Expert Q&A on Expert Witness Practice in New York

Expert testimony often assumes a key role in prosecuting or defending a claim in both federal and state courts actions. Yet the procedural, substantive, and practical differences in expert witness practice between New York and federal civil litigation can challenge even the most adept attorneys. Practical Law asked *Benjamin Neidl* of *Jackson Lewis P.C.* to discuss important considerations for counsel when working with expert witnesses in New York litigation and highlight best practices to prevent potential problems with an expert or her testimony before it is too late to address them.

BENJAMIN F. NEIDL
PRINCIPAL
JACKSON LEWIS P.C.

Benjamin focuses his practice on litigation, regulatory disputes, and administrative law, as a principal in the firm's Albany office. Over the course of his career, he has litigated, among other things, numerous commercial disputes, professional malpractice and product liability claims, and other tort matters.

What key concerns should counsel anticipate before offering expert testimony in New York?

A threshold consideration is whether the materials relied on by an expert in forming her opinion are admissible. For example, an economist testifying about the typical work-life expectancy and earning capacity of a construction laborer likely consults many data sources, including wage studies, actuarial tables, and demographic labor trends, when conducting her analysis. The admissibility of each of those materials varies, in part based on whether the case is in a federal or New York state court.

The Federal Rules of Evidence (FRE) permit an expert to rely on outside materials if they are "of a type reasonably relied upon by experts in the particular field" (FRE 703). By contrast, New York expert witness practice derives from common law principles, teased out in a sprawling body of case law. The case law recites

a doctrine similar to FRE 703, namely that an expert may rely on out-of-court material if both:

- The material "is of a kind accepted in the profession as reliable in forming a professional opinion."
- There is "evidence establishing the reliability" of the material.

(*Hambsch v. N.Y.C. Transit Auth.*, 63 N.Y.2d 723, 726 (1984).)

Collectively, the case law sends mixed messages about what materials meet the evidence of reliability requirement. At the very least, an expert must testify specifically and with some authority about why the materials are reliable. This means the expert must have a firm knowledge of the sources, including how they were prepared and how they meet the profession's standards. (See *In re New York v. P.H.*, 22 Misc. 3d 689, 708-09 (Sup. Ct. N.Y. Co. 2008) (striking expert testimony where the witness relied on out-of-court studies and was unable to address these details).)

Too often, attorneys overlook potential admissibility issues. When preparing for trial, it is important that counsel understands what the expert relied on and develops a plan to meet the standards outlined above. Counsel should be ready to elicit necessary testimony on direct, and prepare the expert to combat *voir dire* and cross-examination that will seek to erode the indicia of reliability associated with the expert's testimony.

What other rules should counsel be aware of when presenting expert testimony in New York?

At the outset, counsel should consult the New York Civil Practice Law and Rules (CPLR). The most pertinent rule concerning the presentation of expert testimony is CPLR 4515. Similar to FRE 705, CPLR 4515 provides that an expert may testify to her ultimate opinion before explaining the grounds on which it is based.

Though this sequence is optional, CPLR 4515 dispenses with the need for a long, dry explanation of the expert's process before announcing the conclusion that the jury is waiting to hear. Instead, counsel may ask the expert to state her opinion to the jury first and then walk through the grounds that support the opinion. Notwithstanding the long-settled propriety of CPLR 4515, counsel should expect that some adversaries will continue to assert foundation-based objections when they hear counsel ask questions in this order.

Additionally, counsel should review any local court rules or individual judge's rules concerning expert witnesses. The CPLR is surprisingly sparse when it comes to expert disclosure and testimony. Some courts and judges fill that void through local rulemaking. For example, some judges require experts to bring certain working papers (or even their entire files) with them to court on the day of their testimony, even if those materials were not subpoenaed by the adversary. To avoid surprises at the courthouse, counsel should identify these rules early and communicate clearly with the expert about them.

What are the main procedural differences between New York and federal practice for expert evidence?

The major procedural difference concerns discovery and disclosure. Though it might seem inconceivable to many attorneys, the New York rules generally:

- **Prohibit attorneys from taking pretrial expert depositions.** By contrast, expert depositions are routine in federal practice (Federal Rule of Civil Procedure (FRCP) 26(b)(4)).
- **Do not require experts to produce written reports.** By contrast, an expert generally must produce a written report in federal litigation, including a thorough statement of her opinions and grounds with any exhibits that will be used to summarize or support them, and a detailed list of all other cases in which the expert has testified in the previous four years (FRCP 26(a)(2)).

However, the Commercial Division of the New York State Supreme Court, the venue for contract and other designated commercial disputes, recognizes a notable exception that allows for expert depositions and requires experts to generate and produce their own reports (Commercial Division Rule 13(c) (22 New York Codes, Rules and Regulations (NYCRR) § 202.70(g))).

Outside of the Commercial Division, the sole expert disclosure contemplated by the CPLR is a pleading written by the attorney (not the expert) that identifies the expert and her qualifications, and summarizes "in reasonable detail … the substance of the facts and opinions on which [the] expert is expected to testify" (CPLR 3101(d)).

The phrase "in reasonable detail" is fairly subjective. It is not uncommon for an adversary to send short, vague statements that fail to provide a meaningful forecast of the expert testimony, which typically results in motion practice. The issue is particularly uncertain in personal injury cases where the expert is the plaintiff's treating physician. Outside of the Third Department, the plaintiff's attorney in those cases is not required to make a reasonably detailed disclosure because there is a presumption that defense counsel's review of the physician's treatment records (which are commonly disclosed in paper discovery) can offer a fair preview of the expert's testimony (see *Schmitt v. Oneonta City Sch. Dist.*, 55 N.Y.S.3d 834, 836 (3d Dep't 2017)).

As a practical matter, these limitations make witness impeachment in New York considerably more difficult than in federal court. Expert depositions are invaluable for impeachment purposes, so losing that ability is a disadvantage. Further, the absence of expert reports can be hobbling to trial practice. An expert report ties the witness to a formal expression of her opinions and can present good cross-examination opportunities when, for example, the expert strays on the witness stand and offers insights that are not included in the report. New York's expert disclosure pleading, which is written and signed by the attorney only, cannot serve the same purpose.

Therefore, counsel litigating in New York must build impeachment material by carefully researching the opposing expert and the subjects on which that expert is expected to testify. A party's own expert can provide significant assistance in this research. Additionally, counsel must develop a trial plan that relies more on presenting strong expert evidence to advance the client's arguments than on delivering a knockout blow to the opposing expert.

What are the main substantive differences between New York and federal practice for expert evidence?

Substantively, the key difference between the New York and federal systems concerns how they address novel scientific evidence. Federal courts follow the so-called *Daubert* test, while New York adheres to the older *Frye* standard (see *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); see also *People v. Wesley*, 83 N.Y.2d 417, 423 & n.2 (1994) (affirming the continued use of *Frye* in New York)). Both tests serve the same general policy purpose, namely that opinion evidence based on scientific principles must come from good science, not junk science. However, the two tests call for a court to apply different levels of scrutiny, with *Frye* widely recognized as less stringent than *Daubert*.

In particular, under *Frye*, an expert's scientific theory or technique is admissible if it is "sufficiently established to have gained general acceptance in the particular field in which it belongs" (*Frye*, 293 F. at 1014). This test focuses on the degree of consensus the theory or technique has achieved, but it does not contemplate second-guessing the scientific principles themselves. As the New York Court of Appeals has said, the *Frye* test "emphasizes 'counting scientists' votes, rather than ... verifying the soundness of a scientific conclusion.'" (*Parker v. Mobile Oil Corp.*, 7 N.Y.3d 434, 447 (2006).)

By contrast, the *Daubert* test expects that a court will examine the science more rigorously. Although *Daubert*, like *Frye*, requires general acceptance in the relevant field, *Daubert* also urges a court to evaluate other factors, such as:

- Whether the theory or technique can be or has been tested.
- Whether the theory or technique has been subjected to peer review and publication.
- The known or potential rate of error for the particular scientific technique.

(*Daubert*, 509 U.S. at 593-94.)

These differences present more opportunities for pretrial challenges to expert evidence in federal cases. New York practice generally does not involve as many motions and hearings dedicated to disqualifying the expert's scientific premise.

What advice do you have for counsel when identifying and vetting prospective expert witnesses?

Before retaining an expert, counsel should:

- **Examine the expert's education, training, and other qualifications.** With few exceptions (depending on the expert's field), counsel should obtain a thorough *curriculum vitae* that shows all of the expert's education, including the degrees she earned, and a full employment history, in a format that is clear enough for counsel to digest and corroborate as necessary. Counsel should also ask the expert for a complete list of her published works to identify any prior writings that might compromise the expert's opinions in the present case.
- **Consider how well the expert will present as a witness.** Ideally, and if geography allows for it, counsel should try to meet with expert candidates in person to discuss the subject matter of the litigation. During these conversations, counsel can assess a candidate's personal stature, credibility, and communication skills. Some very well-credentialed experts can be ineffective communicators and it is better to know that before it is too late to take a different approach. Jurors need to be persuaded of the truth of a witness's testimony, regardless of the witness's professional expertise.
- **Review the expert's testimony from prior cases.** If an expert has testified before, either in depositions or at trial, counsel should interview the expert about the details of that earlier testimony. Depending on the number of cases, it may not be feasible for counsel to review all of the candidate's previous testimony, but counsel should ask the candidate for one or two transcripts from the prior proceedings to get a sense of how the expert handled the dynamic experience of question and answer.
- **Research whether the expert has any disciplinary history or other blemishes that could arise during cross-examination.** If the expert is a licensed professional, it is often possible to use a regulator's website to determine if the expert has any suspensions or other license sanctions in her profile. In some

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EXPERT TOOLKIT

The Expert Toolkit available on Practical Law offers a collection of resources to help counsel prepare to work with experts in civil litigation. It features a range of resources, including:

- Webinar: Locating and Retaining an Expert in a Litigation
- Experts: Testifying Expert Budget Template
- Experts: Expert Reports
- Expert Evidence in International Arbitration
- Depositions: Deposing an Expert Checklist
- Depositions: Defending an Expert Deposition
- Experts: Daubert Motions
- Expert Q&A: Trends in Daubert Challenges
- Experts: Deposition Outline for Deposing an Expert
- Patent Litigation: Infringement Expert Report
- Patent Litigation: Validity Expert Report
- Patent Litigation: Expert Considerations

jurisdictions, it is also feasible to search for civil actions against an expert for professional negligence and similar claims.

Search Experts: Locating and Retaining an Expert for more on the steps counsel should take before hiring an expert.

Search Experts: Expert Retainer Agreement for a sample letter agreement between counsel and an expert outlining the parties' duties, with explanatory notes and drafting tips.

What information about an expert must be disclosed to opposing counsel? Does counsel have any discretion when deciding what to disclose?

As discussed above, the New York standards on disclosure differ from federal practice. Outside of the Commercial Division, the CPLR requires an attorney to serve a pleading that discloses, in reasonable detail, only the following information:

- The expert's identity.
- The subject matter on which the expert is expected to testify.
- The substance of the facts or opinions the expert expects to offer.
- The expert's qualifications.

The attorney is not required to disclose the expert's prior testimonial history as required in federal court. (CPLR 3101(d).)

These basic requirements are not discretionary. In practice, however, CPLR 3101's generality accords attorneys a fair degree of latitude in the level of detail they use when disclosing the substance of the facts or opinions an expert expects to offer. The best practice is to describe (in consultation with the expert) the expert's expected opinions and grounds for those opinions completely and clearly. Being over-inclusive minimizes the risk that an adversary will later claim surprise or prejudice.

By contrast, some attorneys favor a more general approach that avoids giving away too much information. This approach runs a significant risk that a court will preclude the testimony at trial if it deems the disclosure to be too vague. However, some judges disfavor trial objections on these grounds and hold the view that objectors should have addressed any deficiencies in the expert disclosure before trial like any other discovery dispute. Therefore, if counsel receives a vague expert disclosure, the safest approach in New York is to file a pretrial motion to compel a more robust disclosure from the opposing expert.

In federal practice, attorneys have much less flexibility, because they are required to serve a report signed and prepared by the expert with "a *complete* statement of *all* opinions the witness will express and the basis and reasons for them," along with any exhibits the expert will use to summarize or support her opinions (FRCP 26(a)(2) (emphasis added)). Because the federal courts construe this requirement strictly, most practitioners have learned it is better to be more detailed than less.

Is there any information about the case or the client that counsel should not share with a testifying expert?

Counsel should always share any information that the expert should have to render her opinions. It is a mistake to selectively hold back parts of a document production or other evidence produced in discovery that might conceivably impact the expert's opinion. Indeed, if an adversary discovers that something important was not shared with the expert, the expert's testimony could be nullified entirely if she admits that the withheld evidence might have changed her opinion.

That said, counsel should take care when communicating with a testifying expert. In New York practice, written communications between a testifying expert and an attorney are potentially discoverable if the expert is subpoenaed. While communications between an attorney and a consulting expert are generally considered protected under the attorney work product doctrine, if the expert is a testifying witness, the door is open to discovery. Accordingly, counsel should avoid relaying privileged or confidential information to the expert that is not material to her assignment. By contrast, FRCP 26, as amended in 2010, now largely protects communications between testifying experts and attorneys from discovery in federal litigation.

Search Expert Privilege and Confidentiality Considerations Checklist for the practical issues counsel should consider to protect privilege, work product immunity, and confidentiality when working with experts during litigation.

What are some best practices for counsel when preparing an expert to testify at trial?

Unless counsel has worked with the expert frequently, counsel should conduct reasonably formal dry runs of both the direct and cross-examination of the expert, at least as much as the expert's time and the case budget allow.

These practice sessions provide a better preview of the expert's readiness to testify than more general approaches (such as simply discussing the subjects to be covered and the order in which counsel intends to cover them). Additionally, these sessions allow counsel to identify areas where the expert has something valuable to say, but is failing to get the idea across clearly, and to improve the expert's testimony on those points. It is much better to discover problems ahead of time so that counsel can fix them collaboratively with the expert rather than improvising a solution for the first time at trial.

How important is demonstrative evidence when presenting expert testimony to the jury at trial?

It depends on the case, but demonstrative evidence can be a tremendous asset. The dilemma of expert testimony is that it is often both the most important proof in a case and the most boring. Listeners tune out when they do not understand something. An expert who spouts a lengthy monologue and then asks the jury to believe her because all of that esoterica is held "to a reasonable degree of professional certainty" is much less effective than an expert who can genuinely engage and educate a jury. Sometimes, a graph, a model, or even a dry erase board can be the key to capturing the jurors' attention and impressing the expert's conclusions on them.

For example, I handled a case several years ago involving complex injury issues that called for a biomechanical expert. In many of our dry runs, we could not penetrate the "understandability" barrier — the expert's verbal descriptions of forces, surfaces, and dynamics were too dry and did not effectively communicate the concepts. We decided to develop an animated computer model that illustrated the expert's presentation point for point. With that animation, the presentation came alive. In addition to making the opinions believable and comprehensible, the model made them seem like common sense. It was an expensive undertaking, but worth every penny.

What common pitfalls should experts try to avoid when testifying at trial?

The usual warnings apply equally in New York and federal practice. For example, the expert should try to:

- Stay calm and collected.
- Avoid appearing arrogant or indignant when challenged by the adversary.
- Keep her guard up and not underestimate the attorney conducting the cross-examination.

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The most important thing that good experts do well (and bad experts do not) is understanding a juror's point of view. Counsel should not assume that a jury will believe the expert's testimony just because it is correct. To the expert, as a trained doctor, engineer, economist, or other specialist, the correctness of the opinions and conclusions may be clear. Yet this seeming obviousness may not extend to a layperson. Indeed, a cross-examiner's questions might strike an expert as absurd while appearing illuminating to a juror who knows virtually nothing about the expert's field. For this reason, an expert should strive to view her testimony through a layperson's eyes and make her ultimate objective to educate a perfectly ignorant juror. The expert's answers should be clear, direct, and expressive enough to achieve that purpose.