

Direct exam of experts

By: F. Dennis Saylor IV and Daniel I. Small © August 9, 2018

Many cases rise or fall on the testimony of expert witnesses. That can complicate a case considerably and make an ordinary juror's job even harder. Special attention must be paid to the preparation, presentation and refutation of expert witness testimony.

This first of three columns on the subject will look briefly at direct examination of experts; the next column will take up cross-examination; and the third column will examine some special issues involving expert testimony.

The direct examination of an expert witness normally follows a certain choreography, with at least four components: (1) establishing the witness's expertise, (2) establishing the witness's familiarity with the subject matter, (3) eliciting the expert opinion, and (4) eliciting the basis for the opinion.

1. Establishing the witness's expertise

The first step is to establish that the witness is, in fact, an expert in the relevant field. Most expert witnesses will have a curriculum vitae that sets this out in (sometimes excruciating) detail. Some judges will admit this as an exhibit, or the parties may agree to admit it. Typically, the CV lists the following:

- formal education
- training (such as internships or fellowships)
- experience (in both the general area and the specific focus of the case)
- honors, awards and prizes
- membership in professional organizations (and recognition or positions held)
- publications, papers and speeches
- prior qualification and testimony as an expert witness

How much of this you want to place before the jury is a judgment call. As a general rule, you want to make sure that relevant expertise is established beyond any real doubt, but you don't want to wallow in every detail.

2. Establishing familiarity with the subject matter

The second step is to establish that the witness is familiar with the subject matter of the case (at least, the part as to which the witness is rendering an opinion). This is accomplished by asking questions about what the witness did to familiarize himself or herself with the case.

Normally, the expert will have done things such as review records and deposition transcripts. Sometimes an expert will interview a party (for example, a psychiatrist might interview a defendant who contends he has a mental-health condition) or go to the scene of an event (such as an accident reconstructionist). Occasionally, expert witnesses will be present at the trial during the testimony of the witnesses.

3. Eliciting the opinion

The third step is to elicit the opinion. This is usually accomplished in two questions:

1. Dr. Expert, do you have an opinion as to the time of death?
2. Yes.
3. What is that opinion?
4. That the time of death was between 12 midnight and 3 a.m.

The principal reasons for the formal two-step approach are (1) to make very clear what exactly the witness is opining on, and (2) to permit the opposing party to interpose an objection as to the witness's expertise or basis for rendering the opinion before the actual opinion is delivered.

4. Eliciting the basis for the opinion

The fourth step is where the expert states the reasons for the opinion.

1. Dr. Expert, would you please tell the jury the basis of that opinion?
2. I have concluded that the victim died between midnight and 3 a.m. based on four pieces of medical and scientific evidence: [A, B, C and D].
3. Would you please explain that in detail?

A good expert is really a teacher. Ideally, you will want to get the expert off the stand, standing before the jury, in front of a chalkboard (real or metaphorical) — in other words, doing the things that good teachers do.

A good expert witness normally will be allowed to give narrative answers, at least within some reasonable bounds. You should nonetheless assert some degree of control, taking things one topic at a time and stopping to explain technical terms or other difficult points.

Whatever you do, remember: This is your case, and it's your responsibility to make sure that your expert has given testimony that is both clear and persuasive.

Previous installments of Tried & True can be found at [here](#). Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.

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10 Milk Street, Suite 1000,

Boston, MA 02108

(617) 451-7300