THE EXPERT

Expert Testimony In A Court Trial, Deposition Or Hearing

By Lawrence Ubell & Alvin Ubell - April 15, 2009

Presentation: The Brooklyn Chapter of The American Institute of Architects (AIA).

Why Does the Court System Need Experts?

Experts are needed because judges, lawyers and juries may not have knowledge about the technical, scientific or intellectual aspects of the dispute. An expert is sometimes necessary to explain the non-perceptive aspects of the dispute and shed light upon the subject, i.e. "How does a nail work?" "What is odor?" "What is the function of a kidney?" "What role does gravity play?" "What is the life expectancy of a person of fifty years?"

What Is an Expert?

An expert is a person who is supposed to know a great deal about the technical, scientific or intellectual aspects of a dispute. Such a person has been educated in that discipline by experience, training, theoretical and practical contact and observation of facts or events, knowledge or skills acquired over time and by formal schooling and/or participation i.e. (technicians, physicians, surgeons, dentists, counselors, architect, engineers, home inspectors, professor, scientists, accountant, etc.)

Who Should Be an Expert?

An expert should be a person with a specific skill, knowledge and participation in a specific Discipline, Science, Technology or Intellectual pursuit that pertains to a dispute at issue.

Who Could Be an Expert?

Anyone, who has a strong knowledge base in a particular field.

Example: A shoemaker, in certain instances can be a more experienced, believable and knowledgeable expert than a podiatrist in a dispute related to the aspects of shoe comfort, design or construction of a shoe for a particular purpose.

Who Should Not Be an Expert?

One who may have some theoretical knowledge about a particular type of disputed technology or science but has never participated in its use or performance and in its particular application or understanding might not make a good expert. A teacher or professor who is being used as an expert, may have taught the subject for many years, yet during the trial, it become evident that the expert has never applied or participated in its real time application. This expert may be disqualified from testifying, this largely depends upon the subject or more important the judge hearing the dispute.

Are You an Expert?

You might be an expert if you have unique training, experience, knowledge and an intellectual understanding of a particular discipline and if you would be comfortable being challenged, badgered, bated and probably insulted on your expertise. The challenge could relate to your education, skill, technological proficiency and understanding of the matter in dispute. Nonetheless you should be able to control your emotions and not lose your cool and composure, and thus you may be a good candidate to be an expert.

Your Curriculum Vita (CV)

Should contain your life's experience as it pertains to your expertise, (education, papers, books or journals published, most important jobs, positions you had, subjects you taught, awards you had received, projects your were involved in, courts that you testified in, etc.). All should have year date and/or duration. It should not look like a job resume and it should not look like you are looking for a job or position. What ever you write in your CV should be totally truthful. If it is not the whole truth and nothing but the truth the adversary attorney will certainly find out. The CV should all fit on a single page and show the creation date at the top.

Whom Do You Serve?

An expert who is paid to give his or her opinion under oath can only serve one master at a time! The engaging attorney and his or her client is a single master entity! You are serving both the attorney and his client whose interests must coincide since they both need your help concurrently. You are also serving as the tryer of the facts, by either a judge trying a case without a jury or a judge and jury together.

You Must Be a Teacher to the Attorneys, Judges and the Jury.

Your task, as an expert is to explain, teach and inform, in the simplest terms, complex concepts of a dispute. This should be done without using trade or professional language or jargon. At the same time you must try to convert on the fly all your technical, scientific or overly intellectual nomenclature to plain language by being an instant living dictionary and thesaurus. In preparation you must teach and train the trial lawyer to be as much of an expert as you are in the matter disputed for the short time that the trial, hearing or deposition takes. The more the trial lawyer knows about your subject matter, the more knowledgeable he or she will be better able to question both you and the opposing expert. This will enable the trial lawyer to better serve the client and argue the case with the judge as well as with opposing counsel.

Cases You Should Decline to Accept.

1. A case that is beyond your professional knowledge, expertise and understanding.
2. One that you are not comfortable with, no matter what!
3. A case that you may feel is unethical.
4. When you are offered more compensation than you deserve
5. When the information and facts given to you are not credible in your professional judgment.

Ethical Cases

Accept cases as an expert where the matter at issue is totally within your field of education, experience training, expertise and understanding.

1. Accept a case where you know with certainty that you will not be disqualified at trial.
2. Treat every single case as though you know that it will go to trial.

Record Keeping

1. Don't throw anything away. Save everything pertaining to the case.

2. Create a file with the name of the engaging lawyer, together with the client's name and date.
3. All correspondence you receive from anyone pertaining to the case should be dated stamped on the date of receipt, keeping the mailing envelope.
4. Date all your work.
5. Date all photographs and make certain that you save them.
6. Date and save all evidence.
7. Date and save everything.
8. Make a table of contents of what you have in the file and keep a copy of the table of contents on the outside of the folder as well as keeping a copy inside the folder.
9. The file folder should be kept in a safe place forever.

Your Relationship with the Engaging Attorney and Adversary Attorney

The engaging attorney will in most instances try to befriend you so that the professional relationship is smooth. They will pick your brain. That is what you are paid for.

Be open, totally truthful and forthcoming. Impart to the attorney all you know about the subject. Don't hold back anything. Try to think outside the box to help the lawyer prepare the case for the client. At this point in the case you are the advocate of both the lawyer and the client, trying to help them with all your knowledge, experience and expertise. The lawyer may not know a thing about your skills or the technology that is required in the disputed matter. You are there to help, teach and train so that the lawyer is comfortable with the understanding of the technology or science.

You may never meet the adversary attorney except if the case goes to trial. With regard to the opposing council, be friendly but do not discuss any aspect of the case even if he or she was once a client of yours. Whether it is a friend, a relative or even your mother, if she is connected in some way with the opposition do not discuss the case. Do not involve yourself in anything that might be construed as a conflict of interest. If you have a relationship with any person or entity that is on either side of the dispute, you must inform the engaging attorney as soon as you are aware of the connection. If the attorney says, "forget it", DON'T!! Instead send a letter to the attorney setting forth the relationship and keep a copy.

You and the Client, Plaintiff, Defendant

No matter whose side you are on, i.e. (plaintiff or defendant) you must give the engaging attorney your all. One giving testimony should never take sides. This is especially so when you are under oath. Just do your job as an expert to the best of your abilities and then a bit more. Don't ever let your emotions get in the way of your good sense. Always be beyond reproach. If you sense unethical behavior from anyone connected to the case bring it the attorneys attention. If this is disregarded, make a big fuss about it and bring it up again and again until you are satisfied that your observations are being heeded. Always avoid conflicts of interest.

In New York State there is a rule that states that one cannot serve two masters at the same time. If you do and it be discovered prepare to be sued by either side should the case not turn out the way it should. If it is part of a trial proceeding you may be breaking the law with implications that go far beyond a civil money matter. Don't do anything stupid. Always be on the alert and awake. Never let the attorney who retained you or any one else dictate the opposite of what you know to be the truth, the whole truth and nothing but the truth. If it discovered, that you did not tell the truth, you may have committed perjury.

Prima Facie Evidence

(The basic material needed to prove a certain fact or proposition.)
(Evidence good and sufficient on its face, unless rebutted.)

Your job may be to find evidence or some basis of how to dispute evidence. This may include reading depositions documents, bills, photographs, drawings, samples, site inspections and the list goes on and on. You may be called upon to reconstruct a condition, create orthographic projections (sketches), models and develop concepts to explain and describe what you have discovered and/or what your theory is in the disputed conditions, facts, evidence or testimony.

Being a Detective, Inspector, Researcher and Scientist

1. You will sometimes need to do research. You may have to examine relevant trade publications, visit Building, Fire Health, Highway and Tax Departments. You may be required to visit libraries, museums, and the Internet. The list goes on and is endless, when you are required to prove or disprove a particular piece of prima facie evidence. You will need to measure, weigh, photograph, take samples for testing or test things on your own so that you can describe, demonstrate and explain in court what and how you did what you did and then render an opinion. You may be asked about facts that you discovered, even by opposing counsel. If you are asked, you are then testifying as a fact witness i.e. (is one who testifies from his or her own knowledge of the facts). You may not be asked for your opinion by opposing counsel, since you may only serve one master and that master is the trial lawyer that retained you. The opposing counsel cannot ask for your opinion on a subject that was not asked of you by your retaining attorney. In other words, you cannot give an opinion for the opposition. But you may be queered as to the opinion you gave during the prier testimony.

2. The trial attorney should explain these: 1) notice 2) constructive notice 3) cause 4) create

There are several conditions or concepts that either side needs to know in order to go forward with a case.

1. **Actual notice:** when either of the parties received written, verbal or visual notice of the condition that may be the subject of the disputed matter.
2. **Constructive notice:** when a condition existed for time long enough for a party to have known or should have knowledge or is presumed to have knowledge of the existence of the condition even if the party never had actual notice of the condition.
3. **Cause:** When either of the parties caused the underlying condition, whether by construct or non-construct and thus would be responsible for the existence of the condition.
4. **Create:** When one of the parties did something physically and therefore constructed the thing that caused the occurrence, and may have not done it well.

Your Report

Depending on the subject of the work you have been retained to performed or create you may or may not be required to write a report. If you are not asked for a report do not write a report but keep all your notes and

photographs. When this occurs i.e. not asked for a written report you would be required to meet with the trial lawyer to review the scope of your investigation and its findings. The conversation with your trial counsel is generally not permitted to be disclosed to the opposing counsel because this is the attorneys work product. This is usually true in professional malpractice cases and several other areas of trial practice. In most cases you will be asked to prepare a written report. Understand that this report will be given to the adversary counsel and their expert will have an opportunity to review your report and even critique it. So be clear, truthful, and succinct in making the report. If you are uncertain whether or not to include some material in the report meet with counsel before its preparation. It is helpful both in and out of court if the paragraphs of the report are numbered. It should begin with and include or mention your curriculum vitae. It should also include your specific expertise as it relates to the matters at issue and to any hypothesis that will be rendered or discussed. It may be impressive if your report is made into a sworn type statement, with a place for a notary public to take your oath and that signed report has been sworn to.

Opposing Counsel's Expert

From time to time you may be asked to critique the opposing counsel's expert report, which may also include a critique of your report. Your response may not require a written report. However, if your attorney requests such a report, stick to the facts of the case in question, just criticize the data and information in the report and don't go outside the report or add anything that was lift out. Don't criticize the expertise of the opposing expert in writing this could backfire. There is no way for you ever know his or her total life experience or expertise in the mater disputed. Personal type of criticizing, such making a statement "The expert is not qualified in the discipline under dispute!" could give the opposing counsel an opportunity to criticize you in open court, "You don't know anything about my expert, do you!" and their possibility that you may have permitting the opposing attorney to read the expert's entire CV to the court. Criticizing the expert's expertise is the attorney's job, not yours. Just stick to the facts only.

Affidavit

On occasion you may be requested to sign an affidavit on your findings. The attorney will prepare an affidavit for your signature. Read the affidavit very, very carefully. You may have to defend what you signed, at trial. If the affidavit is not completely, totally and absolutely truthful i.e. (opposing counsel, at trial, may make you feel and look like a liar), therefore if you are uncomfortable with something written for your signature or if it was not completely, totally and absolutely truthful i.e. (if the writer may have embellished your expertise or changed some of your findings), you have few choices. You can call the lawyer and ask him to rewrite it. You may rewrite it yourself. You may edit the document and initial each of the changes (something most lawyers may not want since the document will ultimately be in the hands of the adversary.) When the affidavit is satisfactory sign or initial each page and sign the last page in front of a notary public who will take your oath. Make sure you keep a copy of the notarized, completed affidavit in the same form, as when you sign it and notarize it prior to returning it to the engaging lawyer.

Conferences

There will probably be a few conferences between you and the attorney to discuss your thoughts and findings. The attorney will try to explain his or her "modus operandi". (The procedure, strategy, and the desired outcome or what is to be accomplished by these proceedings.) Never forget, you are not the attorney. It is not about you or your ego! The attorney of record is the conductor and you are just one of the many musicians in the orchestration of the matter in dispute. Don't try to out smart or upstage any of the attorneys. If you do, you will be sorry.

Pre-Trial Conference

Here again you will be discussing the "modus operandi" of the case that is about to go to trial. This type of conference should never be held in the courthouse on the day of trial. The attorney will have many things to take care of while trying to control the client (who has probably never testified before). Your conference should take place at least a day or two before you appear at trial. The meeting should be held at the lawyer's or your office or some place where you have each other's undivided attention. Listen to the attorney very carefully and don't interrupt. Never interrupt by saying "I know! I know!" this will tell the Attorney that maybe, you don't know. Let the Attorney finish his or her sentence. Interrupt only if the information coming from the Attorney stops and if a question is asked. Give information only if it is relevant to what is being discussed. Remember that, the attorney is probably using you as an audience to rehearse his or her trial presentation. So again, Listen and do not interrupt!!! Take notes and when it's over, you can and should be able to ask questions and render your opinion.

Qualifying Expert At Trial

At the pre-trial conference is the time to prepare the list of questions that will qualify you as expert. All the questions and answers should be short and to the point and should support the expertise required for the court to accept you as an expert for the issue before the Judge and/or Jury. Immediately prior to testifying give the attorney another copy of the questions.

- What do you do for a living?
- How many years have you been at your profession?
- What is the name of the firm that you are working for?
- How long have you worked for them?
- What level of school have you achieved?
- What Professional degrees have you received?
- Do you have any professional licenses?
- Have you authored any papers or books on the subject at issue?
- Have you received any awards pertaining to the subject at issue?
- When was the last time that you utilized your expertise or your profession?
- How many times have you testified in a court of law?
- Are you getting paid to be here today?
- And many more questions will be asked to establish your expertise?

Create a list of questions that you should answer to establish your expertise?
You and your trial attorney should create a comprehensive list of the question that will be asked. You and your attorney should also make another list of the questions that you both believe will probably be asked by the opposing consul so that your are well prepared to answer appropriately.
At the end of this session your trial attorney will sometimes request the court to qualify you and then the opposing consul may make a request for voir dire. (To cross-examine your expertise.)

The Hypothetical Question

The pre-trial conference is generally the best time to discuss and/or construct the hypothetical question. A hypothetical question is a presentation or scenario put to the witness by the trial lawyer. It consists of all the events and evidence that was presented during the trial and that has

occurred before you got on the witness stand, and which you may not be privy too. This technique is used by the trial lawyer, to be certain that a witness and the jury know all of the facts presented. This is to make certain that your opinion is based on all of the events, facts and conditions that relate to or pertain to your expertise. In turn, this technique strengthens your opinion. If it is not done, the jury may think, "the expert does not know what he or she is talking about. The expert was not present when the plaintiff or the defendant was on the stand testifying". Some Attorneys do not have the skills to present a hypothetical, if it is rejected by counsel don't be concerned, remember it is the lawyer's game, not yours.

The Trial

The court room, the Judge in the black robe and all the trappings are designed to make all who come before the bench to give respect to the judge, the courtroom, the jury and to the proceeding's, that are to take place in the court. Be quiet! This is the time to be seen and not heard until you are called to the witness stand for your testimony.

Your Demeanor

Look and act the part. Be appropriately dressed. Look as well as the lawyers. Be well groomed. Show respect for the court and the proceeding. Let all know that you are here for the business of the court, just by your appearance alone. Don't act or dress flamboyantly. This might hurt your client's case. When the Judge or the Jury enter the courtroom, stand up and show respect. Laughter is not advisable or permitted. The business of the court is very serious. When on the stand, who ever is talking to you, whether it is the bailiff, the judge, or counsel, look them right in the eye and answer all questions and statements directly, distinctly, loudly and clearly. Be slow paced, but not too slow. Be certain that every one can hear and understand what you are saying. Don't mumble!! Everyone in the courtroom must hear what you have to say, especially the jury and the court reporter. By speaking clearly and distinctly, and with energy, gives you the persona of knowledge, truthfulness and trust. You must understand that up until now you were an advocate for your client but as soon as you are sworn in to testify the advocacy is no longer present. The truth is all that matters. You now belong to the court, the judge and the jury.

Be Prepared

Before trial, read and know your entire file. Sort the documents in the order that you believe the trial will move. On the outside of your file list all the names of all parties, persons and the dates of all events that took place. All should coincide with your report, affidavit photographs and documents you may have in your file. Think about what kind of questions the opposing counsel will most likely ask and make a list. "Failing to prepare, is preparing to fail!"

Warning: Beware of using malapropos! Your attorney, the opposing counsel and the Judge will most likely laugh at you and correct you in front of the jury. Don't use words, terms or phrases that you are not totally sure and familiar with. Saying one thing and meaning something else can and will most likely destroy all the preparation that you and your attorney worked on for many months.

Direct Testimony.

Direct testimony is when the Attorney that engaged you is asking the questions. He or she is not permitted to lead you in the question to the answer. Or to put the answer in the question asked, i.e. "Your name is Joe the plumber, isn't it?"

This is a leading question. Opposing counsel will rise and tell the Judge "I object to form!" The way it should be asked, "What is your name?" The answers to most of the questions asked will be within your knowledge, because you and the trial lawyer have gone over them many times. All your answers should be in you own words. Don't let it sound like you rehearsed and memorized a script.

Cross Examination

On the other hand the opposing counsel's can and has the right to lead you into the answer he or she wants to hear, i.e. "Isn't it true that your name is not really Joe the Plumber but actually Ben Franklin the Printer?" The opposing counsel will try to either discredit you or try to bait you into saying or doing something about the case you should not say or do in a court room or to say something that is not true and can hurt your side of the case and help the other. On the other hand some very talented and clever trial lawyers will try to use you to help his or her case by using you as his or her own expert witness. This is the time that you will need all of your faculties to ignore or fend off such process in a very calm or clever way but don't be too clever. Don't interrupt counsel's question. Let the question be completed. Then pause a second or two. This will give your client's lawyer the opportunity to posit an objection. If a comment is very insulting and derogatory, say nothing and turn
to the Judge for help. If a question does come
in cross-examination that needs a direct answer and that answer may hurt your client, don't be evasive, and answer the question directly and candidly. If you don't, all the good work that was laid down during the direct testimony phase will be washed away. The jury will think that you're a paid shill. There is sometimes a tendency to over explain when you think the court does not under stand what you are talking about. A wise friend of mine told me "the enemy of good is better. When you try to improve your explanation you could mix up your original thought and give the impression that you yourself do not understand the issue. Keep your answer short and to the point.

Ego

This proceeding is not about you!! It is about the client's problem. The problem needs your help in the matter before the court. You can help that person or you can destroy what the client's needs because you got insulted or lost your composure. Act like a professional. Be above reproach and disregard anything that you might take to be an insult. Laugh it off mentally with a smile. You know what you know about the subject matter at hand and you also know that you probably know more about the subject than any on else in the courtroom including the judge, your lawyer and the apposing consul.

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The authors of this paper thank the Hon. Judge Jules L. Spodek, N.Y.State Supreme Court, for his commentary.

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Authors:

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