

THE CARE AND FEEDING OF THE EXPERT WITNESS

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Why is an Expert Different?

- Under Rule 26, An Expert is a Person who can assist the Court in Understanding Complex Issues
- True Difference between an Expert and a Fact Witness

CAN TESTIFY TO AN OPINION

FINDING THE EXPERT

- What is the expertise that you need in your case?
- Who can provide that expertise
 - CPA?
 - Economist?
 - Industry Expert?
 - Other?

IS THIS THE RIGHT EXPERT?

- Experience
- Technical Background
- Plaintiff vs. Defendant
- Where are the Warts?

CONFLICTS?

- Give the expert enough information to determine whether there are any potential conflicts.
- Make certain that any potential conflicts are discussed. What may not be a conflict from the expert viewpoint, may be one from your clients viewpoint.

ENGAGING THE EXPERT

- Yes – You do want an Engagement Letter
 - Remember – the engagement is fluent and may require changes in the document
- Budgets are Okay – but remember, they are budgets and they will change with the engagement.
- Make certain you are both on the same page
 - Have a true meeting of the minds

WHO'S IN CHARGE

- The Attorney is always the BOSS.
 - You must be in charge of the overall engagement.
 - You set the deadlines, etc.
 - You must be involved with the discussions between the client and the expert.
 - You determine how you are going to use the experts work product.

YOU'RE NOT IN CHARGE OF -

- The Experts Ultimate Opinion
 - You cannot control the opinion!

- The Scope of the Information that the Expert will rely upon.
 - Unless you have some very good reason – you cannot limit the information that the Expert will review for the purposes of coming to his opinion.

DISCOVERY ISSUES

- Do get your Expert involved in the case very early. Have the Expert assist you in the discovery issues related to the expert's opinion.
- It is not unusual for the Expert to provide you with a listing of the information that will be needed to form the opinion in the case.

COMMUNICATE, COMMUNICATE, COMMUNICATE

- Stay in touch with your expert.
- Make sure that you continue to communicate changes in the process.
- It's okay to ask how the engagement is going.
- On larger engagements, have milestones that require meetings between the client, the attorney and the expert.
- Keep the client informed of what is happening.

FAXES, E-MAILS ETC.

- **RULE – NEVER PUT ANYTHING IN WRITING THAT YOU DO NOT WANT READ IN THE COURTROOM!**
 - Assume that everything that your expert looks at is discoverable.
 - Be careful about notes taken.
 - Remember Client Privilege – usually does not extend to the Expert.
 - Make certain that your expert understands this concept.

REPORTS

- Early in the Process – discuss the type of Reports that you will need for this matter
- I Suggest – Full Written Reports – Usually is cheaper in the long run.
 - “This Case Will Settle” so I don’t need a full report. - When the case does not settle, it is more costly to now recreate the full report that you will need for the Courtroom.
 - My view – The complete report assists in Settlement.

DRAFTS????

- How should you handle “drafts” of reports?
 - Draft Reports are Okay, if handled properly.
 - Your and your Clients input should consist only of factual and clerical information.
 - Do not try to change the “opinion” of the report to suit your purposes. The expert must believe in the opinion, or it will not survive.
 - Drafts should be destroyed after any changes are made.

PREPARATION

- From the beginning of the Engagement, You must make yourself available to help prepare the Expert.
 - Continuing Discovery
 - Depositions
 - Additional Filings
 - Answering Questions

AND MORE PREPARATION

- Be prepared to set aside significant preparation time for each of the following
 - Draft Reports
 - Prior to Deposition of Your Expert
 - Prior to Deposition of Opposing Expert
 - Prior to Trial

YOUR EXPERTS DEPOSITION

➤ During the Preparation

- Discuss the style of the Attorney that will be taking your experts dep.
- Discuss YOUR style in defending the Experts deposition.
 - When you object – are you talking to your expert?
 - Do you normally just let the dep play out?
 - How much information do you want your expert to give out at the deposition?

PREPARE WITH YOUR EXPERT FOR THE OPPOSING EXPERTS DEP

- Your expert should be very involved in the deposition of the opposing expert.
- Let the Expert provide you with questions for the opposing expert.
- Discuss what issues are to be brought out in the deposition, and what issues will be left for trial.
- Building the Box.

THE OPPOSING EXPERTS DEP

- Your expert should attend the opposing experts deposition.
- What Role do you want your expert to play at the deposition
 - Active – writing questions, notes, etc for you during your examination
 - Semi Active – preparing notes to discuss with you at breaks.
 - Passive – just sitting there and being ready to discuss issues at breaks.

THE TRIAL – QUALIFICATIONS OF YOUR EXPERT

- When do you stipulate to your experts qualifications?
- Bring out the Warts early.
- Emphasize similar matters where the expert has testified successfully.
- Bench vs. Jury
- How Much is Too Much

DIRECT EXAMINATION

1 OF 3

- Your expert should be intimately involved in the direct examination preparation, to include writing questions for you to ask.
- If possible, let the expert see the courtroom before testifying.
- Make certain that you understand the technical language that is necessary for the expert to tell the story.
- Make the direct examination a dialogue between you and the expert.

DIRECT EXAMINATION

2 OF 3

- When telling the story – let the expert teach the fact finder about the issues.
- Use visual graphics whenever it helps make an important point.
 - Visual aids must be very simple, try not to demonstrate more than one or two items per chart.
 - Electronics vs. Paper

DIRECT EXAMINATION

3 OF 3

- Handle all of the potential weaknesses on Direct, not on Rebuttal
 - Every case has a weakness or two.
 - It's easier to bring those out on direct, rather than have them thrown at the expert on cross, and then having to go back to the item.
 - Helps to demonstrate the experts lack of bias.

CROSS OF YOUR EXPERT

- It's up to you to protect your expert from bad lawyering.
- You can't protect your expert from being bad.
- Keep track of issues that may need to be addressed on re-direct.
- Less is better

CROSS OF OPPOSING EXPERT

- Keep is Simple, Stupid
- The shorter the Cross, the better.
- Don't argue technical issues with the opposing expert – chances are the other expert know more about the issue than you do.
- Make sure that you lock in the experts answer
- Set up your expert for an effective rebuttal, and do your cross using your expert.

REBUTTAL

- Let your expert be the person that discusses the complex matters that are different between the experts.
- Back to telling the story.
- Keep it short – Key points only.

QUESTIONS
