

## Expert witnesses: special issues

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Expert witnesses pose a wide range of challenges. In our prior two columns, we spoke generally about direct and cross-examination of experts. Now, let's turn our attention to some of the special issues that are unique to expert testimony.

### 1. If your opponent offers to stipulate to your expert's qualifications, should you agree and move on?

Generally, no. If your expert has fabulous qualifications, let the jury hear them, even if only in a summary fashion.

*"Have you won any prizes or awards?"*

*"Yes."*

*"Can you give us an example?"*

*"I won the Nobel Prize for Medicine."*

Qualifications testimony gives the jury a chance to get to know the witness and understand why his or her testimony is worth listening to.

### 2. Should you prepare your expert witness for testimony?

Unquestionably, yes. Extensively. Lawyers too often fail to prepare their experts adequately, because they fall into one of two common traps: (1) "My expert has testified many times before; he or she does not need my help," or (2) "My expert knows more about the subject than I do, so I don't need to prepare."

As to the first: You are trial counsel. It's your case. If your expert has testified before, does that mean he is a great witness who needs no instruction? Or has he developed lots of bad habits? Find out.

As to the second: It's your responsibility to make sure you understand what your expert has to say and help her find the best ways to communicate it to the jury. You're in charge, not some expert.

### 3. Should you pose your opinion question to the expert in the form of a hypothetical question?

Absolutely not, unless law of jurisdiction requires it. Hypothetical questions to experts are often tangled, if not incomprehensible. They also are fraught with opportunities for mistakes. Keep it as clear, simple and direct as possible.

### 4. Should your expert use visual aids?

Yes, almost always. Expert testimony is often complicated, and visual aids can help demonstrate and explain. And also because expert testimony is almost always important, and jurors focus better with visual aids.

### 5. Should your expert express his or her disagreement with the opposing expert's opinion?

Yes, if the rules of the court will permit it. It is much easier to understand the differences between experts if they can freely talk about their disagreements. An expert cannot opine on the credibility of another expert, or normally criticize that person's qualifications. But whether the opposing expert (for example) used the correct methodology, or interpreted the data correctly, ought to be fair game. You can say that the other side's expert is wrong in your closing, but your expert can say it more professionally and believably.

*Previous installments of Tried & True can be found [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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