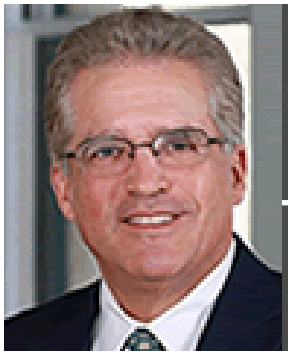

IDENTIFYING AND PREPARING EXPERT WITNESSES FOR TRIAL

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Working With Experts: A Trial Lawyer's Overview

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Experts matter. As any trial lawyer can attest, the selection of, and the ultimate testimony of, expert witnesses is critical to the outcome of most significant lawsuits. This is especially true when the subject matter is complex or technical: experts with specialized knowledge play a pivotal role in discovery and at trial.

The expert is the witness who helps the court, and therefore the jury, sift through dense, often seemingly impenetrable information, and helps the trier of fact to decide critical issues in the case like 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 trier of fact when the relevant facts are too complex or specialized to speak for themselves.

Behind this seemingly straightforward function, however, is a complex web of additional functions and responsibilities. In a trial, experts play many, often interrelated, roles, sometimes shifting from one to another in the course of a single day. The first steps, then, in maximizing the benefits of experts, is to both appreciate these interrelated roles fully and understand the impact an expert can have on your case.

Effective Experts

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 trial, an expert witness needs to be 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 in 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 also need to be free of conflicts, unimpeachably impartial and strike the correct balance between being professionals in their field and serving as an expert witness.

The Impact of Experts

The financial implications of a good trial expert are 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 recent and illustrative examples of the impact of experts are the series of lawsuits filed against Johnson & Johnson, alleging that the talc used in their baby powders was contaminated with carcinogenic asbestos fibers. With some consistency, the outcome of these cases hinged on the involvement (or lack thereof) of expert witnesses.

In the recent California Superior Court case of Leavitt vs. Johnson and Johnson, venued in Oakland, California, a 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 alleged asbestos-laced baby powder was a "substantial contributing factor" in her illness. Johnson & Johnson was also found to have "fail[ed] to adequately warn" users about the powder's "potential risks."

Plaintiff's expert witnesses testified that not only was the baby powder 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 expert witnesses for the plaintiffs resulted in a very large verdict despite 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.

A strong expert witness can also be an important force multiplier, and vastly increase your leverage during settlement negotiations. When the lawyer sitting across the table believes your expert witness is strong, they tend to develop an increased 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 nuances of your case, and can make a legal conclusion seem not just correct but overwhelmingly so – undeniable, inevitable and in the best examples, obvious.

Exclusion of Expert Testimony

Exclusion of an expert's testimony typically occurs through a Daubert motion (or its state court equivalent). 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 necessary qualifications or knowledge. The inconsistency with which courts stringently apply the Daubert factors varies widely by jurisdiction, and results in plaintiffs seeking venues they believe may be more "friendly" to their expert.

Daubert requires 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.

When successful, a Daubert challenge turns the tide in a case. And when properly applied, the Daubert criteria can keep junk science from being introduced into 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 Court excluded 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 excluding 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.

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 plaintiffs' claim was that the use of Zoloft during pregnancy 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, so 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."

Preparing for the Courtroom

Perhaps the most critical aspect of being an expert witness is the actual live experience of testifying and being subject to both direct and cross examination. Developing a rapport with the jury, and ensuring the expert is believable and does not fall into the trap of becoming an advocate is key – in some ways, more important for the defense experts. All of this highlights the need for significant preparation of your expert.

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. 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 ensure solid performance in the courtroom by being well 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 your expert knows what to expect, and where potential areas of vulnerability lie, 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."

The first lesson of both keeping calm, and answering questions slowly, truthfully, and carefully is of supreme importance. 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 trained trial attorneys, it can seem like a profoundly unnatural act.

As a first step in expert 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 through aggressive verbal or emotional manipulation. Of course good trial lawyers will object 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.

Opposing counsel's 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. And preparing experts to give deposition testimony is key, so that your expert offers consistent and reliable testimony at trial.

Another area of vulnerability for experts is often demeanor. This is largely 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 are presenting. Without over preparing, which can make an expert witness seem scripted and uncertain, training (or a refresher) on presenting their opinions 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. A jury watching an expert fumble their use of equipment can damage their credibility.

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 critical to your case. This allows experts 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 to the trier of fact.

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 or opinion than they were asked to provide, with potentially damaging results. Some explanation is appropriate, but the expert needs to feel confident that you can follow up on redirect, and allow them to explain their full testimony.

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.

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. And practice, practice, practice – while the testimony cannot and should feel scripted, ensuring your expert is aware of pitfalls (and confident you will help them if they stumble) is key.

An Expert Witness or a Consulting Expert?

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

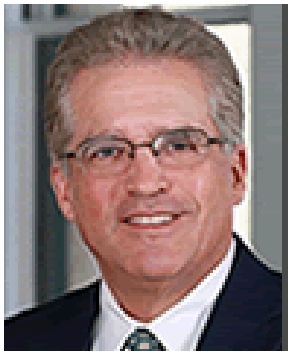
By contrast, a consultant (or consulting expert) does not testify. Accordingly, all work product, correspondence and so on with them is privileged. A consulting expert can be a formidable asset at trial – they can not only help you formulate your own case, but can also help you analyze your opponent's. 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 unreliable. Consultants can also be a vital resource during the trial itself, should something unexpected arise.

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. In some jurisdictions, your opponent may then be able to call them in their case in chief. 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.

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, and their value at trial hinges on their character, demeanor and perceived veracity at least as much as their sheer technical expertise. While their 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.



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As a trial attorney, Steve Lowenthal represents individual and business entities in all forms of trial and arbitration matters throughout the state and country including a variety of complex commercial matters. He has also developed a niche consulting practice, arising from his tenure at the Chairman of Farella (2005-2016), as a counselor to small, closely-held corporations, partnerships, law firms, trusts, or high net worth families dealing with operational issues, fiduciary duty questions, and related matters.

Professional services firms operating in competitive markets often find themselves grappling with complex legal and strategic issues relating to liability, strategic planning, structure, and similar questions. Addressing these issues requires an analysis of both the big picture, and operational details, and advice concerning their business activities.

Steve has a unique set of skills, drawn from the combination of his professional work as a litigator and his management roles at Farella. Whether he is analyzing the financial statements of a law or accounting firm, or meeting with and counseling the principals of an investment management firm, he represents an experienced, analytical, and forward-thinking voice that is a considerable competitive advantage for firms that benefit from a dispassionate, data-driven, and experienced point of view.

This same sense of pragmatism also guides Steve in his work as a litigator. He takes a decidedly businesslike approach to his practice of trial law, leading teams that provide practical advice, solutions, and efficient dispute resolution. His goal, where possible, is to seek a resolution of the dispute on terms favorable to his clients from a business and strategic perspective, but is prepared to handle the dispute through arbitration or trial when that approach is in the clients' best interests.

He has taught trial advocacy at the Stanford University Law School Advocacy Skills Workshop and at the trial advocacy workshop at the University of San Francisco Law School.

Services

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Memberships and Affiliations

- Past President of the Board of Governors of the Association of Business Trial Lawyers
- Board member of the Legal Aid Society of San Francisco
- Stanford Law School Center for the Legal Profession Advisory Committee
- Advisory Committee for the Project for Attorney Retention

Education

- Stanford University (J.D., 1982)
- University of California, Berkeley (B.S., 1979)