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Expert Witness Practice – Basic Tips For Becoming A Better Expert

by
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Abstract: This article explores a variety of items that an expert witness should consider during preparation for trial and also during testimony. Experts can become more competent by understanding critical facts of the case at hand as well as the retaining attorney's trial theme. To be more compelling and believable on the witness stand, experts should deal with any imperfections or "bad facts" honestly and up front. When they are familiar with the evidence code in their particular jurisdiction, their testimony will be enhanced and the strain of cross-examination will be lessened. Experts will also be more successful on the witness stand if they adhere to pertinent testimony and do not go out on a limb, which could jeopardize the outcome of the case.

Key Words: Expert witness, Testimony, Cross-examination, Trial tactics, Federal Rules of Evidence sections 702 and 703

Expert witness practice is an important—and oftentimes, decisive—part of any lawsuit. Expert witness practice dates back to Old English Common Law and, though it has evolved over the past few centuries, experts have always been retained and called upon to testify about areas that require special knowledge, skill, experience, training, and/or education. In many cases, the expert will be pitted against another expert who claims to have equal or better training and experience or who has a more defensible interpretation of the evidence as presented. Because this is so, it is critical for anyone who includes expert witness practice as part of his or her professional activities to learn about the dos and do nots of expert witness testimony.

The practice of testifying as an expert witness includes many important skills. The most important, of course, is a complete understanding of the subject matter. But a testifying expert should understand trial themes, because unlike subject studies, trial testimony involves an audience who will make decisions based upon perception. Judges and juries are forced to make decisions about parties, their positions, their credibility, and their retained expert's testimony within the strict confines of the rules of evidence, and the ever more strict constraints of time (and with recent budget cuts, judges do not allow their courtrooms to be tied up for any longer than absolutely necessary). Entire treatises have been written about courtroom demeanor and the effect it has on jurors. This article will not touch upon every tip for trial testimony, but it will explore the basics of understanding the trial theme and the key facts of the case, as well as the pitfalls that may inhere if a testifying expert does not understand the theme and facts.

The Trial Theme

If you take just one thing from this article, it should be this: know your trial lawyer's trial theme before you leave your first retention meeting.

Every trial lawyer worth his or her salt has a theme, also known as a "theory of the case." Simply put, a theme is the reason that one side wins and the other side loses. A good theme is simple and easy to understand. It is one that a jury of our peers can relate to and quickly absorb.

At the very first meeting with the retaining attorney, the expert should understand the theme of the case. Often, lawyers take for granted that an expert either organically understands the theme or, more commonly, does not need to know the theme. This is folly. An expert should *always* have the retaining attorney explain the critical facts to him, and articulate the theme in a few sentences. Failure to do so can be a case-threatening mistake. Experts are routinely brought into a case late in the game. (The reasons for this are noble enough—attorneys do not want to spend client funds if it can be avoided—and most cases settle before they reach the trial stage.[1]) The far better practice is for attorneys

1 The vast majority of lawsuits that are filed settle out of

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to retain experts early on in the case so the experts can help develop the trial theme.

The expert should assist the retaining attorney to better understand the scientific or technical issues, so that *together* they can formulate the trial theme. Financial constraints sometimes prevent this, but whenever the expert is retained, he or she should quickly get a firm understanding of the nature of the theme. A failure of theme usually means a loss at trial.

Get Comfortable With The Facts Of The Case and The Scope Of Your Testimony

Attorneys often call the witness stand the "hot seat." That seat can be HOT and if the opposing attorney is doing his job well, he is shoveling coals at a frenetic pace. When I lecture to both expert witnesses and attorneys—and also when I prepare percipient witnesses for trial testimony—I almost invariably get the same question: "What can I do to not be so nervous up there?"

This, of course, involves physiological issues regarding which I am ill-equipped to offer an opinion. But I know enough about human nature to know this: if we are speaking in front of others, we do not want to look like idiots or liars.

The single most important thing an expert witness can do to ensure that he does not look like an idiot or a liar is to have a firm understanding of the parties' themes and the relevant facts. If an expert understands what each side is trying to accomplish—and more importantly, *how* they are trying to accomplish it—the testimony part becomes much easier. When the witness is on cross-examination, opposing counsel will surely set traps for him (in fact, will likely have already set them during deposition). If the expert understands the terrain, he will be able to sniff out the ad hoc trial traps that have been set.

As for those traps that are set by opposing counsel at deposition, the witness and his attorney should work through them and understand how to best deal with them before trial. No case is a perfect case; they all have their problems and imperfections. The expert must know the weaknesses and imperfections of his testimony. If he is struggling with a particular piece of evidence, he should figure out how to deal with it before getting on the hot seat. The expert may ultimately decide that a bad fact is so insurmountable that he needs to just "own it." He should remember that, during some of his testimony, the jury may be sleeping. He must not give the opposition an opportunity to get out the highlighter and highlight an area where his testimony was just plain incredible.

I recently tried a case where two banking experts were offering conflicting testimony about the standard of care relating to the acceptance of checks for deposit, and what needed to be included before the bank could, under the Uniform Commercial Code (U.C.C.), accept a check for deposit (e.g., endorsement on the back of the check, presence of the depositor at the bank, whether the depositor was the owner of the account or simply the person making the deposit, etc.) The expert on the other side agreed with my expert that, as to half of the checks that were at issue in the case, there was clearly a problem, and the bank should not have accepted them. She was conceding half of the checks, but as to the other half, she found what I thought was a defensible distinction. It was an excellent trial strategy. It was damage control which could have cut our damages in half, if it had worked.

This expert owned the bad facts and dealt with the ones where she had a puncher's chance. The trial strategy did not ultimately work (the jury awarded my client the value of all of the checks, not just half). But it was clear that this expert was comfortable with her testimony because she did not have to strain to render an opinion that would have been ridiculous (that the checks were all acceptable). Whereas she very easily could have tried to find some reason why all of the checks

court. In California for instance, the statistics are typically in the high 90% range. So, sadly, it is highly unlikely that your dispute will ever make it to an actual trial. Further, the 90% figure gets staggeringly large when you factor in that there are millions of disputes that happen every day that never result in the filing of a lawsuit. An expert can rest assured that if a dispute has reached the point of trial: 1. The parties usually hate each other; 2. The lawyers are wary of one another because they have been fighting it out for over a year; and 3. The parties are so committed to their respective positions that they are willing to pay their lawyers what usually amounts to a king's ransom to do their best to win.

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could be accepted for deposit under the U.C.C., she would have been extremely uncomfortable when I started cross-examining her. Instead, she held her head up and testified honestly that there was a difference between the categories of checks. Consequently, her seat was not nearly as hot. Post-trial jury questioning revealed that the jury deliberated on whether they would award us half, or all, of the checks. She gave her attorneys a puncher's chance.

If the expert witness gets comfortable with the themes and the facts of the case, he will testify clearly, concisely and, most importantly, with a clear mind. And if he understands the imperfections of his testimony and deals with them, he will be far more compelling and believable.

Know The Evidence Code

Expert witnesses are not typically attorneys, nor are they legally trained. But the best experts with whom I have worked have a firm understanding of the basic rules of evidence pertaining to expert witness practice. Regardless of the expert's jurisdiction, the code has a dedicated expert witness practice section. It is not very long and the expert would be wise to take the time to learn it and commit the important parts to memory.

I liken this to the rules of poker. You would not sit down at a poker table without knowing that a flush beats a straight or that you are supposed to bet in order. If you did, you would be devoured quickly by the players who did know the rules and who would take advantage of your naiveté. The same goes for trial. You do not need to know all of the rules of evidence that are used at trial, but you should know the ones that have been tailored to you. The more an expert witness knows about the practice of law, the better he or she will be able to navigate the sometimes turbulent cross-examination waters.

The applicable Federal Rules of Evidence for expert witness practice are located at sections 702-706.[2] There are many websites that publish the full text of these sections for free. The most important sections are Federal Rules of Evidence sections 702 and 703, which provide as follows:

Section 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Section 703:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

There are three particularly important points:

Expert witnesses are special. And not in the Fred Rogers sense. The expert is someone who has knowledge, skill, experience, training, etc. that allows him to weigh in on a particular area where no one else can, *or may*, testify. He is the authority on the subject. He should act like it and be definitive in his answers whenever possible. And when he cannot be definitive, he should explain the nuances in a scholarly way.

Percipient witnesses do not get to testify about their opinions. Just the facts. Experts get to tell the jury their opinions about certain issues in the case. That is because they are experts in their field, and their opinions count. So, unlike what Mr. Rogers

2 Know in advance which jurisdiction governs your trial testimony. The Federal Rules of Evidence apply in all Federal Courts. If you are testifying in State Court, that state's rules will apply. Though the rules are almost the same across states (and they parrot the Federal Rules), there are some nuances, so make sure you are studying the right rules. The retaining attorney will be able to guide you in this regard.

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taught us, everyone is *not* special when it comes to trial testimony. But the expert witness *is* special.

Experts can rely upon inadmissible evidence. No one else gets to do this. When doing so, the expert ought to make sure that it is good inadmissible evidence ("I am relying upon such-and-such a treatise which is endorsed by NADE and other highly reputable document examining associations around the nation.") and not bad inadmissible evidence ("I heard Harvey Levin talking about this last night on TMZ.").

A good working knowledge of the rules of the game is important. And if you enjoy the theory, I would encourage you to review the history of expert witness practice in English and American law. You may be surprised at how expert witness practice has evolved in our never-ending search for the truth—and a more perfect system to get at the truth.

Do Not Go Out On A Limb

The expert must not go out on a limb. This bears repeating. Do not go out on a limb. Ever. Never, ever, ever.

Expert witnesses must be confident, but not arrogant. They should be secure in their opinions based upon a mastery of their craft, the trial themes, the facts, the applicable evidence code, and any imperfections. Experts testify before 9-15 humans who are going to decide the fortunes of two or more competing parties. They should sound scholarly, but not superior. In addition to potentially alienating the jury, arrogance might lead one to a pitfall that can only be accomplished by the haughtiest of experts: going out on a limb. Only pure hubris can lead the witness to this particular part of the tree, and he must stay away from it. Testify about what you are there to testify about. Be concise and expand only when necessary to add color to your testimony. The pitfall of going out on a limb can be best explained through the following anecdote.

I recently represented a defendant in an unlawful foreclosure case. The case lasted over a month, and it involved five different testifying experts. My opponent was a well-known plaintiff's trial attorney/Orange County politician who was known for putting arrogant experts on the stand. The first expert he called was also an attorney who was supposed to be an expert in titles, foreclosures, and lock-outs. He testified for two days. While he was testifying, it felt like two weeks, until the end of the second day.

Toward the end of the second day of his testimony, this expert was feeling quite comfortable (as well he should have—he was playing pitch and catch for a full day and a half on the stand with his attorney, and without any cross-examination). The second half of day two was going to be mine. But at the end of the expert's direct examination he made a mistake that, in my view, probably sealed the fate of the plaintiff. And in retrospect, the mistake could not possibly have had anything to do with his attorney, as you will soon see.

The expert was testifying about the lock-out process and how he knew everything there was to know about lock-outs, including if and when sheriffs will draw their guns to physically remove an owner who refuses to leave his home after lock-out. He testified well. He spoke about how guns are *never* drawn. He testified that the drawing of guns at a lock-out was so unusual that it could only have been the result of a malicious request made by my client.

And then—here it comes—he stated 21 hubristic words that were manna from heaven: "The *only* reason a sheriff would draw his gun during a lock-out would be if the person was a convicted felon!" I was exuberant. No, that's not a strong enough word. I was outright manic. It was all I could do to stay in my seat.

This little embellishment was intended to make my client look *really* bad. This poor plaintiff who had lost his home (never mind that he hadn't paid his mortgage in almost three years) was subjected to a gun being pointed at him during the lock-out. It was horrible. It was uncommon. It was unnecessary. It was *malicious*. The problem was, the plaintiff was a felon.

And I had been trying—and failing up until that point—to get this felony in front of the jury. It was for the sale of cocaine to an undercover police officer. And then he violated his parole, eight times by testing positive for coke.

Under California Evidence Code section 352,

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the judge had the right to exclude this evidence from this civil trial on the basis that it was "too dangerous" and would have an inflammatory effect upon the jury. Without the magic 21 words, the jury would never have heard about this conviction. The plaintiff would have been this poor old man who looked sweet enough and whom the jury should just feel sorry for (even though he didn't pay his mortgage), and find in his favor. Fact was—he was a deadbeat coke dealer.

I'll say it again: Do not go out on a limb. The expert witness may think he is helping the retaining attorney by embellishing—and he may well be. He also may be uttering the words that will completely and irretrievably bury his case. At a minimum, before the expert includes unnecessary hyperbole, he should run it by the retaining lawyer who may have other ideas.

Closing

Being an expert witness is one of the highest callings a professional can have. You are a luminary and you are establishing a standard of care by providing a requisite fact and/or simplifying an otherwise complicated matter. The legal definition of an "expert witness" tells you everything you need to know about the law's opinion of you. You are not just versed. You don't dabble. You are an expert. If you work hard at your craft by ensuring you understand the retaining attorney's theme, the evidence code, and any imperfections in your testimony—and you emphasize preparation over all else—you will find success as an expert witness. And like the attorneys who retain you, you will also achieve the ultimate success: helping to ensure that justice prevails for your client.

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