Experts Preparing Lawyers for Trial

BY GARY L. HIX

Much has been written about attorneys preparing expert witnesses for deposition or trial, but there is another side to that story, and it can work both ways. There is also a lot that an expert witness can do to prepare an attorney. One way is to teach the attorney how to properly use the special words and recognized terms of that profession. And it goes without saying that an expert witness also can help an attorney formulate the proper questions using words and expressions common to that particular science when questioning the opposing expert.

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When a scientific expert and an attorney first meet, they have to get past the instinctive issue of "friend or foe" that is contained in all of our DNA. Once we are mutually accepted as a "friend of our clan," then they can begin to discuss the other's qualifications and expertise. Next come the details of the issue at hand and identifying any conflicts of interest by either party. Once past those hurdles, the conversation turns to the details and extent of experience each side has on the topic. Finally, the conversation gets down to the real meat of the contested issue. That's when the "techish" jargon of the expert's field of science comes into play.

If an attorney can use the proper technical terms that are commonly used in the science of the expert's field during questioning, it is easier for the expert to give a precise answer to the question being asked. A really good expert witness will want any question posed to them to be properly phrased in the language of their science so that they can reply with an unqualified answer—such that another expert in the same science would have no question about the clear meaning of the statement given, even if they didn't agree with it. Debating the merits between the statements made by two different experts is easier if the questions are clearly worded in the commonly used language of that science.

There is another reason to keep the discussion or testimony as clear and concise and possible. To persuade a jury to see the merits of one side of the argument, it must be stated as concisely as possible, given the nature of the science in which it is stated. Medical terminology and words commonly used by professionals in that area can be "as clear as mud" to a jury. Experts are most often scientists accustomed to stating measurements, observations or conclusions clearly and with full knowledge of the limits of the data that support their statement. They are far more likely to stammer or ad lib if they feel that they have to qualify their statement.

If an attorney can use the proper technical terms that are commonly used in the science of the expert's field during questioning, it is easier for the expert to give a precise answer to the question being asked.

For instance, a groundwater scientist expert under questioning might state that the concentration of arsenic as measured in a water sample he or she collected that was meant for drinking water was analyzed and reported to be 0.001 mg/l. That could be a statement of true fact, but the expert still has in the back of their mind that this is an accurate fact only if the sample was properly collected following EPA Recommended Standards for groundwater sampling, and that it was properly labeled, stored and transported under a valid and properly signed Chain of Custody form until it reached a Certified Laboratory. Once signed for by the laboratory, the sample was prepared for analysis following more stringent EPA Standards for testing drinking water samples. The laboratory would also have a Quality Assurance – Quality Control plan that was followed while testing. The expert's statement is true, but with qualifications.

So when the attorney asks the expert to report to the court the value of the analysis, the expert knows the true significance of the value reported. If the geoscience expert is asked to explain the significance of the reported value, they could describe it in relation to the EPA's Maximum Contaminate Level (MCL) for public water supplies.

But if the expert is asked to explain the significance of that value in terms of adverse impact on the human body, they should state that such an answer would be beyond the limits of their area of expertise.

An attorney must recognize the limits of this expert's area of expertise. So a better question might be along the line of defining the limits of the validity of the testing process, the limits of measurements, and the expert's statement regarding the value comparison.

If the expert can answer a clearly worded question about the reported value, he or she might be able to explain that the value of 0.001 mg/l is within less than one percent of the finite accuracy of the testing equipment and procedure. And while the value is quite low and below the EPA's MCL for public drinking water, it is not zero (because zero does not exist in chemical testing). Hopefully the expert has explained to the attorney in advance that this reported value is a plus or minus value, and the MCL is a current limit for public water supplies that in most states does not apply to private drinking water supplies.

All this knowledge might prepare the attorney *not* to ask the expert a question that begs them to answer with a "in all cases" this water with this value of arsenic is safe to drink.

A scientist working as an expert witness typically does not want to use words like "all, always, and forever" because in the back of their mind they know the basis for the sampling, testing and reporting—and there can always be an exception to any conclusion. If attorneys want their expert witness to look and sound convincing, they should make sure they are asking questions within the area of expertise of that expert and use the proper terminology so that does it not force them to needlessly qualify their answer.

A science-based expert witness must learn from the attorney the rules of deposition, the need to remain calm under cross-examination, and waiting for the question to be fully stated before giving an answer. In turn, it helps tremendously if the attorney can ask the questions in the proper words and/or "techish" jargon of that science. An attorney can learn from an expert that gives them the proper vocabulary to use. They will both sound and appear better where it counts—in the courtroom.