Going to Trial:
Extracting Effective Expert Testimony

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One of the most important parts of effective communication is to engage. How do you engage? You look people in the eye. You lean in and listen. You use words to convey you understand. You ask questions to show that you are listening. This is easy to do in a one on one conversation. However, when the person you are conversing with is not an active participant in the conversation it can get tricky. In trial, your communicative abilities with an expert witness can be the difference between winning and losing. You must communicate clearly and engage the jury at all times. Yet, the jury is not an active part of this communication. The jury is only receiving information during trial. Your job as a trial lawyer is to keep them rapt in what is happening. They must want to listen and understand everything that is of import. The burden is on you to make difficult concepts crystal clear.

I recently tried a very complicated medical malpractice case in Long Beach. After the trial was over and we were talking to the jury, we asked about the witness testimony. Several of the jurors told us that the most understandable expert witness was our economist. I scratched my head upon hearing that feedback. Taking the time to think about it, the feedback started to make sense. The witness was a nice guy. Someone with whom I would like to have a beer. Moreover, his testimony was actually understandable. He was not combative on cross. He was a normal person on the stand. I wish more experts made my job that easy.

Getting an expert to give you clear, concise and powerfully convincing trial testimony is the challenge. Depending upon the type of expert witness, this could mean very dense subject matter that you might not entirely understand yourself. So the first step in this process is to appreciate the information you are trying to convey. That's a logical concept, but it does not mean it will be easy. The next step is to work with the expert to help them break it down in a clear and convincing manner.

This process begins very early in a case, well before the eve of trial. In other words, the last thing you should do is wait until the expert disclosure deadline is approaching to choose experts and talk to them for the first time. The timing of when you should begin having conversations with expert witnesses will vary based upon the type of expert.

What are the tools you need to make your expert understandable? First, get to know your expert! Understand why you need that expert. Make sure that your expert is the

right expert for your case. Second, use your expert to make sure you have everything you need to reach a successful verdict in your case. Third, make sure your expert is prepared. Finally, ask yourself, do you understand what your expert is trying to convey? If the answer is “absolutely”, then you are in a perfect position to make the concepts clear to a jury.

GETTING TO KNOW YOUR CASE AND EXPERT

Medical Experts

When you first get your new case, whether it is already in litigation or it is in pre-litigation, immediately begin speaking with your doctors. Going over medical records is not enough. Pick up the phone and have an actual conversation with the doctors. These early conversations will building a rapport with the expert, which will come across at trial. More importantly you will learn your case. If you don't know your case, you cannot teach it to the jury through the expert witness testimony.

Getting to know you doctors early on will also help shape and inform your case. This will ensure that you are on top of your client’s treatment as well. Is he/she going to get physical therapy? Are they following up on post-operative appointments? There is no downside to an open line of communication with your client’s treating doctors.

This is more imporatant in a medical malpractice case. I strongly advise having an expert on board with a strong opinion before you even choose to file the case. I medical negligent cases you are required to have an expert opinion to prove standard of care (liability).

My good friend Steve Goldberg gave me very good advice in regards to standard of care experts in medical malpractice cases – go to them with the records. This is advice I have followed because it is advantageous on so many levels. He told me to never, never, ever just send your expert a stack of medical records with a retainer check. Seriously, don't! They may want you to do this but it is never a good idea. I did it once and the expert used the entire $3,000 retainer and told me I had no case. That ended up being a waste of money and effort, but I learned my lesson. When someone gives you good advice, follow it.

In my medical malpractice cases, I initially review the medical records and summarize them myself or with the help of a legal nurse consultant. By this time, I personally have identified what I believe to be the problem area to discuss. After this initial review, I copy the key records, organize and tab them in a binder.

The next step is to make an appointment with the expert to meet in person, not on the phone. You will bring the check and records with you to this meeting. This is a great opportunity to have face time with your expert going through the file. By doing this your expert is not just blindly reading the entire file. They are focused, asking to look at key records during that meeting.

Remember, you are building that valuable rapport that will help in trial AND you are learning the strengths and weaknesses of your case while the expert is actively reviewing everything. Your expert will be asking you the tough questions as you are going through medical records together. You should take this opportunity to focus your case on the real issues and learn what you need in terms of discovery.

This approach saves money as well. Your expert is not spinning their wheels going through every medical record because you are keeping them focused. They will not have to spend as much time (and your money) to give you that initial standard of care review. You will leave this meeting saving money, learning what discovery you need up front and what kind of witness your expert will make.

Liability Experts

You need to get to know your liability experts as early as your medical experts. For instance, you don't necessarily need to be working with them in pre-litigation. However, you do need to get them involved in your case fairly early. My practice is primarily personal injury and wrongful death relating to either premises liability or automobile related cases.

Whether it is a slip and fall, automobile accident, or other type of case requiring a liability expert, with early involvement you have the added benefit of having the opportunity to use your experts to assist in the discovery process. Whether it is preparing for that inevitable Summary Judgment Motion or gathering all of the evidence you need for trial, there is no one better to assist you at this phase.

When I was a younger attorney, I had my experts assist in drafting written discovery and asking them what they needed me to ask at deposition. Now, I use them to fill in the blanks. I will have early conversations about the information I have and ask them “what do you need?” Remember they are the expert, you are not. Your expert will help you ask the right questions and ask for the right documents. This is what you need. They can provide tremendous assistance it getting everything you require for your case – if you ask.

TRIAL – TIME TO RAZZLE DAZZLE THEM!

Juries expect trials to be much sexier and interesting than they often are. This is a challenge. You now have to transform a complicated and scientific testimony into something that will not put the jury to sleep. The expert must be prepared. This preparation begins at deposition. Have a long conversation with your expert in advance of the deposition. Dig into the opinions and question the basis for those opinions. Ask probing questions to get at the heart of their opinions. Explore any problems you foresee. If you cannot understand it, you cannot sell it at trial.

At this stage, before their deposition, you must also make sure that they have everything they need and have reviewed everything you need them to review. This is critically important. You don't want your expert to have skimmed over critical documents. You also don't want your expert testifying that they did not get all of the facts and information they need to formulate a competent opinion.

Several years ago, I had an expert testifying as a treating and retained expert in an auto v. auto case. I had previously used this expert in trial and felt confident that he would do a good job. Unfortunately, I could not have been more wrong. Because of my past experience with him, I did not spend the necessary time to ensure that he was ready to testify. He was totally not prepared at tral. He misstated critical facts and forgot about the client's pre-existing medical conditions. His disastrous testimony would have been completely avoided by simply making sure he was prepared.

Most experts who are frequent players in litigation do understand what to expect at trial. These tried and true experts understand how to communicate to the jury. But, don't just assume that this is true. A good expert will look at the jury while testifying and be able to sense when they are not being understood. It is your job to make sure that your expert knows this.

The most effective expert witness testimony is conversational, as opposed to overly rehearsed. Talk to your expert like a person – not like an attorney talking with a doctor or engineer. Use normal words instead of fancy jargon. For example, if a biomechanic engineer says… "there is a Delta-V of 12, which is sufficient in this type of impact to create the mechanism of injury," you need to clear that up. What is a Delta-V? Have the expert explain how cars move, and that the change in speed is important to the impact on the human body. Most importantly get this expert to use language that a jury can relate to.

Always remind the expert who their audience is. You know the answers to the questions you are asking! The jury does not know the answers. When you are asking your expert to explain a basis for an opinion, begin that question with, "Doctor please tell the jury how you reached that conclusion." This is an important cue for the newer expert to look at the jury, not you.

The bottom line beyond being prepared, is remember what you are trying to accomplish. You are there to communicate to the jury – why your evidence makes sense and proves your client's case. You cannot do that by viewing the jury as a fly on the wall. You have to use your expert to do something you cannot do – talk to the jury.