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An expert is born

Expertise must be accompanied by the ability to communicate it at trial

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By Miles B. Cooper

A last-minute flurry of activity before expert disclosure. One of the experts had a conflict – couldn't make the trial. She suggested a colleague, "Outstanding, brilliant."

A phone call, a chat; he seemed great. In the midst of preparing for his deposition, the replacement paused, "I did tell you this was my first case, right?"

No. You didn't.

Testifying experts start somewhere

Many lawyers run into situations where the person has expertise but lacks trial experience. Treating doctors are a classic example. The knowledge is there but the ability to communicate it in a litigation environment – and avoid pitfalls – is missing.

Starting out

• ***Taking notes during calls:*** Most people unfamiliar with litigation act like normal people. You call to talk to them. They start taking notes (to remember what you said). Know this. If you describe the case strategy or make an overly casual comment about opposing counsel (I know *you'd* never do this but someone out there might), the comment may live on. *Nothing you say to a disclosed expert is privileged*. That can hurt. Imagine: you may have to balance pulling the expert against turning over the information.

• ***E-mail banter:*** E-mail is outstanding. Rapid communication. The blessing is also its burden. People check e-mail at all hours, frequently with a smart phone, and in who knows what state of sleep deprivation (or worse). Imagine the joy of opening an opposing expert's file and finding an e-mail string: "Tommy – read opposing expert's depo. That guy's an ass! You had him for lunch. The material I gave you really set him up. Lunch next week?"

Explain to your expert that jurors will see the e-mails; therefore, the messages should have the same formality as a letter. An expert who appears invested in the outcome and too friendly with the lawyer will come across poorly.

• ***Billing:*** Another potentially troubling area – specifically, the descriptions of the work done. A chat with a fresh expert about this in advance is helpful. "Telephone conversation with plaintiff's attorney" is sufficient. "An hour learning from lawyer how to demonstrate my knowledge to a jury" may be more detailed than is necessary.

• ***Explain the obvious:*** This means obvious to you. Many of us have been doing this a long time. When you've been doing something a long time, there's a lot that seems obvious. The problem is, it is not obvious to everyone. The most common example: the burden of proof. Most experts are unfamiliar with the legal standard in a civil case. The expert can't help you unless you tell the expert what that standard is and that the opinions being rendered need to reach that standard.

Watch out for the overly helpful expert, though. This is the expert who memorizes the phrase "more likely true than not true," and parrots it every other sentence.

Readying for deposition

You know your opposing counsel and that lawyer's style. Make sure your expert knows his job is to answer the questions, not get riled by an argumentative attorney. The same preparation you do for a client can be useful for a first-time expert. Experts oftentimes have large egos and can be more volatile than clients. Cover the basics. Stay calm. Answer the question. Support your answer with information (not, "Because I'm an expert and I say so.")

Before the deposition, you should ask the expert to state to you her opinions, and the basis for those opinions. You'd be surprised how many experts are expecting detailed questions. When those experts meet a lawyer whose question is, "Tell me all the opinions you intend to offer at trial," the expert has difficulty.

Readying for trial

The expert needs to be an expert. The best way to do this is to be a teacher. Get the expert prepared for standing up out of the witness chair, using props like anatomical models or charts, and generally being professorial. But you also have to make sure their language is not too technical. If it is, ask them to explain the technical words when they appear.

The expert also needs to know the motions in limine rulings before taking the stand. A minor point, but frequently overlooked. You don't want to open the door on evidence you fought hard to keep out (or risk a mistrial).

Playing to your advantage

We put the novice expert on the stand. We highlighted his lack of experience as a witness – to make him seem more credible than his veteran opponent. He wasn't perfect. But his lack of polish made him believable. And at the end of the day, believability beats trial experience when the jurors render a verdict.

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