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INCREASING THE EFFECTIVENESS OF EXPERT TESTIMONY

The most knowledgeable experts may have their opinions devalued or discredited if the attorney who hires them has not effectively defined the purpose of their engagement and prepared them for their testimony.

OBJECTIVITY

Objectivity, along with thorough analysis and honest assessment, is the foundation upon which credibility of an expert's opinions, and ultimately his or her testimony, will be based. It is equally important that nothing the expert does gives the mistaken impression that he or she is an advocate for the client rather than an unbiased analyst that every ethical expert must use.

When an attorney works with experts, it is critical that one makes it clear, from the initial phone call, the attorney wants an unbiased assessment of the key issues the expert is to address. Experts need to have all of the available evidence and information relative to the issue the attorney wants them to address. It is important to focus on improving clarity and eliminating potentially ambiguous statements (as opposed to suggesting changes to the substance of the expert's opinion) to

avoid any appearance that an attorney has compromised the expert's objectivity.

UNDERSTANDING THE WHOLE CASE

It is important to make sure that expert witnesses understand the whole case, not just the few issues they will be addressing. This is necessary so they can effectively plan how they reached each of their opinions.

An expert who is not fully informed could inadvertently use the same terms that other witnesses or key documents have used with radically different connotations in another part of the case. Thus, the time spent working with experts will more than pay for itself by ensuring that they express themselves in a way that accurately supports their opinions without opening the door to misinterpretation or misapplication of their words.

KEY TERMS RELATIVE TO THE CASE OR AREAS OF LAW

Each area of law has its own terms of art with particular meanings that might differ from, or be less specific than their plain English connotations. Every legal specialty uses plain English words with much more specific, or even contradictory, connotations than those they have in normal speech. Experts who are not aware of a legal specialty's specific terms of art may incorrectly use these terms intending only their plain English meaning.

KNOW WHAT TO EXPECT FROM OPPOSING COUNSEL

Experts who have not been briefed on plaintiff's counsel's approach and style will not be able to anticipate where various lines of examination questions are leading. This may cause them to veer off track and confuse the jury or arbitration panel, or to lose their composure.

It is always in the interest of plaintiff's counsel to devalue the credibility of your expert's testimony by discrediting the depth or relevance of expert's experience or expertise. In order to avoid having experts lose their composure, one should attempt to prepare them for the types of

questions and level of aggressiveness they can expect from opposing counsel.

FAMILIARITY WITH FACTS, DOCUMENTS AND OTHER WITNESS TESTIMONY

Defense attorneys need to weigh the balance between the number of documents they have in their expert's review and the total money at risk in the case. The key is relevance. It is essential to give experts access to everything that could conceivably pertain to the issues they will ultimately testify about.

It is important to make sure that you have kept your experts informed so they are not forced to respond to something extemporaneously that they have not been able to consider thoroughly beforehand. In the case of conflicting testimony, experts have to be able to explain why they have weighed one version more heavily than another, and how that has or has not affected their opinions.

OPINIONS AND TESTIMONY OF OPPOSING EXPERTS

Since experts are going to be cross-examined not only on their own opinions but also those of opposing experts, they obviously need to know what those opinions are. They need sufficient time to assess which opinions, or components of opinions, they agree or disagree with, and why or how opposing experts' opinions may or may not be relevant in the case.

While experts cannot be present in person during the opposing expert's depositions it is often very beneficial to arrange for electronic participation to give them a complete grasp of the opposing expert's conclusions and reasoning. If this is not possible to let your experts participate in the opposing expert's depositions electronically, you should at least provide them with timely copies of the transcript.

ON POINT ANSWERS

Experts may at times become enamored with a particular opinion, or aspect of an opinion that may not be critical to the case. It is therefore essential for attorneys to remind experts not to spend time on non-critical issues.

You should make sure that your experts know which issues and opinions are most critical to the case as it develops during trial or arbitration, so they can stay on track as they give their testimony. It is also important to remind experts not to address any of the non-critical issues that expand beyond what was covered in their direct examination.

DEPOSITION TESTIMONY VERSUS TRIAL AND ARBITRATION TESTIMONY

Experts are obligated to give true, accurate and complete answers to every question. However, within this obligation, experts may have some latitude to add clarifying detail to their explanation even if that exceeds the immediate scope of the question being asked, particularly in their deposition testimony. This level of detail can vary greatly between the time when your expert gives the deposition testimony and the time of trial or arbitration.

Your experts will testify most effectively when they understand how your objectives may change from one phase of the case to the next. At trial, the depth to which experts go in explaining their conclusions may depend more on how the jury or arbitration panel is responding to the answers than on the attorney's predetermined objective.

Experts need to be alerted to the judge's expectations as well as to the responses of the jury or arbitration panel's testimony. Another consideration to bear in mind in preparing experts for testimony is whether there are experts with overlapping expertise engaged on the case. All of your experts need to know which of the potentially overlapping areas they should focus on and which issues will be covered by other expert or experts.

LAST MINUTE PREPARATION

Even highly capable experts who have substantial experience testifying in lawsuits cannot be expected to be aware of all the information the attorneys have and cannot be expected to be up to date on all of the latest developments in the case. Attorneys must take the time to prepare their experts for examination and for different expectations between the deposition and trial. Attorneys who do not prepare their experts thoroughly may result in the expert giving testimony that will be misinterpreted, misapplied or discredited.

EVALUATION

This article offers interesting insights on the use of experts in a case. With the right amount of communication and preparation, experts can help insure a victory at trial.

JLH/SBB/smm/tsr