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## Corrections Lawsuits...Retain Your Expert Early!

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Some years back while leaving a courtroom with a colleague, who was a defendant in a case, I overheard his conversation with the defending attorney. The defendant had just completed his testimony. At issue during his testimony were inmate records which my colleague claimed could not be found at his facility. The plaintiff's attorney was incredulous. She believed the records must exist there and that the defendant was not being truthful. As we exited the courthouse the defendant questioned his attorney as to why the plaintiff's attorney had not pursued the location of the records further. His attorney's answer, "Because as good as she is, she does not know what she does not know.....she should have retained an expert."

It turns out that the records did exist but not at the facility of the defendant. The explanation was fairly simple. The plaintiff was at one time incarcerated at the defendant's facility. However, he completed his sentence and was released. Sometime later he committed another crime, was convicted and was incarcerated at a facility other than that at the time of his release. The policy of the department involved was to send those "dead records" to the inmate's new facility. This circumstance never occurred to the attorney so she never thought to seek the records elsewhere and did not go beyond asking the defendant about records storage at the time of release. After thirty plus years of in-service experience and three years consulting post retirement, I have developed two solid opinions regarding attorneys. The first is that they are overwhelmingly bright, dedicated and professional. Secondly, attorneys not unlike all of us "Do not know what it is they do not know". A doctor treating the broken leg of a person who fell from a ladder may have little need to know the circumstances which led to the injury. In all likelihood the doctor can successfully treat the injury with knowledge from -x-rays and perhaps an awareness of the patient's medical history. The attorney, on the other hand, would require a great deal more information for success on behalf of the injured client. If the injury occurred at a work place the attorney would want to know if the injured was properly trained. Did certain policies govern the use of the ladder? Did the injured follow policy such as employing assistance in use of the ladder? Did the place of employment have a history of such accidents? Was the ladder defective? Of course, most attorneys would know to ask these questions and may retain an expert to answer some of them. The difficulty with prisons and jails is that variables from facility to facility and jurisdiction to jurisdiction are vast in number and often so remote that it would be unreasonable to expect even the brightest, most dedicated attorney to have an awareness of every nuance. A corrections expert retained early on will provide invaluable assistance with the identification of the variables and their application to a specific case, thereby maximizing the potential for success.

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All of my experience with attorneys tells me that they will read and mull over the previous paragraph with interest and some general agreement and be inspired to ask for more specifics. Variables? Nuances? A few examples follow.

Correctional Facilities are individual communities. Each has a culture in and of itself. The culture within these communities is developed from variables, which alone or in combinations make that which may be perceived as common, in reality unique. Region of the country would certainly have an impact on the personality of the facility. The physical layout of the facility or political climate may have an impact on everything from employee attitude to the type of rehabilitative programs offered. A correction officer from urban New Jersey may have viewpoints which differ greatly from those held by an officer from rural Texas. While Vermont might offer computer training as an inmate program Louisiana might focus on agricultural work. An older facility may face infrastructure difficulties causing problems ranging from proper lighting to availability of recreation space. The age of the facility may also affect employee acceptance of and adherence to new policy and procedure, ('who cares what central office says, we do things our way'). The security level and mission most certainly affects facility culture. A medium security juvenile female substance abuse treatment center will have little in common with an adult male maximum-security facility. These are but a few examples and there are many more. In combination with each other one can easily see why these varied characteristics make the culture of each facility distinct. If retained early in a case a quality expert will be able to identify facility characteristics in order to better define its culture. Having done so the expert will then be prepared to offer some very practical and valuable assistance. This practical application comes in three ways. First with discovery. Having clarified the culture of the facility the expert can assist the attorney by directing attention to specific crucial information. Federal and state laws, along with certain departmental rules, regulations and local policy may apply to the circumstances of the case. Such things as training records and investigation reports may matter. For example, in one case an employee claimed in a report that he had been trained in the use of the piece of equipment during his initial training. A review of policy showed that the equipment was not placed into use until several years after the claimed training and a further review of training curriculum showed no lesson plan for training in the use of that equipment. Most incidents, depending on their magnitude are investigated either internally or by external resources. An expert will, in most cases, be able to identify the level of the investigation, the type of documents which might be produced and may offer an evaluation of the investigation's conclusions. Other records such as but not limited to employee grievance records, employee evaluations and disciplinary history, inmate disciplinary history, labor management minutes, and audit results may be critical.

Second, is the matter of the expert assisting with preparation for witness examination. Having reviewed the premise of the case coupled with the characteristics of the facility the expert then will be able to attach that information to a particular witness type. For example, security, civilian and contract employees have different roles and viewpoints. At a deposition a question posed to a correction officer might evoke a very different answer to the same question when asked of a teacher. Furthermore a question about the value of an inmate program to a correction officer at a treatment center might garner a different response than that from a correction officer at a maximum-security facility. Also, supervisors and administrators might have an entirely different viewpoint than that of a correction officer and all of those might vary from individual to individual. The point again is that the expert will, after reviewing

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the case circumstances, applicable documents and corresponding facility culture, be able to develop questions appropriate to the individual witness. In the end it might be only one question but it might well be that it is the one that matters the most.

Finally as to expert conclusions and report production. Certainly engagement in the process will help in the development of expert conclusions. The volume of information available to the expert has a direct correlation to the expert's ability to draw conclusions and issue a strong report. Ultimately, the engaged and informed expert will be much more able to support those conclusions during testimony. In the case noted at the beginning of this article the jury found for the defendant. In that case an expert hired early would, have recognized the situation and advised the plaintiff's attorney in several ways. The expert first would have sought written policy regarding the administration of inmate records. Secondly, the expert would have requested information as to which employee was responsible for administration of records and advised the plaintiff's attorney to depose that individual. Finally, the expert would have advised plaintiff's attorney to ask the defendant the next question, which would have been, 'If you are not in possession of the records do you know who is in possession of them?' The defendant's attorney was correct. Plaintiff's attorney, 'did not know what she did not know' and clearly would have benefited by retaining an expert at the outset of the case. While better late than never, retention of a correction's expert early will almost always increase the likelihood of success.

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