THE SELECTION AND PREPARATION OF PRODUCT LIABILITY EXPERTS

By George W. Soule

Product liability cases often turn on expert witness testimony. The momentum gained by an effective presentation on direct examination, or lost by a weak performance on cross-examination, is critical to winning and losing cases. The groundwork for a powerful direct, impenetrable on cross, begins with the selection of experts and continues until the expert takes the stand. Thorough preparation by the lawyer and expert is necessary, not only to build the case for direct, but also to avoid mistakes that can create vulnerabilities for cross.

While the expert must bring the substantive evidence to the presentation, the lawyer must marshal the evidence in a way most advantageous to the client's cause. The lawyer is the trial's "director," sorting through the evidence, choosing trial themes, and organizing the presentation. Thus, the lawyer must take responsibility for expert preparation and presentation.

1. Score points and minimize your losses.

Each aspect of expert preparation is important to your goals: To score points and minimize losses with your experts.

a. Informative and interesting direct examination. Experts are best used to teach and inform jurors. Rather than try to dazzle jurors with credentials and conclusions, experts should build their case step by step. Their testimony should be simple and direct. Visual, tangible evidence should be used liberally to complement oral testimony. The expert's presentation, and even qualifications, should be interesting. The presentation should be designed so that the jurors understand, not just accept, the expert's conclusions. Jurors are more likely to retain and believe what they understand.

b. Prevent openings on cross-examination. The direct examination should be tight and organized, designed to close avenues of cross-examination. Anticipate and cover cross-examination areas on direct even if the evidence presented does not help your case. If you present troublesome areas in the light most advantageous to your case, the jury may not be troubled by the topics when covered a second time on cross-examination. You and your expert must also be fair to earn credibility with the jury.

To build a bulletproof direct examination, you and your expert must avoid mistakes in trial preparation. You must also listen carefully to your opponent's lawyers and witnesses to identify likely cross-examination. From the beginning of the case until your expert takes the stand, you must listen for the vulnerabilities of your case or expert and prepare to prevent or minimize damage on cross.

2. Select the right expert witness.

a. When to retain an expert. The product liability lawyer should carefully consider whether an expert should be hired for the case. An expert may be necessary in most states to get a product defect claim or defense to a jury. See, e.g., Britt v. Chrysler Corp., 699 So.2d 179 (Ala. Civ. App. 1997); Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 670 A.2d 24 (N.J. Super. Ct. App. Div. 1996); Wernimont v. International Harvester Corp., 309 N.W.2d 137 (Iowa Ct. App. 1981). An expert may also be needed to explain a complex subject to you and to the jury. Some complicated subjects, e.g., an anti-lock brake system, a medical device, or a brain injury, must be taught step-by-step to educate the jury. Other times, an expert may be helpful to emphasize and advance your theory of the case. For example, a claim that degenerative disc disease, rather than a single accident, caused the plaintiff's back injury will be more readily accepted if analyzed by

continued on page 5

George W. Soule, a partner in the Minneapolis office of Bowman and Brooke, is national trial counsel for a number of product manufacturers.

IT# 1-497-249-8

THE SELECTION AND PREPARATION OF PRODUCT LIABILITY EXPERTS

continued from page 8

a biomechanics expert or orthopedic surgeon than if simply noted in medical records or raised on cross-examination of plaintiff's treating physician.

b. Criteria in selecting an expert. The two major criteria for assessing potential experts are expertise and ability to testify. These two considerations are roughly equal in importance, and strength in one area does not necessarily compensate for a weakness in the other.

You will want the person with the best expertise available, not just general skills transferable to the subject matter. This criterion is especially critical when the expert will present scientific evidence that must clear *Daubert* challenges. Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996). But, true expertise does not necessarily require an advanced degree or publications. Persons with fewer paper credentials, but a lifetime of practical experience, may be preferable. Credentials will be irrelevant, however, unless your expert is able to testify effectively. You must be convinced, either by personal experience with the expert or by recommendations from persons you trust, that the expert will be a good witness.

Other considerations also may influence the selection. Jury demographics may make some witness candidates more attractive. Litigation experience may be a factor—it may give the witness confidence in the courtroom, but a professional expert witness may bring baggage. Check whether the expert has any professional or testifying "skeletons in the closet." Ask whether the expert has ever been beat up on cross-examination and verify the expert's references. Choose an expert who understands his or her role in the case and does not try to do too much. Find an expert whose demeanor is compatible with the tone of your case.

c. Inside the company or outside. The manufacturing defendant must decide whether to use an in-house expert or hire an outside consultant, or both. Size of the case may be a factor; a manufacturer may be more comfortable relying on an employee expert in a smaller exposure case. You should also consider case themes and the expert's role in the case. If the principal focus is on the manufacturer's conduct or "due care story," a long-term employee of the company may be the best witness. There is a fine line between fact and opinion: An explanation of why a design was chosen or how it was developed may provide the best evidence of the integrity of the design. If the defense focuses on the plaintiff's conduct, an outside expert may be preferable. Testimony from a company insider that plaintiff's negligence caused the accident may sound self-serving. If the focus is on industry custom or practice, evidence of competitor designs may be offered by either an outside expert with experience in the industry or an in-house product designer who considered competitor designs in product development.

3. Confirm the business aspects of the expert's work.

This "housekeeping" practice will avoid business misunderstandings and problems, as well as soft spots for cross-examination. You and the expert must have a clear, mutual understanding of the terms of the retention—role, work to be done, cost, and timing. These basic terms should be confirmed in a retention letter, but the letter should be brief and factual to avoid providing fodder for cross-examination. If cost is a major concern, you might ask the expert to agree to a budget. After the expert's retention, you should have frequent communications to avoid surprises in cost, schedule or opinion. Whatever communications occur between lawyer and expert on business terms, the lawyer should be guided by the fact that such communications will be discoverable.

4. Oversee the work performed by the expert.

a. Define the expert's role. From the onset, lawyer and expert should establish the expert's role in the case. That role should be limited to the witness's true expertise. For example, mechanical engineers with design experience should focus their work on the mechanical design issues, and not attempt to cover warnings claims. Accident reconstruction experts may offer opinions on the performance of a product in an accident, but probably should not give design opinions. The problem with all-purpose experts or experts who try to stretch their expertise is that they become vulnerable to cross-examination. A weak performance on one topic may undermine the expert's credibility in a true field of expertise.

b. Product liability checklist. After confirming the expert's role, the lawyer should assist the expert in gathering information needed to analyze the product or case. You should make sure that the expert has considered standard

product liability sources. The expert should learn about the design history of the product, its evolution and testing, its applications, and how many were produced. The expert must study industry standards and government regulations. Comparable products made by competitors should be analyzed to determine industry custom and practice and/or state of the art. The expert should search for literature to determine whether the design has been criticized or analyzed independently. Finally, the product's safety history should be reviewed, including the manufacturer's records and independent accident databases of other similar accidents (or lack thereof).

c. Agreement on work to be done. The lawyer and expert should stay in communication on the nature and scope of work to be performed. Both may have ideas that would assist the expert's analysis. The lawyer should approve all significant projects undertaken by the expert. The expert should have leeway to do the work necessary to reach and support a considered opinion, but the lawyer should remain involved in decisions to conduct tests or perform significant research. The lawyer must determine whether a project fits within the case budget and advances the themes the lawyer wants to develop. Finally, the lawyer should attend significant testing or demonstrations to monitor their progress.

d. Make sure the work gets done. The lawyer, not the expert, is responsible to the client for the expert's timely, efficient and effective completion of work. The lawyer should stay in touch with experts to confirm that the work is underway. Well before the due dates, the lawyer should verify that the expert will be prepared for disclosure of opinions, a deposition, or trial testimony.

5. Monitor the information obtained by the expert.

a. Information provided by counsel. The lawyer should provide the expert with all documents exchanged by the parties that bear on the issues considered by the expert, including pleadings, discovery responses, and documents produced. Any other relevant documents in the public domain or discoverable by the other side should be provided to the expert. The lawyer should be even-handed, giving all relevant documents to the expert, even ones that may harm the case. Imagine the cross-examination that may occur if a defense expert were not provided, for example, information about other similar accidents involving the product.

The expert should gather standards, regulations and other industry information. Even though the lawyer may have obtained this information months before the expert's retention, the expert should independently draw upon knowledge and research skills to obtain the information. You do not want to appear like the lawyer-tail wagging the expert-dog.

The lawyer should not provide materials protected from disclosure by work product immunity or attorney-client privilege. Many courts will deem the immunity or privilege waived if this information is provided to an expert. See Dominguez v. Syntax Laboratories, Inc., 149 F.R.D. 158, 165 (S.D. Ind. 1993); Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 387 (N.D. Cal. 1991). But See, All West Pet Supply v. Hill's Pet Products, 152 F.R.D. 634 (D. Kan. 1993); Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3rd Cir. 1984). You should assume that all materials provided to an expert are discoverable. Letters containing lawyers' opinions or suggestions or unfavorable witness statements, obtained from your expert's file, may be embarrassing and harmful. If you believe that your work product contains certain information that is important to an expert's opinion, you should convey just that information to the expert. Ask the expert—orally or in writing—to assume that the particular facts are true. Providing limited information in that manner should not waive work product protection for the entire document or other information it contains.

If your expert is an employee of your client, you must be especially careful about the information provided. Attorney-client privilege may be waived if the employee testifies as an expert witness. You should send to the employee-expert only that material which you would provide to an independent expert, and save attorney reports, opinions and evaluations for non-testifying employees of your client.

b. The expert's independent research. As with other information independently obtained by the expert, any proposed research project should be considered by the lawyer to determine whether it comports with case themes. The lawyer should also monitor the documents created by the expert as a result of research or testing, including test records, reports and videotapes. Reports other than field notes may not be necessary, and may provide sources of cross-examination. Any physical evidence created, such as videotapes or models, should have the lawyer's input.

If the lawyer considers the risk of an adverse result or finding too great, the lawyer should consider retaining a consulting expert to conduct the research or run the test the first time. Generally, the consulting expert's work will not be discoverable. Fed. R. Civ. P. 26(b)(4)(B). If the

consultant's outcome is favorable, you can designate the consultant as a testifying expert or ask your testifying expert to replicate the research or test.

6. Disclose the expert's opinions.

a. Report or attorney disclosure. Many courts, including federal courts that have not opted out of the "new" federal disclosure requirements, require expert reports. Fed. R. Civ. P. 26(a)(2)(B). The report must be written and signed by the expert, but the lawyer should participate in its development. For example, the lawyer should review a draft of the report to ensure that it provides a sufficiently detailed disclosure to meet the jurisdiction's requirements.

If the jurisdiction does not require an expert report, the lawyer should prepare the expert disclosure. A lawyer can best characterize the expert's work and opinions to fit case themes. Also, expert reports can provide avenues for cross-examination that lawyer disclosures may not. The lawyer must understand the scope of the jurisdiction's disclosure requirement and the degree to which it will be enforced. Some courts require a very detailed disclosure and will only permit fact or opinion testimony specifically stated in the disclosure. Other jurisdictions allow a summary disclosure, supplemented by a discovery deposition, to provide notice of expert testimony. Details not included in the disclosure may be filled in at trial. If the jurisdiction's requirements are rigorous, err on the side of a thorough, detailed disclosure. Do not save any surprises for trial because they may be precluded.

If additional information is obtained or if additional opinions are formed after the expert's disclosure or deposition, the lawyer should consider supplementing the disclosure. Some courts have established deadlines—by rule or scheduling order—for supplementation. The federal rules, for example, require supplemental expert disclosures at least 90 days before trial and "rebuttal" disclosures within 30 days after the opponent's expert's disclosure or deposition. Fed. R. Civ. P. 26(a)(2)(C).

b. Preparation for the deposition. Start preparation for the deposition well before the deposition date. Consider a preliminary deposition preparation conference, perhaps by telephone, two to four weeks before the deposition. Discuss the progress of any work to be completed before the deposition, the collection of documents, the development of demonstrative exhibits, and the case themes to be discussed at the deposition. Then, set aside several hours immediately before the deposition for an intensive preparation. Anticipate and discuss the "difficult" questions. Prepare the expert to avoid mistakes that will hurt your case at trial.

Your opponent will likely ask to see your expert's file at the deposition. You should review the file to make sure there are no surprises. Hopefully, you have been sufficiently involved in the file's development so that it does not contain problematic documents or lack critical information.

Finally, consider asking questions of your expert at the deposition to clarify other answers or to provide additional disclosure of facts or opinions not covered previously in the deposition.

7. Prepare together for trial.

The lawyer and expert should prepare together for the trial. Well in advance of trial and exhibit disclosure deadlines, they should discuss what exhibits and demonstrative evidence may be needed. The expert may prepare the exhibits, but their design should be approved by the lawyer.

The lawyer should research the witness's prior testimony and canvass the present case record to identify the witness's vulnerabilities on cross-examination. The direct examination should be constructed to cover those points and foreclose effective cross-examination.

A scripted or rehearsed direct will likely be stale and boring. The lawyer and expert, however, must discuss potential questions and answers so that there are no surprises.

Recall the goals of the expert presentation discussed at the beginning of this article. Plan for an informative and interesting direct examination. Use exhibits and demonstrative evidence liberally to have the expert teach the jury. The expert will be most effective off the witness stand, in front of the jury, talking directly to the jurors. Still, the pace and focus should be controlled by the lawyer with questions, rather than allowing the expert to provide long narrative answers. Have the expert paint a picture with words and visual images that the jury will understand and find persuasive.

Conclusion

A successful expert presentation at trial begins with choice of experts and requires hard work by the lawyer at each step until the witness takes the stand. The lawyer is the "director" of the trial, responsible for case themes and development. The lawyer should work closely with experts to maximize their effectiveness at trial.