

# Experts

## Preparing an Expert to Testify

By Keith A. Belzer<sup>1</sup>

### Introduction

Expert criminal defense witnesses can be extremely valuable throughout the litigation of a criminal trial. However, an ineffective expert or the ineffective use of an expert can seriously damage a defense. A poorly prepared or incapable expert can be worse for the defense than no expert at all. This article will examine the preparation that an attorney must go through in order to select and prepare an appropriate expert with an eye toward trial testimony.

### Purpose of an Expert Witness

There are essentially three purposes for expert testimony at trial:

1. Neutralizing the Government's expert. Sometimes it is absolutely essential to hire an expert with the intention of neutralizing an expert for the government.<sup>2</sup> In these situations the prosecution's case may rest exclusively or almost exclusively on expert testimony. The defense must help the jury come to the realization that the government's expert is not strong enough standing alone to obtain a conviction. In that situation the defense expert need not win the case outright, but must cast doubt upon the expert for the prosecution.

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<sup>2</sup>Examples might include a D.N.A. expert, a battered woman syndrome expert or an expert in accident reconstruction.

2. Educating the jury. Often times a defense expert is testifying to facts or to analysis rather than presenting a persuasive opinion in favor of the defense.<sup>3</sup> In these situations the expert is not offering an opinion so much as they are teaching the jury about scientific principles or factual analysis.

3. Offering a persuasive opinion to the jury.<sup>4</sup> Generally this is the most helpful type of expert. In these cases the expert is actually testifying with an opinion that advocates for acquittal based on one or more elements in the charge or charges.

When selecting an expert, it is important to identify which of these purposes the expert is being hired for. In many cases the expert may in fact be asked to engage in all three purposes.

### **Selecting an Expert**

Once the reason(s) for retaining an expert have been identified, it is important to hire an expert as soon as possible. In addition to trial testimony, a good expert can help formulate discovery requests, help prepare adversarial cross examination questions and help with exhibit preparation. In determining what expert should be retained, an eye toward trial preparation should be foremost in the attorney's mind. Here is a list of considerations in hiring an expert that link directly with trial preparation:

1. Consult with other attorneys. The best source for finding an expert is usually other attorneys. In addition to providing information on experts that they have used, attorneys can also provide information regarding experts that they have gone

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<sup>3</sup> Examples of this type of expert might include educating a jury on the rate of alcohol absorption into blood, teaching the jury about how memory works with regard to the creation of false memories or mistaken identification, or explaining in general terms what a mental illness is.

<sup>4</sup> Examples of this type of expert include testifying that an interview of a child was in fact improperly suggestive, testifying that a defendant meets the requirement for an insanity defense or testifying to a cause of death contrary to the prosecutor's theory of prosecution.

against. Be specific though. Many experts that have been retained never actually make an appearance in a courtroom in front of a jury. It is important in speaking to other attorneys to inquire as to whether the expert actually testified at a trial, and if so, to find out how well they communicate with a jury. The communications skills of an expert are as important as their qualifications.

2. Accessibility. In order to properly prepare an expert for trial it is necessary to spend time preparing. While this may seem obvious, too often experts that seem very promising are so busy testifying at various locations around the globe, that they are unavailable for preparation. It is important to talk to other attorneys who have used a prospective expert recently in order to determine how currently available they are. Attempt to talk with the expert at least a few times before hiring to see how available they actually are.

3. Ethos, pathos, logos. Aristotle stated that persuasion was accomplished most effectively when a speaker of great character (ethos) reached the emotions of an audience (pathos) through a logically constructed argument (logos).<sup>5</sup> While law school and most areas of expert testimony focus on logical information and arguments, years of jury study have shown that Aristotle was correct. It is crucial to include character and emotion in all aspects of trial work in addition to a logical argument. This includes the selection, preparation and presentation of experts.

News media, Hollywood and actual practice have led to the impression among many judges and jurors that anyone with money can rent a hired gun to come in and testify as an expert to any opinion that the defense wants. The challenge then, is to select an expert who will be seen as objective yet concerned that an injustice might occur. This

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<sup>5</sup> ARISTOTLE, *Rhetoric*, Book I, Chapter 2

requires the attorney to conduct a background check to determine if the expert is impeachable based upon preconceived bias. Once this background research is completed, it is important for the attorney to meet with the expert personally to ascertain whether the expert has the character and communications skills necessary to connect with a jury at the heart level. Many experts who have impressive credentials are unable to relate to jurors. While these experts may be extremely helpful in a consulting capacity, they are virtually useless in front of a jury. The reality is that generally, an expert with great presentation skills but average qualifications is more effective than an expert who has impeccable qualifications but cannot communicate with a jury.

Losing credibility with a jury is one of the nastiest things that can happen to a criminal defense attorney. An expert that comes off as sleazy, incompetent or uncaring can single handedly ruin the case. As stated previously, it is much more preferable to go to trial without an expert rather than have a dreadful expert.

4. Attain the expert's curriculum vitae before making a final hiring decision.

Experts are often trying to sell themselves and their credentials. An expert who sounds great on the phone may fall apart upon tight scrutiny of their qualifications. If it is not obvious from their C.V., the expert must be asked how many times they have previously been allowed to testify as an expert in the general and specific areas of their expertise. In addition to the number of times testifying, careful consideration should also be given to which side they testified on. While this may not be a determinative factor, it must be considered.

5. Find an expert that you can relate to. This may be the most important part of preparing an expert to testify. Much like the direct examination of a client, there will

be a relationship between the expert and the attorney. There is always some sort of relationship. If the relationship is strained, the jury will perceive this and make all kinds of assumption about the cause of the strain. While it is not necessary that the attorney and the expert are the best of friends, the relationship as perceived by the jury must be one of mutual respect and preparation.

### **Pretrial Preparation**

Like all aspects of trial preparation, preparing an expert to testify requires a lot of preparation. If the expert is in an area unfamiliar to the attorney, the first step that must be taken is to gain an understanding of the area of expertise that is required. While the retained expert can help educate the lawyer once they are retained, the very decision about who to hire cannot made in any meaningful way without at least a working knowledge of the area of expertise. Fortunately, the internet provides elementary information on just about any area necessary for criminal defense work.

Once an expert has been retained, the preparation has really just begun. It is a major mistake to sit back and wait for the expert to put everything together. At this point it is imperative for the attorney to learn as much about the expert's area of expertise as possible. In the same way that putting a client on the stand requires hours and hours of preparation for every hour of testimony, the trial testimony of an expert demands the same care and attention. All too often attorneys make the mistake of thinking the expert can just be thrown up on the stand and their testimony will speak for itself.

One of the most important responsibilities of the attorney in pretrial preparation is too make sure that the expert's testimony is not lost in translation. Most experts, like lawyers, have a language all their own. It is imperative for the attorney to help the expert

testify in a manner that allows the jury to understand what is being testified to. This is particularly important in white collar and D.N.A. cases. Any information that the jury does not understand will typically be ignored. As stated previously, this requires the attorney to develop a very good working knowledge to the expert's area of testimony. Lawyers should not be receiving an education from their expert in the middle of the direct examination. While this does tend to make the examination feel very alive for the jury, it is fraught with all kinds of danger and unpredictability. It is imperative for the attorney to help the expert use language that is understandable to the jury. It is equally important for the attorney to make sure that neither the attorney nor the expert is condescending to the jury.

### **Trial Testimony**

1. Retain control of the process and presentation. Often, expert witnesses, especially those that have testified often will attempt to take over litigation strategy and trial preparation. While the advice of an expert can be invaluable, the trial attorney is the person in charge and must remain so. Likewise, it is imperative that the expert knows who is in control in the courtroom. An expert witness who is too long winded or advocates too strongly during cross examination can cast doubt on the entire defense while frustrating the jury and incensing the trial judge. The attorney must be responsible for the presentation of the witness. An expert who comes off as arrogant or insulting will hurt the defense more than help it. The expert's presence is only to help advance the theory of defense.

2. Make the testimony interesting to the jury. Many times the testimony of an expert is put on in a way that is uninspired at best and coma inducing at worst. There

is absolutely no reason that the testimony of an expert has to be mind-numbing. It is incumbent upon the attorney to find ways to bring an expert's testimony to life.

Demonstrative exhibits, models and physical demonstrations are easy ways to make the testimony more interactive and interesting. While PowerPoint can have the effect of creating distance between an attorney and the jury, it can be used very effectively by or with an expert. In the hands of the right expert the use of PowerPoint can result in the jury feeling like they are being taught by a very helpful professor. However, the attorney must go over the presentation with the expert to make sure that it is understandable and attention-grabbing. If the expert is not interesting, it is the attorney's fault - not the expert's. The biggest mistake that attorneys make with experts is not spending the time necessary to make the testimony accessible to the jury.

3. Make the testimony meaningful to the jury. Most experts have examples, anecdotes or stories that are much more interesting than dry lecturing about an area of expertise. These metaphoric teaching tools are much more appealing, helpful and persuasive than a dry recitation of scientific principles and can be subtly slipped into the testimony through creative organization and planning. Experts, particularly those that are not used to testifying, may not think to try to incorporate these avenues of persuasion. As interesting persuaders, we must find ways to make an expert's testimony not only interesting but also meaningful. Asking an expert to give an example or story of a particular scientific principle in practice is usually much more interesting and informative than the principle standing alone.

4. Use the expert's curriculum vitae in a manner that is interesting and persuasive. All too often, an attorney will either have the expert talk about their

background and experience in a narrative format or will go through the C.V. in a step by step process that is uninspired and tedious. An expert should never be asked to go through their background and experience in the narrative. In addition to being dull, the expert will be perceived as a braggart and arrogant. The expert's background should be of interest to the direct examiner in such a way as to elicit a dialogue between the expert and the attorney that shows respect and admiration. The direct examination of a lay witness or client can be made more interesting by integrating the witness's background into the body of a direct examination. Likewise, an expert's background information can be creatively intertwined in the same way. For example – in most cases an attorney will talk about an expert's published materials as a part of the initial background materials. In the appropriate case it would be much more interesting to the jury to bring up prior authorship in the context of a particular area of examination. An expert on tainted child interviewing techniques could be asked, in the context of reviewing a video tape, if they have ever published any articles on the suggestibility of children. In this way the testimony seems much more relevant to the issue at hand rather than artificial and introduced for the sole purpose of promoting the expert in the eyes of the jury.

General areas of examination regarding the C.V. should include:

- A. Personal background.
- B. Education.
- C. Honors and awards.
- D. Employment history.
- E. Publications.
- F. Prior recognition as an expert in general or specific area.



5. Compensation. Generally, expert compensation should be discussed during direct examination rather than waiting for it to come up on cross examination.

### **Preparing for Cross Examination**

Most attorneys would not think of putting a witness on the stand without preparing them for cross examination. Yet, when putting an expert on the stand the same attorney will assume that the expert can handle things on their own. This is our trial not the expert's. The same care and consideration that goes into preparing for the cross of our client or lay witness must be exercised with respect to an expert. Obviously, any background information that provides fodder for the prosecution cross examination should probably have been considered prior to hiring the expert. Nonetheless, it must be considered in the context of cross examination. Here is a list of topics that must be prepared for or considered:

1. Friendly fire. Ideally, have someone else in your office prepare a cross examination of your expert in the same way they would if it were an opposition expert. If you do not have the ability to have someone else investigate your expert in this manner, do it yourself.
2. Internet research. Search the internet for any information on your expert.
3. Contradictory opinions. Find out whether your expert has ever opined in any contradictory way with their current opinion.
4. Transcripts. Get all available transcripts of prior testimony.
5. C.V. verification. Verify the veracity and content of your expert's C.V.

6. Consult with the expert directly. Most experts will have a pretty good idea about what topics and areas of cross examination they will be confronted with. They will also usually have an idea about where possible areas of weakness lie.

7. Background check. Contact local licensing boards to see if your expert has ever been suspended or disciplined in any way. (Hopefully this has been checked into prior to the hiring decision.)

### **Conclusion**

Expert witnesses can be extremely helpful in educating and persuading a jury. In some cases they are absolutely necessary to at the very least neutralize the prosecutor's expert. All cases in which an expert is retained require a lot of preparation on the part of the attorney. This preparation must include acquiring a working knowledge of the expert's area of expertise. Additionally, the preparation should include time spent considering methods of presentation that are interesting and meaningful to the jury. It is the attorney's responsibility to select and present expert testimony that is interesting and meaningful as well as relevant.