Feature
By **Mark Solon**

Managing expert witnesses – going beyond the evidence

The successful use of expert witnesses does not rely solely on the nature of their evidence. Litigators would also be well advised to consider courtroom protocol and psychology

An expert can publish a very useful report which warrants inclusion in a case, but if the case goes to trial, the lawyer has a dilemma as to whether to call the expert as a witness. Will the expert perform well? Will he be able to defend the research? Will his credibility stand up to scrutiny in the courtroom?

A large proportion of disputes settle without the need for a trial, and many experts have been involved in litigation but have never actually given oral evidence. Others are petrified of the prospect. It is therefore important to fully consider the practical strategy surrounding expert witnesses taking the stand and effectively manage the witness.

Pre-trial

While seemingly obvious, when the lawyer has permission for an expert witness to give oral evidence at trial on a date he can attend, it is important to ensure that the expert has reserved the dates exclusively in his diary. For trials that are listed for several days, if at all possible, plan when the expert needs to attend through discussion with the lawyer, with the other party and, if there is a pre-trial review, with the court. It is very expensive and unlikely to lead to good performance by an expert if he attends for several days when it is unnecessary.

It is also important to ensure that the expert has been kept completely up to date with all developments in the case relevant to his evidence.

Similarly, check whether the expert has given oral evidence at a trial before and, if not, whether he might benefit from some familiarisation training in courtroom skills, or from a visit to observe a trial at the court in question. However, it is important to ensure that you do not arrange or endorse specific 'coaching' on the actual case or use similar scenarios.

If you decide that an expert should attend to hear the evidence of witnesses of fact or that of other experts, seek permission from the trial judge for the expert to sit in court. Then, advise the expert to keep notes of important new points relevant to his evidence – particularly technical matters – and on how to communicate these.

Expert evidence usually follows after the evidence of witnesses of fact for each party, but sometimes the usual trial pattern will be varied by the judge or in order to accommodate an expert with limited availability.

Examination in chief of witnesses is often dispensed with at trial, as the reports have been exchanged and the judge will have read them. Nonetheless, sometimes judges prefer expert witnesses to explain their expertise in relation to the case, and the key points of their opinion, before cross-examination.

It is worth noting that, not infrequently, experts from the same discipline instructed by opposing parties will be invited by the lawyer or the judge to discuss points of continuing disagreement or new points outside the courtroom.

At court – in the witness box

It is advisable for the expert witness to sit in on some of the proceedings, as it gives a familiarity in terms of what to expect and the layout of the court. In any event, a witness may be asked to sit in when a witness on the other side is being cross-examined. This is crucial, for example, for an expert when the equivalent expert for the other side is giving evidence.

From the moment the witness enters the witness box, he should remember that the judge (or the jury, if there is one) makes the decision in the case and therefore all answers – regardless of who has asked the question – should be directed at the judge or jury. The witness should not try to persuade the lawyer – who, of course, cannot be persuaded. The judge should be formally addressed, so clarify whether the witness knows the correct form of address to use.

When the witness is asked preliminary questions, he will be asked for his full name, address and, if giving expert evidence, for details of his qualifications and experience entitling him to give expert evidence in this case.

This is an ideal opportunity for the expert to outline his expertise and why he is the appropriate person to be giving evidence in this case. Therefore, he should not be modest.

Most of the time that an expert witness spends in the witness box will involve cross-examination. The aim of cross-examination is to test the evidence, so the witness should prepare to expect critical questions and attacks on credibility.

The following tips will be useful to experts in the witness box:

- The general rule is that the witness takes nothing with him into the witness box. Giving evidence is not a memory test, however, so preparation is essential. In the witness box, the witness can

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refer to the trial bundle which has been prepared in advance of the hearing and lodged at court. The bundle contains, among other things, the statements from all factual witnesses together with any exhibits, and the reports of the experts together with any appendices. During oral evidence, the witness may be referred to the bundle. The witness should not be afraid to ask the judge for permission to refer to the bundle himself and, if unsure of a reference in a question, should ask the judge to be directed to that part of the evidence within the bundle.

- The witness should address everything through the judge. This is as a matter of respect, and since the judge is presiding over the case and is the decision maker. However, care should be taken by the witness if he feels that the question is irrelevant, inappropriate or indeed personal. Ultimately, it is for the judge, and not the witness, to decide whether a question is to be answered.
- A courtroom is not a natural environment in which a witness will find himself. It is important to communicate effectively, taking time and speaking clearly and slowly. In particular, an expert needs to appreciate that the judge is a lay individual, and avoid using jargon and technical terms unless they are fully explained. When addressing the judge, the witness may see the judge making notes. This is a useful reminder to the witness to slow down, as we write slower than we speak.
- Although the trial bundle has been prepared and lodged at court to assist the judge in understanding the case in advance, the witness should not assume when he is giving evidence that the judge has read and indeed understood anything. Instruct him to take every opportunity to elaborate and expand in his answers, in order to give sufficient detail to the judge.
- The role of the cross-examining lawyer is to try to limit or restrict an answer, look for flaws in the evidence and attack the expertise of the expert. The witness should treat every question as an opportunity to give as much relevant detail as is felt necessary. Techniques on cross-examination differ, but may include an attack on the expert's qualifications and expertise, interruptions, closed questions, multiple questions or hypothetical questions. The opposing lawyer may also try to undermine the witness through tone of voice or gesture. By taking a moment before every question and answering towards the judge, the witness can decide how much detail to give. If the witness has not understood the question or is interrupted before giving his full response, then he should seek the assistance of the judge. The witness may also simply ignore any gestures or other theatrics designed to undermine him.
- The witness should not go outside the facts or his area of expertise limited by his qualifications and experience. If the witness is asked about facts that he does not know about or if the question is outside his expertise, then he cannot answer the question.
- The witness is under a legal obligation to tell the truth. This means, quite simply, that if the witness does not know the answer to a question or cannot recall the details, then he should express his answer in such terms.
- The witness needs to remain calm throughout his time in the witness box. It is important that he does not argue with the lawyer, regardless of tone or possible rudeness.

Finishing touches

The aftermath of a trial or settlement is often an anti-climax, even for the successful party. The lawyer's effort is concentrated, quite rightly, on explaining the outcome to the client, ensuring that the judgment and the order are entered correctly, carrying out the terms of the order and dealing with the costs.

The work of the expert witnesses is then completed. If you and the client are satisfied with the expert's report and/or his performance at court, and you intend to instruct him again, do not neglect to advise him of the outcome and pay any outstanding fees as soon as possible.

You might also wish to consider providing some feedback on the expert's work, as many expert witnesses have told me that frequently they hear nothing at all from the lawyer after they have sent their report. WTR

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