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Five Tips for Preparing a Testifying Expert for Trial

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Under the Federal Rules of Civil Procedure and applicable state court rules, qualified experts may provide opinion testimony at trial, enhancing the presentation of your case. An expert witness who has not been properly prepared, however, may undermine your case rather than strengthen it. While effective expert witness preparation may seem intimidating to a young attorney, it is crucial to any successful trial strategy. This article provides helpful tips for young attorneys preparing experts to testify.

Tip 1: Preparing an expert for trial is a process that starts when the expert is first engaged.

Identification of areas requiring expert testimony at trial should occur as early as possible in the litigation. When choosing an expert witness to engage, be sure to focus not just on the expert's qualifications but also on any prior experience testifying, including their demeanor, confidence, and effectiveness in communicating. Be sure to discuss with the expert any prior cases in which he or she has been involved, deposition testimony the expert has provided and/or publications he or she has authored – all of which may be needed to be disclosed at some point during the litigation. Early in the engagement you will need to confer with the expert and educate them about the facts of the case, applicable legal standards, and case themes. As the facts continue to develop, you will want to be diligent and keep the expert apprised. Because not all communications with experts may be protected, be sure to consult applicable civil procedure rules (e.g. Rule 26 of the Federal Rules of Civil Procedure, if your case is in federal court) to avoid inadvertent waiver of privileged information. If you are working with multiple experts, be sure to note that communications experts are generally not protected.

Bear in mind that, absent stipulation or court order, the Federal Rules of Civil Procedure require parties to identify testifying experts and issue expert reports at least 90 days prior to trial for affirmative experts and 30 days for rebuttal experts.¹ Some states follow these deadlines and requirements but not all states do. If your case is in state court, you will want to consult the state rules of civil procedure and local rules early in the case to determine when testifying experts must be identified, whether expert reports are required, and when such reports are due. By the time expert reports are due, you will already have been well on your way to preparing the expert for testifying at trial.

If an expert report is required, you will also need to consult the applicable civil procedure rules governing the report's content. The importance of the expert report cannot be overstated. Although the expert report is generally inadmissible hearsay, it will nonetheless form the basis of the expert's deposition and trial testimony. The Federal Rules of Civil Procedure specify that the report must include: (1) a complete statement of all opinions the witness will express and basis and reasons for them; (2) the facts or data considered by the witness in forming his opinions; (3) any exhibits that will be used to summarize or support the opinions; (4) the witness's qualifications, including a list of all publications authored in the previous ten years; (5) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and (6) a statement of the compensation to be paid for the study and testimony in the case.²

Tip 2: Do not lose sight of your role in educating the expert.

Remember that the main point of the expert testimony is to support the theory of your case and enhance its presentation. While an expert will generally have a far greater grasp of the technical or scientific topics at issue

in the litigation than you, remember that you are best situated to educate the expert on the facts and applicable substantive law, without which the expert cannot present his or her opinions persuasively. Before the expert begins drafting a report, you will need to spend time revisiting the facts and legal theories with the expert. Additionally, you will want to spend time with the expert identifying with precision what their opinions will be; the methodologies the expert will use; documents and evidence that support their opinions; any assumptions underlying their opinions; and any potential lines of attack.

Tip 3: Be aware of limitations on rules protecting certain communications with experts.

While you will want to maintain an open line of communication with your expert, you will need to be aware of the limits on protected communications with experts. The Federal Rules of Civil Procedure, for example, protect drafts of any expert reports, regardless of the form in which the draft is recorded.³ Be attentive to the fact, however, that what constitutes a draft report (for example, notes, outlines, memoranda) may vary from one jurisdiction to another. Additionally, the rules also provide that, although "communications between the party's attorney and any witness required to provide a report" may be protected work product, such protection is limited "to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed."⁴ Accordingly, many communications may not be protected. You should be aware of these limitations when communicating with a testifying expert and take care to segregate protected communications from non-protected communications (such as communications containing facts, data, and assumptions). You should also bear in mind that communications with experts, even if protected, may still be subject to production if "substantial need" for such materials is shown and the party seeking disclosure cannot "without undue hardship" obtain the substantial equivalent information by other means.⁵ Because of this, as a practical matter, you may consider limiting communications to and by experts, regardless.

Of course, if the case is in state court, you will want to consult the applicable state and local rules. For example, in Louisiana, whether draft expert reports, notes, and communications are discoverable hinges on whether they reveal the mental impressions, opinions, or trial strategy of the attorney for the party who has retained the expert to testify.⁶ And such materials may become discoverable upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means. Additionally, such materials will become discoverable if the expert relies on them in forming his or her opinion. Becoming familiar with the applicable rules regarding discovery will help you avoid inadvertently waiving protected information.

Be sure to communicate the limitations on protected communications to your expert as well.

Tip 4: Use the expert report to guide the preparation of the expert witness for deposition.

Once expert reports are issued, any party may depose your expert.⁷ Because opposing counsel will endeavor to obtain harmful admissions, challenge underlying assumptions, and even lay the foundation to disqualify your expert, you must thoroughly prepare the expert for the deposition.

Though preparing an expert witness for deposition is no different than preparing fact witnesses in most respects, there are some differences. The expert report will be the roadmap for the deposition and preparation should track the expert report closely. Prepare the expert to provide his or her opinions in a concise and confident manner and avoid being rattled. When working with your expert on the expert report, you must have these goals in mind and ensure that the expert report is structured in a way that facilitates your expert's testimony.

Depending on the case's complexity, you may want to reserve several days to prepare your expert witness. As with any witness, be sure to remind your expert that the most important rule to remember is to tell the truth. Additionally, even though many experts are familiar with deposition procedure, you should not rush through deposition process basics. If possible, you should prepare the expert in the same room where the deposition will take place. Discuss details such as where the expert, counsel, court reporter, and (if applicable) videographer will be seated or situated. Do not forget to give the expert an opportunity to ask questions before launching into the substance of the deposition.

Additionally, as with any witnesses, you will want to instruct the expert witness to listen to each question carefully; request clarification if needed; think before responding; and pause long enough to allow you to object to a question if needed. Remind the expert to answer only the question asked. This last point is particularly important with expert witnesses. Because of their expertise, an expert may launch into a lecture on the subject, which should be avoided. Such lapses may open new, and possibly unanticipated, lines of questioning that could be avoided with preparation. You can address such issues by building in plenty of time to practice questions and answers to expected deposition questions with the expert, using the expert report as a guide.

Tip 5: Prepare the expert to be persuasive and not become flustered or combative on the stand.

Once the expert has been deposed and prior to trial, you will once again need to build enough time to prepare the expert for testimony at trial. Remind the expert to review the expert report, deposition transcript, and all materials upon which the report relies. Set aside adequate time to practice the expert's direct examination, cross examination, and voir dire. Preparation is key, as without thorough preparation, an expert may get the underlying facts of the case wrong, seriously undermining any opinions.

Be sure to instruct the expert not to take any notes with them to the stand. To help the expert organize his testimony, consider using a demonstrative such as a PowerPoint to go through the expert opinions and methodologies. Using a demonstrative has the added advantage of taking you as the attorney out of the spotlight and allows the expert to talk directly to the fact finder. Such demonstratives will also help the fact finder better understand the expert's testimony. If you use a PowerPoint, you will want to practice going through the PowerPoint with your expert multiple times. When preparing your expert, practice using any technical devices that will be required, as technical difficulties may make you look unprepared or rattle your expert.

While the substance of the testimony is important, be sure to focus also on presentation and demeanor. Practice answering questions without resorting to jargon. Remind the expert not to become defensive during cross-examination. If a question is objectionable or if opposing counsel is harassing the expert, assure the expert that you as the attorney will handle it. Be sure to impress upon the expert that cross-examination is an opportunity to defend his or her opinions and bolster your case. There are no points to be gained from the expert sparring with opposing counsel on cross-examination. Composure under pressure sends a message that the expert is confident, well prepared, and professional. Just as with a deposition, remind the expert to pause and really process the question at hand before answering. Getting your expert witness accustomed to doing this with every question will greatly diminish the chances that he or she will falter under pressure. The priority is to not compromise your witness's credibility or image.

Finally, when preparing the expert, be sure to consider your jurisdiction and jury composition (if applicable). Small town jury members will have accumulated different life experiences than jury members in a larger city, for example; it is important for the expert to be familiar with the local flavor so that the expert, with preparation, can best translate complicated expert theories in a way that connects with the specific audience.

¹ Fed. R. Civ. Pro. 26(2)(B) and 26(2)(D).

² Fed R. Civ. Pro. 26.

³ Fed. R. Civ. Pro. 26(b)(4)(B).

⁴ Fed. R. Civ. Pro. 26(b)(4)(C).

⁵ Fed. R. Civ. Pro. 26(b)(3)(A)(ii).

⁶ La. Code Civ. Pro. Art. 1425(E).

⁷ Fed. R. Civ. Pro. 26(b)(4)