperforming case. Consultants and experts can be expensive, but *not* retaining their services early enough can cost much more. Don’t take cases or file or dispute claims without an upfront investigation that includes conferring with a relevant consultant.

Consultants and Subject Matter Expertise

In addition to wanting to delay or minimize the expense of consultants or experts, one of the reasons often cited for not engaging a consultant or testifying expert early is the possible difficulty and expense of finding the right expert. But a detailed subject matter expert possessing the credentials to testify regarding your specific matter may not be needed at all. A generalist in the relevant profession — for example, an accountant, doctor, engineer, someone in human resources — may be able to provide you with all the information you need at that stage.

An upfront consultant can guide you regarding whether and what kind of more specific testifying expert you may need. He or she may already have the qualifications to serve as a testifying expert witness if you need one. If not, the consultant can assist you in defining the needed qualifications. The consultant may already know someone who is qualified.

The consultant can assist in assessing the qualifications and credibility of a potential testifying expert and be available to assist in preparing an expert witness for testimony. Being one step removed from the minutiae of the specific subject matter, a consultant may effectively play devil’s advocate in verifying and clarifying a testifying expert’s opinion. This activity can be helpful in preparing your expert for cross-examination.

Don't Go It Alone

A quote often misattributed to Einstein is, "The definition of insanity is doing the same thing over and over again and expecting a different result." **The value of conferring with a consultant right away instead of later could be many thousands of dollars made or saved, and so much more.**

Regardless of the type of cases you handle, think of the number of times you have said, *"I wish I'd known that sooner."*

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