

Attorneys & Expert Witnesses ... An In-depth Examination of a Complex & Challenging Relationship

- **Searching, Selecting and Retaining the Perfect Expert.**
- **Issues Attorneys Have When Hiring and Working with Experts (other than Expertise).**
- **Expert Reports, Attorney Instructions, Court Appointed Witnesses.**

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Table of Contents

Introduction

Section A. Searching for the Perfect Expert.	4
Who looks?	4
Where do they look?	5
How much does it cost?	6
What are the most vexing problems/issues?	8
Section B. Selecting & Retaining the Perfect Expert.	10
Are credentials and background verified?	10
What effect, if any, do the expert's rates and location have?	11
How often are proposed rates negotiated?	12
Are written retainer agreements always required?	13
How frequently are experts retained in anticipation of litigation?	14
Section C. Attorneys non-Expertise Issues in Hiring and Working with Experts.	15
General Consulting/Cost Issues.	15
Qualifications as a Witness.	16
Performance as a Witness.	17
Section D. Expert Reports, Attorney Instructions, Court Appointed Witnesses.	18
Attorneys Requesting Report Revisions.	18
Experts Writing Too Much, Too Soon.	19
Written Instructions for Opinion Backup.	20
Court Appointed Experts.	21
Methodology	22
About: Author / ExpertPages	23
Contact Information	24

Introduction

For almost a quarter-century, as the first online directory of experts and consultants, the ExpertPages.com unit of Advice Company™ has been regarded by lawyers and experts as the premier platform linking North America's most qualified experts and consultants with the attorneys, law firms, government agencies and businesses who retain experts for litigation and/or general consulting.

Over the years ExpertPages in-depth studies of experts' fees and practices have been recognized as the gold standard, providing experts and attorneys alike with valuable insights. We knew and could track over time how experts felt about matters such as fees, expenses, location, retention agreements and a host of other issues. Less understood was how did attorneys feel about these issues? Moreover, were there other issues that attorneys felt strongly about that have not been discussed or identified?

To answer these questions Advice Company's ExpertPages unit retained DeBow Communications Ltd., New York, NY (www.debow.com), an independent market research firm, to conduct an online survey of Attorneys and non-attorney legal professionals who identified as being actively involved in selecting and/or working with expert witnesses and litigation consultants. More than 200 completed responses from a wide array of practice areas and firm sizes throughout North America contributed to the survey.

This Report discusses at length some of the most important issues for experts who seek to promote their practices: How do Attorneys Locate and Select Experts?, as well as other critical questions including, Are Expert Fees Negotiable, How Widespread is Use of Retention Agreements, Do Experts Write Too Much, Too Soon? It also provides an in-depth look at the most common non-expertise problems/issues/complaints attorneys have in their day-to-day relationship with experts.

Section A. Searching for the Perfect Expert. Who looks, where do they look, and how much does it cost?

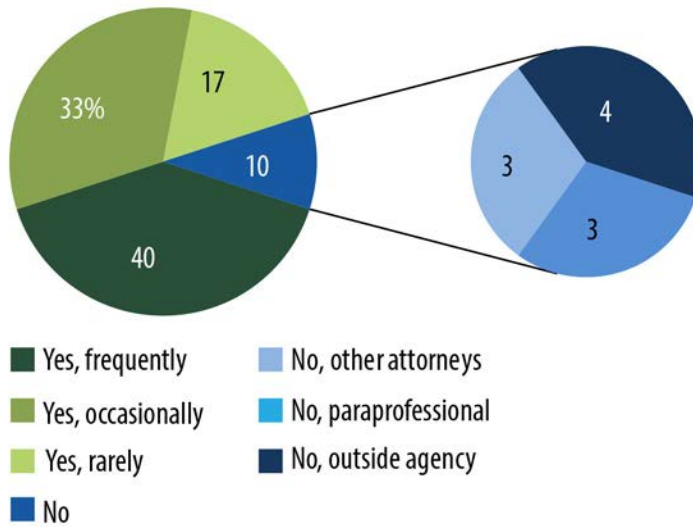
Attorneys are likely to be personally involved in the initial searching.

When asked if they were personally involved in searching for new experts – ones that they or their firms had not previously used – nine out of ten attorneys (90%) said Yes with the largest percentage (40%) saying Yes, frequently.

Of the 10% of attorneys that said that they were **not** personally involved, 4% utilized an outside agency, and 3% (in each instance) had the initial search done by paraprofessional staff or other attorneys at the firm.

Are you personally involved in searching for potential experts that you, or your firm or organization, have not previously used?

Response Scale = Yes, frequently, Yes, occasionally, Yes, rarely, No, the initial searching is always done by other attorneys, No, the initial searching is always done by paraprofessional staff, No, the initial searching is always done by an outside agency



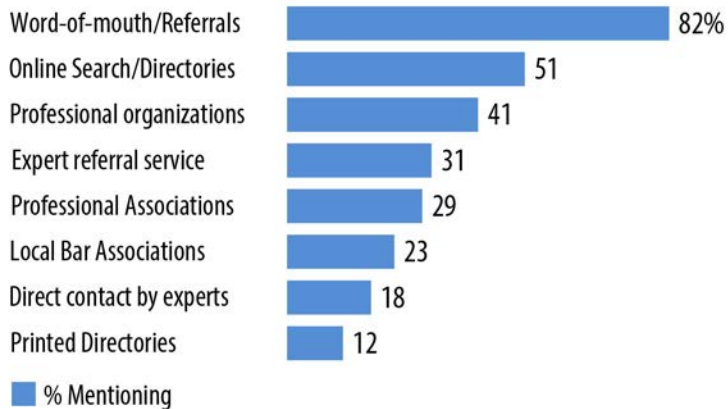
While there are a plethora of choices available in searching for a new expert, attorneys have clear favorites with Word-of-Mouth/ Referrals from other attorneys and Online Search/Directories being mentioned by more than half of responding attorneys.

When asked to name the methods they used in searching for an expert not previously used, the overwhelming majority of attorneys (82%) choose Word-of-Mouth/Referrals from others.

Moreover, attorneys seemed quite willing to share their experience as only 11% of respondents (as shown in the Chart on Page 8) said that they Often/Always experienced a problem in getting the opinions of attorneys who had previously used that expert.

In searching for potential experts you have not previously used, which methods do you use?

Response Scale = Word-of-mouth/Referrals from others, Online Search Engines (Google, Bing, etc.), Online Directories of Experts, Printed Directories of Experts, Professional organizations (AAJ, DRI, etc.), Expert referral service, Direct contact/marketing from experts, Professional Societies, Trade Associations, Local Bar Associations, Other (please specify)



After Word of Mouth/ Referrals, the second most common method attorneys search for experts is through Online Search/Directories of Experts, which 51% of the attorneys responding mentioned.

The reported cost to locate and verify the background and credentials of a new expert was unexpectedly low with more than six in ten (63%) attorneys thinking they were spending less than \$500.

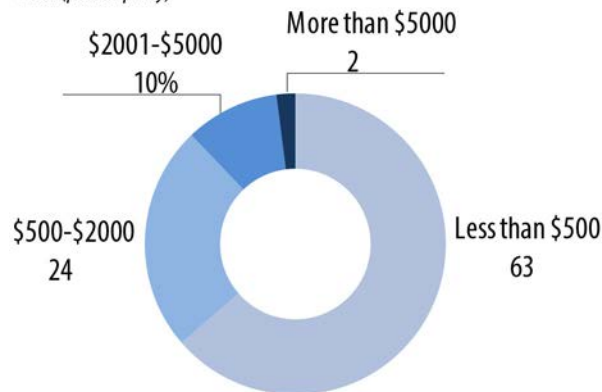
Factors that may well explain this include the failure of attorneys to attribute the cost of their and their associates' professional time to searching for the right expert and instead focusing on the absence of out-of-pocket cost when searching through Word-of-Mouth and Directories. In addition, for some attorneys, there was a minimal level of background & credentials verification, as well as a possible lack of understanding as to the actual costs of a referral service.

The wide range of costs, with almost two out of three attorneys (63%) saying Less than \$500 to locate and verify the background and credentials of a new expert, to the 12% saying more than \$2,000, can be explained by several factors.

- Word-of-Mouth and Online Search / Directories – both with little or no out-of-pocket costs for attorneys – were the most favored methods. (See Chart on Page 5)

What is your estimate of the typical cost to your firm or its clients to locate and verify the background and credentials of a new expert?

Response Scale = Less than \$500, \$500 - \$2,000, \$2,001-\$5,000, More than \$5,000, Don't know, Other (please specify)



- More than a third (36%) of attorneys Never or only Sometimes verify the background and credentials of a new expert. (See Chart on Page 10)

- Almost a third (31%) of attorneys mentioned Expert Referral Service. With those services, the costs can be: (1) a direct fee of \$1,500 or more; (2) a markup of the expert's actual fee (frequently negotiated, but ranging from 20% to 35%, or more); or (3) a combination of (1) and (2).

As to the cost of using expert referral services, anecdotal evidence (subject to validation in our follow-up surveys) suggests that attorneys are not always aware that they are paying a premium. Many believe that the referral agencies are charging the attorneys the retained experts' normal fees and assuming the experts are providing the referral service with a discounted fee structure.

Experts discounting fees with a referral service are certainly not the case in most instances. Our ExpertPages surveys confirm that two out of three (67%) experts that work with referral agencies charge their normal fees, and one can only assume the services apply their markups¹ to those fees.

For example, in a case where the attorney is charged \$20,000, and it includes a 30% markup, the expert would receive \$15,385. And the Referral service would keep \$4,615.

The retaining attorney can find out what the expert is being paid by the referral service, and certainly will know what the referral service is charging their firm. However, the retaining attorney can (1) not necessarily know what the expert's "normal" fees are and (2) may be under the mistaken impression that the rate being paid has not been "marked-up." Hence, a response that "my costs were less than \$500," when in fact they may have been almost \$5,000 more than if the attorney had worked directly with the expert, is certainly possible.

¹At a recent Expert Witness group webinar, a senior referral service executive explained that expert witness agencies have highly varied fee structures with many charging a set fee for locating one, or more, qualified experts, then followed by either an add-on percentage or a flat hourly mark-up. In other cases, that same referral bureau waives its initial fee, and simply marks up the expert's hourly fee. The net result is the retaining attorney is often paying significantly more for the same expert by going through the referral bureau than by contacting the expert directly.

With so many sources available to attorneys to find their perfect expert, the task should be straight-forward; however, almost two out of three attorneys (65%) report that they Sometimes, or Often/Always have problems in locating their perfect expert.

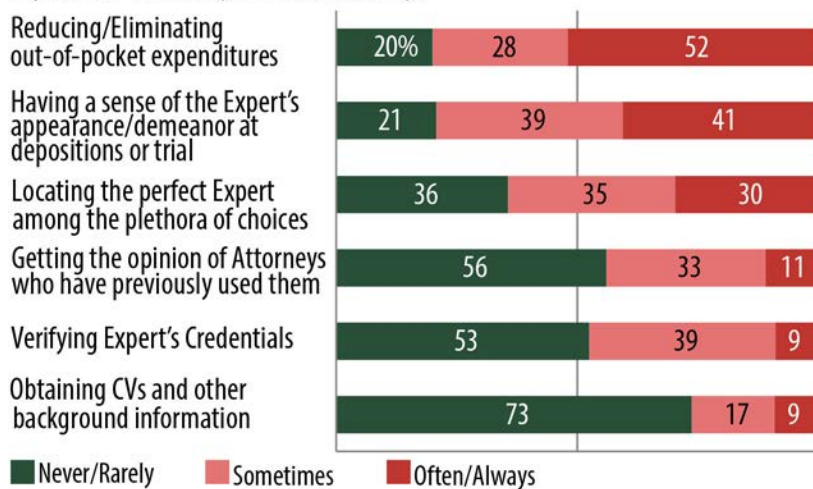
Locating the perfect expert, however, was the third most mentioned problem/issue, with Reducing Out of Pocket Expenses, and Having a sense of the expert's appearance/demeanor (both at 80%) topping the list.

When asked which of the six (6) most common problems/issues in searching for a new expert were experienced most often by them, eight out of ten (80%) said Reducing/ Eliminating out-of-pocket expenses were either Sometimes (28%) or Often/ Always (52%) a problem for them.

As the survey respondents were primarily plaintiffs attorneys – heavily concentrated in practices (personal injury, etc.) where the attorneys carry the out-of-pocket costs before recovery – that outcome is understandable.

Of the six (6) most common problems/issues reported by attorneys in searching for a new Expert (one that they have never used before), which, if any, have been problems/issues for you?

Response Scale = Never/Rarely, Sometimes, Often/Always



Once again, eight out of ten (80%) saying Having a sense of the expert's appearance or demeanor at depositions or trial either Sometimes (39%) or Often/Always (41%) was a problem for attorneys. This is an issue that with seemingly relatively little effort on the part of experts could be reduced. Many experts' "Background" materials consist of a CV, and in many cases, an outdated photograph, when experts could easily add a video at little or no cost.

With seemingly so many sources to find the perfect expert that we previously discussed (see Chart on Page 5) having more than six of ten (65%) attorneys saying either Sometimes (35%) or Often/Always (30%), Locating the perfect expert was a problem for them, seemed somewhat high. Comments from attorneys responding to the survey put those results in better perspective.

In some cases, there was an abundance of experts available, and the problem was taking the time to sort them all out. In other cases, the number of experts with the required expertise, willingness to testify, and an absence of conflicts, was so small, finding a proverbial “needle in a haystack” was the challenge. Our follow-up research will attempt to clarify this issue.

All three of the remaining issues, Getting the opinion of Attorneys who have previously used them, Verifying the Expert’s Credentials and Obtaining CVs and other background information were seen as less problematic for responding attorneys with only approximately one in ten (10%) in each instance saying they Often/Always are an issue.

Section B. Selecting & Retaining the Perfect Expert. What factors go into the decision, are credentials and background verified, and at what point in the process are experts retained?

We would expect that the first step in selecting the perfect expert is obtaining CVs and background information and verifying the accuracy of that information.

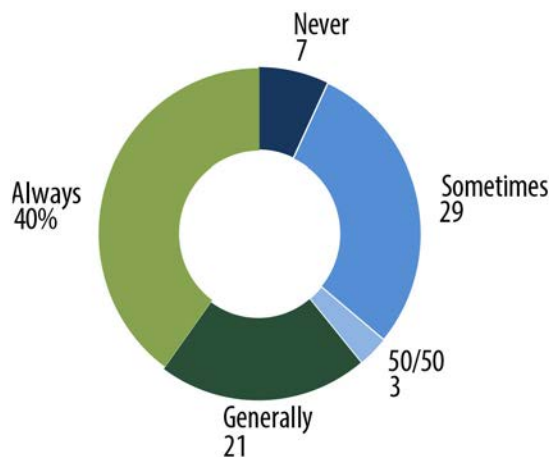
Surprisingly, while most attorneys report not having a problem in doing either, more than a third (36%) never, or only sometimes, verify that information.

When attorneys were asked how often, if ever, they experienced a problem in obtaining CVs and other background information – or in Verifying the expert’s credentials – fewer than one in ten (9%) said that this was Often or Always a problem in either case.

Given the reported ease with which attorneys were able to obtain and verify the information, it was surprising to find that more than one in three (36%) of attorneys reported that they Never (7%) or only Sometimes (29%) verified the background and credentials of a potential new expert witness.

How often do you verify the background and credentials of a potential new expert witness?

Response Scale = Never, Sometimes, 50/50, Generally, Always



Experts' Fees, and the geographical location of the expert played a definite role in the selection process for attorneys.

Our ExpertPages Fees and Practices Surveys over the years have shown the wide disparity in experts hourly fees by field of expertise (with average hourly rates ranging from less than \$200 to \$1,000, or more), but also showed substantial differences in hourly rates within the same field.

In SELECTING experts, how often do you drop consideration of a potential expert because:

Response Scale = Never/Rarely, 50/50, Often/Always



To ascertain the role that fees played in the selection process, we asked attorneys how often they dropped consideration of a potential expert because his/her rates were too high, and more than one in three (38%) said high rates were, Often, or Always a problem.

Expert's hourly fees are important, but only a part of the total cost of retaining an expert. Retaining an expert geographically distant from the trier of fact's venue can – in addition to the normal issues of working remotely – result in substantial out-of-pocket expenses.

Asked if geographical considerations caused them to drop consideration of an expert, once again more than one in three attorneys (35%) said, Often/Always.

It is likely the increasing use of remote depositions via teleconference, such as Zoom® and similar services, that reduce the need for travel will impact what has been some attorneys reticence to use out-of-area experts, although local experts likely will retain some advantage.

Given the concern about fees and expenses, one would expect attorneys to attempt to negotiate experts' fees, but most do not on a regular basis.

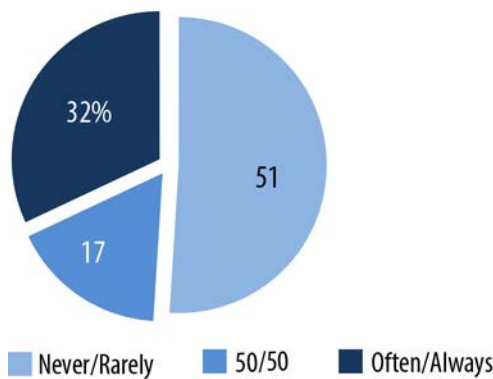
When asked if in the process of selecting and retaining an expert how often they attempted to negotiate with the expert over his or her proposed rates, a full half (51%) said Never or Rarely while only about one third (32%) said Often or Always.

While it sounds somewhat surprising to hear that attorneys are not looking to negotiate, it may well be due to many experts' unwillingness to negotiate due to the fact that it could appear that varying their rates might be used to suggest bias.

In our most recent Fees and Practices Survey, we asked experts, "Do you sometimes negotiate your rates and fees," and almost half (45%) said that their rates and fees were non-negotiable.

In SELECTING and RETAINING experts, how often do you Negotiate over proposed rates/fees ?

Response Scale = Never/Rarely, 50/50, Often/Always



Formal retainer agreements are increasingly being utilized by experts, and all indications are that attorneys view this trend in a favorable light. Of interest, attorneys find these retainer agreements important both for experts that they have, and have not, used previously.

With payment and collection of fees – and more often expenses – being a major point of conflict in attorney/expert relationships, the increasing interest in formal retainer agreements is not surprising with the usage of retainer agreements among experts growing from 53% in 2010 to 73% in 2016.

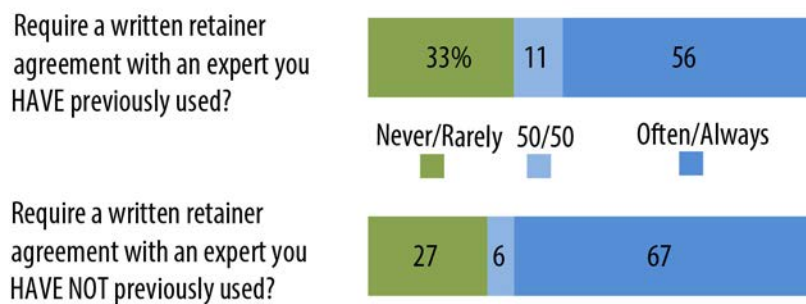
Given the increasing use of fee agreements by experts when attorneys were

asked if they, “Require a written retainer agreement with an expert you HAVE NOT previously used?”, it was not unexpected that two out of three, 67%, said Often or Always.

Not surprisingly when attorneys were asked about experts that they HAVE previously used – with one assuming the previous relationship was satisfactory but supporting the old adage that “Good Contracts Make Good Friends” – more than half (56%) said Often or Always.

In RETAINING experts, how often do you: Require a written retainer agreement with an expert you HAVE, or HAVE NOT Previously used?

Response Scale = Never/Rarely, 50/50, Often/Always



Approximately 10% of attorneys commonly retain experts before establishing an Attorney/Client relationship, and an additional 25% do so on occasion.

Although most experts are retained by attorneys during the course of litigation, ExpertPages has observed an increasing number of attorneys retaining experts well before the attorneys themselves have been formally retained by any client.

Given the substantial financial risk a plaintiff's counsel handling cases on a contingent fee basis assumes, and in the increasing complexity and cost of

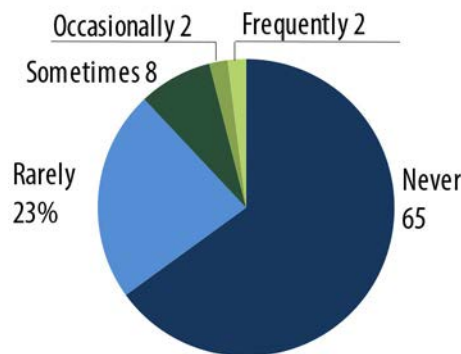
medical malpractice, intellectual property, technology and mass tort litigation, obtaining an expert's opinion – at a relatively small cost – before entering into a relationship with the client is often a prudent first step.

It has long been a standard practice for plaintiffs' counsel to get a medical expert's preliminary assessment as to the merits before agreeing to represent a client in a malpractice case. Defense counsel also sometimes retain experts in advance to be able to demonstrate to prospective corporate and insurance company clients that they understand the technical issues as well as have the legal capability to handle specific types of major litigation.

To determine how prevalent this practice currently is, we asked: "How often, if ever, do you retain an expert in anticipation of litigation BEFORE an Attorney/Client relationship is established?" Fewer than seven in ten (65%) attorneys said "Never." A full one third (35%) said that they have, but most of those (23%) said "Rarely." Although anecdotal evidence from ExpertPages Members seems to suggest that attorneys have been increasingly retaining experts before a Client/Attorney relationship is established, in the absence of an existing benchmark, we will continue to look at this question in our follow-on surveys.

How often, if ever, do you retain an expert in anticipation of litigation BEFORE an Attorney/Client relationship is established?

Response Scale = Never, Rarely, Sometimes, Occasionally, Frequently



Section C. Non-expertise issues. Of all the issues that are most commonly identified by attorneys, which are the ones that occur with the greatest frequency?

Overbilling – or at least the perception that experts overbill – is clearly the issue attorneys most frequently raised in the category of General Consulting/Cost Issues.

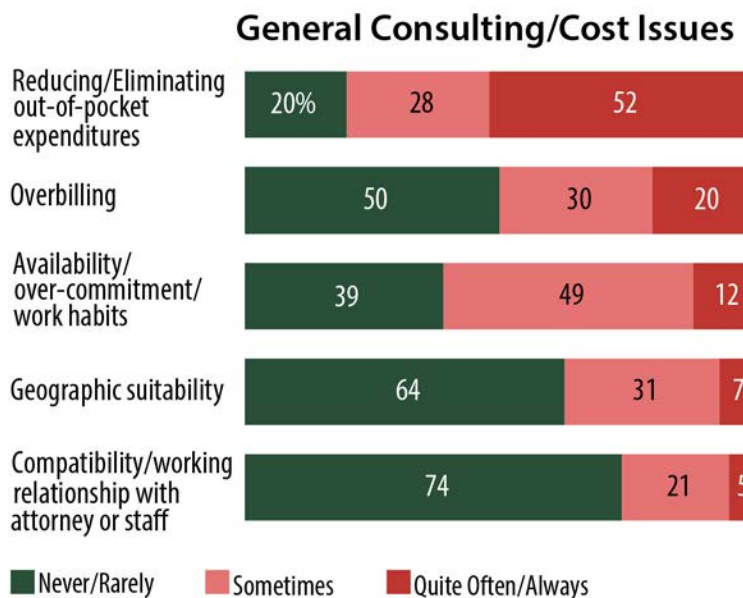
With one in five (20%) of attorneys identifying “Overbilling” as occurring Quite Often/Always, attorneys are likely to regard overbilling as a very serious and not uncommon issue.

This suggests that attorneys and experts should establish a clear understanding, in advance, of the anticipated budget, and the nature and scope of the work the expert will carry out, and that the attorney and expert should regularly confer as to where things stand so that expectations are met or clarified.

Another key issue attorneys raise is the “Availability/over-commitment/work habits” of the experts they retain, with more than one in ten (12%) of attorneys identifying these issues as occurring Quite Often/Always. Geographic suitability (7%) and Compatibility/working relationship (5%) Often/Always are both issues experienced far less often by responding attorneys.

Non-expertise Issues. How often have you experienced any of the following non-expertise issues when dealing with experts you have retained in recent years?

Response Scale = Never/Rarely, Sometimes, Quite Often/Always



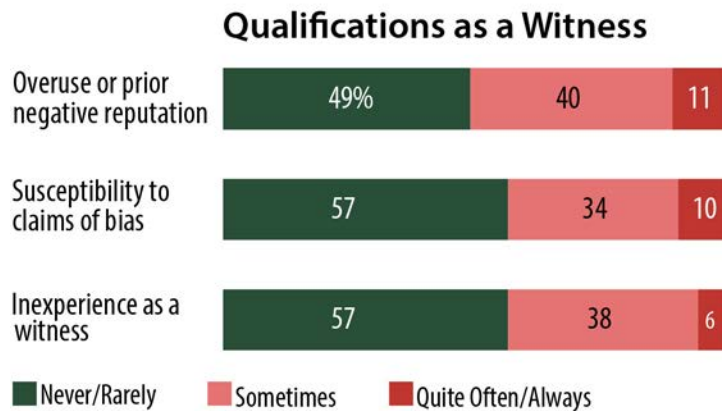
Overuse or prior negative reputation is the leading negative issue when the question is Qualification as a Witness.

Every attorney wants an expert who is a great witness as well as a top expert and the trick is to strike a balance by having an expert with enough experience as a witness, but yet not so much experience as to have a “hired gun” reputation.

As the results clearly show, that balance is hard to achieve, with Often/Always at 11%, 10% and 6% (for each category) all within the margin of error.

Non-expertise Issues. How often have you experienced any of the following non-expertise issues when dealing with experts you have retained in recent years?

Response Scale = Never/Rarely, Sometimes, Quite Often/Always



If anything, attorneys would seem to choose the more experienced over the less experienced expert, resulting in “Overuse or prior negative reputation,” at 51% (11% + 40%) being substantially higher than “Inexperience as a witness” at 44% (6% + 38%).

This data suggests that to make lawyers more comfortable, experts with less experience in litigation should highlight their experience in speaking with other audiences and place a video of themselves on their profiles to provide prospective law firms with an indication as to how they might comport themselves in a deposition or trial.

Having Difficulty in explaining methodology/opinion in layman's term is the most frequent performance issue mentioned by attorneys, while Discomfort with the required position is clearly the least frequent.

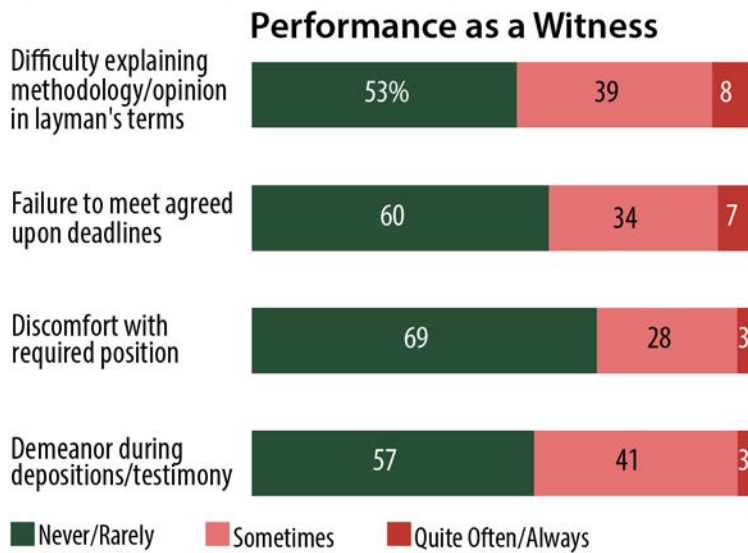
When asked how often they experienced performance issues with their retained experts, on average, attorneys indicated that they experienced any of these issues less than half of the time.

Of all of those, Difficulty in explaining methodology/opinion in layman's terms, at 47% overall (8% Often/Always and 39% Sometimes) was most mentioned.

Conversely, Discomfort with a required position at 31% (3% Often/Always and 28% Sometimes) was the least mentioned.

Non-expertise Issues. How often have you experienced any of the following non-expertise issues when dealing with experts you have retained in recent years?

Response Scale = Never/Rarely, Sometimes, Quite Often/Always



Section D. Expert Reports, Attorney Instructions, Court Appointed Witnesses.

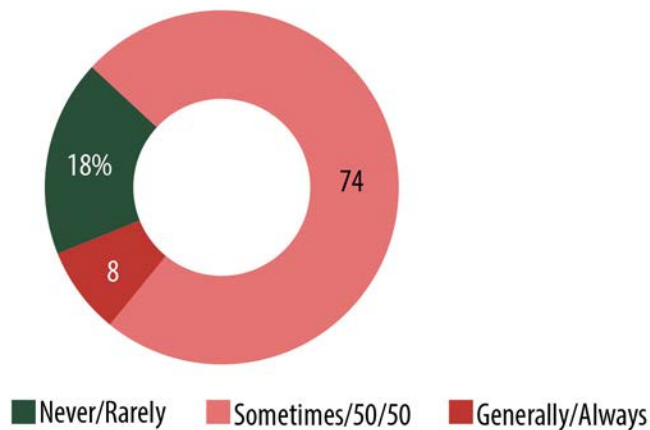
Most attorneys ask their experts, at least sometimes, to reconsider, revise or expand on their draft reports.

More than seven in ten attorneys (74%) either Sometimes (65%) or 50/50 (9%) ask an expert to reconsider, revise or expand on a draft report, while far fewer (18%) Never ask. Even fewer (8%) Generally ask, and none (0%), Always ask.

It seems apparent that clear and ongoing communications between attorney and expert as to the scope and intensity of effort the expert is expected to devote to the matter could go a long way to reducing any “surprises” when the expert’s draft report is delivered.

How often do you find it necessary to ask an expert to reconsider, revise or expand on a draft report?

Response Scale = Never, Sometimes/50/50, Generally/Always

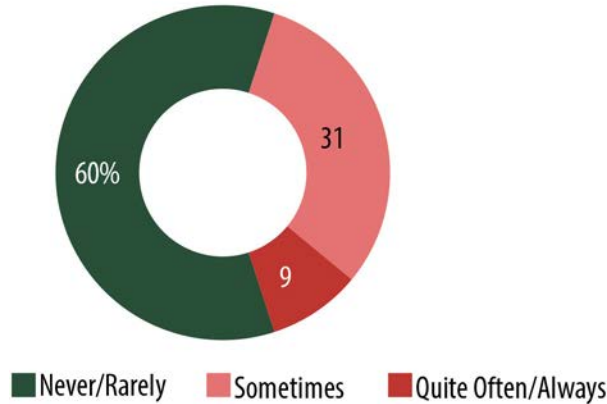


Most experts do not write too much, too soon or too casually.

When asked if their retained experts wrote too much, too soon or too casually, six in ten attorneys (60%) said Never or Rarely. Slightly more than three in ten (31%) said Sometimes, and fewer than one in ten (9%) said Quite Often or Always. Again, this suggests the need for attorneys to provide detailed guidelines to the experts on what they expect in terms of timing and written work, and ongoing communications to assure that expectations are met.

Have Experts Writing too much, too soon, or too casually been a frequent issue for you?

Response Scale = Never/Rarely, Sometimes, Quite Often/Always

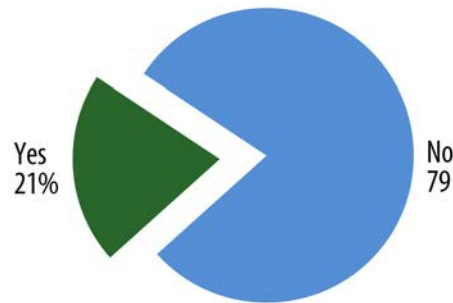


Most attorneys do not provide their experts with written instructions on keeping track of what they review, or rely on, to form their opinions.

Approximately one in five attorneys (21%) provide their retained expert(s) with written instructions with regard to how they should keep track of everything they review, or rely on, to form their opinion. The vast majority (79%) do not. Our research suggests that clear instructions from the attorney to the expert at the outset of every engagement, and ongoing communication as the matter progresses, could go a long way to avoiding problems down the road.

Do you provide your retained expert(s) with written instructions with regard to how they should keep track of everything they review, or rely on, to form their opinion?

Response Scale = Yes, No



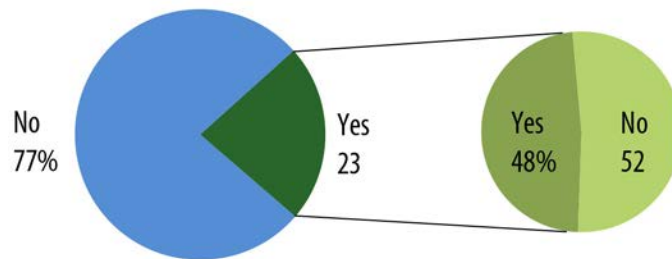
Most attorneys have not been involved in cases in which the Court has appointed experts. In cases where they have, approximately half of the time they were also allowed to bring in their own expert to provide an opinion.

Fewer than one in four respondents (23%) have been involved in the past few years in any cases in which the Court appointed one, or more, experts. The clear majority (77%) have not.

Of those attorneys that have been involved in cases in which the Court appointed one, or more experts, approximately half (48%) were also allowed to appoint their own experts in respect to the same issues, while slightly more (52%) were not.

Have you been involved in the past few years in any cases in which the Court appointed one, or more experts? If Yes: In those cases where the Court appointed an expert, were the parties involved also allowed to appoint their own experts in respect to the same issues?

Response Scale = Yes, No



Methodology

ExpertPages retained DeBow Communications Ltd., New York, NY (www.debow.com), an independent market research firm, to conduct an online survey of Attorneys and non-attorney legal professionals who identified as being actively involved in selecting and/or working with expert witnesses and litigation consultants. More than 200 completed responses from a wide-array of practice areas and firm size throughout North America contributed to the survey.

While every effort was expended to obtain representative samples from both the plaintiffs' and defense bars, the majority of responses have come from lawyers principally representing plaintiffs. This survey is ongoing and is updated periodically. In future surveys we will continue to look at this issue to ascertain possible differences in the experiences and perceptions between Plaintiffs & Defense attorneys regarding experts.

The detailed survey covered numerous facets of each professional's involvement with experts.

About the Author

Gerry H. Goldsholle – A practicing attorney, expert witness, and serial entrepreneur, Goldsholle is Founder and CEO of the Advice Company, a San Francisco area-based internet publisher whose properties include: ExpertPages.com, AttorneyPages.com, and SeniorCareAdvice.com.

Actively developing and launching web-based companies since 1994, including the co-founding and eventual sale of DoItYourself.com to Internet Brands and FreeAdvice.com to 360Quotes LLC., Advice Company has continued to manage a portion of the FreeAdvice-Law section of that property.

Goldsholle is a graduate of Columbia Law School and the Stanford Graduate School of Business' Executive Program. He served as a trial lawyer with the Securities & Exchange Commission, practiced at a large New York law firm and then served as Assistant General Counsel of Metropolitan Life Insurance Company where he later became MetLife's Chief Brokerage Executive and the President & CEO of MetLife Marketing Corp.

About ExpertPages

ExpertPages.com was the first Internet directory of experts, expert witnesses, and consultants. Since 1995 it has been widely recognized as the Internet's leading resource for expert witnesses and consultants.

Each month ExpertPages assists thousands of attorneys, law firms, judges and court personnel, government and law enforcement agencies, insurance companies and others in the legal, business, insurance and forensic communities to find and/or retain experts, expert witnesses, and consultants.

ExpertPages provides extensive information to assist attorneys and legal personnel to locate and utilize experts in investigations, discovery, depositions, trial preparation, expert reports, trial testimony, and appeals. ExpertPages also helps prepare professionals who are considering serving as expert witnesses or consultants in legal and forensic matters as to what is expected of them in writing expert reports, in testifying, and in providing their services to the legal community, enabling them to become highly qualified and effective.

Unlike many firms, ExpertPages does NOT receive any portion of any fees paid to a member expert nor does it charge attorneys or markup expert's fees from the expert retained – or the firm retaining the expert – saving money for both experts and attorneys.



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