# Working with Experts 101: The Do's and Don'ts Every Young Lawyer Should Know.

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## Q: WHAT ARE THE TOP 3 "DO'S" WHEN COMMUNICATING WITH EXPERTS?

### JOHN CONNOR:

"Define the scope of the expert's testimony carefully, as well as the expectations for the report and deposition. What will he/ she cover and not cover? Do you want the expert to try to make the case in the deposition (e.g., as in cases where settlement is likely) or make the opposing expert drag the info out of them (e.g., as in cases where a trial is likely)?"

"Review and challenge the technical argument. If it doesn't make sense to you, it probably won't make sense to anyone else either. Is there sufficient supporting information for each conclusion?"

"Keep the expert informed of scheduling orders and changes, with as much advance warning as possible regarding deadlines."

### PETER BURG:

**"**Do your homework. You should be familiar with the expert's background, fields of expertise and published literature. Also, be clear about the purpose of your contacting the expert."

"Do ascertain immediately if he or she has any conflicts with the parties in your case. It is important to learn this early on rather than downstream when you may have to scramble for a new expert."

"Do provide factual information about your case early on so that the expert understands the nature of the litigation and has context for any opinions you may ask the expert to render."

### TRACIE RENFROE:

"Fully manage the expert's file and its contents"

"Be very clear with the expert about his scope of work and whether he is permitted to vary or stray from the assigned scope of work. One of the worst pitfalls of working with experts is their tendency to pursue their own rabbit trails and ideas without lawyer clearance. This often leads to disaster."

"Carefully examine and test the expert's ability to offer the ultimate opinion you are seeking -- don't presume that because they are the expert that they have the expertise to give the opinion you need."

## Q: WHAT ARE THE TOP 3 "DON'TS"?

**JOHN CONNOR**:

"Don't focus on discovery concerns at the expense of developing a good technical case. I've never seen a case lost due to a discovery problem, but I've seen plenty of cases of poor expert reports because of failure to deliver the right information in an efficient manner and/or to review the expert's work carefully in advance of submittal."

"Don't wait until the last minute to inform the expert of submittal deadlines. Some attorneys seem to use this as a tool for budget control, but the end result is undue stress and an inferior product."

"Don't focus exclusively on the positive. Outside of the expert report/deposition process, get an understanding of the uncertainties and potential weaknesses in the expert's opinions and findings."

**PETER BURG:**

"Do not put your theories of the case and legal reasoning in a format which can be discovered. Remember, in most jurisdictions communications with experts are discoverable."

"Do not try to maneuver or misrepresent the facts of the case in order to either facilitate the expert's opinions or potentially to try to obtain opinions from an expert outside his specific field of expertise."

"Do not only provide to the expert studies or articles helpful to your case. Encourage the expert to do his or her own research. Send articles and studies, if any, which are both potentially favorable or unfavorable to your case."

**TRACIE RENFROE:**

"Minimize written and email communications -- don't allow the expert to conduct casual email exchanges with you or others because all are discoverable."

"Don't present your theories or propositions that you want the expert to examine in writing -- conduct all of this discussion orally."

"Don't share work product such as lawyer summaries or analyses or attorney-client privileged communications with your expert -- it becomes discoverable and all privilege is waived."

## Q: WHAT MISTAKES DO YOUNG ATTORNEYS MAKE WHEN WORKING WITH EXPERTS?

**JOHN CONNOR:**

"Recognize that new experts may not anticipate the level of abuse they may take in a deposition or trial. Help them prepare for that by reviewing the rules of the game in advance and discussing how you will deal with aggressive tactics. Even career experts will benefit from deposition prep by

reviewing the particular questions to anticipate and pitfalls to avoid. Also, don't assume a technical guy necessarily has his act together. If what they say doesn't make sense to you, chances are it doesn't make sense, period."

"The worst disasters I have seen entail new experts who were college professors (people who perhaps are accustomed to having their every word not just believed, but revered) and who walked straight into a *Daubert* buzz-saw by not having carefully critiqued and checked their own work and/or by proudly referring to their work as "novel" or "unique" when challenged."

**PETER BURG:**

"Be aware of the rules of evidence and civil procedure. If in federal court, make sure you are up with *Daubert* and its progeny and you address *Daubert* with your expert from the very early conversations."

"I suspect that most lawyers who have worked with experts have horror stories about circumstances where too much free reign has been given to an expert which resulted in either unanticipated costs and billings, testing being performed that was not planned or desired, or substantial work on opinions that either were not useful or desired. The lawyer must manage the litigation and understand the goals to be achieved by retaining an expert. It is a major mistake to turn over responsibility for either working up the case or proving the case to the expert."

**TRACIE RENFROE:**

"The biggest mistake in expert work occurs because lawyers fail to tightly control the expert's work and development of opinions and reports. Related to this is the common mistake that experts are often allowed to prepare reports that are far too detailed. The more detailed the report, the more fodder for cross-examination and impeachment. Reports prepared by experts should be as minimal as possible. The second major mistake most often committed by young lawyers working with experts is the failure to tie the expert's opinion directly to the elements of the cause of action or defense on which you carry the burden of proof. Too often the opinions of an expert are developed for their persuasive value (which is an appropriate consideration and objective) but without any connection to elements of one's cause of action or defense. Additionally, experts whose work is unfettered and uncontrolled generally run up very large bills, which in turn is used to impeach their credibility and their work so that the investment in their opinions is often wasted. Another major mistake often made is over-reliance on expert witnesses and under-reliance on fact witnesses. Juries so often discount experts as hired guns and prefer to rely upon the "real" fact witnesses."

## Q: HOW DO YOU DETERMINE WHAT TYPE OF EXPERT TESTIMONY YOU NEED?

**PETER BURG:**

"Early in your case you need to determine your burden of proof (e.g., duty, breach, causation and damages) and determine who is going to testify on each point. Often times, you may also have

consulting experts to help you evaluate technical aspects of the case, but whom you may not call upon to testify. These consulting experts can also be very helpful in evaluating experts needed in specific areas. On the defense side, much of your expert selection may be governed by the types of experts retained by the plaintiff and your own independent analysis of the plaintiff's burden of proof and affirmative evidence to support asserted defenses."

**TRACIE RENFROE:**

"Consideration of expert testimony needed for an environmental, mass tort, or product liability case should occur at the outset of the case."

**Q: HOW DO YOU SELECT EXPERTS?**

**PETER BURG:**

"The best sources of experts remain the universities and the medical literature. Every attorney handling medical malpractice, environmental, mass tort or product liability should have intimate knowledge of how to use PUBMED or MedLine. Run a search on-line for the medical issues in your case and ascertain who has published on the topic. Be aware that the first author may NOT be the right one for your case and is often the "youngest" member of the contributing authors. The last named author is the "senior" author. Once articles are found, in addition to reading the article, look at the references. Is there a name or reference which is cited frequently by most articles? Additionally, communicating with other lawyers who have handled litigation matters in the field can be a helpful resource. Plus, this will also give you feedback on positive and negative experiences other lawyers have had with a given expert."

**TRACIE RENFROE:**

"Selection of experts can occur by means of: 1) client guidance; 2) listings and databases; and 3) academia and regulatory agencies active in the relevant disciplines."

**Q: WHY WOULD YOU WANT SOMEONE AS AN EXPERT? WHY WOULD YOU NOT WANT SOMEONE AS AN EXPERT?**

**PETER BURG:**

Reasons why:

"The expert has testified in the past and has survived *Daubert* challenges in similar matters."

"The expert is well-credentialed and well-published on the topic at issue in the field in which you intend to solicit opinions."

"The expert has a track record of success at trial and other lawyers who have utilized the expert speak favorably about their experiences with the expert."

Reasons why not:

"The expert has been successfully disqualified as an expert in similar cases on *Daubert* or other applicable legal standards."

"There are ethical issues or problems in the expert's background or the expert has been taken to task in a number of previous depositions or trials."

"The expert is really not truly an expert, e.g., has too little experience, is not board certified, is too "wishy-washy" with his or her opinions."

**TRACIE RENFROE:**

Reasons why:

"Good communication skills."

"Genuine seasoned expertise in the field."

"Willingness to collaborate with counsel as opposed to dictating/not listening to needs of client and counsel."

Reasons why not:

"Too much baggage in offering opinions that can easily be impeached."

"An expert's unwillingness to take guidance and be controlled by the retaining lawyer."

"Inability to withstand cross-examination."

## Q: WHAT MAKES A GOOD EXPERT?

**JOHN CONNOR:**

"I would think that the top qualities would be:

- established record of knowledge in the area with relevant publications;
- ability to explain the concepts in simple language and with good illustrations;
- no complications with prior positions or testimony; and
- familiarity with the "rules of the game" as indicated by their prior deposition/ courtroom experience.

And yes, in my experience, Plaintiffs attorneys have been less interested in the resume and qualifications of their experts, as the attorneys often plan to "put on the show" themselves and the expert is simply an "extra" at best."

**PETER BURG:**

"Both sides are typically looking for the same thing, the "true" expert in the field: those who have published many peer-reviewed articles and medical/scientific textbook chapters; those who have been invited to lecture on the topic around the country or world; those with a "courtroom presence" and good communicative skills."

**TRACIE RENFROE:**

"Both plaintiffs and defendants are always looking for an effective, persuasive communicator who can also convey depth of knowledge and true expertise. Apart from that core essential, variations in what plaintiffs look for and what defendants look for often vary more on the nature of the case. In many cases, plaintiffs seek an expert to handle not only the technical and scientific issues in the case, but to tell a larger story that they may otherwise like a witness to tell."

## Q: WOULD YOU RATHER USE A CAREER EXPERT OR A NEW EXPERT? DOES IT DEPEND ON THE TYPE OF LAW OR THE FACTS OF THE CASE?

**JOHN CONNOR:**

"Tough question. The answer is that it probably depends on the particular expert and not so much on the case. Career experts can be very good at NOT answering questions and making the opposing counsel do their job, if that is a skill that is needed. However, at the same time, the white haired dudes can get lazy, rely too much on staff, and have poor familiarity with details of the case – making them ripe for picking by a good attorney.

New experts who are knowledgeable in the key subject area can bring a fresher, more open approach to their testimony, but you must be very careful that they understand the rules of the game. Unlike standard engineering work, in a lawsuit, the top dog on the technical team must have intimate knowledge of every calculation made by his/her staff; he/ she should very carefully check for possible mistakes (which can be fatal); and they must understand the significance of certain terms with regard to *Daubert* issues.

New experts sometimes do not anticipate how aggressively they will be challenged on their technical findings, and they need to know how to react properly.

I would add one other note in this regard: For environmental cases, avoid the temptation to use the site consultant as your testifying expert. Although that consultant will certainly have good familiarity with the technical matters at hand, they may be too personally involved in the history of the case, and, if they have not testified previously, they may not understand the rules of the game for the courtroom, where the types of "course corrections" that commonly occur in any environmental/ scientific study, as new data become available, can be portrayed in a very harsh light as egregious errors or intentional misrepresentations."

**PETER BURG:**

"Depends more on the expert. The career expert may, in fact, not be up to date on a new issue or disease. There also may be substantial previous deposition and trial testimony that makes the expert vulnerable. On the other hand, some seasoning and understanding of the litigation process is very helpful. Knowledge and communication skills are tantamount."

**TRACIE RENFROE:**

"My preference is always to use experts who work in their field of expertise as opposed to those who work primarily in the courtroom. However, my willingness to use a non-courtroom veteran depends solely on the depth of true expertise held by the testifying expert. The greater command of the area of expertise, the more willing I am to work with a courtroom novice. At the end of the day, it's always about how effectively they communicate."

## Q: WHAT IS THE DIFFERENCE BETWEEN CHOOSING AN EXPERT FOR DEPOSITIONS/REPORTS VERSUS CHOOSING AN EXPERT FOR TRIAL TESTIMONY?

**JOHN CONNOR:**

"The expert qualifications would likely be the same. However, the instructions to the expert may be quite different. If the case is not anticipated to go to trial but is very likely to end in a settlement, then the expert may need to make their case as strongly as possible early in the process, laying out the details of their argument in their report and deposition. On the other hand, if the case will most likely go to trial, some attorneys prefer a "minimalist" expert report, thereby posing a greater challenge for opposing counsel in the discovery phase."

**PETER BURG:**

"Very little to nothing. The expert has to clearly delineate his or her opinions and the bases therefore, within his or her expert report and then have the backbone to stand up for them during both the deposition and during trial. However, a consulting expert is clearly distinguishable from a testifying expert. We often use a number of consulting experts who are knowledgeable in the fields, but either are not good in the courtroom or prefer to avoid the litigation process."

**TRACIE RENFROE:**

"In selecting an expert for trial testimony, you are looking for the ability to withstand cross-examination and display genuine scientific and technical expertise in a jury-friendly, persuasive manner. In selecting an expert for the deposition stage, you are not necessarily looking for these same

skills; however, my clients genuinely prefer the efficiency achieved in selecting an expert who can handle both the underlying analysis and report writing, as well as the presentation at trial."

## Q: WHEN DO YOU BEGIN THINKING ABOUT *DAUBERT/HAVNER* STRATEGY? DO YOU FIND THAT *DAUBERT*/HAVNER STRATEGY IS WORTHWHILE?

**JOHN CONNOR:**

"As an expert, I would advise that the attorney ensure that the expert is very aware of *Daubert* implications as they make pertain to his/her testimony. Use of certain terms is to be avoided, etc."

**PETER BURG:**

"You need to be thinking about these issues when you first begin looking for your expert. Again, the "true" expert in the field is one who has published many peer-reviewed articles and medical/scientific textbook chapters, those who have been invited to lecture on the topic around the country or world. Those who actually do the work in the area of concern are going to trump the "expert" who, perhaps is also a specialist in a general field, but has not worked/published/lectured on the topic and, instead, has become an "expert" because he or she was given articles to read. In the context of *Daubert*/*Havner*, one must recognize that having an expert stricken may actually be worse than not having an expert endorsed on a given topic. Certainly, these topics need to be given consideration throughout the process of retaining experts and preparing the case."

**TRACIE RENFROE:**

"Good lawyers begin thinking about their *Daubert*/*Havner* strategies from inception of the case. This is a fundamentally important tool in the lawyer's toolbox and planning for offensive or defensive *Daubert* motions must begin immediately. As a defense lawyer, I have generally have great success with *Daubert*/*Havner* motions and view these as an essential consideration in every case. These motions are not necessarily appropriate for every case -- but good lawyers must evaluate the possibility of such motions each time."

## Q: WHAT DO YOU DO WHEN YOU WANT TO USE A CONSULTING EXPERT AS A TRIAL EXPERT? WHAT ARE THE ISSUES AND SOLUTIONS INVOLVED?

**PETER BURG**:

"First of all, you have to go back and review all communications and materials shared with the expert. Obviously, once you convert the consulting expert to a testifying expert, you potentially open up all communications for discovery. Additionally, converting a consulting expert to a testifying expert, you

will need a vetting process that goes beyond merely the expertise and make sure that you are comfortable with the expert for the trial process. Depending upon how the process turns out, you may actually choose not to convert the consulting expert to a trial expert. However, the consulting expert may be able to point you in the direction of other experts in the field who may be more appropriate for trial purposes."

**TRACIE RENFROE:**

"Use of consulting experts as a trial witness is very tricky and should be used with great caution unless one has no concern about the discoverability of the consultant's file. The most important consideration in allowing a consulting expert to serve as a trial expert is to realize the file and work product, including communications with counsel developed as a consultant, all become discoverable absent some agreement or special court order. The discoverability of these materials can have a great chilling effect on communications with a consulting expert. Lawyers must look down the road and seriously evaluate whether they want the freedom to work with a consultant knowing that work is shielded from discovery or whether they intend to convert that consultant to a trial expert, in which case they extent of communication, particularly in writing, must be carefully thought out."

## Q: SHOULD ATTORNEYS E-MAIL/COMMUNICATE IN WRITING WITH THEIR EXPERTS? WHY/WHY NOT?

**JOHN CONNOR:**

"In my experience, e-mails are OK to use when they are limited to simple document transmittals. As an expert, I am biased toward keeping it simple and using the electronic media to deliver necessary documents. As noted above, it seems that some attorneys invest too much energy in "discovery issues" rather than focusing on having the best case to present by ensuing that the expert gets the necessary info and makes good use of it. Miscommunication is a bigger risk than inappropriate communication."

**PETER BURG:**

"Much of this depends upon the rule and the jurisdiction and whether there are stipulations concerning such communications being discoverable. If there is an agreement with opposing counsel that all written communication and draft reports are NOT discoverable, then there may be less reluctance to communicate in writing or by e-mail with an expert, although caution and prudence should always be exercised. Unfortunately, many experts desire and prefer to communicate by e-mail, particularly if they are located far away from the lawyer. Given the potential for the discoverability of such communications, lawyers should be judicious and careful at all times about such communications. If such communications are necessary or desired, the lawyer should make sure that there is not any appearance of impropriety or any suggestion that the lawyer is attempting to influence or manipulate the opinions of the expert."

**TRACIE RENFROE:**

"Absent court order or agreement among counsel, attorneys should assume that all communications, including email with the experts, will be discoverable. It is the rare case when this is not so. Plan accordingly. However, it can be beneficial to both sides to reach agreements at an early stage of the case that communications between experts and counsel are not discoverable. In negotiating these agreements, lawyers must distinguish between non-substantive communications and communications that are substantive in nature which form the basis of the expert's opinion, as the latter should never be insulated from discovery."

## Q: AS A YOUNG ATTORNEY, WHAT IS THE BEST WAY TO GET YOUR FEET WET WORKING WITH EXPERTS?

**JOHN CONNOR:**

"The young associate often works as the go-between for the expert and the legal team, helping to locate key documents, etc., which can be a good learning experience. Also, participating in depositions for both sides' experts is a good way to see where the rubber hits the road. Knowing how to make a career expert answer the questions is an acquired skill. It's nice to be able to see the legal pro's in action."

**PETER BURG:**

"Ideally, it would be for the young attorney to work up experts with a more senior attorney. This would involve attending meetings with the expert, participating in the expert selection process, attending pre-deposition strategy meetings, the deposition process, pre-trial and trial. Alternatively, a young lawyer can learn a great deal by working with seasoned experts who have had frequent and substantial experience with the litigation process."

**TRACIE RENFROE:**

"The best way to begin working with an expert is to design the direct examination of your expert and design the cross-examination of your opponent's expert and then begin to work with your expert in supporting the direct and cross. Ideally, your expert will guide you in shaping the direct examination and the cross-examination to achieve the testimony that you need to meet your burden or proof or to undermine the opponent's expert. Above all, do not wait until the eve of depositions to begin thinking about the testimony of your expert. The foundation work needed to develop good expert opinions usually takes a lot of time and thought, and you should not short-change your client or your expert by leaving these things until the last minute."

## Q: ARE THERE ANY PARTICULAR "GOLDEN RULES" OF WORKING WITH EXPERTS THAT A YOUNG ATTORNEY SHOULD KNOW?

**PETER BURG:**

"Be aware of the "ring around the bath tub" phenomenon and employ it. Each lawyer handling a medical malpractice, mass tort, environmental or medical device MUST learn as much medicine and science as possible. You cannot work with an expert if he or she has explain all the minutia repeatedly. Good trial lawyers often know much of the science of the issue as the expert. Then, when the case is over, you pull the plug and start the science and medicine of your next case, leaving a ring of knowledge around the tub that you will carry forever.

Additional "golden rule" is remember that you are the lawyer and it is YOUR case. Fit the expert into your strategy, plan and goals for the litigation. Do not expect the expert to know more about the law and the case presentation than you and do not abdicate responsibility for the case to the expert."

**TRACIE RENFROE:**

"'Golden rules' of working with experts must always include careful thought about the discoverability of what you provide your expert. Be careful not to undermine your expert or set him up for impeachment by placing something inappropriate in this file. Protect the file as you work with your expert. The second "golden rule" is never to push your expert beyond his comfort level, as his credibility will easily be impeached and the entire effort, and perhaps your case, lost. Never force your expert to go outside the scope of his given expertise. This rule is violated more than it is followed, typically at great cost to the credibility of the expert and the merits of the case."

## Q: WHAT OTHER ADVICE WOULD YOU GIVE A YOUNG ATTORNEY REGARDING WORKING WITH EXPERTS?

**JOHN CONNOR:**

"Drink lots of coffee."

**PETER BURG:**

"Treat experts with respect and expect respect. Make sure the expert understands that you are a person of integrity and you expect integrity from the expert. While you are seeking to solicit opinions that are favorable to your case, you always want the expert to perceive that you are seeking to be truthful and accurate despite the inherent bias created by your advocacy role. Try not to argue with your experts although discussion and collaboration are important. Finally, "have fun". One of the great things about being a trial lawyer is that we get to learn a lot about a lot of different subjects and we get to interact with some of the best and brightest persons in their fields!"

**TRACIE RENFROE:**

"Prepare. Prepare. Prepare before starting work with your expert. Know the subject matter that you will be seeking expert testimony about so that you can retain control of what your expert is doing."

"Thoroughly cross-examine your own expert and test every assumption and every conclusion well in advance of reports, depositions, and trial testimony."

"Do not overestimate your expert's ability to communicate his concepts to a lay jury. Far too often young lawyers "leave it" to the expert to figure out how best to communicate their opinions when it is the lawyer's responsibility to shape the testimony in a way that the jury can understand. The best expert testimony is for naught if it's not presented in a manner that the jury can understand."

## ABOUT THE PRESENTERS

### Peter W. Burg

Mr. Burg's practice focuses on complex litigation in a wide range of substantive areas. Mr. Burg has developed a national reputation as a trial lawyer handling cases in the construction field, product liability, personal injury, and mass tort litigation. Mr. Burg has been selected by members of the national legal community as one of the 2009 Best Lawyers in America for Mass Tort Litigation.

### John A. Connor

Mr. Connor is President of GSI Environmental, Inc. (GSI). He received an M.S. in Civil Engineering from Stanford University and has over 28 years of experience in environmental engineering, with specialization in environmental site investigation, human health and ecological risk assessment, and corrective action design. Mr. Connor is Registered Professional Engineer, a Licensed Professional Geoscientist, and a Diplomat in the American Academy of Environmental Engineering.

### Tracie J. Renfroe

Ms. Renfroe is a partner in the Litigation Practice Group in King & Spalding's Houston office. Ms. Renfroe is a trial attorney who represents energy, petrochemical, and manufacturing clients in a broad array of litigation. Her practice focuses on toxic tort, product liability, environmental, and commercial disputes, including complex multi-party litigation in state and federal courts.