EDUCATORS AS EXPERT WITNESSES

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Two kinds of witnesses: lay witnesses and expert witnesses.

Eyewitnesses to the event may only tell what they saw, heard, felt or smelled; they are not allowed to tell what others have said (hearsay) or say what they think of the case. As a technical witness, on the other hand, an expert is allowed to express an opinion on any relevant issue falling within the scope of his or her expertise. It doesn't matter that the expert was not there when it happened. The expert witness is presumed to be an impartial, disinterested witness who is simply explaining why and how things happen.

Who is an expert?

An expert is someone who **knows something beyond common experience** who can **help you prove something** you could not prove otherwise. The most common expert witnesses are professionals, but there are also non-degree experts whose background and experience qualifies them.

One might compare the expert to a salesperson, **teacher** and communicator. The expert's function as a teacher to the attorney and judge or jurors is a critical one. The more **persuasive** he or she is the better.

There are four general reasons why expert witnesses are brought into cases.

- When required by law. In most jurisdictions, expert testimony is required in cases involving the negligence (malpractice) of a professional. The expert is required to help the court and jury understand whether the professional breached the objective standard of care required of a professional.
- When required by the facts. When the case concerns complex, technological issues that are beyond the training and experience of a layman. When the subject is sufficiently beyond common experience.
- To assist the jury. The facts may not be difficult to understand but the opinion of an expert may be of some assistance to the jury.
- When the attorney has a tactical reason for hiring an expert: if the other side has hired an expert or if the attorney feels the jury might be persuaded by an expert rather than a lay person. The attorney may wish to use an expert to get otherwise inadmissible evidence before the jury.

An expert should be used when the information that needs to be presented to the trier of fact or the jury is of such a nature that the "average person" (one who does not possess the experience, training and education of the expert) is not able to fully understand the specific information to be presented by the expert so that they would be able to make an informed decision regarding the facts.

Using school employees as experts.

There are pluses and minuses to utilizing experts from within the school district involved in litigation. On the **positive side**, they have generally devoted time to the issue and are less likely to be blind-sided. Also, judges and jurors tend to pay more attention to the participants in an event. On the **negative side**, however, it may be easy for opposing counsel to show that they are not independent and that therefore their testimony may be biased. Keep in mind that although school administrators may make strong witnesses, designating them as experts opens them to discovery, which can be a pitfall.

When to use an expert.

There is general agreement that an expert should be involved in a case as **early** as possible: in technical analysis, preparing for deposition, during discovery, analyzing documents in settlement and mediation discussions, and summing up complex facts for the judge or jurors.

Preparation of the expert.

During the preparation process the lawyer should set a positive tone by providing **support**, projecting confidence and being enthusiastic about the case.

The job of the lawyer is to ensure that the expert **knows the case thoroughly**, but should not attempt to fashion the expert's opinion. During cross-examination the expert will be asked how his or her opinions were formed.

The expert should be neither just a "yes" person nor argumentative. Also, watch for inconsistencies.

Experts should be supplied with everything that might bear on their opinions. Lawyers should not wait until the last minute to do the preparation. Experts should think about possible questions and responses and be warned about possible opposing tactics. It is important that the expert not be afraid to say, "I don't know."

Experts should be assured that it is often valuable that they **point out any weaknesses** in the case and voice more conservative opinions than to exaggerate the strengths of a case.

In preparing experts for trial, lawyers should tell them to be polite, respectful and to communicate: to **tell a story**, as would a teacher. It is also wise that the expert's message be delivered in more simple language than they would ever believe necessary.

Matters of appearance.

During testimony, the expert is on trial as to the facts, but will also be scrutinized as to his or her **communicating abilities, emotions and appearances**. Experts need to be advised about body language. Crossing the arms defiantly, lounging in the chair, ignoring or paying too much attention to the jury are all to be avoided.

In deciding which witnesses to believe, judges cited demeanor, body language and "obvious sincerity," as well as careful consideration of the evidence. The judges were bothered by the use of crutch words such as "You know what I mean," "Whatever," and "Umm..." as well as run-on sentences, poor eye contact and rude or aggressive attitude.

Qualifications and professional background, and good preparation were considered most important by the judges, along with the ability to explain the information in clear, simple terms with consistency and lack of bias.

During trial.

During trial there is no question that the **expert will be attacked** relentlessly. He or she may be the most important witness. The lawyer should anticipate this and try to get everything out on direct examination.

In qualifying an expert before the judge or jury the lawyer should focus on what the expert has to say rather than past performance. Passing out copies of the expert's resume to the judge or jurors and mentioning a few of the important points can save time.

Getting hearsay admitted.

Experts can get things into evidence that would be otherwise inadmissible, from visual aids to projections and treatises. Visual aids, maps, diagrams, charts, photos, models and videos are also helpful in simplifying complex issues for the jurors.

Sometimes an expert may give an opinion that is based on hearsay. All kinds of records, facts and data may be relied on by an expert in forming an opinion, including the expert's experience, so long as the reliance is reasonable, but an expert may base his or her opinion only on reliable information.

Experts should not simply be told to analyze something. To be most effective, they should know the issues and how the lawyer planes to use their reports. Those experts who are able to communicate effectively can be invaluable. They should be qualified carefully, used early and prepared with painstaking care.

What the expert has to say is more important than what the lawyer has to say.

TELL THE TRUTH.

HONESTY

The duty of an expert is to the court. Regardless of whether the plaintiff, the defendant, or the court pays for the expert's time.

ACCURACY

The expert has to be accurate, pay attention to details and stay within his or her expertise. The expert should not get in over his or her head.

TRUTH

Be truthful. Analyze the case from the perspective of both the plaintiff and the defendant.

BE PREPARED – DO YOUR HOMEWORK.

WARNING, DEPOSITIONS ARE CONFRONTATIONAL!

Depositions may involve both direct and cross-examination. But the cross-examination and "trick questions" come first.

PURPOSE OF A DEPOSITION.

The purpose of a deposition is to collect information for **impeachment** of a witness. The lawyer conducting the deposition is **sizing up the expert**, learning about **options**, gauging the **strength of the case** and obtaining "**admissions**." The following suggestions have been offered by various lawyers over the past few years and may prove helpful.

GUIDELINES.

- Meet with the lawyer before the deposition to discuss opinions, review documents, and present exhibits.
- Pause before answering – don't answer without thinking.
- Ponder innocuous-appearing questions.
- Do not respond to questions with unasked information – Just answer the question posed (e.g., Q: What is your name? A: My name is John Smith *and I live in New York.*
- Be alert for "inducers to speech" – e.g., silence, yes, ok, etc.
- If you have nothing to add to your previous response, do not be "induced" to say more by a "pregnant pause" or silence.
- Recognize open-ended questions – What's your theory? Why?
- Anticipate possible questions and think about them.
- Don't get too friendly or make "small talk" with opposing counsel – This is an adversarial proceeding and an offhand comment like "This isn't a great case", even if made off the record, will be inquired into when the deposition reconvenes.
- Do think about "helpful" exhibits for trial; these may have to be disclosed before trial, pursuant to fed. Rule Civ. Proc. 26.
- Do think about good analogies for the judge or jury.

TESTIFYING AT TRIAL

Direct testimony**:** You describe your findings.
Use the three C's:

- Clarity;
- Crispness; and
- Conviction.

Help the attorney develop the technical questions to be asked at trial. **Teach** the attorney how to pronounce the medical or scientific expressions or terms and guard against surprises or misunderstandings at trial.

Do not testify to anything with which you are uncomfortable or unsure.

Tell the story.

Stick to just two or three conclusions and bring your answers back to them.

CROSS-EXAMINATION

Under cross-examination the attorney tries to restrict you to yes or no answers.

Under the federal rules of evidence 611(b): Scope of Cross-examination it is stated that "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness"...Additional matters at the court's discretion.

RESPONDING TO CROSS-EXAMINATION

Answer without being defensive, even though many questions will be designed to make you appear uncomfortable.

Be prepared for questions dealing with:

- Any skeletons in your closet, e.g., loss of professional license, convicted of a crime, DWI, etc.;
- The basis of your opinions – presented or not in direct;
- Your degree of certainty – How certain are you?;
- Your competency as an expert – learning, training and experience;
- The completeness of your review – what didn't you see?;
- Implications of Bias – fees, the number of times you've consulted to the same law firm, ratio of work for plaintiff's vs. defendant's or whatever may look bad;
- Attempts to impinge your integrity – tone, innuendo, sarcasm; and
- Facts, e.g., advertising practices, prior inconsistent statements, writings or testimony.

RHETORIC

The art of speaking or writing effectively: skill in the effective use of speech (Webster's).

- Point out what is unfair – deny what is not true.
- Give the givens.
- Recognize innuendo and sarcasm: ask for rephrasing.
- How much are you being paid for your testimony?

HOW ATTORNEYS TRY TO CONFUSE OR MISLEAD WITNESSES AND THE JURY

- Hypothetically – what if?
- Alternative theories – did you consider?
- Isn't it possible? (Possible can range from 0-100%).
- Logical fallacies – if X then Y.

ACTIVELY LISTEN TO THE QUESTION

- Pause before answering - think!
- Don't answer without thinking…Your testimony is being memorialized.
- Become a good listener – Work on it.
- Pay attention to: The tense of the question – present, past, all-encompassing; active or passive; who is doing what to whom; who or what is the subject of the question; a specific person or the "community of experts"; what does the question assume? What does the question imply? What is the "tone" of the question? If you don't understand the question...ask for it to be rephrased. If you don't know the answer to a question…don't guess, but an "educated" estimate is ok.

TYPES OF QUESTIONS.

Broad vs. Specific Simple vs. Compound Factual vs. Hypothetical

Ambiguous	Do you understand that what you appear to have heard was not what I think I intended to say?
Implication	When did you stop beating your wife and with what did you use to beat her?
Over broad	Can you tell me all of your opinions? What's your theory of the case?
Unintelligible	Is it further to New York than it is by plane?
Hypothetical	The facts assumed in a hypothetical must be supported by the evidence (i.e., testimony) presented (or anticipated to be presented) at trial. *Banks vs. St. Francis Hosp.*, 697 S.W. 2d 340 (Tenn. 1985) and many others.

SAMPLE QUESTIONS	CONSIDER
Isn't it a fact?	Under all circumstances?
Isn't it fair to say?	What does fair mean?
Wouldn't you agree?	On a scale of "0" to 100?
Isn't it possible?	Is it likely or unlikely; probability.
How much are you paid for your Testimony?	
Hypothetical.	Do you have enough information to answer?

BECOMING MORE COMFORTABLE IN THE COURTROOM

- Try to visit the courtroom before you are called to the witness stand – sit in the witness chair if possible – you will feel more comfortable.
- Sit erect, don't "shrink" or slouch.
- Try to minimize nervous gestures with hands.
- Attacked witnesses often feel embarrassment, shame, irritation, or anger during cross-examination.
- Taking a deep breath or two and pondering the question provides time for thinking, is relaxing and helps you assert control over the pace of the proceedings.
- Cross-examiners will try to get you to look at them instead of the jury – that's ok for yes-no questions but narrative responses should be addressed to the jury.
- If the cross-examining attorney "invades your space," don't recoil – lean forward to meet him or her.
- Learn the names of the attorneys and use them.

Some of this material was adapted from:

Poynter, Dan, *The Expert Witness Handbook: Tips and Techniques for the Litigation Consultant,* Para Publishing, Santa Barbara, CA, 1997;

Benjamin, David M., *The Role of the Expert in the Courtroom*, Presentation materials.

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