Seven mistakes expert witnesses make

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The task of expert witnesses in a case is to determine the facts in their areas of expertise so that the judge and jurors can understand the technical aspects of the case and arrive at an informed verdict. In the course of this determination, experts receive and must analyze mountains of documents and depositions. In this process, the experts must guard against making the following seven mistakes.

1. Inaccuracies in Résumé

There may be items in the expert's résumé that applied at one time but no longer do, such as a membership in a technical society that has been allowed to lapse or a time-limited qualification that has expired. I was once a Certified Fire and Explosives Investigator but, because I did not use that qualification within the required two years after its receipt, it lapsed.

The presence of inaccuracies in credentials opens the door to opposing counsel to call into question the expert's attention to detail or accuse the expert of deliberately making false claims to bolster credibility in the case. The expert should present a résumé that is updated and completely correct.

2. Prior Writings or Testimony May Contradict Expert's Opinions

The expert may have published technical articles or discussions or provided a deposition or trial testimony in another case that appears not to support the expert's opinions and conclusions in the present case. Opposing counsel will find all of these documents.

I once published an article in an engineering magazine on the practice of Forensic Engineering and opposing counsel found it. It had no bearing on the case but demonstrated that he was leaving no stone unturned in his efforts to discredit me.

If there are such landmine documents, the expert must be aware of them and have a credible explanation as to why they do not really contradict his/her opinions in the present case.

3. Opinionated Notes in Deposition Margins

During the review of depositions for facts, the expert may make notes summarizing the testimony to avoid having to re-read it in its entirety later in the case. It is tempting to supplement these notes with the expert's opinion on their meaning and significance in the case. However, as the case evolves these opinions may be invalidated or change but the notes are still preserved on the expert's copies of the depositions.

When the expert is deposed and must provide copies of all of the documents used to arrive at the opinions expressed, opposing counsel will seize on these obsolete opinions to discredit the expert. To avoid this, the expert should save any written opinions for the formal expert report.

4. Opinions in E-Mails

E-mail has become the standard method of business communication. It's easy for the expert to dash off e-mails to the retaining attorney expressing an opinion about some aspects of the case. Once again, either opposing counsel will find them or the expert must produce them at deposition. If these e-mailed opinions differ from the opinions in the expert report, opposing counsel will use the discrepancies to discredit the expert. The expert should seek the advice of the retaining attorney before committing anything to writing in an e-mail message or otherwise.

5. Unsolicited Expert Report

Experts are used to documenting their professional findings in writing. And in the practice of their profession not involving litigation this is a good practice. However, when an expert writes a report documenting opinions in a legal case that have not been specifically requested by the retaining attorney, the expert is creating a monster. This report will be requested with all of the other documents used by the expert to form the opinions. If the retaining attorney is not aware of this report, particularly if the report does not agree with the sworn testimony of the expert, it may undermine the case.

6. Providing Information not Requested by Opposing Attorney

This is a problem that is very common with engineering experts. Engineers tend to be helpful souls and like to explain things in great detail. So, instead of just answering the questions posed by opposing counsel, they tend to elaborate. Opposing counsel likes this because it provides them with food for additional questions. A safe rule to follow is: If the answer is yes, say yes, and if the answer is no, say no.

7. Expert as Advocate

The expert may be tempted to make the case for the retaining attorney's client, particularly, if it appears to be an open-shut case to the expert. Instead of helping the client, this may hurt because the expert is risking his/her impartial standing in the case. The job of advocate is for the attorney, not the expert. The expert's job is to find the facts for the attorney and relate them to the expert's field of knowledge, not to actively seek to persuade the judge and jury that the verdict should favor the client.

Retaining counsel needs to brief the expert on expectations, communications and expert report format, to help the expert retain the impartiality that will enhance credibility of the professional opinions expressed. ■