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Persuasive Experts At Trial: 3 Times A Charm

Law360, New York (May 28, 2015, 12:00 PM ET) -- Stated as plainly as possible, experts testify at trial to simplify complex or technical issues that are outside the knowledge of the average juror. Attorneys spend significant hours finding, vetting and legally qualifying subject matter experts who will offer the opinion that supports the client's "truth." The expert spends considerable time as well; conducting research, reading documents and deposition transcripts, finding others' research, building an analysis, and issuing the report and then defending the opinion at deposition. These pretrial skills do not necessarily translate to persuasive testimony at trial.



Nancy J Geenen

An experienced trial consultant helps prepare the expert to persuade the trier of fact that the expert's process is reliable, fair and persuasive; and moves the expert from the report, through a script, to a memorable discussion that includes exhibits and demonstratives. Persuasive expert testimony connects the key messages that make the opinion reliable and fair with memorable graphics that simplify the complex concepts in a delivery style that is pleasant and helpful.

Conducting the First Trial Prep Meeting

Expert reports are often full of technical jargon and follow a format that is focused on satisfying the legal requirements of qualifying an expert to testify at trial. The report is rarely prepared with the fact finder in mind. The skilled trial attorney reads and annotates the report, identifying the key concepts that must be explained to the jury: subject matter expertise, unbiased analysis, and the opinion on one or more ultimate facts. There are five key questions the jury wants answered: who is this expert; what process did the expert use; how did the expert stay true to his/her process; what does the opinion mean; and most importantly, why is the opinion important?

In the first (of many) trial preparation sessions with the expert, the attorney tasked with the direct examination asks the expert to narrate the report. This first meeting should not be delegated to other attorneys as it is the best opportunity to build the rapport that the jury wants to see in the courtroom. Other members of the trial team should be present, including the trial consultants who will work with the expert on graphics and delivery style. This narrative shapes the story that the expert will tell on the stand and should be given three times in the first meeting. In the first instance, the expert states the opinion and narrates the process used to arrive at the opinion without interruption. Before starting the second narrative, a member of the trial team writes the opinion and the five key questions on an easel pad or white board and asks the expert to organize the second run-through of the narrative to respond to these five questions. On the third time through, the trial team

interrupts the narrative with clarifying questions, asks about the exhibits or sources on which the expert relied, and works on sketches of the graphics that will illustrate and complement the narrative. Skilled trial attorneys and consultants start to uncover and encourage the “expert as teacher” and then shape the narrative into an interactive learning opportunity for the jury.

Reinforcing the Teacher Persona

Having the trial and graphic consultants, preferably trial-tested, in the room during the first trial preparation session seems like an extravagance, but is truly a money saver and a strategic advantage. The trial consultants have not lived with the case for the past three years and are not subject matter experts. However, a seasoned trial consultant has been present in at least 100 trials, worked with at least that many trial teams, and watched hundreds of experts testify at trial. This wealth of experience is an under-utilized resource in the preparation of experts to testify at trial.

By the third time through the narrative, the trial team develops and asks “hard” questions that when answered create a simplified and comprehensive narrative that a jury wants to hear. The graphic consultant sketches out ideas that complement the responses to the key questions as soon as the expert starts the narrative. More than just a visual representation of the expert’s testimony, the graphic consultant focuses on making the complicated simple, memorable and meaningful. The trial consultant simplifies the technical jargon (i.e., using resume instead of curriculum vitae), suggesting everyday language used in media outlets such as The Huffington Post and USA Today.

The graphic consultant works with the trial team and the expert to determine the universe of exhibits and demonstratives that will best illustrate the expert’s key points during direct examination. Using logo graphics to illustrate formal education, degrees, credentials and writings keeps the jury engaged during the qualification stage of the examination. Emphasizing real-life experience with a timeline that illustrates the work history, the work performed, and the relevant published papers helps the jury understand that the expert works for a living and is not just a “hired gun.”

Memorable and persuasive graphics reinforce the key message; these graphics do not repeat the key message. A juror can listen to the testimony or read a slide; she cannot do both. The graphic representation should support the testimony, not be the testimony. Experts want to explain the importance of the sources and the detailed analysis used to create the charts. The jury is not persuaded by the detailed analysis, mostly because it is not helpful. The jury wants to understand what the expert did and trust the process used to arrive at the opinion. The graphic consultant translates these details and creates a selection of visual concepts that a juror is more likely to remember at the conclusion of a trial. Over the course of many trial preparation sessions with the expert, the iterative process results in a combination of exhibits and demonstratives that complement the expert’s discussion and help the jury remember the importance of the testimony.

Delivering the Message

After listening to the narrative three times, both the examining attorney and the trial consultant start to see the person who will take the stand and be helpful to the jury without sounding pompous or arrogant. This person will have certain behaviors and mannerisms that need shaping so that the expert is likeable by the middle-of-the-road fact finder. That first impression of the expert is rarely revised during the trial. Facial expressions, hand gestures, stride, and even how the witness arranges himself at the witness stand account for over 50 percent of the visual cues that form that first impression.

In future preparation sessions, trial consultants use video from the deposition to identify the annoying characteristics that distract from the key messages. The trial consultant works

with the expert witness on tone, modality, speed, gestures, body position and openness: conveying confidence without arrogance. A well-trained expert is the person who "connects" with the jury and judge.

The expert opinion becomes memorable and meaningful when the expert explains the opinion using everyday language and supporting visuals. The expert repeats key messages in Twitter-like sound bites that the jury will repeat during deliberations. The graphic consultant does not make slides of these testimony tweets; rather he/she creates visual images that support the expert's key messages. These images follow well-developed principles of design and avoid glitz and glamor of the newest "tools and animation" included in the latest versions of presentation software — less is often more.

Throughout future preparation sessions, a team mentality develops between and among the expert, the examining attorney, and the trial consultants who work on the graphics and delivery. This integrated approach is evident in the courtroom and signals to the jury that the trial team is confident, competent and prepared. Prepared teams increase the odds of winning at trial.

—By Nancy J Geenen and Suann Ingle, Suann Ingle Associates LLC

Nancy Geenen is a managing partner at New York-based consulting firm Suann Ingle Associates. She has over two decades of experience as a BigLaw trial lawyer, including two years as a prosecutor for the United Nations, preparing and trying high-stakes cases involving commercial and intellectual property law.

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