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Hon. Peter J. Polos (retired)
Orange County Superior Court

Effective expert preparation and presentation

Observations from eight years of watching how attorneys use – and misuse – their experts

As a Superior Court Judge, I presided over hundreds of trials, many where expert witnesses testified. Prior to being appointed to the bench, I was a trial attorney who prepared and examined expert witnesses in my own cases. However, it was my time on the bench – watching other attorneys present experts and sometimes being the final trier of fact – that provided me with the most critical lessons about expert witness preparation and presentation. Over and over again, I saw experts make the same mistakes, likely because they were not adequately prepared by counsel to testify. I also saw ineffective expert presentations by attorneys. In some cases, mistakes affected the outcome of the case. When a verdict comes down to which side's expert the jury believes, sometimes it really is the little things that mean a lot.

Now back in private practice after eight years on the bench, these are the lessons I will convey to any expert testifying on behalf of one of my firm's clients:

Quickly get to the expert's opinions

The single biggest problem I saw as a judge in expert presentation was attorneys who blew through the limited attention span of the jury with tedious questioning about an expert's qualifications. Only after the jury stops paying attention does the attorney get to the important part of the expert's testimony – his or her opinions. On the other hand, I witnessed numerous trial counsel who effectively presented an expert by going right to the expert's opinions. For example, the questioning would go like this: "You are a medical doctor?" "Do you have an opinion as to whether the defendant breached the standard of care?" "What are your opinions?" With this type of questioning you get the jurors when they are most attentive and willing to hear what the expert has to say. Later, after the attorney is done with the important questioning, they can question the expert in more detail on his or her qualifications. I have found that the differences in experts' qualifications are far less important than how

See Polos, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2010 Issue

they come across and how they are presented at trial.

Don't just testify – teach

Often jury duty can be tedious and boring, especially in complicated cases. Juries like to feel like they are learning something in the course of their jury service. The most effective experts are the ones that teach the jury about an issue before giving their opinion – whether it is about a medical condition, how a car is manufactured or the right way to fly an airplane. An expert should use graphics and props to show a jury what happened; he or she should stand up when appropriate and walk to a dry erase board or easel and create lists or diagrams (with the court's permission, of course.) An expert should not be afraid to look at the jury directly and tell a story. A jury is going to have a positive impression of an expert who uses simple language to educate them on an issue, and they are going to tend to believe the expert whose testimony they truly understand.

Be courteous

Don't underestimate the impact of good manners on a jury. Juries are impressed by courteous behavior so experts should be respectful and polite. Answer questions: "Yes, sir/ma'am" and "No, sir/ma'am," and address the judge as "Your Honor". Experts should not let their tempers show no matter how bad the behavior of the questioning attorney. If the expert maintains his or her composure and the cross-examining attorney does not, it can only negatively impact the other side. Some of the worst expert witness testimony I saw was due to argumentative or defensive testimony by the expert on cross-examination.

Be organized

When an expert witness gets to the witness stand, he or she should have everything needed to testify. The expert should bring a folder or binder with the relevant materials and a list of everything that the expert reviewed in forming his or her opinion. You do not want a trial to be delayed or for there to be a long pause between a question and answer because the expert is looking through a pile of disorganized documents for the answer.

Look and act the part of an expert

One of the easiest ways to impress a jury is to *look* like an expert witness; one of the fastest ways to lose credibility with a jury is to look unprofessional. The first impression a witness gives to the jury is visual – what he or she is wearing and whether he or she is well-groomed or disheveled. Unless you have prior experience with someone as an expert, confirm with him or her what the appropriate attire is for court. If your case is important to you, and it should be, don't be afraid to suggest to an expert that they should seek some professional advice on his or her attire.

Never exaggerate

While I was a judge, I sometimes saw experts unnecessarily exaggerate – which can diminish their credibility significantly. For example, an expert once put on his resume that he attended UCLA medical school for four years, when, in fact he had spent the first two years in medical school in Grenada and the last two at UCLA. The expert easily could have just listed that he graduated from UCLA and the year of graduation and avoided the issue. Such a point may seem minor, but when a jury is deciding which expert to believe, it makes a difference. Similarly, experts should not misrepresent certifications or organizations of which they may be members. Not only is that easily discovered by the other side, it is unethical. Upon retention, lawyers should question their experts regarding their curriculum vitae. Even a little investigation is not out of the question as the other side will certainly be doing that. It is best to be prepared for any issues rather than blindsided.

Don't forget what you wrote or said before

Cross-examining counsel loves to use an expert's own words against him or her. You can be sure that any articles and books written by the expert will be pored over by the other side looking for any contradiction between the expert's testimony and those writings. Web sites are also a wealth of information as are speeches or presentations that are publically available. Expert witness testimony now is commonly available on legal research Web sites. In one case, I saw an expert contradicted by a PowerPoint™ presentation that he had done five years before – he had no idea the organization he had spoken to had posted it on its Web site and never taken it down. Before testifying, an expert should be familiar with what he or she has said or written that has been provided to the other side or is publically available. Importantly, an expert should be careful about denying that he said or wrote something unless he or she is certain that is the case – it is never good when an expert mistakenly denies authorship of material that is then put in front of the jury to see.

Don't let your invoices be the focus of cross-examination

Experts' bills sometimes become the focus of intense cross-examination, which only places undue attention on the money the expert was paid by one side. To avoid that, make sure that fees are billed correctly and that the expert avoids unnecessary detail. For example, the expert generally should not include on an invoice an overly detailed description of work that can be dissected by the other side – such as a description of tests that he or she began to perform but did not complete for a legitimate reason. In short, the invoice should be sufficient to support the amount being charged but not so detailed that it will provoke a series of questions that are not really relevant to the case.

Provide your expert with all the documents to review

Experts should review all of the documents in the case, not just the documents that the retaining party thinks the

See Polos, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2010 Issue

expert should review. Otherwise, it is too easy for the opposing counsel to point to the failure to review all documents as evidence that the expert didn't have all the information necessary to form his or her opinion. Much of the information may be irrelevant, but the expert should at least consider it or opposing counsel will make the expert look unprepared. On too many occasions, I heard experts testify who were not given relevant depositions or medical records. A good lawyer will use that fact to diminish the expert's opinion and make the attorney presenting the expert look like he or she is hiding something.

Understand the law

The expert should know what you have to prove in your case and what the other side is trying to prove, especially with regard to the subject upon which they are to testify. It may seem obvious, but I have seen experts who were supposed to testify in support of causation, for example, give answers that demonstrated that they had little understanding of what the party who retained him or her was trying to prove, which severely undermined the party's case. Similarly, an expert should know the standard for the admissibility of expert testimony (e.g. *Daubert/Kumho*). While they may not be testifying as to the ultimate issue for the jury, knowing the law will allow them to present their testimony in the most effective manner for the jury.

Conclusion

The presentation of experts is one of the keys to effective trial presentation in any case. Therefore, an attorney must be careful to make sure an expert is properly prepared to testify, look and act like an expert. The difference between winning and losing is sometimes a very fine line. Thus, even the smallest issues can make a difference to a jury.

The Honorable Peter J. Polos (Ret.) is currently the Director of Litigation for Panish Shea & Boyle LLP. *Judge Polos was appointed to the bench by Governor Gray Davis in 2001. He spent eight years as a Superior Court Judge in Orange County, California, and sat for almost five years on the General Civil Panel hearing complex tort, business, employment and product liability cases before stepping down from the bench in February 2010. He presided over 250 trials, including* The City of Anaheim v. L. A. Angels of Anaheim *naming case as well as numerous other high profile cases*.