Attorney's Guide to Expert Witnesses

Timing is Important in Selecting An Expert Witness

A prominent southeastern Michigan law firm specializing in certain types of litigation recently asked me if I was able to serve as an expert regarding measurement of damages in an employee discharge case. As the lawyer, who was handling the matter for the partner in charge, explained during his initial phone call, the mater had proceeded through discovery and mediation was imminent. Following the normal course of timing after mediation, trial was just around the corner. The associate, with whom I was working primarily, because the partner was tied up in several other matters at the time, presented me with a series of conclusions and asked whether I would have any trouble testifying as to these conclusions should the matter actually come to trial. The mediation summary had been prepared.

As I read through the pleadings and discovery testimony and reviewed the company's records regarding the employee's complaint of age discrimination, I raised a number of questions that occurred to me and asked counsel why they had not been addressed during deposition. Unfortunately, it turned out that these questions had not occurred to counsel. Then, in support of the research necessary to determine whether I could testify as requested I prepared a series of schedules regarding the plaintiff's potential damages should the question of liability be decided in his favor. Plaintiff's complaint had some astronomical numbers for which there was no basis. Notwithstanding the lack of support for plaintiff's contentions, the schedules that I prepared even on the most conservative assumptions produced some astonishingly big numbers. Now the matter had gotten to partner level and serious attention was being devoted. Client and counsel were quite anxious that my schedules not become known during the progression of the case. Of course, they were protected work product, but the concern was nonetheless well founded for the fact remained that if I was able to make such computations plaintiff might have an expert who could do so as well.

Importance of Timing for Lawyers

Obviously, the choice of an expert is one to be addressed very carefully. Notwithstanding which expert counsel chooses, the lesson from the above scenario was that timing was very poorly done. Had counsel engaged me or another expert earlier in the case before depositions were taken or plaintiff and his witness, they may very well have asked questions that could have had a material effect on the outcome of the case. Now that discovery was complete those questions could not be asked until the trial. The best defense is, of course, to prevent cases from going to trial when you are the defendant. Also, had the counsel the benefit of my computations before the matter got as far as mediation, they may have taken an entirely different strategic approach from simply attempting to stonewall the case and come to me with conclusions. All in all, the situation proved to be somewhat difficult and the outcome was a settlement far in excess of what might have otherwise been obtained had the case been managed more skillfully. At least, I was able to show them real exposure could have existed at trial.

Timing of Expert's Work

In my experience, an expert, such as myself in the field of accounting, or in any other field of professional technology, will seldom cost more if he is engaged early on in a proceeding as compared with waiting until just before trial is ready to commence.

Usually I have to do the same amount of work to prepare for testimony when I am engaged early on as compared when I am engaged late in the case. Sometimes, if I am engaged too late my time will be significantly more because of the need to find defenses and strategies that are "catch-up" in nature rather than being well planned in advance and addressed to the needs of the case. In other words, it sometimes costs more to repair damage than it does to prevent it through anticipation and careful homework.

The use of an expert to assist counsel in formulating questions for depositions, items and facts to be obtained during discovery, documents to be searched for, and interrogatory guidance often proves to enhance substantially counsel's effectiveness in carrying out a good litigation strategy. Considering these areas in which an expert may be able to make a positive contribution should give you ideas as to how they may apply to cases you are presently working on.

Experts need not be advocates to suggest to counsel ways in which their case strategy may be improved. Often, the expert has an insight into the case or the technology upon which the matter rests that is different from counsel's experience. Usually, the expert's background and experience is far different from that of the client.

One exception in this regard applies when I am called to testify on matters relating to professional malpractice. In this type of case, the expert is very often a peer of counsel's client and their backgrounds and viewpoints may often be very similar. However, this exception need not invalidate the general rule that an expert, if he is skilled in his profession and experienced in court work, can bring an entirely new dimension to litigation that neither counsel nor the client can anticipate. In fact, that is often why experts are needed.

Further, sessions in which counsel, the expert and the client play "what if" are often very valuable in exploring avenues which may be anticipated or dealt with well before case strategy and a trial script are ready to be committed. Every litigator has his own style for case management and such trial techniques as document retention and recovery, evidence organization, trial manners and the like, but these should have no impact on questions of strategy, matters of fact and very importantly, the expert's opinion and what he is willing and prepared to testify to at trial.

Other Possible Outcomes

In one matter in which I was involved regarding a claim of lost profits, plaintiff had prepared an elaborate presentation of forecasts purporting to show what he would have earned had the business gone forward upon which the lost profits claim was based. Because I was engaged early in the development of the case, I had an opportunity to carefully study plaintiff's expert presentations and plaintiff's counsel pleadings.

Fortunately for my client, plaintiff's assumptions had several serious flaws and the presentation made by their experts was based on an approach which was entirely unproven and heretical. As luck would have it, plaintiff's counsel wanted very much to depose me as defendant's expert early on in the proceedings. My testimony demolished their case as it stood at that time and they were forced to redo their entire assumptions and presentations.

A lenient court allowed this and when they came to trial they were really unprepared and on very weak ground. As a consequence of their being forced to

redevelop their case before trial they did not handle the case very well and the result was an extremely favorable result for our client. Needless to say, counsel did an excellent job in taking full advantage of the situation

Can Every Expert Do This?

Not at all! But, the likelihood is that your expert will be able to attack the other side's case much more effectively if he has the opportunity to do so early on in the game than if the case is fully developed before he has a chance to get at it. You don't always count on demolishing the other side's case just before they go to trial, but if you are well prepared and have plenty of time to develop your strategy it is much more likely.

In another matter, in which a very careful and enlightened counsel was defending a professional malpractice case, we found that the other side had in fact "set up" the case from the very beginning and actions taken by the opponent had been calculated to put the defendant of the malpractice claim into a position where malpractice could be claimed. How did we discover this? We got into areas well aside from the ostensible initial reason for having an expert. But, because we had time to develop this theme we were able to ask the right questions, seek the right documents and long before trial commenced to mount a series of proofs which were inescapable.

Considerations In
Choosing An Expert

Choosing an expert is not an easy task. There are several things which counsel should look for.

* First, counsel should look for an expert that has experience in his field. I don't mean just a little bit of experience, I mean a lot of experience. All too often persons are called to expertize on matters upon which they have peripheral knowledge, but unless they have practiced at some length in the area in which their testimony is gong to be required, they may overlook items which will become important later on.
* Second, counsel should be careful to select an expert that is "court-wise". This means that your expert should have had trial experience and many cases under his belt before you place your case in his hands. How does an expert obtain this type of experience? The only way to get it is to be expertizing for a considerable length of time.

That does not necessarily mean that the expert who has been holding himself out for twenty years is a better expert than one who's been at it for ten years. What it means is counsel should look for the expert that has had the most significant and relevant experience during the period of time he has been expertizing. A hundred cases within a ten-year period is worth more than a hundred cases over twenty years.

The expert should be aware of when to answer the question and when to expand his answer. Most trial judges will allow experts to roam freely in a complete exposition of their subject. There are times, however, when a simple, direct and limited answer is best. You want to be assured that your expert knows when the "answer the only question" and when to answer "the real question." Case and trial experience should give some clue as to the expert's understanding of these concepts, but you can only find out for sure by questioning him intensively yourself.

* Third, counsel should look for an expert that is interested in the broader aspects of trial law. Not to say that the expert is going to try the case or should even be considered to do so. But, counsel should be looking for an expert that is imaginative, has experience in developing strategies, has an inquiring mind and a willingness to use it and gets enjoyment and exhilaration

out of the process in which he is being utilized. An expert that is bored, dull, or not interested in what he is doing will produce a bad result in court. If your case should get to a jury (which many of mine don't because we are able to deal with them well before that time comes) your expert should be able to carry himself well and make a positive presentation.

* Fourth, before you get too far into strategy, planning, and the mechanics of the case itself you should (along with some of your partners or associates if that is possible) test your expert to see how well he withstands close scrutiny and intensive questioning. You should be looking for an expert that does not wither under intensive fire. To a great extent, this comes from experience, but it also comes from having the type of personality and demeanor that enables the expert to carry himself with confidence, assurance and authority. Juries, and your client, will listen and believe an expert who conveys his message effectively. In addition to testing the expert yourself, reference checking should be employed to find out how the expert actually performs in a courtroom situation. Many people, however good they may be technically, come unglued in a courtroom setting. This is the last thing you want to happen after having invested a lot of your time and your client's money in developing your expert's knowledge of the case. All too unfortunately, humans make judgements about other humans based upon initial appearances, impressions and personal prejudices. Therefore, a college professor who comes across as a tweedy, rambling and inoffensive soul will be less likely to impress a jury than a mathematically precise well suited conservative individual.

Sometimes, certain types of forensic specialists can appear in the uniform of their trade. I know one trial lawyer who has dressed his medical experts in white hospital coats, for example, as if the person giving testimony came directly from making rounds. Law enforcement people sometimes can dress in their uniform, although it is singularly inappropriate for a retired law enforcement person to wear a uniform which he is no longer entitled to wear. Engineers, accountants, actuaries and the like should be dressed in precise, conservative business suits. I always wear either a solid blue gabardine suit that is trimly tailored or a light gray pin stripe, similarly tailored, along with a maroon spotted necktie. I have noticed that little things even to the extent of a person wearing a striped shirt can give a jury the wrong impression. Once, I observed a case being lost by an attorney who wore a shirt with a collar of a different color. The jury upon later interview felt they did not trust counsel on the other side, even though they could not identify why. My observation was he came across as a dandy. That is the last thing you want your expert to have happen to him.

Other Qualifications

* Fifth, pick your expert from among those who have knowledge of the law. Again, it is not suggested that the expert be in a position to "try your case", but if he has a thorough understanding of trial procedure, cut-off dates, the meaning of mediation, the importance of motions and the like, he will be much more effective in serving you as trial counsel. The importance of agreeing to and meeting deadlines cannot be overemphasized. In checking references you will want to ask how timely are the expert's efforts on developing questions for counsel and the like. Is the expert always early for meetings and does he make it to court on time?

Beware of the expert who wants to come to court, recite his little specialty and leave without regard for the panoply of the entire proceeding. Look out for the expert who takes only a very narrow view of the experience, duties and responsibilities. Skilled opposing counsel often can make a mockery of the expert's testimony if the expert is not acquainted with the entire case situation and prepared to handle anything that comes. Nonetheless, the broad

gauged and experienced expert needs to know when to trip up his cross-examining questioner and when to buy time to think over or delay answering.

Interest Important

* Sixth, your expert should be interested in the entire matter. Be aware of an expert who maintains only a narrow interest in his particular chosen technology. An expert who studies all the pleadings, reads and understands the motions, participates in some strategy sessions and, above all else, is willing to sit through the entire trial if necessary will be far more effective. Very often subtleties in opposing counsel's presentations, the judge's rulings, the jury's reactions and the like make a great deal of difference in the outcome of a case. If your expert has a handle on these and discusses them understandably with you so there is mutual utilization of all the actions going on, he will be far more effective than one who is not.

Understanding of Case Law

It is also important that the expert have an understanding of case law relative to matters within his undertaking.

For example, I was recently involved in a condemnation proceeding where costs were awarded to the plaintiff and, upon motion of opposing counsel, a hearing concerning experts' fees was conducted by the trial judge. I could see that the judge was headed in a certain direction. Unknown to counsel for either side, there had been a case recently in the involved state where time expended by an expert in coaching counsel (that is educating or training counsel) was not awardable. The judge expressed a line of questioning which required quick thinking on my part to minimize the impact of this precedent. Had I not been aware of this prior law. I might very well have been trapped into answers that were inappropriate.

Prior Contrary Testimony

Another factor counsel should evaluate in selecting an expert is whether there has been prior contrary testimony by the expert somewhere in his career. Nothing can be more harmful to your expert's position than if counsel for the other side is able to obtain information on previous testimony by the same expert that is inconsistent with the position being taken on the matter at hand. Generally, it is safe to inquire of your expert whether there has been any inconsistent testimony in his experience and what the circumstances were.

Conclusion

It is a safe generalization that the timing of the use of experts is greatly enhanced by bringing your specialist in at the earliest possible time during the development of a case. Selection of an expert should be a thoughtful and carefully undertaken process which includes a thorough examination of the expert's experience, credentials and references.

[Editor's Note: Peter H. Burgher, CPA, is a retired managing partner at Arthur Young & Company, and has appeared as an expert witness on accounting matters, audit failures, cost determination, insurance claims, securities fraud, employee and labor claims, lost profits, damage measurement, specialized businesses, professional firm valuation, national prominence in professional firm disputes.]

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