



Expert examination

Experts need to show, tell and teach. You need to emphasize your expert's objectivity and defuse the common defense attacks



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BY MILES B. COOPER

The young lawyer cringed when the treating vocational rehab expert, testifying in a civil trial, said “insurance.” Yes, the expert was referencing workers’ compensation insurance. While not a veteran expert, it was the young lawyer’s witness and the young lawyer’s questioning that drew the comment. The young lawyer had forgotten one preparation point – the motion in limine rulings. As much as the lawyer wanted to run up and whisper in the expert’s ear, that wasn’t going to happen. The only hope was cautious questioning to keep the expert contained...

Preparation

Good expert direct examinations start early in the case, keeping in mind every communication is fair game. That offhand text message? Discoverable. The staff’s emails to the expert? Discoverable. The off-the-cuff initial analysis email from the expert? Yep, that too. Even the voicemail you leave could be going through automatic transcription and then emailed to the recipient – meaning your voicemail is now in the expert’s file. Educate the expert and the office to make sure potentially damaging communications don’t show up in trial.

Preparation also involves defusing potential bombs. Ask the expert if there’s anything in the expert’s background that opposing counsel is likely to go after on cross-examination. Many experts can point you to their own Achilles’ heels and help you with the way around it. But it still helps to pretend you are opposing counsel. Spend time researching your own expert.

The final preparation occurs before the trial examination. Do a final review of your outline with the expert, check that demonstratives are in place, and make sure the expert has everything. It is also the time to go through case-specific and courtroom-specific issues. This includes the obvious (like in limine rulings – something I now never forget). But it also includes seemingly mundane details. Where to wait, mobile numbers just in case, and courthouse-specific parking or security issues. These seem mundane until an expert runs late because you failed to advise about an issue.

Experts sometimes make their own final preparations before trial. That means there might be something new in the file. Look through the file one more time when the expert arrives at court. Why? Because a smart opposing counsel will do so.

The examination

Qualifying an expert can seem old hat. President of this society, published on that issue, top of every class, including pre-school. But remember the jury instruction asking jurors to compare qualifications. Highlight the expert’s strong points that contrast with the other expert’s. Break up the qualification with teaching. Yes, teaching.

Whatever the topic, there’s a reason an expert is testifying. Is this an orthopedist? Have the doctor teach the relevant anatomy in response to a question about the number of knee replacements performed. Get the expert out of the stand. Use models and demonstratives. Most people are visual learners and will retain information better if they see it. They also want to be educated and entertained. Oblige them, and they will appreciate it. Talk without visuals and you’ll rival NPR’s barbiturate effect (Peter Sagal would approve this joke). As for qualifying, know the court’s rule. Some require that the expert be accepted before offering opinions. Other judges don’t “accept” experts. Better to know the difference before asking in front of the jury.

If this is a frequently used expert, it will come up during cross-examination. Your frequently used experts may have found weaknesses in one or more of your prior cases – meaning told you that you didn’t have a case. Use this to defuse the prior work and emphasize the expert’s objectivity.

Once one gets into the technical parts, resist the urge to look smart. Some lawyers think technical jargon sounds impressive. Jurors want to learn but will give up if everything is literally in Latin. Ask the expert to explain technical terms, and then give it back with more common language. “So, if I understand this, when you say you imaged the hard drive, that’s like making an exact copy of the contents of that hard drive?”

Highlight the materials reviewed and the work done. Err on the side of providing more material – cherry-picking looks bad. Cover the expert’s bill at this point. “Reviewing all that material, doing testing, did that take a lot of time? And given all your experience and the fact that forensic work takes time away from your regular work, do you charge for your time?”

The opinions themselves? They now flow given that the expert has already educated the jury. But make sure to emphasize key points – causation for example. Do a final wrap on each opinion using the jury instruction language. “Your opinion that the surgery was necessary because of the collision, do you believe that is more likely true than not true?”

Outro

Back to our young lawyer. Fortunately, a jury instruction modification let the jury know that the court would address the workers’ compensation insurance issue. And the young lawyer, older now, gained another battle scar that would not soon be forgotten.

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