DIRECT EXAMINATION OF EXPERT WITNESSES

By: Michael J. Warshauer

I. INTRODUCTION

> "Modern litigation is using experts with unparalleled frequency. No longer are experts used merely in personal injury cases, nor are they only physicians and surgeons. Injury cases now regularly use economists. Products liability cases often use reconstruction experts. Building construction cases regularly use engineers and architects. More and more frequently, trial lawyers are using experts to explain how and why things happened the way they did, or did not happen the way they were supposed to. Because of this, being able to prepare and effectively present experts at trial is an essential skill every trial lawyer should have."[1]

The use of expert witnesses is unquestionably an essential and ever increasing practice in modern tort litigation. Certainly, in every case involving a bodily injury, expert testimony comes in through medical care providers. Attorneys in Georgia regularly use economists, accident reconstructionists, engineers, and other more specialized experts in state and federal court trials.[2]

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[1] Thomas A. Mauet, *Fundamentals of Trial Techniques*, § 4.4, p. 135

[2] However, despite the seemingly endless trend towards using expert witnesses, the "lay witness" who can testify based on personal observation and common sense often remains the most effective witness. This is often more appealing and readily understandable to jurors than is the "ivory tower" intellectualism of the expert witness. With this in mind, the best practice is to use lay witnesses for as many of the elements of proof as is possible and to use expert witnesses to explain what those elements of proof mean, and why they establish a breach of the defendant's duty or a causal link between that breach and the injury suffered by the plaintiff.

Despite the fact that expert witnesses can make or break a case, and are sometimes incredibly expensive, it is amazing how often experts are inappropriately selected, ill-prepared, and inadequately presented to the jury.

Direct examination is often given too little attention and time by attorneys. Instead, the focus is on preparing for, and conducting, a blistering cross examination of the opposition's expert. This is a mistake. Unless the jury has been convinced by the direct examination of the expert on whose testimony the case hinges there is no amount of cross-examination which will salvage the case. Simply put, for plaintiff's counsel, direct examination is the most important part of the trial and has the greatest impact on the result. "What happens during direct examination is a dynamic system of intercommunication. The lawyer asks a question of the witness and it is registered not only by the witness but also by the jury, the judge, and the opposing attorney. The witness's reply is registered not only by the asking lawyer, but also by all the above-mentioned participants in the process."[3]

"The appearance of an expert witness in a trial should be the signal for a time of clarity and reason, when the expert, who in legal theory has been called to help the jurors understand complex evidence, will explain the significance of what they have already heard. Every now and then, one would expect an expert to provide a moment of sparkling interest and, not too rarely, even a bit of high drama."[4]

II. SELECTION OF EXPERT WITNESSES

The selection of an expert is a vitally important aspect of using experts. Typically, in a given field, there are several persons who are willing to serve as expert witnesses. Finding these potential witnesses, and selecting those whose abilities, both as experts and witnesses, best fits the case, is as much of an art as it is a science. Keep in mind that "[t]he part of the process called

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[3] Roberto Aron, et. al., *Trial Communications Skills,* § 22.05, p. 258 (1986)

[4] James W. McElhaney, *Trial Notebook,* Chapter 21, p. 161 (1981)

direct examination has a 'star': The witness, who is the natural focus of the performance. He or she is the person whose words can help the jurors to understand the facts of the case. The jury and judge are focused on the witness, whose answers can confirm, damage, or destroy the lawyer's theory of the case."[5] Accordingly, it cannot be overemphasized that "[t]he best curriculum vitae is of no use if the witness does not know how to communicate. In many areas, the expert can be a very successful professional but still not have charisma or the ability to persuade."[6] Careful selection is the first step to a successful direct examination and positive trial result.

A. DETERMINE IF AN EXPERT IS NEEDED

Too many great cases are weakened because the use of experts is an afterthought. Because the use of experts is often the only way certain aspects of the burden of proof can be met, experts should be selected as early as possible in the case preparation. Often, if not in most cases, an expert should be retained before the suit is filed. Certainly, this is true in professional negligence cases in which O.C.G.A. 9-11-9.1 requires that an affidavit identifying at least one negligent act be attached to the complaint.[7] At a minimum, experts should be immediately

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5 Roberto Aron, et. al., *Trial Communications Skills,* §22.04, p. 258

6 *Id*. at § 29.03, p. 379

7 Case law provides that in suits against several types of professions an affidavit is required. When in doubt, the careful advocate will allways attach an affidavit. For example, in suits against pharmacists the Court of Appeals initially took the position that O.C.G.A. §9-11-9.1 did not apply. *Harrell v. Lusk*, 208 Ga. App. 358, 430 S.E.2d 653 (1993). The Supreme Court then took the opposite position and held that an affidavit is required when suing pharmacists. 263 Ga. 895 (1994). If the appellate courts cannot be sure, the advocate who wants to avoid malpractice will attach an affidavit whenever the defendant is involved in almost every kind of licensed field of endeavor.

consulted and retained in all product liability suits, all malpractice suits, and all toxic injury suits. Even car wrecks can benefit from expert testimony if there is serious doubt about the cause of the crash. (In car wrecks involving serious injury and death, regardless of how clear cut liability appears to be, it is essential to get expert involvement as early as possible while the evidence is still available. The bigger the case the more vigorous the defense.) Of course, if the matter is one in which expert testimony is not needed because the question is one of common knowledge, it will be impossible to have an expert testify.[8]

i. Limits on Use of Experts

Expert witnesses can only testify within the limits allowed by the rules of evidence. Usually, the question of whether expert testimony is necessary and admissible is fairly easy to answer. Medical and engineering questions need experts in order to be answered. The more difficult question is confronted when the area is on the cutting edge of science. The recent decision of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* _ U.S. __, 113 S.Ct. 2786 (1993), while not binding precedent for Georgia's courts, must be considered in all such cases.

a. Federal Courts

Federal Rules of Evidence 704 provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." "As a general rule, questions relating to the basis and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility, and should be left for the jury's consideration."[9] A "witness qualified as an expert of knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or

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8 *Garner v. Salter*, 168 Ga. App. 520, 521 (1983)

9 *Viterbo v. Dow Chemical Company,* 826 F.2d 420, 422 (5th Cir. 1987)

otherwise."[10] "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one."[11] "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."[12]

In complicated cases, typically those involving occupational diseases and cancer causing agents the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* _____ U.S. _____, 113 S.Ct. 2786 (1993), the controlling precedent in the Eleventh Circuit Court of Appeals, and the Federal Rules of Evidence, establish the standards by which a federal court is to judge the question of admissibility of expert opinion evidence. *Daubert* identified the relevant rules of evidence as Federal Rules of Evidence, Rules 102, 104, 401, 403, 702, and 703.

In determining whether the expert can testify under the Federal Rules of Evidence, in addition to satisfying itself that the expert is qualified, a trial court must determine whether:

> the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology . . . properly can be applied to the facts in issue.[13]

The Supreme Court has suggested that courts faced with this issue consider the following:

> [1.] "[W]hether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (or has been) tested."[14]

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10 Fed. R. Evid. Rule 702

11 *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* ___ U.S. _____, 113 S.Ct. 2786, 2797 (1993) (footnotes omitted)

12 *Id.*

13 *Id.* at 2796 (footnotes omitted)

14 *Id.* at 2796

> [2.] "Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication."[15]
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> [3.] "Additionally, in the case of a particular scientific technique, the court should consider the known or potential rate of error . . . ."[16]
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> [4.] "Finally, 'general acceptance' can yet have a bearing on the inquiry. A 'reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.'"[17]

"Pertinent evidence based on scientifically valid principles will satisfy those demands."[18] When attempting to use expert testimony in Federal Court, focus on the fact that the methodology used is appropriate and accepted.

One of the significant differences between federal and state practice is that under the federal rules of evidence the expert is allowed to recite the opinions of other experts upon which he relied - even if those experts' opinions are not in evidence and those experts are not available for cross examination.[19] In Georgia, such testimony would be hearsay.[20]

b. State Courts

Georgia law provides that the opinion of an expert on "any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts

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15 *Id*.

16 *Id*.

17 *Id*. at 2797

18 *Id*. at 2799

19 Fed. R. Evid. Rule 703

20 *Southern Bell Tel. & Tel. Co. v. Franklin*, 196 Ga. App. 474, 475 (1990)

as proved by other witnesses "[21] "[A]n expert witness may be qualified when it is shown that he has education, training, or experience in a field and that his opinions are his own although they may be based on facts related by others."[22] An expert may give an opinion when it falls within the profession and business or calling which the expert pursues.[23] Formal training is not a pre-requisite for expert status.[24]

It is not necessary that an expert have a formal training in order to be qualified as an expert. In fact, informal training or experience is sufficient to qualify an expert in the field in which the person is experienced.[25]

An expert may give his opinion without stating the reasons therefore, but one who is not an expert may give his opinions only when accompanied by the reasons.[26] However, an expert should be allowed to state the facts upon which he bases his opinion and it is error to refuse to permit him to do so.[27]

An expert may give his opinion on the ultimate issue where the conclusion of the expert is one which the jurors would not ordinarily be able to draw for themselves - a conclusion which is beyond the knowledge of an average layman.[28] An expert may not serve as the conduit for the

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21 O.C.G.A. § 24-9-67

22 Robert A. Falanga, *Laying Foundations and Making Objections in Georgia*, (1988) § 11-5, p. 146

23 *Southern Ry. v. Cabe*, 109 Ga. App. 432 (1964)

24 *Brown v. State*, 245 Ga. 588 (1980)

25 *Brick & Block Company v. Meadow,* 92 Ga. App. 338, 330 (1955)

26 *Wallace v. State*, 204 Ga. 676 (1949)

27 *McDaniel v. Department of Transportation*, 200 Ga. App. 674 (1991)

28 *Smith v. State*, 247 Ga. 612, 619 (1981)

opinions of other experts.[29] Often, physicians are called upon to read the opinions of other health providers under the guise that the report containing the opinion is a business record of the testifying doctor and thus admissible. The law does not allow this.[30] In short Dr. Jones, the family physician, cannot testify that Dr. Smith, the radiologist, read the MRI and believes that the plaintiff has a ruptured disc.

For the testimony of an expert witness to be received, his qualifications as such must first be proved.[31] This is addressed to the sound discretion of the trial court.[32]

B. LOCATING AN EXPERT

There is rarely a day that goes by in which we trial lawyers are not bombarded with advertisements from services willing to assist in finding experts. There are broad based services, such as TASA, which claim to be able to find an expert in just about any field, and there are boutiques which specialize in only medical malpractice, for example, Medical Quality Evaluations, Inc. which reviews cases and finds experts. Additionally, experts can be located through the grapevine of other lawyers and through independent research at the library. A gas station mechanic may well be the very best expert to testify about brake systems and cars. He works on them everyday and it is unnecessary to get some engineer who claims that his expertise arises by virtue of having a degree from Georgia Tech. The best degrees are those earned in life. However, it must be kept in mind that "[w]hen it comes to a battle of experts, it is important for the lawyer that the jury thinks the expert on his or her side is distinguished. Particularly, when the details of the opinion to be rendered are complex, the jury may well decide the case based on which expert appears more distinguished rather than what the expert says. That is especially true

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29 *Southern Bell Tel. & Tel. Co. v. Franklin*, 196 Ga. App. 474, 475 (1990)

30 *Id.*

31 *Knudsen v. Duffee Freeman, Inc.*, 95 Ga. App. 872 (1957)

32 *Clary v. State*, 8 Ga. App. 92 (1910); *Hines v. Hendricks*, 25 Ga. App. 682 (1920)

when the juror does not really understand the testimony of either expert. Therefore, qualifications are not just a means to allow a witness to render an opinion, but are a first step in making sure that the jury is receptive to the expert's opinion."[33]

Regardless of the method used, there are a few things to keep in mind. Beware of experts who testify exclusively for one side or the other. "If lawyers can point to the fact that the witness testifies for both plaintiffs and defendants, this can help counter the prejudice"[34] associated with witnesses who testify for a living.

In searching for an expert it is important to know as much as possible about the subject on which the expert will be asked to testify. This will both assist the lawyer in finding an expert and will serve to satisfy the expert that counsel is willing to do what is necessary to prepare his case. "To encourage cooperation, the lawyer must demonstrate a sincere interest in the expert's field. The potential witness will be alienated if the lawyer seems to be just getting a report and testimony to sway a jury. Unless a lawyer has the kind of curiosity that relishes the opportunity to take a mini-course in someone else's field, he or she will not be an effective trial lawyer."[35]

"Experts, particularly those from universities and medical schools, are often too willing to see the other side of the story. They have enough experience to know that nothing is 100% certain. They are also used to showing deference to opinions held by colleagues. These professionals frequently make terrible witnesses. They tend to be wishy-washy on direct and to crumble on cross-examination."[36] Some believe that "[a] fine accent, a beard, or graying temples are a plus for the expert."[37] This may or may not be true depending on the beard and

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33 Roberto Aron, et. al., *Trial Communications Skills,* § 29.17, p. 392

34 *Id*. at § 29.04, p. 380

35 *Id*. at § 29.10, p. 385

36 *Id*. at § 29.05, p. 381

37 *Id*. at § 29.06, p. 382

the accent. A ragged beard and distracting accent do anything but add to the credibility of the expert. Regardless of appearance, the best experts are those who are well credentialed and good communicators and teachers.

i. Services

When using a service be very clear about the fees. Some services apply a surcharge to the expert's regular rate - this can get incredibly expensive in a case involving a substantial amount of expert witness time. Other services, especially those which review malpractice cases, charge by the hour to review the case and find an expert who fits the case. These services leave the relationship between the expert and counsel to be worked out between the two. This method has advantages because the service is independent, has specialized expertise which the attorney can grow to trust after several cases, and, in the long run, the costs are significantly lower. Be careful about using an expert who advertises in publications directed at only one side of the bar - this can negatively affect their credibility.

ii. Library and Computer Bulletin Boards

The library is a free and very effective place to find experts. One need only use the Card Catalog (now on computer almost everywhere) and Index to Periodicals to find experts in just about every field imaginable. This is especially true in very specialized areas. In a case where the issue was whether smoke inhalation from an electrical fire in October caused a death in December, a literature search (actually a reference in Time magazine) identified a very credible expert in Alberta, Canada who was board certified in occupational medicine, internal medicine, and pulmonology who had studied firefighters in Baltimore with similar exposures. Newspapers and television news shows should also be reviewed.

The Internet is the largest computer bulletin board in the world. Scientific types love to participate on its hundreds of bulletin board forums to discuss various specialized topics. With a little luck, a bulletin board can be found and it can be used to find the expertise needed. It is

amazing to see the responses and the wide variety of genuine experts who participate in the forums.

iii. Other Attorneys

Jury verdicts, appellate decisions, and reputations expose all of us to attorneys who regularly use expert witnesses. Do not hesitate to call on attorneys who have worked similar cases to get the identity of experts, and thoughts about the expert's fees, qualifications, and courtroom presence - not to mention skeletons and warts. Call both the plaintiff and the defense counsel and get a read from both.

Further, if counsel has never used a particular kind of expert before he or she should try to get some guidance before heading into the courtroom. For example, many lawyers have never used an economist at trial while others use them many times a year. The less experienced should absolutely ask the more experienced to share transcripts and experience so that testimony which sounds complex can be presented in the most simplified and effective manner.

At ATLA conventions, the specialized practice forums often include a frank discussion of experts who are working in a particular area. Attend the conventions and learn a lot.

iv. Treating Physicians and Investigating Police Officers

In many cases, the experts, in the form of treating physicians, and investigating police officers, are pre-selected and thus come with the case, and there is not much the attorney can do about it. However, even in cases in which the plaintiff has already seen various treating physicians, the attorney still can choose which of those physicians to depose, which to have testify at trial, and can also choose to have the plaintiff see additional expert medical witnesses if necessary. (In fact, the attorney can have the plaintiff meet with a potential expert for evaluation and never be required to tell anyone if the results are not favorable.)[38]

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[38] *See*, O.C.G.A §9-11-26(b)(4)(B)

The seriously injured plaintiff often sees numerous physicians in the course of treatment. There will be the emergency room physician(s), the family physician, the various specialty physicians including the surgeons, the rehabilitation specialist, the psychiatrist, the radiologist, and perhaps others. It is probably never a good idea to call all of these physicians as witnesses. The case will simply take too long to try, the jury will be bored, and the expense will be unwarranted. Instead, counsel should first carefully review the medical records to see which of the doctors have records most helpful to his position. Then, counsel should interview, if at all possible, either in person or by telephone, each physician to determine what kind of testimony he or she will be able to provide. This process will also help the attorney decide whether or not to have the witness come live, testify on videotape, or testify via standard oral deposition. (Often a lot can be discovered about a physician's demeanor as a witness through other attorneys who have had experience deposing or using the doctor at trial.) During the interview process, the attorney should look at the physician's demeanor, how close the doctor is to his or her patient (is he a patient advocate or a money maker who hates lawsuits and lawyers and is unwilling to help his patients in any way other than by prescribing medicine?), his level of bias towards the plaintiff's or the defendant's position, whether he has an accent or other impediment to being an effective live or videotaped witness, and what his general credentials are. Keep in mind that one of the real advantages of using treating physicians is that hypothetical questions are usually unnecessary.

It is amazing how often the family practitioner will be the strongest witness of the treating physicians. Perhaps this is because these doctors treat the whole patient and do not merely screw the bones back together as do orthopaedic surgeons. More importantly, they are often better able to describe the effect of the injuries on the plaintiff and how these injuries have changed him physically, emotionally, and financially. There is no substitute for a good bed side manner.

a. Additional Physicians

If the treating physician is unable or unwilling to provide the testimony which is needed retain an additional physician or two. There are two kinds of specially selected medical experts. One actually provides additional treatment and diagnostic evaluation of the plaintiff; and the other merely provides an expert opinion linking the plaintiff's injuries to the event or describing what the plaintiff has to look forward to in the future. When a plaintiff comes to an attorney and it is clear that the plaintiff has not gotten good care, or is in the care of a physician who is known to be a hostile witness (the company doctor), it is imperative that the attorney protect his client's interest by assisting him in getting into the care of a physician who will provide good testimony in addition to good care.

Avoid selecting physicians who are widely known to be pro-plaintiff, unless necessary, as this will often make the case impossible to settle because the defendant will give no credence to the physician's testimony. Of course if settlement is not desired this is not a problem as the jury will never know that the physician is well known to link every known ailment to his patient's history of being in a car wreck.

Additionally, there are circumstances in which the changing of physicians will so aggravate the presently treating physicians that they will become even more hostile. All of these matters should be taken into consideration. There is absolutely nothing wrong with the plaintiff testifying that his attorney assisted him in finding a particular physician. Certainly, able counsel will have no trouble at all explaining to the jury that he sees dozens of plaintiffs a year and has a better ability to have a feel for this area of expertise than does the plaintiff himself. It is our job, as advocates, to get clients into the best medical care that is available. As a result, it is imperative that when the attorney is involved with selecting a treating physician for the client that the one selected have absolutely the best credentials possible. This makes the attorney's task much easier when it comes to defending that selection. The reasons for changing from the small

town practitioner to the medical school professor with a special expertise in the area involved in your client's injury are easily dependable. Do not hesitate to use physicians in major medical centers or to have the client travel out of town to obtain medical care. This is particularly true in toxic tort situations because there are only a handful of physicians in the country with genuine expertise in this field.

b. Investigating Police Officers

With respect to the investigating police officer, it is important to contact the officer very early in the case so he will know the case is one in which he should be prepared to come to trial. It is difficult to get a cooperative police officer when he is surprised with a subpoena requiring him to appear on his day off. This can be remedied by contacting the officer early and insuring him that, even if the trial date falls on his day off, he will be paid a day's wages.

III. RETENTION OF EXPERTS

After selecting the expert (other than the treating physician who is going to charge whatever he wants to), some sort of agreement with the expert should be executed. Beware of an agreement which allows the expert to quit at any time and keep the retainer. Beware of experts who charge too much as this affects their credibility. However, some experts do have high rates which can be justified by the overhead which their particular business carries. For example, there are experts in Atlanta who have 14,000 square foot laboratories and facilities for their engineering practices. There are other experts who work out of their basements, and have absolutely no overhead to speak of, as all of their laboratory work is sent out to various subcontract laboratories. It would certainly be reasonable to pay the expert with the big overhead more money than the expert who has virtually no overhead at all. This can be justified to jurors who seem to understand the different rates.

Experts who are new to the expert witness business will often have no idea what they should charge. Do not make the mistake of suggesting a rate that is too low. The expert will

eventually discover, through his friends or other sources, that he is not being paid a fair rate and will hold it against you. Always offer a fair rate that is justified in the market place. Additionally, the experts who have never testified before must be made aware that they will be expected to be advocates as opposed to merely professors who will be talking in general terms.

IV. COMMUNICATIONS WITH EXPERTS

Counsel must be careful in its communications with experts. Although there is case law which provides that the work product impressions of the attorney can be shared with the expert without having to disclose the correspondence to the opposing party,[39] there is always the risk that the expert will inadvertently produce the letters or that, for one reason or another, the trial judge will not recognize the confidential nature of the communication and allow the opposing party to discover it regardless of case law. Thus, it is best to communicate your thoughts about your theory of the case in an oral fashion with the expert. This way it cannot be discovered and it leaves you more flexibility. Further, written reports from experts are not usually a good idea. They trap the expert into an opinion which can be the fodder for subsequent cross examination and unnecessarily prepare the opposing side. Accordingly, unless reports are essential, the expert should be advised to report his thoughts orally. In federal court, written reports are becoming required in many districts as are answers to mandatory interrogatories which require particularized statements identifying the experts and their opinions.[40] The opinion statement should be carefully crafted and reviewed before being finalized. Early drafts should be destroyed to prevent them from being inadvertently produced in discovery.

V. PREPARATION OF EXPERTS

Preparation of experts must begin long before the trial. It is essential that experts be prepared for depositions every bit as carefully as they are prepared for trial.

A. DISCOVERY DEPOSITIONS

Every sheet of paper in the expert's file must be reviewed by counsel before the deposition begins. Any documents which are confidential, irrelevant, or unnecessary to the file can be excluded. Similarly, where the expert has not included in his file all of the materials

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39 *McKinnon v. Smock*, Case No. S93G1738 (Georgia Supreme Court, July 15, 1994)

40 Fed. R. Civ. P. Rule 26 as amended in 1993

which have been provided to him, this should be remedied. The expert should be told what to expect in general and should particularly be told about the tough questions he can expect in cross-examination. He should actually practice answering questions such as "What did the defendant do wrong?" With cases in which epidemiology is necessary to make the causal link, the expert should be thoroughly familiar with the *Daubert* decision and be prepared to explain the methodology used in reaching his opinion.

There are various checklists, available in form books, for preparing expert witnesses. These are quite helpful, particularly with the novice expert. A simplified checklist is attached at the end of these materials. Most importantly, particularly with the inexperienced, experts should be cautioned to keep their answers confined to the questions and leave themselves room to do further inquiry and modification of their opinion if necessary.

Experts should be provided with everything - the good and the bad. When possible, the expert should meet with the client to discuss how the client was injured and how his injuries are affecting his life. Visits to the site of the injury in a premises or car wreck case, and a review of the particular machine in products liability cases, are essential steps for liability experts in these types of cases.

An economist who will be testifying about numbers does not need to meet with the client and it serves no purpose for him to do so. However, it is essential for the economist to be provided with complete financial information including several years of wage history and tax returns in addition to race, age, and education level.

Usually the following materials should be provided to the specially retained engineering or medical expert:

i. the plaintiff's deposition, in its entirety;

ii. other witness statements describing the injury;

iii. all sworn interrogatory answers which are relevant;

iv. all of the plaintiff's medical records from the beginning of time until the present;

v. photographs and videotapes of the incident scene and equipment if available;

vi. the depositions, statements and reports of opposing and other retained experts including all medical care providers;

vii. anything which is remotely relevant - do not be "penny wise and pound foolish" by thinking about saving expenses by reducing the expert's workload!

It is imperative that no records or facts be omitted because to do so will simply open the expert up to effective cross-examination. In general, the lawyer should give the expert complete and accurate information about the case in order to increase the effectiveness of the expert's testimony. This is not just a good idea. It is the lawyer's professional responsibility towards his or her expert.[41]

Even treating physicians should be made aware of the opinions held by others. Particularly when the opinion is damaging and opposite of the treating physician's opinion. This will often cause them to become even more firmly entrenched in their opinions and helpful in counsel's efforts to minimize the effects of an unfavorable IME.

VI. DIRECT EXAMINATION OF THE EXPERT

The best and most carefully selected expert will be of no value if he is not given the opportunity to be an effective witness. This means testifying in response to open ended, direct, questions designed to make the expert the focus of the jury's attention. Cross-examining your own expert with leading questions is ineffective and should be avoided at all costs. The witness must remain firmly and solidly within the confines of his expertise. To do otherwise not only

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41 Berg, *Counsel's Responsibility in Preparing Experts, For the Defendant,* July, 1987 at 28

risks the possibility that the expert will not be allowed to testify but also exposes the witness to effective cross examination. "Finally, make your direct examination brief and well organized. By making an outline of your direct examination, you will be able to go through it quickly and cleanly, avoiding the outrageously prolix repetitiveness which is the key note of the lawyer that keeps on asking questions just to make certain he has covered everything. While it would be a mistake to read all the questions to the witness, it is a good idea to work out the exact wording of the important once in advance, making the direct examination of your expert witness a high point in the trial."[42]

Tell the expert specifically what to do when there is an objection. They must know to look at the person asking them questions and not merely stare at the jury the entire time. That makes them too professional and makes it look like as if they are presenting a show. They should know not to look at the counsel that retained them when things get tough.

The entire credibility of an expert was lost when, throughout his cross-examination, which was on videotape, the expert almost continually looked at the lawyer who retained him instead of at the lawyer who was asking the questions. This was devastating to his credibility as it appeared that he was very concerned about his answers and was apologizing to his employer even as he spoke. It cannot be overemphasized that the lawyer must make the expert aware of the importance of presentation techniques. The use of the actual demonstrative aids, before trial, will insure that the witness is effective. Further, the witness must be made aware that the collective intelligence and attention span of the jury is similar to that of precocious seventh graders.

A. TIMING OF WITNESSES

The timing of the use of the expert is also important. The question of when in the case a particular expert should appear is answered differently in every case. An effective use of experts

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42 James W. McElhaney, *Trial Notebook,* Chapter 21, p. 166

is to have them testify somewhere in the middle of the trial at one of the "power points" such as the first witness of the day, the last witness before lunch, the first witness after lunch, or the last witness of the day.

It is usually a mistake to call the expert witness as the first witness in the trial. If the expert is the very first witness, the jury will not have a foundation, through lay witnesses, on which the expert's testimony is laid. This creates the potential that the expert's testimony will have to based on hypothetical questions which, by their very nature are inferior to more direct examination techniques. When an expert testifies after two or three fact witnesses, their testimony can be used as the basis of the expert's testimony. This will allow the expert to explain what the facts mean and why those facts are so devastating to the opponent's case.

In the typical personal injury case, if there are going to be experts needed for medical causation, breach of duty, and economic losses, I prefer to sequence the experts so that the overall thread of the plaintiff's case is as smooth as possible. For example, in a case involving a defective product, expert testimony was provided by an engineer, two physicians, and an economist. The engineer was the second witness. A lay witness first testified as to how the particular tool had been used, how he expected it to operate, and how he witnessed it break while the plaintiff was using it. This set the stage upon which the expert could give his opinions without having to resort to hypothetical testimony. The expert then was able to testify about the standard of care, about what the tool was expected to do, and about how it's failure was likely to cause bodily injury. The next witness to testify was a medical witness by written depositions. This short deposition made a nice filler after the fairly lengthy direct and cross-examination of the engineering expert. Following this witness was an additional fact witness concerning the plaintiff's general health and this was followed by an additional medical expert who testified as to the plaintiff's health and his limitations. As the medical testimony was not as strong as one would like with respect to causation it had been decided to have all of the medical testimony

come in by simply reading it into the record. The additional impact of live testimony or videotaped testimony would not have helped the plaintiff's case. Following these witnesses was the economist who told about the lost wages, both past and future. The case ended with the plaintiff testifying about how all of these matters have affected his life and he was able to tie each the testimony of each expert and fact witness to his own condition. The result was quite favorable to him.

B. WHAT POINTS TO COVER

The direct examination has several areas that must be included. The expert must provide his educational qualifications, his experience, his opinion, and the relationship between his opinion and his qualifications and the work he performed in reaching that opinion. An effectively planned and implemented direct examination will present these areas in the correct sequence and with the appropriate emphasis for the particular case. Proper timing and balance is what separates an effective direct examination from a waste of time and money.

C. EXAMINATION HINTS

"Preparation is the most important part of direct examination in general and of direct examination of an expert in particular. It is not the only part. If the questions are not properly phrased, even the best prepared expert can have difficulty establishing a dialog that will communicate to the jury. Conversely, a skillful lawyer can salvage the case when the expert freezes on the stand."[43] "The attorney who has become completely conversant with the scientific and medical issues in his case should take care as well, that he does not forget himself and use incomprehensible jargon in his questions, leaving the jury in the dark as to what is being asked."[44] "Good preparation means not only that the witness knows what is going to be asked, but also that the phrasing of the answers, including the choice of words, has been gone over

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[43] Roberto Aron, et. al., *Trial Communications Skills,* § 29.16, p. 391, Aron

[44] Scott Baldwin , *Art of Advocacy, Direct Examination*, § 22.01 [10], p. 22-12

carefully in advance. If the witness delights in arcane terminology, . . . [counsel] should consider calling some other expert."[45]

The examination technique which is chosen for any particular expert must relate to that expert's particular personality, the area about which he will testify, his qualifications, and the qualifications of opposing experts, if any. In circumstances in which there will be no other treating physicians, it is a waste of time to go into extensive testimony about the qualifications and training of the expert himself. All this does is distract the jury and waste everyone's time. With these unchallenged experts, one can get right to the meat of the case - the causal link between the injury and the event and how that injury will effect the plaintiff for the rest of his life.

When there is going to be somewhat of a fight about the credentials of experts, and their competing opinions, the experts' credentials should be gone into in more detail. Special care and attention must be given to the credentials which relate specifically to the area about which the expert is going to testify. Even a family physician can be made to look quite knowledgeable about orthopedics when he testifies about his orthopaedic rotation and the fact that he sees people for orthopaedic injuries every single day of his practice and has for the last 30 years. Sometimes, the caring family physician can be made to be even more credible than the orthopaedic surgeon who merely fixes the bone and does not see the patient much for follow-up.

i. Use a Method Which Insures Impact

"The expert must be told to control himself or herself to prevent information over load to the jury."[46] The jury should be made to see the expert as an authority independent of counsel, as

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45 *McElhaney,* Chapter 21, p. 165

46 Roberto Aron, et. al., *Trial Communications Skills,* § 29.12., p. 387

well as one whose expertise, manner, and impartiality make his or her testimony both believable and important in the jury's eyes.[47]

"The expert may not think he or she needs visual aides to make a point with a jury. The expert is wrong. The lawyer should be prepared to supply visual aides for the expert and to go over them prior to trial"[48] Demonstrative evidence is essential to the effective expert witness. This kind of evidence often takes weeks to arrange and counsel should begin the steps necessary for its use very early in case preparation for trial. It does not make much sense to save $1,000.00 by not obtaining good demonstrative aids until it is too late to use them. Enlarged photographs, models, positives of MRIs and x-rays, should all be used as needed. It is important for the expert to be involved in the preparation of the exhibits so that he will be comfortable using them and so that they will be accurate. Some jurors learn from a visual standpoint and some jurors learn from an auditory standpoint. Counsel must present the information in ways which will appeal to both kinds of learners.

A direct examination which has real impact with the jury will focus on the plaintiff and why the expert is being asked to ***help the jury*** understand the issues which concern the plaintiff. In other words, the focus is not on the expert - it is on the opinion about the plaintiff and why the jury needs the expert to provide them with that expert opinion. Countless medical depositions are taken every week in which the focus seems to be on the doctor's medical school, board certification, and hospital affiliations instead of on the plaintiff's injuries. By the time the questions begin to focus on the plaintiff the jury is long since beyond its collective attention span. This is especially inexcusable given the fact that in most cases the expert's credentials are not in dispute. Anyone who has read multiple depositions over the course of a trial knows the

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47 Postal, *A Legal Primer for Expert Witnesses, For the Defendant*, February 1987, at 21, 23-25

48 Roberto Aron, et. al., *Trial Communications Skills,* § 29.13, p. 388

jury's reaction when it sees counsel pull out another one inch thick one hour deposition. The reaction is far from welcoming!

Avoid leading questions if at all possible. While it is technically okay to lead every once in a while, particularly for preliminary matters, it takes away from the witness's credibility when the attorney is doing the testifying. This is true for all types of direct examinations. The witness should be the star and the attorney should disappear into the background. For this reason, do your best to stand behind the jury so that jurors focus on the witness, not the questioner.

When dealing with an expert witness who has testified in numerous occasions for the lawyer's firm, it is important to establish that the witnesses is credible, that there are other witnesses available who can testify as to the same topic if the defendant chose to retain such a witness, that the witness has been allowed to testify on the subject in state courts, federal courts, in that very court house, and for both plaintiffs and defendants. This is often the case with an economist who will be used over and over again by plaintiff's counsel.

Many attorneys write out every question in their direct examination. This is a mistake. Trials are not plays in which every one knows the script. Trials are vibrant and live improvisations in which the characters know the theme, but not the exact script which governs their testimony. A direct examination which is scripted will be jerky, boring, and sound exactly that - scripted. Instead, an outline with some key questions or phrases will be the key to an effective examination.

The most important questioning tool when questioning an expert witness is to be curious. Ask what the words the doctor uses mean. Too often lawyers become as familiar with back anatomy as physicians and fall into the habit of speaking in medical terms to impress themselves and the physician. Do not do this. Instead, pretend that this is the first time you have ever heard about the L5/S1 disc and have no idea where it is or what it does. Similarly, ask why a portion

of the expert's resume is relevant to his testimony. Ask the questions that a very curious eighth grader would ask.

Never waive the qualifications of a witness. However, if you can get the other side to stipulate to the qualification, that is a different matter. Sometimes this can be done in a smaller case where there is only one treating physician, there is no real question about causation, and the real fight concerns either liability or the value of the damages claimed.

Many lawyers interrupt their direct examinations to ask the judge to accept the witness as an expert. This is not a good practice as it breaks the flow of the testimony and exposes the expert to the possibility that the defendant will then ask for an opportunity to voir dire the witness. Instead assume the expert is an expert and keep going until the other side stops you. When qualifying an expert, it is important that the qualifications be focused on the witness's education, training and experience in the pertinent field of study and that they not be limited to merely conclusory statements such as "I am an expert."[49] The opinion will be out quickly and efficiently this way.

A direct examination of a treating orthopedic surgeon, which will stay focused and have impact with the jury, can follow this outline.

a. name?

b. professional address?

c. specialty?

d. what is that?

e. in this specialty is the doctor familiar with injuries caused by (slipping and falling, or rear end car wrecks, or crushing injuries caused by unsafe machines, or injuries caused by unsafe workplaces)?

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[49] *McDonald v. Glen-Brunswick Memorial Hospital*, 204 Ga. App. 7 (1992)

f. in this specialty is the doctor familiar with injuries to the (neck, back, knee, etc.)

g. is the doctor familiar with Joe Plaintiff?

h. how did Joe come into the doctor's care?

g. what history was provided?

h. was surgery eventually performed?

i. describe the surgery.

- here use diagrams, positives of MRIs, positives of x-rays, etc.

j. was the need for surgery consistent with having been caused by the event described in the history? (this opinion held to a reasonable degree of medical certainty)

k. prior to surgery what efforts were attempted to treat the patient by conservative means?

l. after the surgery was the patient restored to the state of good health he enjoyed prior to the event described in the history?

j. what does the future hold for Joe Plaintiff?

A direct examination by deposition can take as little as eighteen to twenty pages of deposition and in court will be read in about twenty minutes or less. (Usually count on about 55 seconds per page of testimony to read a deposition.) The same examination by live testimony can be slightly longer as long as the expert is moved around the courtroom to show exhibits which will keep the jury's attention.

In a case involving competing experts with diametrically opposed opinions, the direct examination has to focus more on the experience and credentials which support the opinion and which will convince the jury that this expert should be believed over the opposing party's expert. An effective outline, with impact, might follow this outline:

a. name?

b. professional address?

c. specialty?

d. what is that?

e. in this specialty is the doctor familiar with injuries caused by (slipping and falling, or rear end car wrecks, or crushing injuries caused by unsafe machines, or injuries caused by unsafe workplaces?)

f. in this specialty is the doctor familiar with injuries to the (neck, back, knee, etc.?)

g. have you assisted jurors in other cases understand cases similar to this one?

h. have you done this at the request of both plaintiff's and defendant's counsel?

i. have you been allowed to do this in state and federal courts, even in this very courthouse?

h. what have I asked you to help **us** (never the jury as separate from the plaintiff) understand?

g. what is that opinion?

h. what training and education do you have which helped you come to the opinion that the plaintiff was injured by the defendant?

i. what materials were provided to you which helped you come to the opinion that the plaintiff was injured by the defendant?

j. what other information did you rely upon which helped you come to the opinion that the plaintiff was injured by the defendant?

k. with all of this in mind, is there any doubt in your mind that the plaintiff was injured by the defendant?

Again, the focus has been on the plaintiff and the relevant portions of the expert's experience which are relevant to the plaintiff. Additional focus and impact can be achieved by continually referring to the opinion and how the particular expert is best qualified to render that opinion.

ii. Use the Trial Theme

Every trial needs a consistent theme. This theme must be a thread running through every witnesses' testimony - not just in the opening and closing. For example, in a case in which the plaintiff died sixty nine days after smoke inhalation the theme was "It took 69 days for a bad locomotive to kill a good man." The expert was asked about the 69 day period repeatedly in order to stress the connection between the event and the death. Of course, the expert was aware of the theme and testified consistent with the theme regularly referring to the 69 day period.

iii. Use Buzzwords

Not only must the theme be woven into the direct examination but the examination must also focus on key words. "Reasonable care", "proximate cause", and similar kinds of key words should be repeated throughout the examination. Additionally, the use and definition of key words can set up the cross examination of the opposing expert.

When dealing with an expert who is of a profession which requires licensure, it is important to ask, as one of the foundation questions, whether the physician, engineer, or other expert is licensed in his particular field. While not absolutely required by the law, asking whether the expert holds his opinion to a "reasonable degree of medical or engineering or scientific certainty" is important. Many judges will listen for these "buzzwords" and it is a good idea to use them.

iv. Use the Jury Charge

The expert's testimony should be consistent with the jury charge. This will not only insure that the elements of the burden of proof are met, but will also give the expert's testimony added credibility when the jury hears similar concepts and language from the trial judge. The expert should be made aware of the law which will governs the case.

v. Avoid Hypothetical Questions If Possible

Hypothetical questions immediately take away from the expert's credibility. The very word "assume" alerts the jury that the expert does not know the facts. With treating physicians the hypothetical question is rarely needed because the history has been provided to the doctor. With other experts the hypothetical can be avoided in a variety of ways including putting all of the evidence necessary to support the opinion into evidence before calling the expert to testify.

"The hypothetical question has long been criticized on the grounds that it is boring, confusing, too complex, repetitive of testimony, encourages bias on the part of the witness, and is time consuming because it gives counsel the opportunity to give a summation in the middle of

the trial. The modern trend is to dispense with the hypothetical, subject to the approval of the trial judge. Thus, the questions calling for the opinion of an expert need not be in hypothetical form and the witness may state his opinion and reasons without first specifying the date upon which it is based."[50]

VI. DEPOSITION OR LIVE TESTIMONY?

There are two ways to use experts. One way is to depose them prior to trial, either by the standard method, or by video, and the other is to have them appear live at trial. There are advantages to both methods. The first question in using an expert, or any witness, at trial is to decide exactly what points the witness is to cover and when in the trial will be the best time for these points to be covered. "Before putting a witness on the stand, lawyers must remember an irrefutable principle: A good witness can help save a bad case; but a bad witness can bury the best case."[51]

A. BY DEPOSITION

There are experts who are more effective when their testimony comes in through the standard depositions. When an expert's testimony is taken by deposition, unless the opposing party objects to the qualifications of the expert at the deposition, the qualification issue is waived. This is a ground which could have been cured at the deposition.[52]

The advantage of the standard deposition is it allows the plaintiff to control exactly when the deposition will be read and the plaintiff knows (as does the opposing side!), before his opening, the testimony that the jury will hear. Further, when there is a written deposition

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50 Scott Baldwin, *Art of Advocacy, Direct Examination*, § 22.04 [1], p. 22-19

51 Scott Baldwin, *Art of Advocacy, Direct Examination*, § 22.04, p. 258

52 *Andean Motor Company v. Mulkey*, 251 Ga. 32 (1983) reversing 164 Ga. App. 752 (1982)

transcript, this allows the party to easily pull out "gems" from the deposition to use during his closing, or even in cross-examination of other experts.[53]

Once it is determined that a witness will be called to testify by deposition, the next question becomes whether to use video or not. Video is allowed by the rules, by obtaining an order[54] or agreement in Georgia, or by simply doing it under the revised federal rules of civil procedure.[55] There are many attorneys who now use video for everything. There are disadvantages to this practice. First, setting up all of the equipment invariably ruins the rhythm of the case. Second, some people simply do not take television too seriously. Third, the deposition which is done by video will take longer to play than the same deposition would to read. Fourth, it is difficult to "cut and paste" from a deposition and use only the good parts. Fifth, some doctors just do not do well on video. There is an orthopedic surgeon here in Atlanta who is somehow able to go 45 minutes without blinking and never takes his eyes off the camera. While he believes this to be the most effective way to be a video deponent, the videotape looks bizarre and is very ineffective. Other perfectly competent and credible physicians lose a great deal of effectiveness because of accents which are difficult to understand.

Demonstrative evidence can still be used in depositions even without video. Simple 11 by 14 inch color blowups, which are available in anatomy and surgery books, can be marked by the physician witness; and, because they can be folded into the original of the deposition which

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53 These "gems" can be blownup before trial for use in closing. When making blowups of testimony from a deposition, is not necessary to actually photocopy the actual page of the deposition. The jurors have never seen a page from the deposition and the poor quality type used by court reporters does not make a very good exhibit. Instead, have the excerpt retyped in a good legible type-face and enlarge it with a much higher rate of success.

54 O.C.G.A. §9-11-30(b)(4). A sample order is attached.

55 Fed. R. Civ. P. Rule 30 as revised in 1993.

is opened by the court, there is a certain amount of credibility attached to such exhibits and they are easily manipulated and reviewed by the jurors. Some attorneys prefer to use anatomical models on non-videoed depositions. The disadvantage of this is that it is difficult for the reader of the transcript to effectively manipulate the model and communicate doctor's descriptions and comments. (Six months after your partner took the deposition it is difficult to figure out what the doctor meant when he said "this side" of the model.)

However, videotapes should be used where there will be large specially prepared pieces of demonstrative evidence on which the deponent is expected to write or otherwise use to describe the extent of the injuries and the treatment provided. This is also true with respect to the use of skeletons and the like.

Another advantage of deposing an expert is that when a deposition is taken with the intent of using direct questions, if the deposition starts "going south", the examiner can change to leading questions and, if the deposition is used by the other side his cross examination will be more effective than the softballs he had been throwing in his direct examination.[56] A deposition may be salvaged during the direct examination by switching from direct to leading questions. This should be done once it is clear the deposition will not be used in your case in chief. In such cases there is nothing to lose by leading and it may well allow you to get some good answers. Thus, if a potentially damaging deposition is turned into a cross examination, with appropriate and timely objections to the opponent's leading questions who usually still believes he is supposed to be using leading questions, it can be made essentially unusable by the opponent and, with luck, helpful to the party who made the mistake of scheduling the deposition in the first place.

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[56] A witness is not either party's witness until called at trial. Thus, if one is not going to use the depositon in his own case in chief he need not use direct questions when examing the witness. *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga. App. 284, 286 (1972).

Many times the expert's testimony should come in through a deposition on written questions.[57] This is often helpful with a specialty such as radiology in which the opinion is fairly straightforward and leaves no room for cross-examination. These depositions usually are accomplished in less than five pages.

B. IN COURT

A specially retained expert should almost always be used live at trial. If the expert refuses to appear live at trial, or does not make a good appearance at trial, you probably should not have retained that expert in the first place. The specially retained expert should serve the role of the teacher and be able to come into the courtroom, and well inside of one hour, tell the jurors everything they need to know about the case and why everything is the other side's fault. Effective experts must be able to use demonstrative aids to assist the jury in understanding their testimony and opinion.

The specially retained expert can only make the best use of demonstrative evidence such as specially prepared medical exhibits, models, x-rays, and the actual defective product itself if he is in the courtroom where he can tell the jury about it. Similarly, as noted above, it is important to involve the expert in the preparation of the demonstrative evidence so that he will be comfortable using it.

VII. CONCLUSION

The effective use of expert testimony can be the difference between success and failure. Careful selection, preparation, and questioning can insure success.

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[57] O.C.G.A. §9-11-31. A sample of written questions are attached.