PDHonline Course G129A (8 PDH)

The Architect as a Consultant/Expert Witness

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MODULE #2: A "Big Picture" of the Legal System from the Viewpoint of the Consultant/Expert Witness

Overview

This module summarizes the legal system to enable the consultant/expert witness to understand the process that leads to a trial, the steps involved in trying a case before a judge or jury, the ways in which the consultant/expert witness can assist the employer-attorney, and the types of interactions with opposing attorneys that the expert witness can anticipate as the case progresses.

Types of Witnesses

Court testimony is provided by one of three types of witnesses.

1. Witnesses that Testify to Facts in the Case – Witnesses that testify to facts in the case are limited to what the individual personally saw, heard, or experienced. Witnesses in this category are not allowed to give interpretation to fact in the case.

2. Expert Witnesses – An expert witness is an individual that possesses a unique understanding of a special subject matter that exceeds the knowledge of the average citizen. This expertise can be derived from and is substantiated by some combination of formal education, specialized training, personal study, and employment experiences. Expert witnesses (a) base their testimony on their understanding of the subject area and the information that is provided relative to the case and (b) provide interpretation for the issues involved in the case that relate to their area of expertise.

3. Witnesses that Testify to Facts AND Serve as an Expert – Witnesses in this category personally saw, heard, experienced events related to the case and have the special subject matter understanding that permits interpretation of their personal experience as it relates to the case and to their area of expertise.

Expert witnesses must be able to demonstrate that their background (education, training, experience) qualifies them in the area of required expertise. The following sections are written from the perspective of the consultant that may become an expert witness.

Order of Discovery (Pre-Trial Activities)

The time interval between the filing of a lawsuit and trial is referred to as the Period of Discovery. During this phase, each attorney attempts to gain insight into every aspect of the case, to identify what information all other attorneys and their clients posses, to identify what information all other attorney's will utilize in the case, to anticipate the

strategy that will used by each of the other attorneys in the case, and to develop a strategy that best represents the interest of the client.

1. Complaint – The case begins with a complaint being filed by an attorney (or attorneys) representing the aggrieved party(ies) along with charges against each and every party alleged to have been involved with harming the interests of the plaintiff. At this point discovery begins.

The defendant(s) in the case next respond(s) to the complaint on a charge-by-charge basis either admitting to the charge (which seldom occurs) or denying/rejecting the charge. The denial/rejection of charges sets the stage for aggressive, adversarial attorney interaction.

2. Request for Production – The request for production of evidence and material that might be used as evidence is a continuing process that begins early in the discovery phase and continues until the trial begins. The objective is to obtain information in the possession of the opposition that will either support or reject the claims of the opposition. As evidence is produced, each attorney is able to better understand the strengths and weaknesses of each party's case and to determine how to best position for trial or, short of a trial, settlement.

3. Interrogatories - Each attorney in the case next "propounds" (i.e., serves) a set of interrogatories (i.e., a list of detailed, formal questions) to the attorney for each of the other parties in the case. (The list of questions will be different for each party depending on the perceived roll of the party in the case.) The purpose of each set of interrogatories is to force the party receiving the interrogatories to provide specific information related to the case that can assist the attorney in developing the best possible case to represent his/her client. Questions address, but are not limited to, (a) known and unknown facts related to the case, (b) who knows what, (c) who has what information and where the information is located, (d) the sequence of events related to the case, (e) the availability of information to support or refute the charges in the case, (f) the documents and information that the attorney plans to place in evidence in the case, (g) the names of witnesses that the attorney plans to use in the case along with their qualifications to provide testimony, and (h) a summary of what the attorney anticipates that each witness will state during testimony. A well-structured set of interrogatories tends to be quite lengthy and attempts to explore every conceivable aspect of the case so that there will be no surprises when the case "goes to trial".

Because some attorneys tend to abuse the interrogatory process, some courts have placed limits on either the number of pages that can be present in an interrogatory or the number of questions that can be asked. Of course, for these situations attorney's have become creative in the way that the questions are posed in order to gain as much of an advantage as possible.

4. Depositions – The deposition is probably the most valuable part of discovery since

the attorney has the opportunity to explore case issues with each potential witness through a formal inquisition where the witness is under oath and an official written court record is kept of all discussion. Depositions provide the attorneys in the case with the opportunity to explore the strengths and weaknesses of each potential witness, establish what each potential witness really knows about the case and can contribute to the case, extract off-hand statements that can be used to decrease the potency of the opposition's case, and test trial strategies.

Depositions are conducted in one of two formats.
(a) If it is anticipated that the witness will be present at the trial, the deposition is conducted by an opposing attorney. Questions are posed in a "cross-examination-type environment". Both direct questions (questions which ask for information) and leading questions (questions that attempt to "suggest an answer") are permitted. Since no judge or jury is present, the attorney asking the questions can use sarcasm, voice inflections, and facial expressions (none of which are reflected on the written court record) to intimidate the witness. Of course, another attorney present at the deposition can challenge a question by entering an objection "on the record". While this objection cannot keep the witness from answering the question, it can be used later in court to possibly keep the witness's answer from being presented to a jury.
(b) If the trial will not be conducted before a jury or there is a potential that the witness will not be available to testify at the time of the trial or the witness of is such importance that requiring the witness to be present at the trial will pose an unnecessary burden on the witness, the deposition is conducted using the same procedures and rules that will be used for testimony in the trial. For non-jury trials, a written record of the deposition is submitted to the court as evidence, and the judge reads the deposition on his/her own. For jury trials, if the record of the deposition is in written form, the deposition is read in open court with a member of the trial team "playing the part of the witness" and reading the witness' response to the questions while the interrogating attorney reads his/her questions. In recent years, video recording has been used for depositions that will be presented in jury trials. In this way, the jury can view the witness' body language as the testimony proceeds. Normally, video depositions are recorded in the presence of a judge so that objections can be adjudicated as they occur.

Court Proceedings

The court system is divided into components: criminal court (where individuals are tried for violations of the law) and civil court (where individuals/entities can sue each other for alleged infringements on personal or property rights). While it is possible that the consultant/expert witness can be involved in either type of case, cases are almost always of a nature that requires assignment to civil court.

1. Jury Selection (if Jury Trial) – The first step in cases involving a jury is to select the panel of jurors. This process begins with *voir dire* – a period when the attorneys examine each potential juror with questions that will establish (a) the candidate's knowledge about the case, (b) personal biases that might influence the candidate's potential to render a verdict acceptable to the attorney, and (c) the candidate's ability to

be “persuaded” by the arguments that the attorney intends to present in the case. The process is concluded with the “striking” of the jury (i.e., elimination of candidates that appear to be unsatisfactory). Some jurisdictions allow candidates to be eliminated as they are interrogated while other jurisdictions delay the process until all candidates have been questioned.

2. Opening Statements – The trial begins with each attorney being provided with the opportunity to make a presentation to the jury. While these presentations are intended to provide the jury with an overview of the case – what the case is about, what evidence will be presented, and the type of witnesses that will be presented – the real objective of each attorney is to persuade the jury that the evidence that he/she will present in the case is the truth and justifies a verdict in favor of his/her client.

3. Plaintiff Presents Case – The attorney for the plaintiff has the responsibility to demonstrate to the court that his client was damaged (physically, mentally, economically, socially …). The various aspects of damage(s) sustained by the plaintiff are supported through the presentation of evidence and testimony from (a) individuals having direct knowledge about the damage sustained by the plaintiff and (b) experts that can support the hypotheses being postulated by the attorney. Each witness is examined first by the attorney for the plaintiff under direct examination (where the interrogation is restricted to questions that ask for information) and then by the attorney(s) for the defendant(s) under cross examination (where questions are permitted that attempt to “suggest an answer”). Upon completion of the presentation of all evidence and testimony by the plaintiff, the attorney for the plaintiff “rests” his/her case.

4. Defense Presents Case – Next, the attorney for each defendant, in turn, presents evidence that the damage(s) claimed by the plaintiff are non-existent, unreasonable, and/or unjustified through the presentation of evidence and testimony from individuals having direct knowledge about the claim and experts that can support the hypotheses being postulated by the attorney. As in the case of witnesses for the plaintiff, each witness is examined first by the attorney presenting the witness under direct examination and then by the other attorney(s) in the case under cross examination. Upon completion of the presentation of all evidence and testimony on behalf of a specific defendant, the attorney representing the defendant “rests” his/her case.

5. Plaintiff Presents Rebuttal – After hearing the case for the defense, the attorney for the plaintiff has the opportunity to present additional evidence and testimony to rebut points made by the defense. Witnesses are again questioned first under direct examination and then cross-examination by opposing attorneys.

6. Defense Presents Rebuttal – If the attorney for the plaintiff elects to make a rebuttal presentation, the attorney(s) for the defendant(s) is/are allowed to present a defense to the plaintiff’s rebuttal.

7. Closing Arguments Presented – Upon completion of the presentation of evidence

and witnesses, each attorney is allowed to present closing arguments. While the purpose of this exercise is to allow each attorney the opportunity is to summarize the case highlighting the weaknesses and deficiencies of the case presented by the opposition and the strengths of the case for his/her client, the real objective of each attorney is to persuade the jury that the evidence that the attorney presented in the case was the truth and justifies a verdict in favor of his/her client.

8. Charge/Instructions to the Jury (by the judge in jury trials) – Upon the completion of closing arguments and prior to jury deliberation, the judge instructs the jury in the laws that relate to the case, the options that are available to the jury, and the constraints placed by the law on the jury. Toward the end of the case and prior to the time for giving the charge/instructions to the jury, the judge allows each attorney to submit a written set of jury instructions which the judge can use as background information in developing the actual set of instructions that will be presented to the jury. This process provides each attorney with the opportunity to ensure that the instructions are complete and, hopefully, not biased in favor of another party in the case.

9. Deliberation and Decision – At this point the case is deliberated, either by a jury (in jury trials) or by the judge, and a decision is made relative to the case.

10. Verdict Announced – Upon completion of the deliberation phase, a decision is announced.

<u>Areas Where Significant Help Can Be Given in Developing a Case in the "Discovery" Phase</u>

1. Questions for Interrogatories – The first major influence that a consultant and expert witness can have on a case is through the development of interrogatories. To be of assistance in the development of the issues in a case, the set of questions must be structured to be thorough, addressing each and every detail of the case. Each individual question must be unambiguous (i.e., clear, to the point, and subject to one and only one interpretation). As each interrogatory question is developed, the author(s) must continually ask (a) "How will this question be interpreted?" and (b) Can this question be rephrased to elicit more information?". During the final review of the set of interrogatory questions, an additional issue must be addressed, namely: "What question(s) have I forgotten to ask?".

The writer has learned from experience that some attorneys will either (a) answer interrogatory questions directly without consultation with some one that has a first-hand understanding of the issues related to the question or (b) first obtain an answer from a person having an appropriate knowledge and then structure the response, based upon the initial answer, to present the information in a different manner that better serves the objectives of the case. To combat these tendencies, the writer asks that the attorney incorporate into each question a requirement that the person(s) answering each question be identified by name, title, and basis on which the answer was provided (e.g., education/training, experience, direct knowledge of events). This information allows the

inquiring attorney to “make life miserable” for an attorney that attempts to corrupt the interrogatory process during deposition interrogation. When the person(s) that supposedly answered the interrogatory question(s) reject(s) interrogatory answer(s). during a deposition, the case for the responding attorney is clearly damaged.

2. Responses to Questions on Interrogatories – The second major influence that a consultant/expert witness can have on a case is through the development of responses to questions on interrogatories. Often, employees for the attorney’s client fail to “see the big picture”, and the attorney does not have an expertise sufficient to understand the nuances of words. As a result, answers can be given that “make life difficult” for the expert witness when the expert witness is forced to contradict statements made on behalf of a client by others.

The writer had just such a situation to occur in a case where a manager (not possessing a background) provided answers to questions to the attorney without consultation with employees having an appropriate understanding. Fortunately, the writer was able to review the draft response and point out to the attorney that the response was not proper and required further research. If the answers had been tendered to the opposition as initially presented, the writer would have had to testify that the interrogatory was incorrect. The result would have been a great deal of “fun” for the opposing counsel as he tormented the writer during questioning and then additional “fun” as he tormented the manager that was the source of the original response.

3. Questions for Depositions – Consultants can be of significant assistance in preparing attorney’s for depositions, especially when interrogating opposing experts and witnesses that possess information that relates to the aspects of the case. Areas of possible assistance include, but are not limited to, (a) the definition of terms and units; (b) the understanding of scientific theories; (c) an understanding of the iterative steps involved in the design of a building, component, system, or product; (d) an understanding of the construction process of a building, component, system, or product; and (e) the education and training weaknesses of various disciplines.

While living in Louisville, KY, a defendant in a case that involved a number of defendants retained the writer to serve as a consultant/expert witness. As the discovery proceeded, the writer realized that the case would eventually revolve about issues in the discipline of biomedical engineering. Of all of the consultants and potential expert witnesses in the case, the consultant/expert witness for the plaintiff was the most qualified to speak to the biomedical issues on the case. While the expert possessed bachelor’s, masters’, and doctoral degrees in electrical engineering, a primary professional focus had been the application of electrical engineering concepts to the field of biomedical research. (In fact, at that point in time in the development of the field of biomedical engineering, this expert’s education, training, and practice clearly qualified him to claim that he was a “biomedical engineering”.)

Unfortunately (for this individual), this individual was the first expert to be deposed. Realizing the situation, the writer advised his attorney to try to “lead” the expert into

saying that he had no expertise in biomedical engineering. This thrust was to be accomplished by continuing to get the expert to emphasize that he was trained as an electrical engineer and not as a biomedical engineer and to testify that he was an "electrical engineer". The expert willingly followed this line of questioning and provided the desired responses.

As the case progressed and the biomedical issues began to surface, the expert for the plaintiff was placed in the uneasy position of having to try to contradict his earlier testimony. While the plaintiff had an extremely strong case at the beginning, the case was greatly weakened as discovery progressed because the plaintiff's expert had allowed himself to have his expertise discounted. As a result, the defendants were able to reach a settlement that was much less than originally anticipated.

4. Questions for Witnesses – As with attorney preparation for depositions, a consultant can be of significant assistance in preparing an attorney to question witnesses at trial. Through the study of deposition responses, the consultant can often identify areas of weakness that can be exploited during the trial and assist the attorney in the preparation of questions. And, even with respect to personal testimony, the expert witness can assist the attorney by preparing the sequence of questions that should be asked during direct examination. Additionally, in situations where the consultant is allowed to be present in the court room during the trial, key issues can be brought to the attorney's attention in "real time" allowing the attorney to optimize the situations that occur as testimony is being rendered.

The writer has had three unique situations to occur relative to the development of questions for courtroom testimony.

The first situation occurred in the Commonwealth of Kentucky. The writer had been hired by one of the defendants in a case. Fortunately, the writer was able to develop a strategy that allowed the defendant to be removed from the case via a summary judgement upon conclusion of the presentation of the plaintiff's case.

On the first day that the first defendant's attorney was presenting his case, his expert witnesses had a heart attack and became unavailable to testify. The attorney attempted to either get the case dismissed or delayed. The judge rejected both options and suggested that the attorney hire the writer since the writer was familiar with the case and with the position(s) being taken by each defendant in the case. The attorney (having no choice) agreed.

That night, a call was made to hire the writer and ask that the writer to be in court the next day to provide testimony for the defendant. At the same time, the attorney indicated that he did not know what questions to ask. As a result, an agreement was made that the writer would develop a list of questions that would assist in the interrogation on the witness stand. Such a list was developed and provided to the attorney the next morning.

After being called to the stand and sworn in, the questioning proceeded “according to script”. While the questioning attorney did not deviate from the script, another defense attorney (an individual that was extremely competent in matters of the case) was able to pick up on the questions and answers during his cross examination and make significant points on behalf of all remaining defendants. The result was a very small judgement for the plaintiff.

The second situation occurred in the State of Maryland. Because of a judge’s ruling, a case was scheduled for trial before a judge (i.e., without jury) before the attorney for the defendant was ready to try the case. The writer was hired to assist the defense attorney as a consultant and asked to arrive two days before the trial and remain through the trial. During the two days preceding the trial, the writer assisted the attorney in understanding the issues related to the case and the strengths and weaknesses of each side of the case.

On the day of the trial, the writer was asked to sit at the counsel table next to the attorney and be prepared to provide the attorney with questions to pose to the plaintiff’s expert witness that would be testifying. When the time came for the expert witness to be cross examined, the attorney asked the judge for permission to remain seated as he questioned the witness. The request was granted. The attorney then leaned over to the writer, and the writer cupped his hand to the ear of the attorney and began to whisper questions in the ear of the attorney. This process was continued for approximately 30 minutes until the issues that needed to be addressed had been exhausted.

Unfortunately, the defense did not prevail in this case.

The third situation occurred in the State of Louisiana. As background, it should be understood that Louisiana law is based on Napoleonic Law. As such, expert witness testimony is not based upon hypothetical situations, as so often occurs in most court environments, but on the actual evidence and testimony presented in court. Consequently, the expert witness is expected to sit in the court room, hear all of the testimony, and then provide testimony based on the evidence and testimony presented to the court.

The writer sat through the entire presentation by the plaintiff and gave his testimony at the conclusion of the plaintiff’s case. Because of other obligations, the writer then had to leave to return home. It was known from the defendants witness list that only one witness would be called to refute the writer’s testimony. Because the writer had left, the attorney for the defense assumed that the writer was “gone for good” and evidently prepared testimony that would “take a few liberties”.

Unknown to the defense, the writer was “on call” to return to be present at the time the defendant’s expert was to testify. And, on the given day, the writer arrived, parked his car across the street, and waited for a signal from the court room that it was time to make an appearance. When the signal came, the opposing expert was already on the

stand and being interrogated under direct examination. The writer entered the court room, strolled down to the counsel table for the plaintiff, and sat down at the counsel table. The witness began to "fall apart" realizing that each and every faulty answer would be subject to rebuttal. As the testimony unfolded, the writer began writing out questions to be used on cross examination. As cross examination proceeded, additional questions were developed. The result was that all issues raised by the defense were rejected and the jury returned a significant verdict for the plaintiff.

5. Questions and Positions for Attorney Negotiations – Another area of support, not involving trials, relates to providing assistance to an attorney involved in negotiations that revolve about contested issues. On one occasion, the writer was hired by an attorney in St. Louis to assist in the development of a posture for a negotiation and asked to arrive in St. Louis early on the morning of the day when negotiations were to take place. The plan was to arrive at 9 am and meet with the attorney until 2 pm when the actual negotiation would occur. As luck would have it, weather conditions caused flight delays that did not allow arrival until 1:30 pm, just enough time for pickup and transportation to the negotiation site.

Knowing that there would be no time for a pre-negotiation conference, the writer spent the morning and the time on the airplane structuring pages of written positions and associated questions that could be raised during the negotiation conference. Upon meeting the attorney (accompanied by a driver) at the airport, the writer presented the attorney with the stack of pages that had been developed. During transit, a quick review was conducted of each issue and set of questions.

The result – the attorney was supplied with the needed background and prevailed during negotiations winning almost every desired point.

The Next Module

Module #3 discusses testimony by the expert witness.