March 30, 2021

ARTICLES

Ten Tips for Preparing Your Testifying Expert for Civil Trial

What have you done to prepare your expert? Is your expert last on your list or an afterthought? Remember: Your expert might need a lot of preparation.

By Mitchell J. Rotbert

Share:

When you engage an expert early in the progress of the case, you will discover facts and issues that may shape how you plead your case.

Motortion, iStock

Discovery is closed. You have a trial date. All motions in limine have been decided, including any motion directed at expert testimony. The testimony of each witness that you intend to call is outlined, cued up with the exhibits and demonstratives that you intend to use; you have outlined and cued up your cross-examination, too. You have spent time with your client, presumably a key witness, on the testimony that he or she is prepared to give. Subpoenas are issued. You have even made a checklist of the non-legal stuff you want nearby at your desk in the courtroom: water bottles, pencils, pads, pens, paper towels, a laser pointer. All of your preparation, however (dis)organized before now, must now come together for one "really big show."

But what have you done to prepare your expert? Is your expert last on your list or an afterthought? After all, you think, your expert is an expert, the author of his or her own report. Your expert knows what he or she is doing; that's why he or she is an expert. You rationalize: "What prep does my expert need?" May I submit, your expert needs a lot, if not the most, prep. Do not presume that your expert is an expert in presenting conclusions in a cogent, engaging manner. Here are 10 tips that I use in preparing my testifying expert for trial in a civil case.

1. Let Your Expert Help You Develop Your Pleadings

Often this is necessary, as where a standard of care is at issue. But the rule works as well absent such critical proof. When you engage an expert early in the progress of the case, you will discover facts and issues that may shape how you plead your case.

2. Keep Your Expert Up to Date with Pretrial Materials

This is especially so as to facts that are asserted by you or your adversary in motions, including discovery motions. I make sure that my expert receives any and all motions that contain matters touching on the merits. And I speak with my expert about them. I find that this exchange is a good way to ensure that my expert remains current in the issues and develops context for what the parties, and perhaps the court, deem material to the outcome. At least under the Federal Rules of Civil Procedure, most communications with your testifying expert are protected by Federal Rule of Civil Procedure 26(b)(4).

3. Preserve

Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure requires that, as part of the expert report, you identify "any exhibits that will be used to summarize or support" the opinions that your expert "will express [at trial] and the basis and reasons for them." This is part of a list of items at Rule 26(a)(2)(B) that are designed to streamline discovery of expert opinions, even to the point of making a deposition of an expert unnecessary. But few, if any, of us develop demonstrative exhibits until trial is on the horizon; and it is the rare client who will agree to pay to develop trial exhibits until trial is nearly unavoidable. Moreover, other than Rule 26(a)(2)(B)(iii), there is little incentive to prepare demonstratives before discovery is closed or before you have decided what issues to bring to trial and in what order. Therefore, at the initial discovery conference with the court, consider raising your ability to preserve a right to exclude from the expert report any exhibits or demonstratives required by Rule 26(a)(2)(B)(iii) until you think you may be ready, e.g., 30 days before trial.

4. Supplement and Amend

Under Rule 26(e)(2), you are required to supplement, including correct, any information in your expert's report and deposition not later than 30 days before trial. You should be using your regular dialogue with your expert to determine how, if at all, any new information arising out of discovery affects the expert's report or deposition testimony. See tip 2, above.

5. Outline Your Expert's Testimony, Including Choreography

You are the most important witness at trial. The jurors are watching you carefully, as they look to you to lead them through the facts as you perform on each promise you made to them in your opening statement. The second most important witness is your expert. Both of you are teachers in the courtroom. But there are things that an expert can do in the well of the court that you may not be permitted to do. The rules of evidence presume that most people learn through their eyes and ears, not by touch or feel (kinesthetically). Most adults, however, learn by what they see and hear. So be sure to use visuals (demonstratives) to support your auditory presentation (testimony). A presentation to the jury that is kinesthetic, even in a small way, will help to make your expert

interesting. In one bench trial I had, I used a core sample of earth to allow the judge to feel how light and porous the earth was at the site in question. Get an early ruling from the court on whether your expert, or any witness for that matter, may come off the witness stand to perform a demonstration. Even if the presentation is to review a map or picture, the jury will be more tuned into an expert who is active and standing a few feet from them while teaching. Finally, agree with your expert on how he or she is to behave in the court while the jury is seated. Your expert should sit in the gallery, not with you. You should not allow the jury to see you in discussion with your expert, not even friendly chitchat. Once excused by the court, your expert should leave not only the courtroom, but the courthouse and, if possible, the city and state in which the jury is sitting. Direct your expert to leave the court without so much as a nod to you. Maintain the aura of independence that you want the jury to infer from your expert's presentation.

6. Pyramid the Expert's Testimony

After you have introduced your expert to the jury, including his or her credentials, begin by asking the expert for his or her conclusions first. Doing so allows you to continually emphasize the conclusions to the jury.

> You: "Have you made a comparison of the handwriting on Exhibit 1 with the handwriting on Exhibit 2?"
>
> Expert: "Yes."
>
> You: "And have you come to any conclusions regarding the identity of the author of each of these exhibits?"
>
> Expert: "Yes."
>
> You: "Please list your conclusions for the jury."

Once that process begins, you and your expert are now teaching. You can write each conclusion down on an easel so that the jury follows along. Your questioning should explore each conclusion, guiding the expert to explain what facts support each conclusion and by what method the expert "discovered" that conclusion. In this manner, you get to identify the conclusion, teach how the conclusion was reached, and then emphasize each conclusion: a neat triad. You may want to give the court notice of this presentation format to be sure that there will be no objection to your method, proffering conclusion first, support second. A pretrial ruling on that will help you organize and limit any objection to your expert's presentation.

7. Three, Five, or Ten

No witness, including your expert, should deliver more than three conclusions. A triad is very satisfying to us humans; I have no idea why. Thesis, antithesis, synthesis. On your mark, get set, go. "What I tell you three times is true." *The Hunting of the Snark*, Lewis Carroll. If you cannot put your expert's conclusions into a neat triad, try limiting conclusions to five; and if that is not possible, you may use ten. But if you use ten, try to organize those ten conclusions into rough thirds. Organizing your expert's testimony this way makes your expert more credible, understandable, and connected to the jury.

8. Set Boundaries for Testimony

By the time of trial, the court will likely have ruled on a set of facts, issues, or words that cannot be used or raised before the jury. You should be clear with your expert on what he or she may not utter before the jury. You should also work out with your expert what he or she should do in the event that, upon examination, the expert finds himself or herself having to testify in a way that the expert believes is contrary to the court's limiting order. If you reasonably foresee a tight squeeze between your expert's testimony and the court's limiting order, you can try to work out an SOS phrase with the court. For example, in a case in which the court has ruled that there shall be no testimony that the plaintiff had smoked or used tobacco products, and your expert is asked a question that fairly requires him or her to account for smoking, your expert can say: "I am not sure I can answer that question fully and truthfully without some guidance from the Court on one of its earlier rulings." In this manner, you will have diminished any potential for your expert to

appear confused in answering subject to the court's instruction while enlarging your expert's growing reputation for veracity and respect.

9. Decide What Parts, if any, of the Trial Testimony You Would Like Your Expert to Attend

In all my years of trial work, I have never heard anyone ask for a sequestration order as to any expert. I do not prevent the expert from keeping notes, either. I recognize that those notes may be produced to my adversary; but that is a risk worth taking. I cannot think of a more efficient way of reviewing with the jury that my expert's testimony is important and reliable than by having my adversary cross-examine my expert using my expert's own trial notes.

10. Practice, Practice, Practice

I work with many other lawyers. Each one of us has a different take on where to draw the line between permissible dialogue with a testifying expert and impermissible coaching of an expert. My rule is simple: I do not say or do anything with an expert that I would be concerned about were it disclosed to my adversary, the court, or the jury. This includes practicing my expert's testimony, if possible before a mock jury. In pre-pandemic days, I would organize a mock jury by offering pizza to people working in the area and have them listen and watch me put on my expert. I would then excuse the expert and talk with the mock jurors. I have always learned from that exercise. And I offer this advice to my expert:

If you are asked on cross-examination if you practiced your testimony, own that question, and remind the questioner—and the court and jury—how that practice was no different from practicing your last speech, your oral examination in defense of your dissertation, or your acceptance of an award.

At a minimum, the jury should be able to infer that it was practice that made the expert's presentation so streamlined. The jury will appreciate the implied respect for their time.

Mitchell J. Rotbert is with Rotbert Business Law, PC, in Gaithersburg, Maryland.
