

Experts and Opinions

The Pitfalls and Possibilities of Expert Witness Testimony

By Michelle Garcia and Nichole C. Patton

Many lawyers speak of the “Law and Order” effect; jurors expect dramatic events and witnesses and they are often cynical about the reliability of certain testimony and evidence. The heroes on TV are always right and moral, witnesses always provide the perfect piece of evidence and the occasional misstatement of actual legal principles is always part of the dramatic arc. The practical fallout of injecting the glamour of TV into the real-world courtroom is seen in the skepticism among jurors about scientific and quasi-scientific evidence, especially in the field of forensic science.

Despite the “Law and Order” effect, expert witnesses are an invaluable part of the trial process. Lawyers use these witnesses in their cases to provide insight into complex subject matter. Expert witnesses aide the trier of fact in the explanation of specialized research, technical concepts, scientific principles and often the interpretation of records or tests. Key factual disputes at trials can hinge on the opinion of expert witnesses; it goes without saying that experts can make or break a case.

As prosecutors, we see experts used to great effect in the courtroom almost every day. But, we have also seen trials go horribly awry during expert witness testimony. There is a fundamental misunderstanding of the value of professional expert witnesses. Professional credentials and expertise can be dual-edged swords where a witness’ “ivory-tower” credentials become a decisive voice for the opposing counsel. Lawyers cannot assume that what looks good on paper sounds good to a jury of one’s peers.

What are the determining factors in deciding which expert to use? It doesn’t matter what your practice area is or if your expert is an airline pilot, an auto mechanic or an accountant, some basic considerations will help you prepare for the courtroom. Carefully review the Federal Rules of Evidence, Rule 702 or your analogous state law which governs qualifying witnesses. Most litigators will tell you, and we agree, qualifying a witness is not the difficult part of the process. Rule 702 can give you some guidance. It states:

“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.”

Together with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,ⁱ Rule 702 forms the basis for the process of admitting expert and scientific testimony into evidence.ⁱⁱ Some considerations

will apply to the use of any expert witness and doing a little research before deciding on an expert witness will prevent you from being blindsided at trial.

1. Background

The qualifications of a witness will always be used at trial so know your witnesses' education, licensing or training very thoroughly. Some questions to consider: are there any factors that raise a red flag or seem inconsistent? Does your witness represent a credible institution? Does your witness have any documented complaints pending against him or her within their professional community? A seemingly well regarded professional can quickly become a liability to your case if his or her ethics or practices are called into question. Ask yourself if you were a juror hearing the testimony for the first time, would you believe the witness?

2. Expertise in Subject Matter

Most lawyers tend to gravitate towards old depositions and trial transcripts to determine what an expert testified to in the past. That is expected, but trial lawyers need to dig deeper and look into the expert's public statements, any published articles, and teaching done by the expert. "Don't forget to check the internet or your good old library for any books, articles or papers written by the opposing expert," says Ted Campagnolo, Senior Litigation Counsel in the Criminal Prosecutions Section of the Arizona Attorney General's Office. "I can't tell you the number of times I have been able to impeach an expert's entire basis for the opinion by showing that he or she said the exact opposite in a publication." Do the same for your own expert witnesses to avoid the same fate. Be as critical of your witnesses as the toughest opposing counsel.

3. Basis of Opinion

This is another area that will almost always be a line of questioning during trial. Find out whether your witness has taken the time to verify all the information that he or she will be presenting. "You are responsible for making sure that your expert reviews all relevant information," says Greg Brooker, an assistant United States Attorney for the District of Minnesota. Brooker finds it helpful to keep a detailed electronic log of all the evidence the expert has reviewed. "By nature, litigation has a million moving parts. Whatever you can do to keep yourself organized will help you with trial preparation."

Also ask yourself whether the witness' opinion has grown naturally from their research or if it was formed expressly for the purposes of testifying. Have your witness go over all the pertinent facts and data so that every moment he or she is on the stand is spent making a good impression instead of appearing unprepared or unsure of information. The *Daubert* case provides several pertinent lines of inquiry regarding preparation and its holding remains a touchstone for witness testimony.

4. Reliability of Principles and Methods

The source of your witness' expertise can become a tricky question during trials- especially jury trials. Remember, you use expert witnesses because they shed light on matters beyond the knowledge of the average layperson. Be wary of the potential pitfalls with attempting

to explain cutting edge technologies that are not well understood outside of scientific communities (for example technologies or theories that have not yet been peer reviewed), or forensic science that may have limited scientific or statistical reliability. On the other hand, it can be easy to overlook the use of uncommon expert witnesses who hold opinions that are not based on scientific theory. One of the best uses of an expert witness we have ever seen was the testimony of a medical record author who interpreted complex system analysis and made the sequence of events at a hospital much more understandable for a jury.

5. The Application of Expertise to the Facts

Some trial lawyers make the simple mistake of explaining a case theory to the exclusion of all other possibilities. A good case to review on this point is *Claar v. Burlington N.R.R.*,ⁱⁱⁱ where testimony was excluded when the expert failed to consider other obvious causes for the plaintiff's physical condition. Always bear in mind that the trier of fact, whether judge or jury, brings a unique background of life experience to the interpretation of testimony. Presenting straightforward questions to elicit testimony on common alternative explanations can help dispel doubts about your expert's conclusions. Get to the 'why' of an expert's conclusion and use common sense to determine what other explanations need to be explored.

6. Biases

A common source of questions by opposing counsel centers on issues of compensation and bias that may taint expert testimony. Consider whether an expert's credibility will be damaged if the expert testifies exclusively for either the prosecution/plaintiff or defense. Decide ahead of time how you will address the payment of experts for testimony. Be critical of experts' methodologies and determine if their methods are as thorough as those used in their regular professional work outside of paid litigation consulting.^{iv}

7. Impression

How is the expert perceived by the trier of fact? Do they seem knowledgeable, trustworthy, and reliable? Will he or she make a good impression on a judge or jury? Be careful of using witnesses who may seem polarizing or use methods which are too far outside the norms of their profession. If he or she does deviate from a standard operating procedure in reviewing data for a case, ensure that there is a good reason for doing so. Seemingly minor details, like making eye contact and speaking understandably about the expert's area of knowledge, will go a long way towards proving facts in any case.

8. Quantity of Experts

Attorneys should use common sense to avoid a battle of the experts. It is not uncommon, especially in cases involving psychological or psychiatric testimony, to have a myriad of doctors or mental health professionals rendering their opinions. The number of experts being used in a particular case by counsel may hinder, rather than help, the jury in clarifying confusing or complex issues. "Multiple experts on multiple sides of a legal issue may do nothing more than confuse the trier of fact to the point that all of the expert testimony presented is nullified in a battle of the experts," says Howard Pohl, a former Chief Assistant State Attorney in Miami, Florida. "What happens is that the trier of fact loses any benefit of the witness' expertise." The

resulting confusion can be so detrimental to case that it totally defeats the reasons for calling the experts in the first place.

Campagnolo points out two recent cases that indicate just how decisive expert testimony can be and the pitfalls that can occur when experts omit information crucial for the jury's understanding. "In two different murder cases, both involved fire investigators testifying about arson-murders. The prosecutors (different ones in both cases), failed to spend the time with the investigator to understand fire dynamics. The questioning was superficial, and both juries came back hung, because they were not convinced that it was arson." Campagnolo said that both cases were retried, but this time, the prosecutors had a better understanding of how an arson fire works. "The prosecutors were able to ask the right questions, and the expert was able to explain why the defendants' respective stories on how the fires happened did not match up with the basics of fire science. In the second trials in both cases, the juries came back with guilty verdicts."

The participation of expert witnesses to explain methods and provide necessary background information can be vital. A smart attorney will be prepared to use expert witnesses to bolster their case and shed light on complicated questions for judges and juries.

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Endnotes

ⁱ 509 U.S. 579 (1993).

ⁱⁱ Remember that much of the treatment of expert witnesses takes place outside of the jury's presence. Judges can and do set motion hearings, like *Daubert* hearings, well in advance of trial. Pre-trial hearings can result in last minute gamesmanship among attorneys to encourage settlement of cases before a jury is empaneled.

ⁱⁱⁱ 29 F.3d 499 (9th Cir. 1994).

^{iv} See *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) where statistical modeling at issue became a decisive factor in the opinion.