

Three Ways Law Firms Can Utilize an Expert Witness to Improve Efficiency

by

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The recessionary climate has greatly impacted law firms of all sizes across the United States. There seems to be an endless stream of news announcing yet another round of layoffs at firms that have already been forced to let go of thousands of experienced attorneys and forego bring new associates on board. While these economically uncertain times persist, law firms should take the opportunity to conduct a self-analysis of operations. An evaluation of standard trial preparation techniques, for instance, will likely reveal areas where the firm can enhance, and even expand, current services while simultaneously reducing the time and cost that must be expended.

Many law firms unknowingly, and unnecessarily, sacrifice limited billable hours by only utilizing an expert witness and litigation support staff during the final trial phase. Law firms can improve efficiency throughout the litigation process by retaining an expert witness early on, and then consulting with that expert witness throughout the trial preparation process. The following three points illustrate ways in which an expert witness and litigation support staff can significantly contribute to the overall success of a case while reducing a law firm's overhead costs.

1. Refining the Discovery Process

While detailed rules governing the discovery process have virtually eliminated the purposeful concealment of evidence from opposing counsel, advances in technology have brought about a new challenge. Attorneys can quickly find themselves under a sea of documents when they broadly request "all communications to/from" or "any document containing the word(s)." Without properly determining what is and is not actually necessary, attorneys will find that while they have obtained every conceivable document they are left to hunt for hidden needles in many haystacks. This process can be extremely time and cost intensive for a law firm, particularly when the documents are of a technical nature (e.g., involving financial records and reports). Quite often junior attorneys and paraprofessionals, who lack the ability to realize the significance of certain documents, are left to organize and sort through many thousands – often hundreds of thousands - of pages of production. A law firm could often benefit greatly by having litigation support personnel familiar with such technical documents review discovery material to quickly identify crucial pieces of evidence.

Attorneys can also narrow and refine document searches, thus reducing the likelihood of obtaining an overwhelming number of unrelated and unnecessary

documents, by consulting with their expert witness *before* submitting a document request list to opposing counsel. An expert witness can review and suggest additional key terms for searches based on certain words that have specific technical meanings and/or are commonly used by those practicing a discipline but not always in common usage by laypersons. An expert witness might also be able to specify and request the production of certain documents that might not otherwise be provided through a general key word search or e-mail harvest that the expert feels is necessary to fully formulate an opinion. Chances are, if an expert believes a certain document is central to forming an opinion, a jury would too - so its retrieval should be pursued.

2. Developing Case Strategy and Themes

Complex cases can take days, months, and even years to fully litigate. As such, it can be quite a challenge to retain the fact finder's attention and to present arguments and evidence in a fashion that is memorable. Textbooks and experienced attorneys often recommend that in order to make a lasting impression attorneys should be cognizant of and tailor their trial strategy to the characteristics of today's jury. Research indicates that jurors process information best in little sound bites and with dramatic visuals, instead of via long monologs on rules of evidence. Presenting material as pieces of a story with a consistently applied theme from opening statement through closing argument has also been found to be effective.

It can be quite advantageous for attorneys to discuss the witness's prior trial experiences with their expert. The expert witness could provide great insight into case themes and strategies that were previously employed and found to be effective. The expert witness might also have utilized demonstrative evidence, such as graphs, diagrams, simulation models, or other objects that could be replicated or modeled, and again be effective in presenting the facts for the case at hand.

Some attorneys may be reluctant to entertain such discussions with an expert witness. They should keep in mind, however, that it is the expert witness, not the attorney, who has had the greatest opportunity to observe juror reactions from the vantage point of the witness stand. An astute observer can have benefitted from those situations, and share that advantage with the attorney he/she is advising.

3. Tailoring Deposition Questions

Depositions are a dynamic component of the discovery process, as they afford attorneys the only opportunity to ask a question and immediately follow up on a response. It is critical, especially when federal rules apply where there is no distinction between evidence and discovery depositions, for attorneys to ask questions that will lead to admissible evidence or risk having a worthless transcript. Asking the right questions and obtaining the right response is critical, as evidence

depositions can be substitutes for trial testimony and might be the only testimony the jury hears from a given witness.

Attorneys can maximize the quantity and quality of the questions they ask a deponent, as well as follow ups to witness responses, by consulting with their expert witness prior to conducting the deposition. An experienced expert witness can provide invaluable guidance on what and how questions should be asked on a particular complex or technical aspect of a case. In some circumstances, it can be advantageous to also have the expert witness provide on-site guidance during a deposition. Having such assistance can help the deposing attorney avoid having a clever deponent, schooled in the technical nuances that the attorney is unlikely to be familiar with, evade the question and any meaningful follow up inquiries.

Early and active involvement by your experts can make the entire litigation process more efficient and even more cost-effective after expert fees are factored in. Deposition and trial outlines are rightly considered to be “lawyers’ work,” but input from qualified experts can enhance those materials and improve the overall litigation work product and likelihood of ultimate success.

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