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Choosing, Preparing, and Presenting Witnesses at Trial: Direct and Cross

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The backbone of most civil cases is the selection, preparation, and testimony of percipient and expert witnesses.

Preparation, Preparation, Preparation

Great trial results begin with great preparation. At the beginning of litigation, begin with a litigation plan. While you do not have the benefit of discovery at this point, you should have a rough outline of the facts of the case based on interviews with your client, statements obtained from witnesses, and discussions with potential experts. Once the facts have been properly digested, begin with a short summary of the case. This short summary should be no more than a few sentences and easily digestible by a potential jury or finder of fact. Think what you would say if you had to describe your case quickly to someone at a party. Use this short summary to guide your preparation throughout the case and guide the selection and preparation of not only your experts but even your percipient witnesses.

Selection of Experts

Expert selection can be daunting and frustrating. In fields such as medicine or engineering, where expert testimony is common, the temptation is to believe that most any selection will be competent. In fields where expert testimony is infrequent, the search can be so frustrating that it can be tempting just to settle for the first person who seems as if they could be reasonably competent. Here are some tips for locating experts:

Literature Search

If the issue in your case is one that has likely been the subject of scientific or medical research, start with a literature search to determine the top minds in the area. Locate the authors of said literature and reach out to them to determine whether they would be interested in assisting in your case. Many times, I have found that while the author might not be interested, perhaps he or she can suggest someone else who might be interested. The advantage of this approach is that those in the field generally know the others in the field with similar levels of knowledge. This also can be helpful when it comes to kneecapping the other side's experts. Experts in medical and scientific fields often know the thought leaders in the field and can be reluctant to get involved for the other side when they find out who your experts are.

Expert Organizations

Various organizations have a cadre of experts available for trial testimony. Typically, the attorney reaches out to the organization with an inquiry, and the organization will seek to match one of its experts to the query. In many cases, these organizations do a good job of providing training and mentorship to their experts in the writing of reports and even providing deposition and expert testimony. The downside of these organizations is that they sometimes will push an expert who isn't truly qualified in the field. The expert can also appear as a hired gun if forwarded by an expert organization. Finally, when it comes to various engineering organizations, many of the experts are no longer actually working in the field but instead are just professional expert witnesses.

Expert Search Assistants

Frequently, a preferred approach to the location and retention of expert witnesses is the use of expert search assistants. These are especially popular in the medical fields and can be anything from an individual to an organization to which you provide information regarding the subject, qualifications desired for the expert, and often geographic regions from which you prefer your expert. The individual or organization then does a search and provides possible candidates. The best of these assistants charge only a fee for the search. The worst of them, and the ones that I seek to stay away from, insist that they retain a percentage of the fee for every hour billed for the expert. Jurors can understand your enlisting someone to search for an expert. They have more trouble with that person being continually paid based on the expert's work in the case, especially if experts charge more than they would had you simply found them through your own search.

Vetting

This is the most important part of expert selection. Especially in difficult fields, there is a temptation after a long and frustrating search to simply settle for the first viable candidate. Resist this temptation. You are going to have to live with this expert for the rest of your case; make sure you are comfortable with him or her. Your initial conversation with the expert should be via Zoom or in person. This expert is going to appear before a jury. It's important to see how the expert presents.

But don't just consider how experts present themselves. Consider how available they were for the initial meeting. If it took weeks to schedule the initial meeting, what are the odds they are going to be able to invest the time and energy necessary in your case? At the initial meeting, there are the essential questions

of fees, experience, past instances where testimony was stricken, and expert qualifications as they are applicable to your individual state; for example, in Maryland, standard of care experts in medical malpractice cases cannot qualify to testify if more than 25 percent of their activities are directly related to testimony in personal injury claims. In addition to these questions, ask for references of other attorneys with whom they have worked.

Once you decide to retain the expert, make sure to send a well-organized packet of materials to the expert. Don't waste your money by sending disorganized materials. Schedule another Zoom to make sure that the expert is fully on your side. Do not make the mistake of choosing an expert who isn't fully committed to your case. There is nothing worse than the feeling of an expert going sideways at a deposition or trial. Moreover, make sure the expert has actually taken the time to digest the materials. An expert who doesn't know the materials at your first meeting after retention is unlikely to know the material well at trial.

Percipient Witnesses

There are two types of percipient witnesses: indispensable and dispensable. Indispensable percipient witnesses are those without whom you cannot present your case. These witnesses are musts for trial, so there is no selection part here for the trial strategy. Dispensable witnesses are those whose evidence can be provided to the trier of fact or jury through other evidence, sometimes your client or another witness. Pain-and-suffering witnesses, for example, are often dispensable. The client may be able to provide the same evidence to the jury, or perhaps there are multiple witnesses to choose from who can provide essentially the same testimony.

For dispensable witnesses, Zoom—or, even better, in-person—interviews are key. Avoid, to the extent possible, multiple dispensable witnesses to testify regarding the same areas. Such witnesses are bound to contradict one another, causing issues at trial.

Preparation to Testify

While in many jurisdictions, communications between counsel and experts are protected from discovery, this isn't the case with regard to percipient witnesses. Attorney and staff must always be aware that their conversations with such witnesses are subject to discovery. This does not preclude preparation of the witnesses for direct and cross-examination, but said preparation typically involves a more open-ended approach of questions and their responses to anticipated direct and cross.

Preparation of expert witnesses can often be more hands-on and dedicated to the advancement of the theme of the case. If possible, compose a direct and enlist another attorney in the office to compose a cross. Once the cross has been composed, review it, modify your direct, and also supplement the cross with weaknesses that your co-counsel might have missed. Your direct examination, ideally, should be a teaching opportunity for the expert. Try to compose a story for him or her to provide at trial. Work through the direct examination with the expert in person or via Zoom. Immediately follow with a cross-examination, ideally with your co-counsel as opposed to yourself.

Experts must also be schooled in laying the proper foundation for their testimony, the standard of care to which they are testifying, the foundation for reliance materials and authoritative articles, and an understanding of what it means that their testimony must be accurate to a reasonable degree of medical, scientific, or professional probability.

Trial Testimony

Percipient Witnesses

At trial, don't get greedy with percipient witnesses. Know your witness. Some witnesses will be more favorable to your side and can be trusted to expound. Many lay witnesses, however, find themselves nervous at trial and are more likely to make mistakes. Stress a few facts that are important to your case and keep your direct focused on those facts. Even witnesses who seem good in prep can fall apart once on the stand. If their heads are filled with lots of tertiary information, they are unlikely to testify effectively. Keep it simple.

Expert Witnesses

For experts at trial, make sure any foundational testimony is well-scripted to ensure the qualification of the expert. Not only must the expert demonstrate the requisite scientific or professional knowledge to qualify as an expert, but you also must be prepared to satisfy other expert requirements. Ensure that all opinions are accurate to a reasonable degree of medical, professional, or scientific probability by having experts agree as part of their testimony that they will only give opinions that they hold to that degree. With regard to standard of care testimony, ensure that you know which standard your expert will be testifying about (e.g., national, state, or local) and establish how your expert is confident they are familiar with said standard. Also, be aware, especially in medical malpractice cases, of other statutory requirements that must be fulfilled in order to testify (e.g., being board-certified in the same field as the defendant or having performed the same or substantially the same procedure within a certain time period of the alleged malpractice). It's a good idea to have co-counsel check your expert's qualifications against a list of requirements to make sure that you have done all that is necessary to qualify your expert.

Ensure that any expert opinions are related to the time period at issue. Experts must testify, for example, to the standard of care at the time of the incident. Don't make the mistake of not clarifying that your expert is testifying to the standard of care for the correct time period.

Direct Examination

For your direct, don't hesitate to enlist technology to assist in the storytelling. For diagrams and demonstratives, first, have your experts explain the concept, and then have them testify that a diagram or demonstrative would further assist the jury in understanding. This allows the jury to get the same information twice. But don't just stop with diagrams and demonstratives. Don't hesitate to use an easel pad, electronic whiteboard, or other technology to highlight parts of your expert's testimony to the jury. For example, in a medical malpractice case, as the expert details the departures from the standard of care, use an electronic whiteboard to bullet-point the departures. You can then use these bullet points to further organize the expert's testimony by having him refer to them. It's much easier for jurors to digest information if two of their senses instead of one are being enlisted.

Cross-Examination

While often the advice is to take the sting out of a cross by addressing the issue in direct examination, know your expert. Jurors have been raised on various courtroom dramas and movies. They expect the key moment where the attorney makes a fool out of the witness or the expert a fool out of the attorney. The worst outcome for an attorney is being embarrassed by an expert. Judge the attorney on the other side. For those points of cross where you feel the most confident in your expert's response, let your expert handle it in cross. You can always handle it in redirect if necessary. For those things that really might sting the most, don't be afraid to take the sting out in direct to blunt the cross-examination.

For your cross-examination of the opposing's expert witnesses, be organized and succinct. Have your cross scripted, and especially for experts, you should be reluctant to depart too far from the script. Don't blunt your best points by having too many points. Young attorneys often will make the mistake of not editing their cross-examination. With the short attention spans of jurors, you don't want them to forget

your three major points because you also made 15 minor points. Get in, get out, and make sure you don't get embarrassed. You can lose your case by being shown up by an expert on cross-examination.

For cross-examination, also do not be afraid to employ similar tactics to what you would do in direct. Tell your story again through the cross. Use an electronic whiteboard to bullet-point your key points of cross-examination so they are there for the jury to see.

Conclusion

Trials are seldom won or lost at trial. They are won or lost during the preparation phase. Prepare all cases as if they were going to trial. If you prepare a case thinking that it will settle, you will not be ready when the time comes for trial. If, instead, you prepare as if every case will go to trial, you will likely increase or decrease the amount of settlement depending on the side you represent. And, if your case does proceed to trial, there is no need to scramble.

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