both sides of the V

PF2 Newsletter

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Welcome

Welcome, friends and readers, to our inaugural newsletter!

This newsletter is about connection, and more specifically the connecting of people, information and ideas across geographies and across the spectrum of litigation. *Both sides of the "v."*

~ PF2

Q&A

Q: Litigators, what are some of the important things you find strong testifying experts regularly do, or do well, when preparing their reports?

PF2 asked this question of litigators in the US, UK, Canada and Australia. We share with you five of the insightful answers we received.

ZACHARY MAZIN

Principal, McKool Smith
New York

"Experts who take ownership of their report, rather than relying on their staff or the law firm to do the heavy lifting, are almost always more effective than their hands-off counterparts. Testifying experts must often draft two rounds of reports, submit to intense cross-examination at their depositions, survive motions *in limine*, and then perform on the stand at trial in front of the judge and jury. Experts who must "re-learn" at each step simply cannot compete with experts who have internalized their work and thus know the material cold each time.

Timely delivery of work product is also immensely important to the ultimate success of the endeavor. It is often the case that we are preparing multiple expert reports at the same time, and it is simply impossible to conduct proper quality control and engage effectively with each expert if we are hard against our deadlines when we receive their drafts.

Those experts who invest themselves fully in the assignment and who partner with us to deliver the best work product possible are the strongest candidates to be hired and re-hired in high-stakes commercial litigations." ■

"Structure and simplicity.

In deciding which of competing expert opinions to prefer, the court embarks upon an assessment of matters that are frequently technically challenging and beyond the court's subject matter experience. The decision is heavily influenced by the ability of an expert to explain the relevant opinion to the court in a structured, simple and rational way. That skill prevails over the sheer weight of an expert's credentials.

The importance of a report's structure cannot be overstated. The expert's report takes the court on a journey from little or no knowledge through to a conclusion that is likely to determine the outcome of a piece of litigation. It is much easier to take the court on that journey if the court can see clear markers as to where it is going and why. Good reports explain the issue to be addressed, the considerations that bear upon that issue, the analysis of those considerations and the resulting conclusion. The best reports go further and explain, pre-emptively, why alternative opinions are not supportable.

Simplicity is similarly important. While courts will be influenced by high levels of technical expertise, no court is interested in resolving the finer points of peer controversy between experts. Instead, courts look for a plausible, logical opinion that can be supported by evidence. Experts that overcomplicate matters, often in an attempt to demonstrate expertise, diminish the force of their efforts. A report that is impenetrable for its technical detail is not persuasive." ■

MARK WILKS

Head of Commercial Litigation, Corrs Chambers Westgarth, Sydney

CHRISTOPHER STUDEBAKER

Partner, Kirby McInerney LLP New York

"Strong expert witnesses immerse themselves in the record when preparing their reports, and can therefore can render objective, informed and factually supported opinions that best serve their legal team and ultimately the court. They are not content with only learning about the facts and data that support the arguments at issue, but they are keen to learn about any information that could challenge or contradict those arguments.

If engaged in the early stages of the case, strong testifying experts often identify important areas for factual inquiry and sometimes assist counsel in fashioning discovery requests. Armed with both good and bad facts, strong experts provide counsel with an independent and impartial assessment of the merits of the case, even if their analyses were to disconfirm counsel's beliefs. Counsel can then adjust its litigation strategy accordingly.

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In objectively considering any information that could undercut their opinions, strong experts are also prepared to address those facts preemptively in their reports or during depositions. They recognize that a one-sided view makes them appear biased, which diminishes their credibility and potentially undermines the case." ■

DAVID R. WINGFIELD

- Barrister, Fountain Court Chambers, London
- Partner, Strosberg Sasso Sutts LLP, Toronto

"In the area in which I practise—mainly claimant-side antitrust litigation—testifying experts may be asked to provide many different types of evidence. They may be asked to provide factual analyses which only someone with the requisite technical expertise can provide, such as market structure, or the existence or degree of market power and competitive constraints. Experts may be asked to demonstrate that an anticompetitive constraint caused a common impact to a class of consumers and to quantify the resulting damages caused to that class as a result of the defendant's conduct.

The expert needs to understand precisely what fact his evidence is designed to permit the trier of fact (a judge in the jurisdictions in which I practise) to find as a fact. This is a simple objective to state, but it is often difficult to obtain because it requires the expert to focus just on that issue or those issues and not to wander off into other areas that might also engage his expertise. This is especially tricky in antitrust cases because so many economic issues that are linked in the expert's world are not linked in the legal world. For instance, some legal standards require that a subject product be identified, but not that a product-market be defined; other standards require that market power be identified and assessed as a preliminary step in the antitrust analysis, but not that the price effect from that market power be assessed.

Experts also need to explain the logic behind their answers. Ultimately, judges must explain the basis for their own reasoning. For this reason, judges are more likely to be persuaded by an expert who can explain how he got from point A to point B, than by an expert who simply states that his opinion lies at point B.

Finally, to make his explanation persuasive, the expert must be a gifted writer who can explain complicated ideas in simple, direct and grammatically correct prose. There is nothing more challenging to a lawyer than being forced to edit (or even worse, to re-write) an expert's report to make it usable to a judge." ■

MATTHEW GETZ

Partner, Boies Schiller Flexner (UK) LLP, London

"I will discuss three attributes I find to be important: the clarity of the report, the focus on the other side, and the importance of educating counsel in the process.

Clear report. It is surprising how many experts deliver reports suitable only for others practicing in their discipline. Reports must be understandable by intelligent laymen – counsel and judges/arbitrators. The report need not be exhaustive, nor set out everything an expert knows on the topic: the best experts are concise and leave out much more than they put in. Finally, so that the expert evidence can properly support the party's case, the expert needs to take the time to understand what that case is. This can require the expert jumping into a different discipline from her normal pool – just as counsel has to do in order to best use the expert.

The opposition. Many experts relish the chance to undermine the opposing expert's report in writing. It can be fun and is certainly easier than putting forward one's own original thoughts. But, again, concision and judiciousness are key: the expert needs to remember that this is only useful inasmuch as it helps counsel show how the opposing expert's evidence fails to support the opposing party's case. Experts should focus on what is key and relevant to the dispute – not old theoretical differences and battlegrounds that don't matter to the current dispute.

Educate counsel. This is often overlooked. Experts should be able to see things that counsel cannot, and steer counsel to profitable new avenues of argument – or away from arguments and submissions that are not worth pursuing or are simply wrong. While putting together their reports, experts should bear this part of the mission in mind. This brings us back to where we started: experts need to really understand the case that employing counsel is putting forward." ■

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