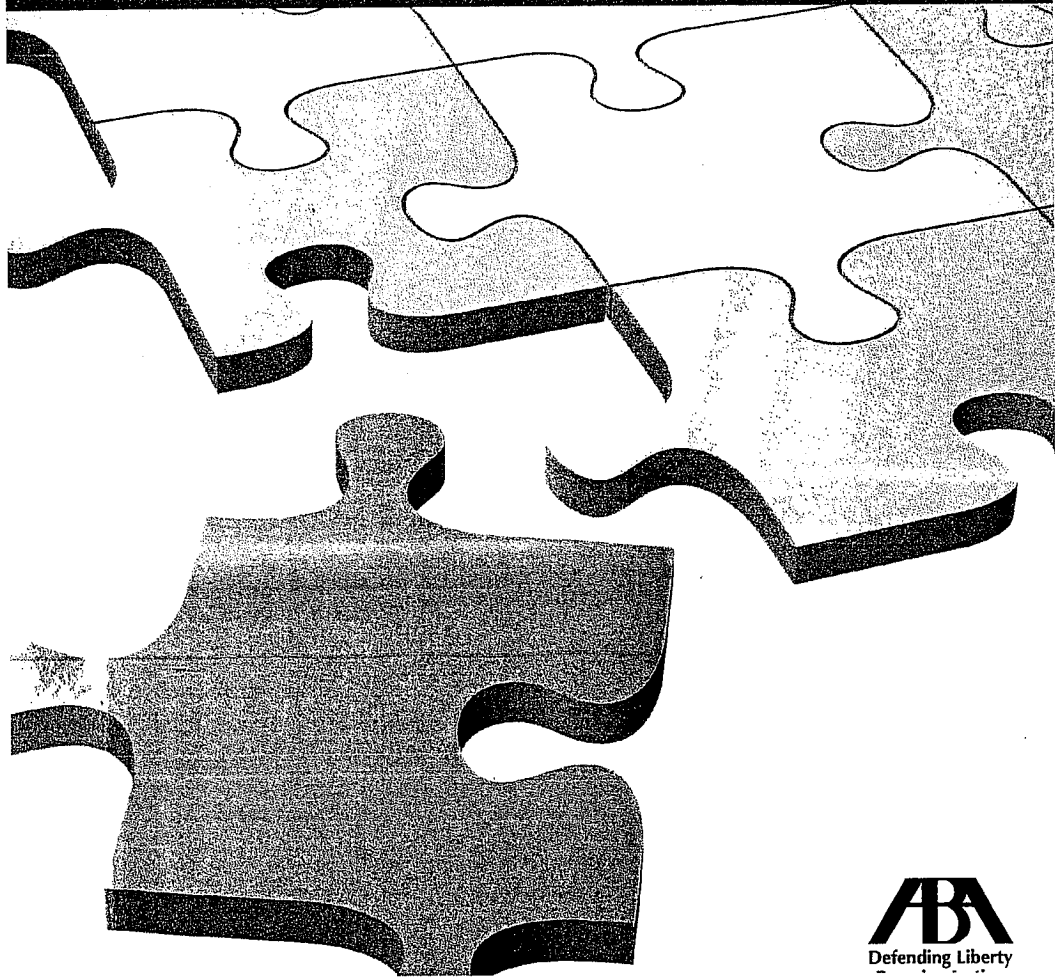


LITIGATORS ON EXPERTS

Strategies for Managing Expert Witnesses
from Retention through Trial

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ABA
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CHAPTER 8

Experts at Trial

PREPARING YOUR EXPERT FOR TRIAL TESTIMONY

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Sometimes expert witnesses are clueless about how and when to prepare for trial and about what to do in preparing for trial. Sometimes experts intentionally wait until the last minute to prepare. Some experts are just like some trial lawyers: they expect the case to settle and think that the effort to prepare will be wasted. Others might think that they already know all they need to know and therefore do not need to prepare: "Been there, done that." Seasoned trial lawyers know there is a rude awakening for those who are unprepared and for those who start too late to get prepared. The other side can sense lack of preparation and will take advantage of the unprepared trial team in settlement negotiations or at trial.²

Experts need leadership. Trial lawyers must provide that leadership. The buck stops with you.³ Some of us are fortunate to have paralegals, legal assistants, legal secretaries, or in-house staff members who are skilled at getting cases ready for trial and have the time to get ready. But the legal assistant might become ill, or the paralegal might have a personal emergency.

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2. The Honorable Mark Drummond, *The Trial Notebook*, LITIGATION NEWS, Spring 2009, at 18.

3. See Nora Lockwood Tooher, *Trade Secrets: Tips for Witness Preparation*, LAW. U.S.A., Jan. 14, 2009 (reporting American Bar Association (ABA) audio seminar given by Stephen D. Susman), available at <http://lawyersusaonline.com/blog/2009/01/14/trade-secrets-tips-for-witness-preparation>.

Trial lawyers should know how to get the case ready for trial and how to make sure the expert witnesses are going to be ready.

When should you start getting ready? Scheduling orders and other pretrial orders under Federal Rule of Civil Procedure 16 might provide a good guide for developing a pretrial and trial plan. Establish deadlines consistent with scheduling and other pretrial orders. If you delegate any of these pretrial preparations to associates or support staff, follow up to make sure that each deadline is met.

This subchapter addresses the following pretrial issues: (1) supplementing your expert's testimony, (2) responding to motions to limit your expert's testimony, (3) taking care of courtroom logistics, (4) ensuring your expert's attendance at trial, (5) educating your expert about courtroom procedure, (6) honing your expert's communication skills, (7) preparing your expert to testify on direct, and (8) preparing your expert to stand up under cross-examination.

Pretrial Supplementation of Expert Testimony

Well understood is the duty to disclose expert testimony.⁴ A more difficult subject is the duty to supplement disclosures of expert testimony. A collection of rules governs the scope of the duty to supplement and the deadline for supplementation. Failure to timely and completely disclose might result in sanctions under Rule 37(c), including exclusion of the expert's testimony.

The scope of the duty to supplement is defined in Federal Rule of Civil Procedure 26(e):

For an expert witness whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends to both information included in the report and to information given during the expert's deposition.⁵

The next sentence in that rule refers to "additions or changes to this information," indicating the supplemental disclosure should include additional information collected and changes made in information previously disclosed.

The trial lawyer's responsibility is to determine whether the information in the expert's report requires supplementation. Experts often continue investigations after preparing written reports or testifying by deposition, sometimes without notifying the trial attorney. For example, some experts perform litigation tests after preparing the report or testifying by deposition. Similarly, as discovery proceeds, additional "facts or data . . . may be . . .

4. See FED. R. CIV. P. 26(a)(2).

5. FED. R. CIV. P. 26(e)(2).

perceived by or made known to the expert”⁶ after he has prepared the report or testified by deposition. “Facts . . . made known” would of course include information provided by the trial lawyer.

Scheduling orders may govern the deadline for supplementing expert disclosures. Rule 16(b)(3)(B) provides that “[t]he scheduling order may: (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1).” Scheduling orders often require that supplemental disclosures be served at least 30 days before trial.

If the scheduling order does not establish the deadline for supplementing disclosures of expert testimony, then Rule 26(e)(2) and 26(a)(3) require that supplemental disclosures be made at least 30 days before trial. Under Rule 26(e)(2):

Any additions or changes to this information [included in the report and . . . given during the expert’s deposition] must be disclosed by the time the party’s pretrial disclosures under Rule 26(a)(3) are due.

Rule 26(a)(3), in turn, provides as follows:

(B) Time for Pre-Trial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial.

The “at least” language leads to a cautionary note: a failure to timely and completely supplement an expert report *before* a deposition, even if the disclosure is made at least 30 days before trial, might lead to an objection or motion under Federal Rule of Civil Procedure 37(c)(1) that the failure is harmful because the objecting party did not have an adequate opportunity to depose the expert on the supplemental information. Waiting until the deadline might not be the best policy.

There is a final cautionary note: the question of whether a party has a *right* to supplement is different from the question of whether the party has a *duty* to supplement. For example, a party might want, for strategic reasons, to expand the scope of the expert’s testimony via supplementation.⁷

Pretrial Evidentiary Motions

As with other evidence, expert witness testimony is the subject of pretrial evidentiary motions. The most common pretrial evidentiary motion is the

6. See FED. R. EVID. 703.

7. See Carl Robin Teague, *Is There a Right to Supplement Expert Witness Disclosures Under Rule 26(e)?* published in American Bar Association, Section of Litigation, EXPERT WITNESSES COMMITTEE ANNUAL REVIEW, at 7 (2009).

motion *in limine*, but, as discussed below, motions to admit or exclude may also be used with respect to expert testimony.

Many judges take a dim view of general motions *in limine*, including those relating to expert witnesses. Therefore, you should avoid general motions and be ready to object to them. Consider asking the court not to refer to the expert witnesses as “experts” and to instruct the parties and the witnesses to refrain from doing so. The Advisory Committee’s notes to the 2000 amendments to Federal Rule of Evidence 702 provide support for such a motion:

The amendment continues the practice of the original Rule in referring to a qualified witness as an “expert.” . . . The use of the term “expert” in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an “expert.” Indeed, there is much to be said for a practice that prohibits the use of the term “expert” by both parties and the court at trial.⁸

This kind of motion *in limine* might be a good idea if you are concerned that a reference by the judge to the opposing party’s expert witness as an “expert” might be interpreted by the jury as a stamp of approval and a comment on the weight of the evidence. A competing consideration, however, is that stamping the opposing party’s expert witness with the label expert might make it easier to attack the witness as a hired gun.

If the opposing party moves to limit your expert’s testimony, consider filing a motion to admit the evidence. Taking the offensive might give you a psychological advantage over your opponent. It might also draw out an opponent who is “laying behind the log,” waiting to make the real objection when you make the offer during trial—when you might be under fire and not as prepared as you might be in a pretrial hearing.

Determine whether an affidavit by your expert witness is necessary to support your motion to admit or your response in opposition to a motion *in limine* or to exclude. Federal Rule of Civil Procedure 43 provides as follows: “When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.”⁹ Local rules might require that affidavits in support be filed with the motion and that affidavits in opposition be filed with the response. Advise your expert, however, that testimony in person during a hearing

8. FED. R. EVID. 702 Advisory Committee’s notes to 2000 amendments; see *United States v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1988).

9. FED. R. CIV. P. 43(c).

might be required or more persuasive and that the expert should be prepared to testify at a pretrial hearing.¹⁰

Finally, consider asking the court to make a pretrial evidentiary ruling definitive rather than merely *in limine*. Since the 2000 amendments, Federal Rule of Evidence 103(a) has provided: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."¹¹ The Advisory Committee's notes to Federal Rule of Evidence 103 caution that "[t]he amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point."

Courtroom Logistics

Do the trial lawyer, expert witness, and litigation support team expect to walk into the courtroom, plug in, and begin? If so, you might be expecting too much and be surprised by what you find when the trial begins. For example, in a recent case, I found that some monitors worked and some monitors did not. In another situation, I found that one laptop was compatible with the courtroom system, but another, newer laptop was incompatible.

Your trial team, including expert witnesses, should visit the courtroom before the trial begins. Contact the courtroom deputy to arrange the visit. If your expert cannot visit the courtroom before testifying, consider sending the expert a video recording or still photographs and sketches of the courtroom and its systems.

Here is a checklist of issues to investigate when you visit the courtroom:

- Where are the electrical connections located?
- Is the courtroom high tech or low tech?
- If the courtroom is high tech, with what audio/visual systems is it equipped? Projector? Speakers? Screen? Monitors? Document camera?
- If the courtroom is high tech, is your equipment compatible with the system with which the courtroom is equipped? (For example, are adjustments in resolution on your or the expert witness's laptop required before images will properly project on a screen? Do laptop settings need to be changed so the laptop screens can be projected on the screen?)

10. See generally *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings).

11. FED. R. CIV. P. 103(a).

- Will there be enough room for all the equipment that the opposing parties plan to use? Or, because of space or other limitations, must the parties agree to cooperate and share some components?
- Is the expert bringing any large objects (such as part of an automobile in a product liability case or a large visual aid)? If so, will the objects fit through the doors of the courthouse and courtroom? If not, should a request be made for the trial to be conducted in a courtroom that can accommodate large objects? Or can the objects be disassembled so that the parts may fit into the courthouse and courtroom?
- Will there be a problem bringing any of your electronic equipment or visual aids through the court security? If so, what special arrangements must be made to allow passage?

Witness Availability

First, it is your responsibility to ensure that your expert witness attends the trial. Inform the expert witness about pretrial deadlines and the trial date as soon as the court renders the scheduling order. Monitor the witness so that the witness does not make conflicting plans.

Assist the expert in making travel arrangements. Do not rely entirely on experts to timely and adequately plan for travel to the trial. Do not wait until the last minute, when flights might be full or inconvenient, or airfares more expensive. Also assist the expert in arranging for accommodations, local travel, and shipment of tangible things (such as a product or exemplar product, test apparatus and fixtures, and visual aids).

Second, plan ahead for the possibility that your expert will be rendered unavailable. Lots of trial lawyers do not ask questions during depositions of their experts by the other side. (Routinely they end the deposition with, "We'll reserve our questions until the time of trial.") If there is a chance that your expert will not be available at trial, you should establish the witness's testimony at the deposition. You might even consider noticing the deposition of your own expert witness. A game is sometimes played between plaintiff and defense counsel regarding treating physicians in a personal injury or disease case. Plaintiff lawyers routinely wait for the defense to notice the depositions of those kinds of witnesses. Sometimes defense counsel does not do so. Do not wait until too late, when the expert witness is unavailable even for a deposition, or the deadline for completion of discovery has come and gone.

Finally, if your expert is suddenly unable to attend the trial, consider whether video or telephone conferencing is available where the witness is located and in the courtroom. Make arrangements for video or telephone

conferencing ahead of time. Under Federal Rule of Civil Procedure 43(a), file and present a motion for permission to present "testimony in open court by contemporaneous transmission from a different location."

Courtroom Procedure

Trial lawyers often forget that the courtroom is a foreign place for many expert witnesses and that it is our job to make sure that our experts understand courtroom procedure. Specifically, you should explain the identity and role of court personnel and emphasize the importance of complying with an order excluding witnesses from the courtroom.

Court Personnel

If the expert witness is not experienced in courtroom testimony, information about courtroom personnel might be helpful. Consider providing information about the duties and roles to be played by the courtroom deputy, bailiff, and law clerks. Inform the expert witness about the formalities observed and required by the courtroom personnel.

Exclusion of Witnesses under Federal Rule of Evidence 615

At least one party usually requests that the court "order witnesses excluded so that they cannot hear the testimony of other witnesses."¹² Often, this request is made in this manner: "Your Honor, we invoke the rule." Federal Rule of Evidence 615 does not authorize exclusion of "a person whose presence is shown by a party to be essential to the presentation of the party's cause."¹³ The question is whether this exception applies to expert witnesses. The Advisory Committee's notes indicate it might: "The category contemplates such persons as . . . an expert needed to advise counsel in the management of the litigation."¹⁴ The exception does not, however, automatically apply to expert witnesses.¹⁵ The burden is imposed on the party requesting application of the exception to show that the court should apply it.¹⁶ The

12. See Fed. R. EVID. 615.

13. FED. R. EVID. 615(3).

14. FED. R. EVID. 615 Advisory Committee's notes to 1972 proposed rules.

15. See *United States v. Seschillie*, 310 F.3d 1208, 1213-14 (9th Cir. 2002), *cert. denied*, 538 U.S. 953 (2003) ("We decline to conclude . . . that an expert witness will *always* meet the criteria of Rule 615(3).") (emphasis in original); *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 629 (4th Cir. 1996); *Drilex Sys., Inc. v. Flores*, 1 S.W. 3d 112, 118 (Tex. 1999).

16. See *Seschillie*, 310 F.3d 1208.

rule "vests in trial judges broad discretion to determine whether a witness is essential."¹⁷ Appellate courts "review the district court's ruling regarding the applicability of Rule 615(3) for an abuse of discretion."¹⁸

Thus, the party requesting application of the exception to an expert witness should not always expect the opposition will agree and should be prepared to show that the expert's "presence [is] essential to the presentation of the party's cause."¹⁹ But the opposition should not routinely object to the application of the exception since some appellate courts have held that the trial court abused its discretion in excluding an expert.²⁰ The party requesting application of the exception should not wait until the rule is invoked before preparing for a request for application of the exception.

Counsel should appropriately advise expert witnesses if the court refuses to apply the exception or if counsel decides that the expert witness should be excluded. The consequences of a violation of the rule can be severe. The trial court might order that the witness be disqualified.²¹ If the court allows the witness to testify, the court might allow opposing counsel to cross-examine the witness about the violation²² or instruct the jury to consider the violation in determining the credibility of the witness.²³

Expert's Communication Skills

If the jury does not trust your expert witness, the substance of the witness's testimony is irrelevant. You should work with your expert before trial to ensure that he is complying with any unwritten dress code in the venue, that your expert does not have distracting habits, and that your expert understands how to answer questions clearly.

Dress Code

If you are trying a case in West Texas, you do not want your expert, "a Connecticut Yankee," to walk in wearing a brand new ten-gallon Stetson, lizard-skin boots, and a western suit. If you are prepared, this situation will happen only to your opponent—and to your amusement.

17. *Opus*, 91 F.3d 625.

18. *Seschillie*, 310 F.3d 1208.

19. See FED. R. EVID. 615.

20. See *Seschillie*, 310 F.3d 1208; *Malek v. Fed. Ins. Co.*, 994 F.2d 49, 54 (2d Cir. 1993).

21. See *United States v. Wilson*, 103 F.3d 1402 (8th Cir. 1997).

22. *United States v. Hobbs*, 31 F.3d 918, 921 (9th Cir. 1994).

23. *Holder v. United States*, 150 U.S. 91 (1893); *Hill v. Porter Mem'l Hosp.*, 90 F.3d 220 (7th Cir. 1996).

Talk to your expert if you have not been together several times, enough to get an understanding of the expert's style of dress. Talk to your expert before depositions, and before trial, because a visual record of a deposition will reveal inappropriate clothing worn then.

Visit the courtroom during a trial. Such a visit should lead you to learn about any informal dress code in that court for expert witnesses. Unless there is a reason to be formal, however, the expert should be dressed comfortably so that testimony will not be affected.

Bad Habits

Review the recording of the expert witness's deposition to identify any bad habits that you can help the witness break. First, look for distracting body language, such as rocking back and forth in the witness chair, covering the face with hands, fidgeting with hands, and playing with a necklace or other jewelry. Also look for communication problems, such as speaking too quickly or saying "uh huh" instead of "yes, ma'am," or "nuh uh," instead of "no, sir." (I try to cure the problem during the deposition: "Did you mean 'no'?" or "Was that a 'yes'?") Finally, listen for the expert's tendency to use obscure words. Physicians are especially prone to use uncommon words like "distal," "medial," and "proximal," which mean nothing to the typical juror and, when used, will lead to frustration. The trial lawyer who retained the expert should try to convince the witness to use understandable language. Experts might use technical terms, to show expertise, but should immediately explain and give examples.

Importance of Responsiveness

Some cross-examiners just love an unresponsive witness. You know that type of witness, the one who, when asked about the defendant's conduct, testifies instead about the plaintiff's conduct, or vice versa. Trial lawyers can make the unresponsive witness look like a fool. As Professor Jim McElhaney recently wrote, "Whenever you're evasive or argumentative, you lose credibility, and the judge and jury won't trust anything you say."²⁴ The trial lawyer should caution the expert to answer the question asked, not the question the expert wants to answer, and to apologize for misunderstanding the question if there is truly a misunderstanding. The lawyer should advise the expert that failing to answer the questions might lead to some of these embarrassing moments:

24. Jim McElhaney, *On Good Behavior*, A.B.A. J., Feb. 2009, at 28.

Q. Did you hear my question?

A. Yes.

Q. What was my question?

A. I don't remember.

Q. I'll ask the question again.

A. Okay.

Q. Did you hear my question that time?

A. I must not have. Please ask it again.

Q. Here goes for the third time.

A. Okay.

Q. Did you understand my question?

A. Yes.

Q. Sir, I know you want to answer *that* question (whether _____) but I want you to answer *this* question.

A. I thought I answered it.

And impress on the witness that the cross-examiner may not even need to ask the judge for help. The judge will finally get impatient and take action without request:

The Judge: The witness is instructed to just answer the question.

Answer: Yes, your Honor. I am so sorry (for playing games).²⁵

Engaging the Jury

Trial lawyers and expert witnesses should be prepared to try to keep jurors awake. One way is to create motion in the courtroom. Normally, witnesses are required to testify from the witness chair, and often trial lawyers are required to ask questions from counsel tables or a podium. But many judges will permit a witness to leave the chair or the lawyer to leave the table or podium for the purpose of, for example, discussing an exhibit, showing an exhibit or visual aid to the jury, drawing on a chalk board or pad, or presenting a PowerPoint presentation. You should check the court's website for guidance or ask the court for instructions during the pretrial conference.

There are other methods for keeping jurors awake. One is to get to—and stick to—the point. Preparation might require practice “Q and A” with the witness so that one prone to verbosity will learn how to be concise.

Another trial technique is to make sure the jobs of the judges and jury are easy. Avoid making their jobs more difficult. Can the jury and judge see

25. See FED. R. EVID. 611(a).

the witness? Exhibit A? Can they hear the witness? The sound and visual record of the deposition? Prepare for these situations with the expert witness.

Can the jury understand the witness? In a case involving some complex or uncommon subjects, the witness should be prepared to use analogies and examples. Once, in the trial of a product liability case involving a fall from a scaffold, a question was whether the scaffold platform could deflect, so that it was not level, causing the user to lose his balance. Trial preparation led to the discovery that the amount of deflection could be calculated using the Pythagorean Theorem. On direct examination, the question was asked, "Is there any theory which enables you to determine the amount of any deflection?" The answer was, "Yes. The Pythagorean Theorem." The high school math teacher on the front row of the jury box smiled and nodded her head in agreement and in recognition of a true expert. The witness then explained the theorem in layman's terms. The witness should be prepared to impress the jury but also to make sure the jury understands what the expert is talking about.

The witness should be prepared to talk directly to individual jurors. Some jurors are put off by watching a witness who pays attention only to the lawyer asking the questions. The witness should be prepared to involve the jury in the story.

Demeanor on Cross-Examination

Have you ever cross-examined an expert witness who, after being so pleasant and forthcoming on direct examination, became argumentative with you and evaded your (hopefully well-formed) questions? Prepare your expert witness to avoid this mistake. Make sure the witness knows the proper role of a witness, which is not to pick fights with opposing counsel, but rather to let opposing counsel pick a fight with the witness, if there is to be a fight. This advice does not, however, mean the witness should roll over for the cross-examiner. It is essential that the witness stand up under aggressive cross-examination.

A witness should be prepared to know the difference between holding one's ground and going out on a limb. The trial lawyer should prepare the witness to listen for that sound of the saw, cutting the limb off after the witness has gone out to the end of it. An example of going out on a limb is testimony by a defense expert in a product liability suit that the product is safe under all circumstances.

Preparation of Witness for Direct Examination

The Role of Expert Witnesses

Sometimes experts forget the proper role of an expert witness. There is the tendency of some experts to become advocates for or against one party, usually, of course, for the party that retained the expert. Advocacy by an expert is a matter considered by the jury in determining credibility and by the cross-examiner in showing the jury that the expert is taking sides. Other expert witnesses just enjoy playing games, like "hide the ball," or picking fights with the cross-examiner, not paying attention to the judge and jury, who are grading their papers.

So what is the proper role? In preparation for trial, the trial lawyer should inform or remind the expert witness about the Federal Rules of Evidence, which provide a guideline for the proper role:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto.²⁶

Thus, the rule indicates the proper role is twofold:

1. Assist or help the jury to understand the evidence; or
2. Assist or help the jury to determine a fact in issue.

The trial lawyer should advise the expert on those two roles and make sure that the expert realizes credibility might be damaged if the expert steps outside of those two roles.

The direct examiner and expert must decide on the scope or nature of the trial testimony by the expert. Will the expert testify on "an ultimate issue to be decided by the trier of fact," as permitted under Federal Rule of Evidence 704?²⁷ Or will the expert just try to "assist the trier of fact to understand the evidence?" Or assist the trier of fact to do both, "understand" and "determine?"

The Advisory Committee's notes provide an explanation of the difference between the expert as educator, through exposition, and the expert as advocate, through opinions:

26. FED. R. EVID. 702; *see also* FED. R. EVID. 701 ("If the witness is not testifying as an expert, the witness' testimony . . . is limited to those opinions or inferences which are . . . helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.").

27. *See also* FED. R. EVID. 702 (permitting the "witness qualified as an expert" to "assist the trier of fact to . . . determine a fact in issue").

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.

[I]t seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.²⁸

Review of Materials in Preparation for Direct Examination

The witness and trial lawyer should, of course, read the transcript of the deposition. The lawyer should make sure the witness has timely corrected errors and returned the corrected transcript to the court reporter.

The lawyer should ask the witness to be self-critical. Some experts will recognize problems such as rambling answers, unresponsive answers, or confusing or unclear answers. To the extent that the witness does not recognize the problems, the lawyer should give advice, based in part on the written record of the testimony. The advice might be about the substance of the testimony. The advice might also be about techniques used by the lawyer taking the deposition.

The lawyer and witness should also view the sound and visual records of the deposition. Here the lawyer and witness may be helped by a third-person nonlawyer, who can provide feedback about mannerisms and clarity.

Preliminary Questions concerning Qualification of a Person to Be an Expert Witness

Prepare the expert witness for preliminary questions. Preliminary questions involve both substance and procedure. The substance is controlled by Federal Rule of Evidence 702:

28. FED. R. EVID. 702, Advisory Committee's notes to 1972 proposed rules; *see also* 1 DAVID L. FAIGMAN ET AL., *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* §§ 3:5–3:10 (2008) (discussing experts as “pure educators,” as “assistant advocates,” and as “hired guns”).

If scientific, technical, or other specialized knowledge will assist the trier of fact . . . , a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto.

The procedure to be followed is based on several rules. Federal Rule of Evidence 104(a) provides as follows:

Preliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court.

"Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a)."²⁹ The Advisory Committee's notes to 1972 Proposed Rule 104 provide an example of such a preliminary question: "Is the alleged expert a qualified physician?"³⁰ In other words, is the witness an expert? In making that determination, the court will also be generally guided by Federal Rule of Evidence 611, which provides for control by the court of interrogation of witnesses. The rules do not, however, "set forth procedural requirements for exercising the trial court's gate keeping function over expert testimony."³¹

The witness should be prepared for opposing counsel to break into the direct examination with an objection to the qualifications of the witness to testify as an expert ("Objection, lack of foundation."), and a request to take the witness on voir dire. Although the federal rules do not expressly provide for voir dire examination of a witness,

[c]ounsel objecting to introduction of evidence on the grounds of lack of introduction of a sufficient foundation will, if requested, frequently be given an opportunity to cross-examine the witness at the time of offer limited solely to the question of the sufficiency of the foundation. The process is referred to as "voir dire."³²

During a voir dire examination involving qualifications, the witness should be prepared to testify about education, training, and experience; the knowledge, skill, and expertise the witness claims to have which are based thereon; and how that knowledge, skill, and expertise relates to the evidence or facts in issue. The trial lawyer should also prepare as exhibits the expert's written report and supplemental reports, resume, bibliography, and fee statements, which are required to be disclosed under Federal Rule of Civil Procedure 26(a)(2)(B).

29. FED. R. EVID. 702 Advisory Committee's notes to 2000 amendment.

30. FED. R. EVID. 104 Advisory Committee's notes to 1972 proposed rule.

31. See FED. R. EVID. 702 Advisory Committee's notes to 2000 amendments.

32. 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 611.9 (6th ed. 2006).

The Outline for Direct Examination: Topical and Chronological

The expert should assist the trial lawyer in preparing an outline for direct examination at trial. Brainstorming can be useful. A good starting point might be the expert's written reports and supplemental reports. In addition, the outline should include the requirements for expert testimony discussed above: proof that the witness is qualified as an expert and that the specialized knowledge of the expert will assist the jury—that is, that the knowledge is relevant and that the testimony is reliable.³³

The court may set forth requirements pursuant to Federal Rule of Evidence 705, relating to disclosure of underlying facts or data. But the rules otherwise leave to the trial lawyer and expert witness the decision as to when and how to disclose such data.³⁴ Normally, the expert is prepared to disclose during direct examination the “underlying facts or data,”³⁵ that is, the “facts or data in the particular case upon which an expert bases an opinion or inference”³⁶ and the reasons for opinions or inferences.³⁷ Failure to fully disclose during direct might lead to unpleasant disclosures during cross.

The outline should enable the trial lawyer to give headlines to the jury and judge so that they know what subject is going to be addressed next. (“Ms. Expert, I’d like to ask you some questions about your investigation. Did you investigate the accident?” Surprisingly, some witnesses will answer, “no,” requiring rehabilitation, so make sure the witness is prepared to answer the questions you plan to ask.) The headings should enable the trial lawyer and expert to stay on point until the point is finished.

Disclosure of Inadmissible Facts or Data

The direct examiner and expert should consider whether they should disclose to the jury facts or data that are “otherwise inadmissible” on which the expert relied. Federal Rule of Evidence 703 governs the disclosure of otherwise inadmissible facts or data in this circumstance:

Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

33. See FED. R. EVID. 702.

34. See FED. R. EVID. 705.

35. See FED. R. EVID. 705.

36. See FED. R. EVID. 703.

37. See FED. R. EVID. 705; FED. R. CIV. P. 26(a)(2)(B)(i).

The cross-examiner should be prepared to object to the disclosure, unless the cross-examiner plans to take advantage of the "otherwise inadmissible" facts or data. The direct and cross-examiner should not take each other or the court by surprise but should consider this matter in motions *in limine*.

Stealing Thunder

In every case, the expert's potential testimony has problems, whether they relate to underlying facts or to qualifications. In preparing for trial, the trial lawyer and expert should discuss those problems and decide whether to attempt during direct examination to steal the thunder from the cross-examiner, that is, to remove the sting, before the expert gets stung on cross-examination.

Open-Ended Questions

The expert should be prepared for leading questions on cross-examination. But in preparing for direct examination, the direct examiner should advise the expert not to expect to be fed the answers by leading questions from the trial lawyer. In preparing for trial, the trial lawyer should advise the expert witness about the rule governing leading questions:

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.³⁸

Both direct examiner and expert should be careful to avoid leading questions or reliance on them because the court will probably sustain opposing counsel's objection ("Don't lead, counsel."), and the jury might get the impression the expert witness is a mere puppet of the direct examiner. Moreover, repeated objections will lead to the embarrassing revelation that the direct examiner is not prepared to ask the questions the right way or that the expert is not prepared to answer the questions without help.

Documents to Be Used during Direct Testimony

In preparation for trial, the direct examiner should ask the expert about documents the expert plans or wants to use while testifying (or before

38. FED. R. EVID. 611(c).

testifying). The trial lawyer and witness should prepare to use the previously disclosed documents during direct examination or be ready to produce the documents during cross-examination. The trial lawyer should also prepare to prove that the documents and other evidence were timely disclosed.

Visual Aids

Most trial lawyers know the science of a trial. We realize that each cause of action and affirmative defense consists of an element or elements that must be proved by the evidence. And most trial lawyers also realize the more persuasive case is the more artful case. The more artful case usually involves visual aids.

The terms “demonstrative evidence” and “visual aids” do not appear in any evidence code in the United States,³⁹ but Federal Rule of Evidence 1006 provides guidance:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination, copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Charts are a form of “demonstrative evidence,”⁴⁰ which serve “merely as a visual aid to the jury in comprehending the verbal testimony of a witness or other evidence.”⁴¹

You should keep a record of the disclosure of visual aids. An adequate record might include a letter of transmittal containing a detailed list of documents and tangible things produced.

You should also consider whether the visual aids will be offered into evidence and whether a request will be made that the exhibit be sent to the jurors during deliberations:

39. See Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Evidentiary Status*, 25 U.C. DAVIS L. REV. 957, 962 n.13 (2002). But see FED. R. EVID. 401 Advisory Committee's notes to 1972 proposed rules (“Evidence which is essentially background in nature . . . is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate . . . and many other items fall in this category.”); FED. R. EVID. 611 Advisory Committee's notes to 1972 proposed rules (“Item (1) . . . covers such concerns as . . . the use of demonstrative evidence.”).

40. See 1 GRAHAM, *supra* note 32, § 401.2.

41. *Id.*

While it is a common practice for demonstrative evidence to be displayed and referred to without formally being admitted into evidence, the formal offering and introduction of demonstrative evidence into the record as part of the witnesses' testimony is preferred.⁴²

Some experts and some trial lawyers like in-court demonstrations and experiments. For example, sometimes a physician or surgeon will conduct part of a physical examination of a plaintiff/patient to show restrictions on range of motion (physical impairment) or to show disfigurement. Another example, in a product liability suit, is the disassembly of a product or part, such as a control, using a visual presenter to project enlarged images of the disassembly onto a screen. Still another example in a product liability suit is the use of a product, or an exemplar of a product, such as a ladder or scaffold, which is allegedly unsafe.⁴³

Trial preparation also includes consideration of whether a demonstration may be more efficiently and effectively shown to the jury through a video record of an out-of-court demonstration. Practice of the experiment or demonstration might indicate to the trial lawyer whether the visual record of an out-of-court demonstration is preferable to an in-court demonstration.

Compensation

Expert witnesses should be prepared to explain why they charge so much, relative to the amounts earned by jurors. One way to explain is to detail the nonreimbursable costs and overhead expenses an expert incurs in providing the service. The trial lawyer should also prepare the expert to testify about the expense of expertise. Without bragging, the expert who charges high fees should show the jury just what was required to reach the point where the expert accumulated the expertise necessary to solve the problem.

Objections

The direct examiner should instruct the witness to pay attention to the other attorneys. The witness should stop talking when another attorney rises to make an objection or to otherwise address the court. Most judges have little patience with aggressive witnesses who rush to complete an answer during an objection. Jurors will take that behavior into consideration in determining credibility.

42. *Id.*

43. See the discussion about the in-court demonstration relating to a fall from an allegedly defective ladder in *Schmude v. Tricam Industries, Inc.*, 556 F.3d 624 (7th Cir. 2009).

The Order in Which Witnesses Should Be Called

The trial lawyer should consult with the expert witness about the preferred order for calling witnesses. Some trial lawyers believe calling a damages expert to testify before liability witnesses is putting the cart before the horse. The reasoning is the jury might not be ready to hear about damages from an expert until after they think the defendant is liable.

A decision should be made about whether to call expert witnesses to testify before lay-fact witnesses. In a case involving an amputation resulting from the use of a power saw, the plaintiffs called the expert to testify about alleged failure to adequately guard the blade and later called the plaintiff's son as a damages witness. After the trial, my cocounsel and I discussed whether the more effective and persuasive way for the plaintiffs to try the case would have been to call the son as the first witness to describe the scene, where the father burst through the door, holding the remains of his hand, screaming for someone to call an ambulance and to help him find his fingers. We both thought the plaintiffs might have won the case if the son had testified first and the expert next, instead of the other way around.

Preparation of Witness for Cross-Examination

Weight and Credibility

The direct examiner should prepare the expert for a cross-examination that involves an attack on credibility. The expert should be informed that under Federal Rule of Evidence 611(b), the scope of cross-examination includes the weight of the testimony and the credibility of the witness. Both the witness and trial lawyer should be prepared for harassment and undue embarrassment, from which the court should protect the witness under Rule 611(a). The trial lawyer should also be prepared to move *in limine* or object under Federal Rule of Evidence 403, on the ground that the evidence should be excluded because the "probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

An example of a question to one of my expert witnesses which I found effective is a question asked right at the outset of cross-examination: "Just how much are they paying you for your testimony?" (Prepare the witness to avoid looking bug-eyed.) Other favorites include questions about the relationship between the witness and the party, and between the witness and the attorneys: "How many times have you testified for the plaintiff attorney?" "Did you used to work for the defendant company?" "Have you consulted

for the defendant?" "And what percentage of your income is derived from testifying as an expert witness?" Remember that, under rules in effect for years, the party or attorney retaining the expert must disclose the compensation to be paid to the expert,⁴⁴ so a professional witness should expect that question and be ready to answer it. Another is, "Do you do anything other than testify for attorneys?"⁴⁵

The rules and opinions in *Daubert* and *Kumho Tire* suggest other lines of attack for which to prepare the witness:

- Have you tested your theory? (By what standards or under what controls did you test your theory?)
- Have you published any learned treatises about your theory?
- What does peer review mean? Has your theory been peer reviewed?
- Has your theory been generally accepted in the (scientific) community?
- Have you ever conducted research about your opinions (principles, methods) independent of litigation?
- Did you develop your opinions expressly for the purpose of testifying?
- Did you consider any explanations for the situation other than the explanation you gave? (Why did you rule out the other explanation?)
- Did you base your opinion on any facts or data discovered by you in your investigation—or did you base your opinion only on facts or data made known to you by the attorney who paid you to testify? (An expert witness may, however, appropriately testify on the basis of facts or data made known to the expert.)⁴⁶

In a product liability case, the expert should be prepared for these types of questions:

- Have you ever used a product like that?
- Have you ever designed a product (or part) like that?
- Have you ever manufactured a product like that?
- Have you ever prepared an instruction manual for a product like that?
- Have you ever prepared a product safety label for a product like that?
- Have you built (and tested) a product (prototype) according to your design and specification (for what you contend is a safer alternative) to determine whether the alternative product design is actually safer? Effective?
- Have you tested the warning (instruction) you propose for determining whether it is effective?

44. See FED. R. CIV. P. 26(a)(2)(B)(vi).

45. See generally 3 GRAHAM, *supra* note 32, § 705.3.

46. See FED. R. CIV. P. 703.

Impeachment by Prior Inconsistent Statements

Prior inconsistent statements may be used at the trial under Federal Rules of Evidence 613 and 801(d)(1). The trial lawyer should advise the expert about the use of prior inconsistent statements. At least to the extent prior statements by the expert witness were not already reviewed by the trial lawyer and expert before the deposition of the expert, prior statements should be reviewed in preparation for trial.

Prior inconsistent statements might be contained in several sources, including the written report by the expert witness, publications by the witness, and written reports and depositions in other cases. The trial lawyer should be wary of cross-examiners who do not question about prior inconsistent statements during depositions but wait for a later ambush at trial. Thus a thorough review of written statements by the witness should be made, even if the cross-examiner did not cover them during the deposition. Sometimes the trial lawyer should simply ask, "Are there any bad documents out there?" One kind of statement that will obviously not have been reviewed in preparation for the deposition is a statement made at the deposition. In preparing for trial, the trial lawyer and expert must determine whether the expert is going to change at trial any deposition testimony. If so, both should expect that the cross-examiner will attempt to impeach by prior inconsistent statements made by the expert during the deposition.

The expert should be prepared to explain the prior statement. If the expert will not deny the statement, a decision should be made in advance of trial about whether to remove the sting or steal the thunder during direct examination.

Leading Questions

You should prepare your expert not to get swept along by leading questions and, if possible, to interrupt the flow of the cross-examiner and slow the cross-examiner down to a pace comfortable to the witness. The witness should avoid appearing to obstruct the other lawyer but should be thoughtful to not jump to conclusions and to not make mistakes that are usually made while in too big a hurry.

Conclusion

One time I was cross-examining a mechanical engineer who had been called by the plaintiff to testify that a valve was defectively designed, causing a leak of hydrofluoric acid, which badly injured a worker at a chemical

plant. Clearly he was qualified as an expert by education (and training). But was he prepared for this case and this trial? Based on the deposition and my investigation, I had compiled a substantial notebook for the cross-examination. I planned for the cross-examination to last a couple of hours.

I started by attacking the credibility of the witness ("Have you conducted any tests for this case?" Answer: "No.") About 30 minutes later, the trial judge almost shouted, "Shut it down, counsel!" Stunned, I soon "shut it down." The judge declared a recess and excused the jury. I nervously approached the judge and asked, "Did I do something wrong?" The judge replied with a question: "Have you ever been in the oil business?" I replied, "No, I have not." He looked back at me as he left the bench: "There's a saying in the oil business. When you strike oil, stop drilling."

Take the time to prepare your expert for trial so that opposing counsel does not strike oil.