

Analysis & Perspective

There's a new trend in class action lawsuits: Lawyers increasingly employ expert witnesses, "typically law professors, to testify about critical aspects of the class suit: certification, settlement, and attorneys' fees," according to law professor William B. Rubenstein. This growing practice "raises legal, policy, and strategic questions" for both plaintiff and defense counsel, and they "should guard against being caught off-guard by an expert retained by opposing counsel," Rubenstein writes.

Using Law Professors as Expert Witnesses in Class Action Lawsuits

WILLIAM B. RUBENSTEIN

Class action lawyers increasingly employ expert witnesses, typically law professors to testify about critical aspects of the class suit: certification, settlement, and attorneys fees. This growing practice raises legal, policy, and strategic questions that both plaintiff and defense counsel must master.

How Are Class Action Lawyers Using Experts?

Class action lawyers have employed law professors to testify as expert witnesses at various stages of the class suit. This expanding practice should be distinguished from the conventional use of expert witnesses to testify as to the substance of the issues in the underlying case itself. In mass tort cases, for example, scientists opine about causation, while in antitrust matters, economists estimate damages, etc.

Law professors are deployed in a different manner. Rather than testifying about the substance of the issues or claims in the lawsuit, they often testify about the mechanics and dynamics of the class suit and attorneys' fees. More specifically, class action lawyers have used law professor experts to testify about: 1) the certification decision; 2) the fairness and adequacy of a proposed settlement; (3) the method a court should use in assessing fees (e.g., lodestar vs. percentage); and (4) the reasonableness of a proposed percentage fee or of the hours spent accomplishing legal tasks on behalf of the class. Expert testimony has also been offered on the question of how to allocate fees among attorneys. Rule 23(g) now focuses a court certifying a class on the attorneys' qualities at the outset of the action, not just at

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settlement; this rule change is likely to generate yet another occasion for expert testimony on both sides.

The law professor expert typically provides testimony in the form of a written declaration. The expert may also appear at the certification or fairness hearing and testify in person, though this is less common. The expert is generally paid an hourly fee; he cannot take an interest in the outcome of the lawsuit lest his impartiality be compromised.

Who Qualifies as an Expert?

Federal Rule of Evidence 702 enables expert testimony on matters involving specialized knowledge when the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. Fed. R. Ev. 702 enables a witness to be qualified as an expert if that person possesses knowledge, skill, experience, training, or education. Rule 702 does not require that an expert possess all five traits; courts look at the totality of the experts qualifications to decide whether she truly possesses the relevant expertise.

Law professors who regularly teach, study, and write about class action law likely possess the knowledge and education Fed. R. Ev. 702 requires. Those who have significant litigation experience, particularly in complex cases, will also possess skill, experience, and training. Retired judges whose work on the bench included oversight of complex cases would also likely qualify as experts. While fellow litigators themselves might have the qualities of expertise FRE 702 requires, using a litigator as an expert witness poses some risk as practicing lawyers will likely not have the same appearance of impartiality to a court as a scholar or retired judge does.

Although a law professor may be a member of the bar, while serving as an expert witness he will likely not be bound by the same ethical constraints that apply to lawyers. ABA Ethics Op. 97-407 (1997) suggests that the lawyer-expert has no attorney-client relationship with the client. In retaining a law professor as an expert, counsel should treat the professor, even if admitted to practice law, as an expert not as co-counsel.

Can Lawyers Be Expert Witnesses?

Courts generally do not like to accept expert testimony from lawyers. The judge is the courtroom's expert on legal matters. Qualifying a lawyer as an expert may confuse the jury about whose recitation of law to follow. This general rule is not applied, however, in cases where a lawyer's conduct itself is at issue. In legal malpractice cases, it is routine that law professors testify as experts on the question of what constitutes a standard practice in the community and whether the defendant's actions lived up to that standard.

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Similarly, courts have generally accepted law professor experts in class actions cases. The core concerns that arise when lawyers serve as experts are inapplicable. First, the class action expert testifies to a judge not a jury, so there is no likelihood of confusion. Second, because class actions are very complex cases, the expert likely knows more about class action practice than the generalist judge and can provide helpful insight. Third, the law professor's testimony is generally about the application of legal principles to the facts of the case, not about the content of the law itself. Everyone agrees on the Rule 23 certification standard, for example; the question about which the expert testifies is whether it has been met in this particular case.

For these reasons, concerns about using law professors as experts rarely surface. There are only a few courts that have disallowed the testimony. Just as often, courts not only allow the testimony, they request it. Some courts seek such testimony to help them understand complicated issues; others seek law professor expert testimony because issues are uncontested (such as the fairness of a settlement) and the presence of an expert assists the court's assessment of the issue in this non-adversarial setting.

When Should Counsel Employ Experts?

Plaintiffs' and defendants' counsel must weigh the costs of hiring experts against the likely benefits. The balance differs at different points in the lawsuit.

At Certification. At certification, plaintiffs' counsel may retain an expert to help persuade the judge that the case can be certified or that counsel can serve as lead counsel. If the case is being handled by a judge likely to be impressed by such testimony, it is probably a good investment. The cost of the testimony will pale in comparison to the benefits of certification; and the cost can ultimately be recouped at judgment. An expert may also assist the plaintiffs' attorneys in understanding the strengths and weaknesses of their case—and hence in securing certification—so it may be worth the consultation costs even if the court finds the testimony of minimal value. If the judge is hostile to such testimony, it should not be offered. Plaintiffs' counsel must also be prepared for the possibility that the defendants might

offer an expert to oppose certification. Rather than scrambling to find their own expert for reply purposes, plaintiffs' counsel should prepare for this possibility in advance. They can do so simply by retaining an expert to be "on call" in case his testimony is needed for, or at, the certification hearing.

If plaintiffs offer expert testimony, defense counsel can (1) take the position that such testimony is unnecessary (and perhaps inadmissible) legal testimony; (2) depose and try to discredit the plaintiffs' expert; (3) respond with their own expert; (4) all of the above. While arguing against experts and retaining one's own appear to be contradictory, defense counsel might nonetheless want to do both in case the judge rejects their argument to keep out expert testimony. Defense counsel also have the strategic opportunity to introduce expert testimony in opposing certification even though the plaintiffs offered none in moving for certification. This can catch plaintiffs' counsel off-guard and leave them scrambling for a response at the last minute.

At Settlement Approval. The strategic dynamics change at settlement because now plaintiffs and defendants are joined in seeking approval of the settlement. They need to do two things: convince the judge to approve the settlement and ward off objectors. Experts can assist with both tasks.

There are three situations in which experts might be especially helpful. First, a judge not familiar with class action practice may be assisted by expert testimony that carefully lays out the relevant legal issues and applies them to the facts of the case but does so in a manner distinct from the way an advocate would in a brief. Such expert declarations can serve as a mini-course on settlement approval for the novice judge without insulting the judge. Second, at the other end of the spectrum, counsel often employ experts in very large cases as such testimony helps support the settlement and the cost is easily justified by the scope of the case. Third, if objections are anticipated, expert testimony in support of the settlement provides neutral third-party support for it and thus might help convince the judge of its merit. Such testimony may even scare off would-be objectors. An expert witness may also assist settling counsel in identifying—and correcting—problems with the settlement before it is presented to the court.

Parties seeking to object to a class action settlement may be especially helped by a law professor's expert declaration. Objectors have a bad reputation as they often appear to be holding up the settlement only to extract a fee (this is not true of public interest group objectors). Objectors can demonstrate their *bona fides* by spending money to employ a neutral class action expert in support of their position. Such expertise also lends weight and credibility to the objection.

At Settlement Fees. Perhaps the most important use of expert testimony is in supporting plaintiffs' fee request and/or in supporting one side or the other in a fee dispute among attorneys. An attorney seeking a fee award for her own work looks self-serving. This image is exacerbated because in a typical class case the fee is coming from the plaintiffs' fund and yet there is unlikely to be any opposition to the request. The judge shoulders the responsibility of protecting the absent class members' interests. The expert's declaration may lessen the courts' wariness by demonstrating that a third party has reviewed the papers and supports the fee request. Even though the judge is aware that plaintiffs' counsel has

hired the expert, an expert-supported fee request may well generate more deference by a court as it provides outside support for the court's ultimate approval of the settlement.

Experts may also be helpful in fee disputes among attorneys. These can arise in class cases where competing counsel each seek fees. Or they can arise where settling plaintiffs' counsel cannot agree on how to allocate the fees among the attorneys. Again, the expert declaration lends the opinion of someone who is not himself taking from the fee award so has less of a vested interest in supporting it.

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More generally, because law professor experts may appear on fee matters regularly, they may be able to of-

fer counsel insights and strategies and help focus arguments. As securing fees is of critical importance, this assistance may well be worth the cost.

Conclusion

Expert witnesses are a new and recurring feature of class action practice. Lawyers litigating class cases should be familiar with the costs and benefits of using law professors as experts and should guard against getting caught off-guard by an expert retained by opposing counsel. Familiarizing yourself with the issues raised in this outline and with potential experts in advance is important preparation for class litigation. A fuller version of this overview, and a lot of additional class action information, is available at my Web site www.classaction-professor.com.