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II. Preparing the Expert for Direct Exam:

Amy Singer, Ph.D.

**A Guide to Preparing Your Expert
Witness for Direct Examination
“VIVA VOCE” or VIDEO
*by Amy Singer, Ph.D.***

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- Obviously, direct examinations are important because they are the only way to tell our story and persuade the triers of fact of the rightness of our position. (1)
- As once told to Robert Sullivan and Bob Langdon by a successful trial lawyer: “An expert is not going to win your case for you, but he sure can lose it.” (2)



- I asked some of the leading experts and trial attorneys in the country to tell me what tips they have for preparing your expert for direct exam.
- Here is what they and I distilled as: The 5 Main Aspects to Focus on when preparing your expert witness for direct examination in court or on video:



1. **Giving**: What will you give them?
2. **Getting**: What must you get from your expert?
3. **Seeing**: What does the jury need to see?
4. **Listening**: What does the jury need to hear to understand your side?
5. **Story telling**: Good lawyers are good story tellers; GREAT lawyers make their experts sound like master story tellers.

GIVING



GIVING

- Here is what you give your expert to prepare him/her. I call this the “Expert’s Tool Box”:
- Give your witness a clear idea of your goals and a clear understanding of what you need and why you selected them. Let them know what you need them to say, within the strictest confines of truth and their science, and what issues, facts, or arguments can be damaging and therefore confronted or avoided. (3)

GIVING

- **Cross examine** your expert on direct. This takes the wind out of opponent's sail and gives your expert an chance to explain issues easily misinterpreted.
- **Prepare** your witness as much as possible and insure they have reviewed all the materials in their file. Do not assume they will do this on their own. (4)
- **Teach your witness the “magic words”** or legal standard he/she needs to articulate. E.g., in personal injury cases doctors must opine to “a reasonable degree of medical certainty.” (5) It is imperative your witness to understand the difference between medical causation and legal causation. (6) Other key words include standard of care, probability vs. possibility, defect, unreasonably dangerous, among many others. (7)

GIVING

- **Create an Outline** for testimony and then stick to the sequence of questions you outlined for your expert. (8)
The last thing you want to do is throw your witness off.
- **BE SURE you review the entire content** of your expert's file with them to avoid any inadvertent disclosure of confidential, non-discoverable matter (9)
- **Organized File Folder(s) with tabs** so experts can go directly where they need to and avoid fumbling . (10)

GETTING



Getting

- The expert is called that for a reason. Here is what you must get from your expert in order to present your case in a successful manner:
- Give your experts an opportunity to reveal their weaknesses. Most attorneys research their experts before preparing them for trial. Of course you want to make sure they do not have a history of being vulnerable to attack. However, be careful not to miss an opportunity to learn about your expert's other strengths and weakness by going directly to the source. After you gain your experts' trust, ask them point blank: What are your weaknesses? If they tell you they don't have any, get another expert (give them the boot). Once they reveal their own vulnerabilities you can deal with them together. (11)
Address potential problems ahead of time, not right before expert is going on the stand. (4) More on this when we review General Tips.

Getting

- **Background.** Be sure you know everything about your potential expert prior to hire. Ask about prior experiences, if s/he knows your opponent, testified for opponent, wrote papers/articles contradicting the opinion(s) given you. (12) You can find experts for almost any issue – problem is you often do. (2)
- **The Truth.** First and foremost, your expert must be truthful. The truth is always consistent. Jurors like consistency. (13) Jurors look for inconsistencies and when they find them, they are unforgiving.

Getting

- LISTEN carefully...and wait until the entire question is asked. (13)
- ANSWER ONLY the question that was asked. (13)
- Have your expert provide you a list of questions they need you to ask in order to provide the information necessary for a complete and accurate explanation. I call this “Playing Jeopardy!®” with your witness; Once you establish what the jury needs to hear, repeat and rephrase expert’s answers; ask him/her in the words the question will be put. Use those questions in court.

SEEING



SEEING

- As we all know, a picture is worth a thousand words. It will not hurt for your expert to have access to demonstrative aids. Knowledge can only be imparted by seeing. Language by itself is meaningless since language is nothing more than symbols. For the jury to "know," they need to see what the expert is trying to teach them. Jurors will not find as fact what they do not understand.

SEEING

- **AVA**: Bridge the knowledge gap by use of visual aids and analogies. (2)
- **REHEARSE VISUALS**: Set some time aside to work with your witness and graphic designer to create some form of Powerpoint presentation, scale models and/or exhibits for their use. Use graphics, trial presentation solutions, media, assistive aids and even demonstratives to ensure testimonial variety in expert's presentation to obtain greater attention, a focused explanation of his or her opinion, and improved recollection by jurors. (14)

SEEING

- **EYE CONTACT:** It is imperative for your expert witness to face the jury and look them in the eye when answering questions. The jurors are the ones who need answers in order to make a decision on your case. This is so simple, yet so influential. (15)
- **COMPARISONS & PERSPECTIVE:** Provide compelling side by side visuals comparing what a product should have done and what a defective one did, or damages *vel non*.
- **“THROW COMBINATIONS:”** Use a combination of high tech electronic presentation and low tech display boards. (1) Be sure all documents are legible and unedited.

SEEING

- **POSITIONING**: In court or video dep, be sure the jury can see both your witness and the visual aids they are using. (1)
- **DEMEANOR**: Insure your expert dresses appropriately and “cleans up” before testifying if necessary. “The best prepared expert limits their value as a direct witness with an off-putting personality; disheveled appearance; excessively sweaty brow; irritating cough; or voice akin to proverbial nails on the chalkboard. In the attorney's quest to find the most qualified and least expensive expert, the attorney should be mindful of the personal demeanor of the expert.” (16) Ultimately, you want the most qualified expert at a fair cost. Do not forfeit dollars to earn pennies. (17)

LISTENING



LISTENING

- **JURY NEEDS:** Jurors will listen to your expert and evaluate his/her credibility. What do jurors need to hear + how do they need to hear it?
- **TUTORING:** You should coach your witness to speak in an appealing and not condescending way to jurors. Be sure your expert can answer questions: “Why am I here?” and “why are we right?”

LISTENING

Jurors will hear everything but you want them to listen to the key information:

- **Teach, don't preach.** (18)
- Give juror's **the Reader's Digest version.** (18)
- **LESS IS MORE:** Jurors appreciate concise and organized presentations – make sure your expert can give one. (19) An electronic presentation on a large screen can help reinforce what your expert says with what the jurors see on the screen. (17)

LISTENING

- **EXPERT’S CREDIBILITY:** Encourage your expert to sprinkle in information about his/her accomplishments throughout the examination. This gives your witness more credibility. (11)
- **EVERYDAY ANALOGIES:** Jurors are more likely to believe your witness if they are saying “this sounds like common sense.” (20) One of the best ways to simplify complex concepts is by explaining them through the use of analogies and providing effective demonstrative aids so your jurors can visualize the concept.

STORY TELLING



STORY TELLING

- **ENGAGE JURY:** Half the fun of listening to good story is becoming engaged in the presentation.
- **EXPLAIN AS YOU GO:** Engage your jurors (students) by explaining all your basic premises before moving on to any advanced concepts. Show your work in writing, smile and be engaging. (21)
- **RULE OF 3:** Focus on 3 main ideas; that seems to be what most people can store easily in their memory box. Suggest that your expert let jury know when to focus on a point by starting his/her sentence with “this is important” and then using visual aid to “anchor” & drive the message across. (2)

STORY TELLING

- **OVERALL THEME:** Make sure your expert witness' testimony fits into the story you are telling the jurors.
- **WHERE THE PARTS FIT:** Ensure your witness understands that they are one piece in the “large jig-saw puzzle of the trial”. (22) However, make sure they understand the entire case.
- **CONTEXT:** Ensure your expert presents his/her opinions in context that corroborates and drives the scientific truth & persuasiveness of the issue. (14)

STORY TELLING

- **RELATION BACK**: Ensure your expert witness' testimony weaves in the theme of your case. (23)
- **SET THE STAGE** for jurors by giving your witness a good introduction.
- **WAKE UP TIME**: Tell the story to alert jurors – preferably in the morning.

AMY SINGER'S GENERAL TIPS



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- **LEAD OFF EXPERT:** When you have multiple expert witnesses testifying, lead with your best punch. Your first expert witness should be strong, as they will give an overview of what facts jurors need to understand in order to arrive at a favorable decision.
- **WHY?** The key is for your expert to always explain the “why” and to show jurors: why we are right. Role play with experts as if you are the host and they are the guest in a TV interview. Ask them to teach you everything you need to know. (24) Let the witness prepare you. (25)
- **REBUTTAL:** Play clips or read opposing expert's deposition and ask your expert if they agree or disagree. This way you are able to cross examine their expert through direct exam of your expert and take the wind out of their sail by asking your expert the "why "question. (26)

AMY SINGER'S GENERAL TIPS

- **RHETORIC**: Tutor your expert on how to answer complex questions. E.g., as lawyers you know the difference between subjective and objective findings but the jury may not, so don't be afraid to follow with, "What is the difference between subjective and objective, Doctor?" (10) "The Kabbalah of Litigation" teaches us that words are just symbols; your expert should use analogies to explain complex concepts.

AMY SINGER'S GENERAL TIPS

- Another option is follow expert Doug Carner's advice:

BE THOROUGHLY TRUTHFUL: “Ever since I began providing extremely detailed written reports, every case has been dismissed or settled without requiring my testimony. With over a 1,000 cases under my belt, this has been a huge cost savings for my clients and time savings for the courts. This has the added benefit of increasing my revenue since I make more money in the lab than I do in testimony.” (27)

- **THE COMPLETE FILE**: Finally, remind your expert to bring all materials with them and be sure your expert is willing and able to stay at the courthouse for as long as necessary. (12)

AMY SINGER'S GENERAL TIPS

AS YOU WERE!



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- 19. **Scott Redman, Esq.**
- 20. **Stanley Curbo, Consultant.**
- 21. **Chuck Bailey, Esq.**
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- 23. **Jeffrey Rollins, Esq.**
- 24. **Mary Wolverton, Esq.**
- 25. **Bonnie Orden, Esq.**
- 26. **Jim Kamanski, Esq.**
- 27. **Doug Carner, Expert.**

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