Working With Experts: A Trial Lawyer's Overview

Introduction

Experts matter.

As any litigator can attest, in the end, litigation is fundamentally about the drawing of conclusions. Although interpretation of the law has a vital role, particularly at the appellate level, the foundation of any adversarial proceeding is progressively more nuanced analysis of what actually happened, and therefore, what it means. And in this, especially when the subject matter is complex or technical, experts with specialized knowledge can play a pivotal role.

The expert is the witness who helps the court, and therefore the jury, sift through arcane, often seemingly impenetrable information, and decide whether due care was exercised, whether a product was safe, whether the accountant should have spotted a questionable transaction. The expert witness is a translator of sorts, communicating an argument to the court when the relevant facts are too complex or specialized to speak for themselves.

Behind this seemingly straightforward function, however, is a complex tangle of additional functions and responsibilities. In the ongoing chess game of a trial – particularly a major one – experts play many, often interrelated, roles, sometimes shifting from one to another in the course of a single day. The first step, then, in understanding how to maximize the benefits of experts is both appreciating those roles fully and understanding the impact an expert can have on your case.

Little of this is obvious. For example, Federal Rule of Evidence 702, "Testimony by Expert Witnesses" consists of all of 146 words, and simply characterizes an expert witness as someone who can "help the trier of fact to understand the evidence or to determine a fact in issue." To an experienced litigator, the brevity of that description calls to mind the old joke about speed-reading *War and Peace*: "It was about Russia."

At trail, an expert witness, of course, presents evidence. They're able to break down complex technical or scientific concepts into understandable, jury-ready segments, and lucidly and compellingly communicate them to a group of laypeople. But that's only the beginning. An effective expert witness also needs to be experienced in court – skilled not only at their area of expertise, but also good at presenting testimony, and capable of handling aggressive cross-examination and managing the full range of challenges your opposing counsel is unquestionably going to throw at them. Experts need to be free of conflicts, unimpeachably impartial and strike the correct balance between being professionals in their field and being full-time witnesses. Too much of either is a problem.

The Impact of Experts

A strong expert witness can be an important force multiplier, and vastly increase your leverage during settlement negotiations, particularly during cases with intricate fact patterns or conflicting evidence. When the lawyer across the table believes your expert witness is strong, they tend to rapidly develop a keen interest in settlement. Additionally, a good expert not only provides factual testimony, but can also provide powerful, enlightening context, insights and explanations. He or she can illuminate the inner workings of a case, and can make a legal conclusion seem not just correct but overwhelmingly so – undeniable, inevitable and in the best examples, obvious.

The financial implications of a really good trial expert are often equally significant. Experts can, and frequently have, tipped the balance to one side or the other during a case. Although there are countless examples, going back decades, one of the most striking and illustrative examples of the impact of experts are the series of lawsuits filed against Johnson and Johnson, alleging that the talc used in their baby powders was contaminated with carcinogenic asbestos fibers. With impressive consistency, the outcome of these cases hinged on the presence (or lack thereof) of expert witnesses.

In the recent California Superior Court case of Leavitt vs. Johnson and Johnson, an Oakland, California jury of five men and seven women assessed $29 million in damages against Johnson & Johnson for Teresa Leavitt's injuries. Leavitt suffered from mesothelioma, a cancer linked to asbestos exposure. Her physicians testified that she was unlikely to survive past the year 2020. The jury found that the asbestos-laced baby powder was a "substantial contributing factor" in her illness. Johnson & Johnson was also cited for "failing to adequately warn" users about the powder's "potential risks."

Expert witnesses testified that not only was the baby powder Leavitt habitually used contaminated with asbestos, but also that the product was the only plausible cause of her illness, despite the fact that Leavitt grew up near two asbestos factories, and was consistently exposed to ambient asbestos. In addition, numerous epidemiological studies have found that talc miners do not have a higher risk of asbestos-related cancers than the general population. The testimony of effective expert witnesses for the Leavitt plaintiffs' counsel resulted in a very large verdict despite a murky, essentially contradictory scientific foundation for linking talc and asbestos.

Over 10,000 lawsuits have been filed nationwide alleging similar causality, many relying on the testimony of a small group of highly paid experts. When plaintiffs' experts are permitted to testify in these talc cases, the results have been some enormous verdicts, including an award of $4.7 billion to 22 plaintiffs in a suit against Johnson & Johnson in St. Louis, and a New Jersey award of $117 million to another baby powder user. In contrast, when expert testimony against Colgate-Palmolive alleging contamination of Cashmere Bouquet talcum powder with asbestos fibers was excluded by in Philadelphia's Court of Common Pleas, the suit was dismissed soon thereafter.

Exclusion of Expert Testimony

Exclusion of an expert's testimony typically occurs because of what's known as a Daubert motion. Named after a trio of pivotal Federal cases in the 1990s, the Daubert standard articulates a widely-adopted set of principles for determining the admissibility of science-based evidence and is essentially a nationwide methodology for insuring that expert testimony has an adequate scientific basis. Regrettably, judges often tend to shy away from granting Daubert motions, believing perhaps that the credibility of science-based evidence should be a question for the jury. This, however, means abdicating their assigned role as evidentiary gatekeepers, and often requires juries to make distinctions for which they lack the qualifications or knowledge needed.

Drastically simplified, the Daubert rules require that admissible evidence provided by expert witnesses:

- Be relevant to the issue at hand and is based on a reliable scientific foundation
- Is the product of a sound scientific methodology, rooted in application of the scientific method
- Utilize the techniques of formulating and testing a hypothesis, as demonstrated by meeting the following criteria:
    - Whether the theory or technique employed by the expert is generally accepted in the scientific community;
    - Whether it has been subjected to peer review and publication;
    - Whether it can be and has been tested;
    - Whether the known or potential rate of error is acceptable; and
    - Whether the research was conducted independent of the particular litigation or dependent on an intention to provide the proposed testimony.

Applying these concepts, an attorney can use a Daubert motion either before or during trial to exclude bad science, and the expert witnesses who proffer it. When successful, this can completely turn the tide in a case. One good example of an effective Daubert challenge was a case in the Southern District of New York, In re Mirena IUS Levonorgestrel-Related Prods. Liability Litigation. In Mirena the dismissed seven plaintiffs' experts who had testified that the defendants' contraceptive device caused idiopathic intracranial hypertension ("IIH"), a rare and potentially serious condition marked by increased cerebrospinal pressure in the skull.

In dispatching one expert witness, the court wrote that the proposed testimony "fails to meet any of the Daubert reliability factors." The expert's causation conclusion "has not been tested; it has not been subject to peer review; it has no known error rate and there are no standards controlling its operation; and it has not been generally accepted by the scientific community." Moreover, the expert's "handling of virtually every one of the individual items on which he relies" was "methodologically suspect." The other witnesses fared no better. Lacking their expert witnesses, plaintiffs' counsel voluntarily withdrew their case soon afterwards. Of course, lacking any witnesses, they did not have much choice.

In another example, the Third Circuit affirmed a trial court's exclusion of unreliable causation testimony, as well as the resulting summary judgment, in the case of In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig. The essence of the plaintiff's claim was that the use of Zoloft by pregnant women resulted in cardiac birth defects in their children.

The court held that the plaintiffs' expert did not reliably apply the methodology or techniques he claimed to, writing that "the fact that Dr. Jewell applied these techniques inconsistently, without explanation, to different subsets of the body of evidence raises real issues of reliability. Conclusions drawn from such unreliable application are themselves questionable." In other words, just because testimony is offered by an expert, it isn't necessarily valid and admissible. Daubert motions are how this gets decided.

Preparing for the Courtroom

If a Daubert motion is made, the ensuing battle over admissibility of expert testimony is primarily fought by the attorneys. It has little direct impact on the witness. However, the expert witness has another courtroom gauntlet to run: examination at trial. Perhaps the most harrowing aspect of being an expert witness is the actual real-world experience of testifying and being subject to both direct and cross examination. Of all that an expert must do as a witness, this often has the least to do with actual expertise and the most to do with the fundamentally adversarial nature of litigation itself. If a Daubert motion, and the ensuing analysis, is a relatively cordial chess game between really good players, examination while on the stand is a fistfight in an alley.

It is one thing to deliver conclusions during a professional discussion or an academic presentation, or in a written report prepared from the safety and quiet of an office. It is quite another to be in a courtroom, with opposing counsel standing right in front of you, either attacking your testimony, or preparing to. Professional colleagues don't (usually) cut you off in the middle of your answer to a question, attempt to bait you into becoming agitated, or deliberately try to paint you into a logical corner. But both at trial, and in depositions, opposing counsel will – that's why they're there. The verbal cut, thrust and parry of the courtroom is often where an otherwise eminently qualified and rock-solid expert witness find themselves covered with cuts.

As in so many other things, an ounce of prevention here is worth a pound of cure. Expert witnesses can avoid mediocre performances in the courtroom by being properly, thoroughly prepared. More specifically, they need to be prepared not just for the technical and legal issues that will arise, but for the emotional and interpersonal experience of testifying. If they know what to expect, and understand what's going on, they will be much more effective, and your case will be that much stronger. Or, to paraphrase novelist Mark Helprin, "A cat could outrun a racehorse, if it could only understand the idea of a race."

Experienced expert witnesses already know this. But even for the most battle-hardened witness, a brief refresher course in the realities of courtroom testimony is a great idea. And the

first lesson, always is the supreme importance of both keeping calm, and answering questions slowly, precisely, and carefully. Or, to put it a little more informally, the most important thing any expert witness needs to remember to do is to not take the bait during cross-examination. As litigators, we know this well, but for people who are not trial attorneys, it can seem like a profoundly unnatural act.

As a first step in witness preparation, then, litigators need to remind their experts that there will be times, perhaps many, when opposing counsel will actively attempt to elicit emotionally-powered mistakes in their testimony through aggressive verbal or emotional manipulation. Of course, as their counsel, you will object as frequently as necessary to help defend against this, but you can't completely prevent it. Expert witnesses need to know that this kind of tactic is not only permissible, but part of the normal trial process.

Your opposing counsel's toolkit includes sarcasm, anger, bullying, cutting off or inaccurately restating answers, deliberate distortions of agreed-upon facts, or simply applying interpersonal pressure. For example, a classic tactic your witness will face is being pressured to answer a question with a "yes" or a "no" when in fact, a simple "yes" or "no" is not appropriate.

The toolkit also includes the exact opposite kind of manipulation -- subtly flattering an expert into offering damaging testimony by, for example, providing answers outside the scope of the question they're asked, or an absolute answer ("always" or "never") that can easily be impeached later. A good trial lawyer is expert at giving your expert enough rope to hang himself in the courtroom – something you need to prepare them to spot, and to avoid.

In either case, the solution is simple, but not easy. Expert witnesses must be taught to always pause, think, rein in their emotions, and answer only the specific question they were asked carefully, calmly and factually. This single concept is the best preparation any witness can have, and if consistently observed, can help prevent a host of mistakes and problems.

Another area of vulnerability for experts is often demeanor. This is irrelevant, of course, in a deposition (unless it's being videotaped) but in front of a lay jury, it's critical. How a witness presents themselves is often at least as important as the content they're presenting. Without overpreparing, which can make an expert witness seem scripted and uncertain, training (or a refresher) in how to carry themselves when testifying can be very helpful. A few basics:

- Dress professionally, but without being too flashy or extravagant. If what the jury remembers is the witness's luxury watch, you have a problem.
- Minimize unnecessary hand motions or repetitive gestures like fiddling with pens, rocking back and forth or nail-biting.
- Maintain eye contact with the jury
- Speak clearly without a lot of verbal filler – "um", "ah" and the like
- If you're going to be doing a demonstration, make sure all the technical items (adapters, pointers and so on) are ready and working, and especially make sure you've rehearsed

using the equipment. Nothing weakens expert testimony more than watching someone fumble with equipment.

It's also important to manage the back-and-forth of actual testimony. The foundation of an expert's testimony is your direct examination. Here are a few ways to make sure that goes as smoothly as possible:

- Instruct your expert to be extremely careful about using professional jargon. Phrases like "distal" and "proximal" will often confuse a lay jury, and should be avoided.
- Remind them also that their responses cannot appear to be biased towards either side of the case. They're expert witnesses, and their testimony should be as factual and neutral as possible.
- Work with them to map out open-ended questions for the points and concepts that are key to your case. This allows them to elaborate on important points.
- Also work with them to prepare to ask anticipated cross-examinations questions during your direct. This tactic weakens both the impact and surprise factor in cross-examination, and allows you to at least partially control the way these issues are presented.

Above and beyond how a witness looks and reacts, interaction with counsel, particularly opposing counsel, is where the expert's actual expertise gets entered into the record. It's very important that the expert understand how to avoid getting sidetracked, trapped or badgered by an aggressive attorney for the other side of the case. A few specific recommendations:

Emphasize the importance of answering only the specific question asked, and then stopping. Experts have a tendency to provide more information than they were asked to, with potentially damaging results. If the question is "Do you think the design of the water intake valve in this Kenmore washing machine was in keeping with industry standards?" the expert must never forget that the answer is either "Yes" or "No". It is not "No, because Chinese mechanical engineers are notorious for ignoring specifications when finalizing designs."

Similarly, experts have to be prepared not to be pressured into providing a "yes" or "no" answer to a question that isn't actually answerable that way. If opposing counsel doesn't allow them to completely answer a question, they need to say so when they answer the next question. And finally, they have to be extremely cautious about offering final, absolute opinions that close off the opportunity for later clarification without seeming to contradict themselves. When opposing counsel (or you) asks them if that's everything, the appropriate response is "That's all I can recall at the moment."

Again, all of this is second nature to litigators, but very unfamiliar and hence difficult for witnesses, particularly experts. Preparation for trial is akin to teaching someone the rules of etiquette in a very foreign, very unfamiliar country. The best way to prevent mistakes is to slow down, calm down, think and then act carefully. As an elderly aunt once said about table

manners, the key is to do everything very slowly. The same applies to expert witnesses. Breathe, slow down, think and be careful, and everything will be fine.

An Expert Witness or a Consulting Expert?

Finally, a critical tactical question is whether an expert should testify at all. Not all experts do, and those that simply provide guidance and expertise to a legal team as they assemble and make their cases are considered consultants rather than expert witnesses. It's a critical distinction. The sometimes-fluid difference between a consultant and an expert is a critical part of preparing expert witnesses. By definition, an expert witness is expected to testify at trial. As has been discussed above, this means subjecting them to both direct and cross-examination. It also means disclosing to your opposing counsel ninety days in advance (in Federal court; state court rules vary) the following:

- The opinions your expert intendeds to express
- The basis for those opinions
- The facts used to arrive at the opinions
- Any exhibits you intend to present
- Your expert's qualifications
- A list of cases in which they've testified in the last four years
- An accounting of their compensation

By contrast, a consultant (or consulting expert) does not testify. Accordingly, all work product, correspondence and so on with them is privileged. A consultant expert can be a formidable asset at trial – they can not only help you formulate your own case, but can also help you analyze your opponent's. A good consultant will be immensely valuable in identifying weaknesses and strengths, and can do things like alert you to studies that contradict the opposing expert's assertions, or literature demonstrating that their methodology has been found to be outdated or in appropriate. In addition, having a consulting expert present at trial can also be useful both in intimidating the other side. Consultants can also and be a vital resource during the trial itself, should something unexpected arise.

The issue of whether and how to designate an expert as a witness or not is a particularly strategic one. At the most basic level, it's important to keep in mind that whether or not an expert testifies will have a significant impact on cost. Preparing someone to be a witness requires significantly more time from both you and your witness, with a corresponding impact on fees.

Additionally, designating an expert as a witness has significant implications on your overall trial strategy. Due to the disclosure requirements, and an expert's obligation to be neutral and factual in their testimony, it is not uncommon for an expert to arrive at conclusions unfavorable to your case. Perhaps, for example, they agree with the opposing counsel's expert, or identify significant weaknesses with your position.

If you have already designated them as an expert witness, and as required, you have made the necessary disclosures, you cannot walk back your designation. At the very least, if you choose not to have an expert witness testify, opposing counsel will know exactly why you're not calling on your expert. They may even be able to call them as witnesses themselves, depending on the jurisdiction. While it may be possible to withdraw an expert witness, this will create credibility issues with a jury, and you will still have disclosed a great deal of information about your case and strategy in the service of a witness who won't be testifying. Not good.

Conclusion

An expert witness's role, at the most basic level, is to be a source of credible factual knowledge in the midst of an adversarial proceeding. That being said, however, experts are human beings, and their value at trial hinges on their character, demeanor and perceived veracity at least as much as their sheer technical expertise. They not only have to be right, they have to be believably right in what are often extremely stressful situations. While sheer knowledge can turn the tide in a case, expert witnesses are also subject to challenges, surprises and all the ups and downs of a trial.

For the litigator, the decision of whether and how to utilize expert witnesses is both judgment call and balancing act. Done wisely and carefully, they can help you prevail, but never forget that the sword you're considering wielding has two edges. Think carefully before you pick it up.