# Chapter 43

# Expert Witnesses

*by Thomas R. Ajamie*

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# I. INTRODUCTION

## § 43:1 Scope note

This chapter discusses the use and defense of expert witnesses at trial.[1] It addresses the basic requirements for the admission of expert testimony: (i) the witness' qualification as an expert;[2] (ii) the specialized knowledge underlying the expert's opinion that will assist the trier of fact;[3] and (iii) the reliability of the data on which the expert testimony is based.[4] It also evaluates the expert testimony in light of Federal Rules of Evidence 403's requirement that the testimony not be confusing or unfairly prejudicial.[5] Additionally, it reviews the applicable rules and case law relating to expert testimony on ultimate issues of fact,[6] the permissibility of expert testimony without prior disclosure of the underlying facts, and the appropriate scope of direct[7] and cross-examination[8] of the expert.

Where applicable, this chapter provides specific strategic and preparation considerations for employing expert witness testimony. These considerations include the use of consulting experts,[9] preparation of testifying experts for trial,[10] framing issues for trial in light of expected expert testimony,[11] and use of demonstrative aids, such as computer models, through experts.[12] This chapter discusses advocacy tips for handling experts in front

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**[Section 43:1]**

[1]Use of experts prior to trial is covered in Chapter 29 "Selection of Experts, Expert Disclosure and the Pretrial Exclusion of Expert Testimony" (§§ 29:1 et seq.).

[2]See §§ 43:11 to 43:28.

[3]See §§ 43:29 to 43:36.

[4]See §§ 43:37 to 43:45.

[5]See §§ 43:50 to 43:57.

[6]See §§ 43:46 to 43:49.

[7]See §§ 43:59 to 43:61.

[8]See §§ 43:62 to 43:65.

[9]See § 43:9.

[10]See § 43:2.

[11]See §§ 43:3 to 43:6.

[12]See § 43:8.

of a jury.[13] Finally, this chapter concludes with tools for the practitioner, including checklists[14] and jury instructions.[15]

## II. STRATEGY AND PREPARATION

### § 43:2 Preparing testifying expert for trial

Certain fundamental principles apply when preparing an expert to take the stand:

*Avoid Inappropriate Communication.* The expert should avoid communicating with the adverse party, opposing counsel, or the opposing experts and witnesses. The expert should not provide comments to the press or other public relations people.

*Courtroom Conduct.* The expert should be aware that technical competence does not excuse any failure to observe rules of courtesy. He should not argue with opposing counsel, nor should he take a position with which he is not comfortable. The witness should demonstrate self-assurance while avoiding arrogance.

*Convey the Objectives.* Counsel should communicate clearly to the expert the objectives in soliciting the expert's testimony. The expert should know exactly how his opinions are being used to construct the proof of the case. Detail the facts of the case for the expert to prevent surprises. The expert should understand the correlation between the expert's testimony and counsel's objectives.

*Direct Examination.* Counsel should caution the expert against volunteering extraneous matter during examination. The expert should appear relaxed while testifying and be comfortable with the areas of his expertise. The expert should be proficient in answering short and simple questions and doing so in a clear and firm manner. The expert should use plain, nontechnical language as much as possible. If technical language is necessary, counsel should have the expert define technical jargon in lay terms: "could you explain to the jury what 'capitalization of excess earnings' means"?

*Cross-Examination.* The witness should demonstrate his ability to withstand possible severe cross-examination tactics. The witness must be able to show reasonable resiliency while sticking by his expert opinions. He should be able to address and explain potentially adverse facts. He should be able to resist overstating his opinions. The expert loses his effectiveness when he crosses the line and becomes an advocate. Such a witness loses credibility and, at the same time, appears overly defensive and un-

[13]See § 43:7.

[14]See §§ 43:66 to 43:68.

[15]See §§ 43:69 to 43:70.

able objectively to consider facts and issues in the case.

*Adverse Background.* Counsel should prepare the witness to deal with any negative history. The witness' entire life and professional career are fair game to intense investigation and interrogation.

## § 43:3 Framing issues at trial in light of expected expert testimony

The use of experts at trial implicates every stage of the trial, not just the examination of the experts. Expected expert testimony might well be taken into account during the phases of the trial discussed in Sections 43:4 to 43:6 of this chapter.

## § 43:4 Framing issues at trial in light of expected expert testimony—Jury selection

The jury can be conditioned during voir dire[1] about issues that will be developed through expert testimony. If the court permits, counsel can condition the jury directly through questioning. For instance, if an economist is going to testify as to the method of developing damages, the party introducing the damages testimony should ask the jurors in advance not to speculate about damages or pick figures out of the air. On the flip side, a party anticipating an opposing expert's testimony should ask the jury to reason independently and to look to the reasons behind what the expert says before accepting the expert's conclusion. If the court does not permit lawyer questioning, counsel can attempt to raise these issues in their proposed jury instructions and questions.

The expert's specialized knowledge can also assist in preparing for jury selection. Although the expert should not participate during voir dire, the expert's consultation before trial can add valuable insight into the views or possible biases of potential jurors. The expert can also help in the formulation of voir dire questions as they relate to the areas of the witness' expertise. In a deceptive trade practices case, for example, defendant's real estate broker expert may provide insight regarding various deceptive practices in the real estate industry. With the expert's help, counsel may ask or submit questions to determine which potential jurors may have suffered from such practices and thus may be biased against real estate defendants.

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**[Section 43:4]**

[1]See generally Chapter 36 "Jury Selection" (§§ 36:1 et seq.).

## § 43:5 Framing issues at trial in light of expected expert testimony—Opening statements

The opening statement[1] is a proper place to introduce the expert to the jury and to explain the expert's importance in the case. Very careful consideration, however, should go into this decision. Before making such a decision, counsel should ask himself whether the expert will be called and whether the court may limit the opinions and conclusions, in whole or in part. The better practice is to describe the expert testimony broadly and without attribution, if counsel decides for strategic reasons to introduce the expert early on. Subject to time constraints, the opening statement may provide information about the expert's qualifications and their relevance to the expert's testimony. By laying the preparatory foundation in the opening statement, the jury will be better prepared to hear the expert's testimony.

## § 43:6 Framing issues at trial in light of expected expert testimony—Final arguments

The final argument[1] is counsel's opportunity to summarize and explain the expert testimony and to link the testimony to the essential elements of the case. The summary of the expert testimony is especially important when the subject matter of the case is particularly complex or involves highly technical issues. The exhibits or charts used during the expert's examination may be reviewed and explained, focusing on the important points of proof. Counsel must keep in mind which facts or data underlying the expert's opinions were admissible and which were not. It is improper for counsel to argue that the expert proved a fact that was merely inadmissible evidence relied upon by the expert in formulating his expert opinion. Finally, the closing argument also affords counsel the opportunity to highlight the deficiencies in the opposing expert's testimony.

## § 43:7 Advocacy skills in handling expert witnesses

No matter how accomplished the expert or careful his analysis, a critical component of his testimony is his skill in communicating his findings and opinions. Consequently, the lawyer must be alert to whether the expert can convey his views in understandable language and examples. Experts must use simple language

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**[Section 43:5]**

[1]See generally Chapter 40 "Opening Statements" (§§ 40:1 et seq.).

**[Section 43:6]**

[1]See generally Chapter 45 "Final Arguments in Jury and Bench Trials" (§§ 45:1 et seq.).

to explain even complex facts or opinions and resist the temptation to use complicated words. The expert may unconsciously use such words because they are understandable and common in his specialized community. All of this may seem unnatural to the expert.

The effective expert uses plain, understandable language. Counsel should facilitate this by phrasing questions in simple, plain language that invites a similarly direct response. Another important technique for the lawyer is to encourage the expert to respond with images that the jury will be able to recognize: "can you show us how this works?"; "would you take us through what happened?"

## § 43:8 Expert's use of demonstrative aids

An effective way to structure the expert's testimony is to illustrate the substance of his work and opinions with demonstrative aids.[1] In many cases, these aids are essential. When done well, demonstrative aids provide clear and simple guides that help the jury follow the expert's testimony. If an adequate foundation is laid,[2] and if the expert's underlying data is of the type reasonably relied upon by other experts in the field,[3] presentation of the models and demonstrations by an expert should be admissible. Demonstrative aids effectively supplement and illustrate the expert's message. The expert should be adept at and comfortable using the various aids as he testifies. When possible and permitted, leaving the witness box and testifying while using demonstrative materials presents a more natural and memorable experience for the jury.

Historically, attorneys have used charts, overhead illustrations, and blackboards as demonstrative aids. Recently, technology has become the standard. Because it is so easy to prepare PowerPoint slides and graphics, attorneys must be careful not to overwhelm the jury with demonstrative aids. Doing so may detract from your expert's testimony. Nevertheless, technology

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**[Section 43:8]**

[1]See Chapter 44 "Evidence" (§§ 44:1 et seq.).

[2]The qualifications of the expert witness and the methodology used by the expert must be established. The witness with, for example, software program expertise or statistical expertise must be qualified as such. See § 43:15. Additionally, the proponent must prove-up through the expert that the software program is of a type that meets the Rule 702 reliability requirements. See § 43:32.

[3]See § 43:44.

can be used in many effective ways:[4]

*Summaries.* An expert can present summaries created as computer-generated tables, charts, or graphs of voluminous underlying data.[5]

*Projections.* An expert can perform in real time a series of projections (*e.g.*, lost future profits) on a monitor, demonstrating the different results when the underlying key assumptions are modified.

*Models.* To illustrate the design, view, or operation of a mechanical device, an expert can show different views of a multidimensional model.

*Demonstrations.* An expert can demonstrate or predict physical events by applying certain conditions to the model. The physical events can be depicted through animation on the monitor.

*Reconstructions.* An expert can use a program that reconstructs and simulates an event consistent with the actual, physical evidence.

## § 43:9 Effective use of consulting expert at trial

If the litigation budget permits, a party may benefit from retaining both a testifying expert and a consulting expert. The consulting expert can assist in preparing to depose and cross-examine the opposing party's expert witness. The consulting expert can also assist counsel in understanding the relevant area of expertise, in formulating important areas for inquiry, in finding flaws in the opposing expert's reasoning, and in finding information that could lead ultimately to the impeachment of the adverse expert's opinion. In general, a party is not required to disclose to opposing parties the work done by its consulting expert.[1]

Another advantage of using a consulting expert is that the testifying expert's opinion at trial can be developed independent from the preparation of the discovery plan and trial strategy. The testifying expert, therefore, will appear more impartial and will be less vulnerable to difficult cross-examination.

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[4]See Chapter 66 "Litigation Technology" (§§ 66:1 et seq.) for discussion of the use of technology during trials.

[5]Fed. R. Evid. 1006. See Chapter 44 "Evidence" (§§ 44:1 et seq.).

**[Section 43:9]**

[1]Fed. R. Civ. P. 26(b)(4)(D); Emerson v. Laboratory Corporation of America, 2012 WL 1564683, *4 (N.D. Ga. 2012) ("To the extent the requested opinions are held by non-testifying or consulting experts, whom [defendant] has retained only in anticipation of the litigation and not to testify at trial, they can only be discovered upon a showing of exceptional circumstances.").

## § 43:10 Strategies for handling admissibility issues when offering and challenging expert testimony

When determining whether and how to offer expert testimony, counsel should consider the following strategies:

*Assess the Likelihood of a Challenge.* The offering lawyer should determine the degree to which the expert's methodology may be portrayed as novel, unconventional, or otherwise unproven. In doing so, the lawyer can assess ahead of time the likelihood of a serious challenge to the reliability of the expert's testimony.

*Consider Making Early Decisions.* The practitioner should decide whether to wait until trial to defend any challenges to the proposed expert testimony or whether to seek early decisions of those challenges outside of the presence of the jury. If the expert's proposed methodology is novel or admissibility of the testimony is questionable, counsel may seek an early decision to avoid surprise at trial. If an early decision is preferable, the practitioner may seek a stipulation, an agreed scheduling order, or a motion in limine,[1] ideally after expert reports and depositions have been concluded.

*Conduct Independent Research.* The offering lawyer may buttress support for the expert's methodology by locating and citing other examples of the expert's methodology. Further, counsel can illustrate the reliability of his expert by locating methods and techniques of other specialists that support the expert's own methodology. The lawyer can find common methodologies and techniques by reviewing other expert reports and by following up on the materials relied upon by these other experts in preparing their reports.

*Capitalize on the Opposing Expert's Work.* In some cases, the practitioner can establish the reliability of his own expert's work by aligning it with selected portions of the opposing expert's work, data, methods, and techniques (as established through publications and expert depositions) that use the same or similar techniques. Counsel can present these other methods and techniques at trial during cross-examination of the opposing expert.

Alternatively, when attempting to exclude the opposing party's offer of expert testimony as unreliable under Rule 702, the challenging lawyer should consider the following strategies:

*Explore Relevant Literature.* Review the literature in the offered expert's field to expose the absence of supporting literature for the expert's conclusions or the presence of conflicting conclu-

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**[Section 43:10]**

[1]See Chapter 37 "Motions in Limine" (§§ 37:1 et seq.).

sions by other experts on the particular subject.

*Consult the Retained Expert.* The challenging lawyer should provide copies of the opposing expert's reports and testimony to the lawyer's own retained expert for review and critical analysis. The retained expert can offer invaluable insight needed to identify weaknesses in the opposing expert's work.

*Expose Defects in Methodology for Opposing Expert's Opinions.* The challenging lawyer should be prepared to attack the opposing expert's failure to perform and resolve adequate critical analysis or to establish scientific basis. In complex accounting cases and design defect cases, the challenging lawyer will spend considerable time with his own expert performing its own analysis, reviewing available data and performing independent tests, all toward an incisive cross-examination of the adversary's expert. Experts are far from infallible, and their work product can be flawed in numerous ways. They may have relied on the wrong data, imperfect or incomplete data. They may have hurried the analysis at the last minute, such that the data, however valid, produces unforeseen (and harmful to them) results. They may have simply failed to analyze their conclusions under the "smell" test. Any one of these failures can result in the complete discrediting of the expert in the eyes of the jury.

*Use Discovery Rules to their Fullest Potential.* Consider the use of depositions, document requests, interrogatories, initial disclosures, and Rule 26(a) disclosures as they provide means to fully exhaust the bases of the opposing expert's opinions and prevent an opponent's untimely attempts to bolster expert testimony.[2]

*Don't Take No for an Answer*. Even if the court denied a pretrial motion to exclude expert testimony, consider re-raising the argument at trial immediately upon the calling of the expert by the opposing party. Although one must consider the appropriateness, and balance the risk of annoying the court, this strategy can be successful if done succinctly and persuasively. Even if unsuccessful, the objection will help strengthen the record on appeal.[3]

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[2]See Chapter 29 "Selection of Experts, Expert Disclosure and the Pretrial Exclusion of Expert Testimony" (§§ 29:1 et seq.).

[3]See Chapter 44 "Evidence" (§§ 44:1 et seq.) for a more detailed discussion of the rules of evidence in trial.