Expert Witnesses 101

By Lily N. Chinn

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Within the first few years of embarking on a career as a litigator, almost every attorney will have to deal with an expert witness. The importance of expert witness testimony is particularly pronounced in areas of law that are intertwined with scientific issues, as in my chosen practice area of environmental law. The few cases that actually reach trial oftentimes hinge on what is termed the "battle of the experts." Thus, having the right expert witness on your side can make or break your case. But how do you identify the right expert witness for your case? And, more importantly, how do you prepare that witness for the rigors of litigation?

Selecting an Expert Witness

The very first hurdle with expert witnesses is finding a sufficient pool of potential experts to interview for your specific litigation need. How do you go about finding an expert? Although there are published expert directories, depending on the field, I think that asking colleagues and clients for referrals of experts they have worked with or seen is more reliable. If that does not pan out, reviewing published articles in the relevant field, attending seminars on the specific topic areas, or even simple Internet searches may identify additional experts to contact.

Once you have a pool of initial candidates, you need to determine which of them are competent and have the proper credentials. Questions to ask include the following: Is the potential expert knowledgeable about the standard treatises, legal issues, and controversies in the particular area? Is the expert known in the field and well regarded by peers? Does the expert have the proper education, certifications, professional degrees, and the like, that would be expected for someone in the field? Has the expert published any articles in peer-reviewed journals? Has the expert testified in litigation matters before? If so, what type of clients and matters, how often, and how recently? Has the expert been qualified to testify in court? In what expertise? What was the result of the expert's testimony? Have the expert's qualifications ever been rejected by a court? Why? Also, remember to do a computer search and other general research about your expert, because you never know what type of personal or professional information might be out there for opposing counsel to find.

Confirming an expert's proper credentials, however, is just the first step in selecting the right expert. In my experience, the best expert witnesses are not necessarily the most celebrated persons in the field, but rather the ones who are able to communicate complex ideas in common, everyday terms without talking down to their audience. Can the expert prepare a well-written, organized expert report? Can the expert convey a mastery of the subject matter in a confident but not condescending manner when testifying? Will the expert be able to maintain this confident manner without losing his or her cool during a heated cross-examination? Does the expert appear trustworthy, honest, and believable? These qualities are not easily discernable from an interview of a potential witness, so I always ask for samples of expert reports, copies of depositions (especially if they have been videotaped), and references from attorneys the expert has worked with in the past.

Building a Relationship with Your Expert Witness

For many young attorneys, handling experts—who are almost always older and more experienced not only in their field of expertise but also in litigation matters—can be a daunting task. That is certainly how I felt when prepping my first expert witness for trial as a first-year attorney. Who was I to tell this expert of over 20 years how to testify when I had never even taken a deposition or examined a witness in court? Experts may also feel the same way when they are faced with taking direction from a young attorney, particularly a woman. Although I have worked with both male and female experts, the majority have been male. The gender dynamics of an older, male expert and younger female attorney, in particular, can be challenging. Defining your role in the litigation while handling your expert's ego is a delicate balancing act.

First and foremost, trust your instincts as a lawyer. If you cannot understand your expert, a judge and jury will not be able to do so either. The expert needs to recognize that while he or she may have expertise in a particular subject matter, you are the expert in the legal field. You each have important but distinctly different roles in the litigation and must work together as a team. It is your job as a lawyer to communicate relevant information to the fact finder in a clear and succinct manner. The expert has to trust you to help him or her accomplish this task. However, before an expert puts himself or herself in your hands, there has to be a certain level of trust. To earn an expert's trust, you have to be as conversant as you can be in the technical or scientific issues. This means doing your homework before meeting with your expert. Demonstrate your own expertise by providing a thorough explanation of the legal and technical issues of the case in your first meeting with the expert. Also, ask your expert as many questions as necessary for you to understand and explain the subject matter to others.

A large part of preparing experts involves giving them specific direction about how to frame their testimony to best support your client's legal arguments. This begins with helping edit and organize the expert report to make sure the legal elements at issue are cogently addressed. This work continues when preparing experts to testify, as discussed below. Experts are much more

comfortable taking direction when they know that the attorney truly understands the subject matter, so make sure you are fully informed before offering concrete direction. If your expert still refuses to take your direction after this process, it is up to you as the attorney to assert yourself and make clear to the expert that he or she has been retained at your discretion, not the other way around.

Expert Witnesses and Discovery

The topic of expert-witness discovery could be an entire article on its own, so I offer only a few tips here. Remember that your expert is an important resource during all stages of a case but especially in discovery. I often ask experts to assist me in framing interrogatories and document requests to make sure I have covered all the technical and scientific issues correctly. I also work with my expert closely to develop outlines for the deposition of the opposing party's expert.

Another key point to remember is that testifying experts are subject to discovery, so be very careful in your communications with your experts. Emails, notes, and comments on draft reports that you send to your expert are generally discoverable (and I usually request them from the opposing party's expert in discovery). Thus, I normally reserve the most critical issues for oral discussions. Also, develop a policy regarding the retention of draft reports with experts.

Preparing an Expert Witness to Testify

The key to successful witness testimony for both the lawyer and the witness is practice, practice, practice. This cannot be underscored enough, particularly with respect to experts who may testify anywhere from a few hours up to weeks in a deposition or a trial. Preparation of an expert witness will require at least several sessions. When the lawyer and the expert have a common understanding of the legal and technical issues at stake in an expert's testimony, they are better able to deal with the unexpected questions from opposing counsel.

When preparing an expert for trial, I always consult the expert about the topics he or she feels should be covered in direct examination. In some cases, I have found it helpful to ask the expert to prepare his or her direct testimony in writing (assuming the jurisdiction where the case is being tried does not require post-discovery disclosure of expert notes or testimony) so that I can see how the expert prefers to organize key concepts as well as how the expert explains those concepts in his or her own words. This is also a good way to get a busy expert to focus on trial preparation. I almost always have to reorganize and shape what the expert has given me, but understanding the expert's point of view is critical in helping me fashion a direct examination that is true to the expert's voice. To maintain your expert's credibility on the stand, his or her testimony has to be honest and believable. Keeping your direct examination focused on the expert's words instead of the attorney's words is crucial to credibility. You do not want your expert to appear coached and his or her answers to sound canned.

Another technique that I have found useful is videotaping my expert witnesses in mock direct and cross-examinations (especially if they have not been videotaped at their depositions) because sometimes a picture is really worth a thousand words. Videos have been very helpful to show experts how their attitude or demeanor in responding to questions can be perceived positively or negatively by a judge or jury.

Strategies for Dealing with Opposing Expert Witnesses

Each attorney has his or her own style when examining witnesses based on his or her personality, the witness, and the situation (e.g., deposition, direct examination, or cross-examination). Conversely, an expert witness will react differently depending on the attorney who is questioning him or her. I have found that experts have oftentimes underestimated me as a young female attorney, and I was able to use this to my advantage during a deposition or cross-examination.

For example, I usually begin an expert deposition in a very nonthreatening tone. I sometimes feign ignorance on certain concepts or ideas and ask the expert to explain them to me with the hope that he or she will be a bit less guarded. Although I have prepared an in-depth outline of questions for the opposing expert (in close conjunction with my own expert), I do not always ask questions in that order, so the expert will not be able to anticipate where my questioning is leading. Although everyone is tempted to ask the "gotcha" question during a deposition, I usually refrain from such theatrics because they are wasted in a deposition and only help prepare the expert for your cross-examination at trial. But I make sure to ask every single foundational question to "box in" the expert during a deposition so I can ask the "gotcha" question at trial if necessary.

Using real-time transcription software can be invaluable during an important deposition of an expert witness.

Using real-time transcription software (so you can see the deposition transcript as the court reporter types) can be invaluable during an important deposition of an expert (or fact) witness, especially for young lawyers who are still learning the art of deposition questions. In my experience, this is one of the best ways to ensure that you have asked the right questions and received responsive answers, because you will likely have only one chance to depose the witness. I know that my first dozen deposition transcripts would have benefited greatly from real-time transcription. But this technology is expensive and may be a distraction if you are not used to looking at a transcript, listening to the witness, and thinking about your next question all at the same time. Having a colleague at the deposition to help you keep track of questions that went unanswered or follow up on topics you may have missed can be equally useful.

Be persistent if the expert is nonresponsive and tries to avoid answering your question by going off on long, irrelevant tangents. This is a classic expert tactic. Ask the question again and demand a yes or no answer before allowing the expert

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of my partner) that whatever we do, we cannot stoop to this level. The legal community is typically "small" (even in larger cities), and our reputations are precious. Winning a case is not worth sacrificing our credibility with the court or the community. Our legal careers will not rise or fall on this one case. However, our credibility with the court can indeed be tarnished in an instant. Chances are, we will find ourselves standing before the same judge numerous times through the course of our careers. Better to have her thank us for our professionalism than have her raise the issue of sanctions.

Lesson Six: Flexibility. I also learned that rigidity has no place at trial. No matter how well we plan and prepare, there will be unexpected issues that arise during the course of trial. Being flexible and ignoring our obsessive-compulsive tendencies is a must. Nearly every seasoned litigator has a war story about the star witness who suddenly changed his story, the judge who did not understand the hearsay exceptions, or the like. Being able to adapt to the unexpected is an essential trial skill.

Lesson Seven: Don't Take It Personally. Perhaps the most difficult lesson for me was that neither the trial nor the outcome was about me. While we certainly want to take responsibility for our mistakes and have to hold ourselves accountable to our clients, whether we win or lose our first trial, we should congratulate ourselves. The reality is, we have finally earned the title of litigator. If like me, you have lost your first (or second, or third) trial, try to not take it personally. Of course, that is easier said than done. Through the course of litigating a matter, we will inevitably become personally invested in the case for any number of reasons. The case may address a compelling moral issue near and dear to our hearts. We may develop relationships with our client and witnesses after spending the better part of two years learning every possible fact we can about them. Or, opposing counsel may just be a jerk whom we have vowed to defeat as our arch-nemesis. Whatever the situation may be, this one loss does not define our abilities as litigators in the future. Nearly every seasoned and well-respected litigator I have spoken with has told me the same thing: "You haven't really tried a case until you've lost a case."

The ultimate lesson in the first trial experience and new crown as a bonafide "litigator" is to realize that there will be many more trials to come. That is why, if you can take the lessons from the past and use them to improve your trial skills and perspective for the future, you will not end up being simply a bonafide litigator; you'll ultimately be an excellent trial attorney. ●

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to explain his response. At the end of an expert deposition, go over your notes, or the transcript if using real-time software, to make sure you have received the answers you need. If not, ask those questions again until you do.

Finally, I usually save my most antagonistic questions for the end of the deposition, after I have had some experience with the expert, who is by then, I hope, tired and off his or her game. When it is time to ask the difficult questions, your questioning style almost always becomes more aggressive by necessity. My past experience shows that experts, especially men, do not react well to aggressive questioning from a young woman attorney and tend to clam up, which is why I save these types of questions for the end of the deposition when I have gotten everything else out of the expert that I can, using the nicer approach.

Finding Your Own Approach

Experience is the best teacher when it comes to expert witnesses. If you have not yet had the chance to work with an expert on your own, volunteer to help senior colleagues with expert witnesses. Offer to prepare a deposition binder and make sure you attend the deposition as well. Watching expert examinations at trial is equally valuable. You can learn so much by just observing how an expert is questioned on the stand. The more exposure you have to different types of expert witnesses and different ways attorneys deal with those witnesses, the better prepared you will be to develop your own approach. Remember there is no one right approach to expert witnesses because each expert and each lawyer has his or her own strengths and weaknesses. ●

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