



NEWS BRIEFS

PICKER, CHOW & FREISLEBEN LLP

IN THIS ISSUE:

This issue of News Briefs features an excerpt from a presentation “How to Get Evidence and Expert Testimony Admitted into Court,” given by Lily Chow, partner in the law firm of Picker, Chow & Freisleben, in Irvine, California. Picker, Chow & Freisleben was founded in 2000 by partners of a multinational law firm and specializes in commercial and civil trial litigation.

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USING EXPERT WITNESSES – STRATEGIES FOR MAXIMIZING YOUR CASE

A key to maximizing successful trial strategy is to identify all relevant evidence, know the applicable rules of evidence, and determine how the rules may, or may not, apply to allow evidence admission or potential exclusion in each case. This is also true with evidence presented through expert opinion testimony.

Introduction of evidence through expert opinion testimony is a significant strategic trial decision. When used effectively, an expert witness can add significant weight to an argument for or against an issue in a case. Likewise, effective handling or neutralization of an opponent’s expert witness can make the difference between winning or losing in the courtroom.

Every effort should be made to present expert testimony clearly and succinctly. Direct examination of expert witnesses usually consists of two distinct phases: (1) qualifying the witness as an expert; and (2) eliciting the expert’s opinions on the subject at issue.

QUALIFYING THE WITNESS

The qualifications of an expert (i.e., that he/she has special knowledge, skill, experience, training, or education about the subject matter at issue) must be established before an expert’s opinion testimony may be offered. While doing this, keep in mind that generally jurors will have limited or no familiarity with the nature of the expert’s specialty or work, so they will likely appreciate the time spent at the onset covering the expert’s background, activities, accomplishments, and explanation of relevant terms. It is a good idea to get the expert’s curriculum vitae admitted into evidence. If an expert has received any

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A SEASONED, CLIENT-DRIVEN TRIAL LAW PRACTICE

awards, honors, or special recognition, ask him/her about them. This will help establish the witness' expertise and credibility to the jury. Even if your opponent offers to stipulate your expert's qualifications, insist on eliciting them anyway. If relevant, compare your expert's qualifications with that of your opponent's.

ELICITING AN EXPERT'S OPINION

Once an expert's qualifications are established, focus on soliciting the expert's opinions and emphasize the key points that you want the jury to remember. The following are some strategies to introduce expert testimony in clear, succinct ways:

- **Ask the expert to summarize his/her opinions.** Before trial, work with your expert to present his/her testimony using clear common words, explain technical terms as needed, and to repeat essential key ideas, if necessary, so his/her opinions are clearly communicated.
- **Ask leading or semi-leading questions.** Depending on the nature of the testimony, however, it may be more effective to allow the expert to respond to short direct questions.
- **Use demonstrative evidence.** Get prepared charts and diagrams which emphasize and/or summarize key points into evidence before the expert's testimony. Be creative. Make the demonstrative evidence dramatic and interesting to capture and maintain the jury's attention – as the saying goes, a picture is worth a thousand words.
- **Be organized.** Ask your expert questions in the order and manner that will make the

information clear, convincing and persuasive.

- **Use hypotheticals.** Hypothetical questions may be asked of an expert during direct examination. Consider the pros and cons of using hypothetical questions. One of the primary advantage is that counsel can draft questions to summarize and highlight the most favorable and relevant evidence. However, hypothetical questions can run the risk of soliciting objections from the opposition. Consider the following points and case law examples when preparing hypothetical questions:
 - A hypothetical question should be based upon the facts shown by the evidence. A party is entitled to base a hypothetical question on any reasonable inference from the evidence, since it is for the jury to decide on whether such inference is sound. *Sullivan v. City and County of San Francisco* (1950) 95 Cal.App.2d 745.
 - It is not essential to the propriety of a hypothetical question that the fact assumed is undisputed. The question is proper if it recites to facts within the possible or probable range of the evidence, so long as it is not unfair or misleading. *Guardianship of Jacobson* (1947) 30 Cal.2d 312.
 - While each hypothesis contained in the question should have some evidence to support it, the question does not need to include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the

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opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question. *People v. Wilson* (1944) 25 Cal.2d 341.

- Although it is generally held that a hypothetical question asked of an expert witness on cross-examination may not assume facts not in evidence, there is an exception where the purpose is to test the expert as to his accuracy or competency. *People v. Busch*, 65 Cal.2d 868.
- Under Evidence Code §801(b), the assumed facts in a hypothetical question can include hearsay statements, and other inadmissible material, as long as it is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.

CROSS EXAMINATION

Equally important is effective cross-examination of your opponent's experts.

While courts generally provide wide latitude on the qualifications and the reasons given for the opinions expressed by an expert witness, there are certain limitations. For example, Evidence Code § 721(b) limits cross-examination on scientific or technical publications unless: (1) the publication has been admitted into evidence; (2) the witness referred to, considered, or relied upon such publication in forming his/her opinion; or (3) the publication has been "established as a reliable authority" by the testimony or admission of the witness by other expert testimony or by judicial notice.

Following is a checklist of strategies to consider when cross-examining an expert witness:

- ❑ ***Be prepared and maintain control of the examination.*** The best way to be prepared is to take the expert's deposition before trial and make sure the expert discloses all opinions he/she expects to render at trial and the basis for the opinions.
- ❑ ***Use leading questions.*** In addition to hypothetical questions, leading questions are permissible during expert witness cross-examinations and should ALWAYS be used.
- ❑ ***Move the court to strike non-responsive answers.*** Also ask the court to instruct the witness to not volunteer additional information after answering when no further question is pending.
- ❑ ***Don't argue with the expert.*** Jurors will not appreciate counsel's arguing with a qualified expert. Also arguing with the expert may open the door for explanation and may further alienate you from the jury.
- ❑ ***Avoid questions to which you do not know the expert's answer.*** Otherwise, you run risk of not being able to impeach the witness or you open the door to additional opinions.
- ❑ ***Avoid general questions that give the expert an opportunity to volunteer damaging information.*** Such questions might include simply asking "Why?" Also avoid "one too many" questions.

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❑ **Challenge qualifications, not opinions.**

Challenging an expert's qualifications is usually the safer approach, rather than attacking the expert on his/her opinions. In all likelihood, the expert has more information and expertise on the topic than the questioning attorney.

❑ **Limit questions on compensation received.**

Questioning the opposing expert on his/her compensation received has limited effectiveness, since jurors generally know and expect all experts to be paid for their time. Also, it's likely the experts you're using or may plan to use are similarly compensated.

❑ **Use the deposition to identify an expert's credentials and publications.**

An expert may be cross-examined about contrary views expressed in materials he/she has authored (for example, prior inconsistent statements) on the topic. Therefore, when deposing the expert before trial, be sure to ask he/she to identify all materials authored on the subject matter at issue.

❑ **Ask for the source of their opinions.**

An expert can be questioned about any materials admitted into evidence as well as about materials which they considered, but did not rely upon, in forming their opinions. When deposing opposing experts, be sure to also ask whether the experts referred to or relied upon any publications in reaching their opinions.

❑ **Impeach an opposing expert.**

Expert witnesses can be impeached by showing that they relied upon inaccurate or non-existing facts in formulating their opinion. Note, however, that your attempts to impeach an expert may backfire if the witness is liked by the jury. Use this

tactic sparingly and save it for important points.

❑ **Challenge the expert's credibility**

An expert's credibility can be challenged by his/her prior inconsistent testimony in other similar cases. But be careful and thorough in your research regarding the similarities between the other cases and your case to avoid the experts distinguishing them in support of his/her current opinions.

CONCLUSION

Trial strategies and presentation vary depending on the nature of the case, parties involved, and even jurisdiction and venue. What trial counsel should always keep in mind in preparation and presentation is to consider all evidence and the most effective ways to get favorable evidence and testimony admitted while excluding unfavorable evidence and harmful testimony. Also keep your audience in mind in achieving that goal – be forceful, credible and likable. These strategies can make a significant difference in the outcome of a trial.

Founded in 2000 by partners of a multinational law firm, Picker, Chow & Freisleben specializes in commercial and civil trial litigation. Drawing on the collective large practice experience of its founding members, the firm provides clients high-level legal counsel and representation, yet with a personal hands-on approach that consistently delivers favorable results.

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