

EXPERT WITNESS TRIAL TESTIMONY CHECKLIST

PREPARE THE COURT FOR YOUR EXPERT

A. PRE-TRIAL HOUSEKEEPING

1. Check FRCP [16\(b\)](#) which governs pre-trial scheduling and gives deference to any local court or judge rules
2. Under FRCP Rule 26(a)(2)(D), disclosures concerning expert testimony should be made at least 90-days before the trial date
3. Certain objections can be raised by opposing counsel under 26(a)(3)(B) anytime until 30-days before trial is set to take place
4. Use Google Docs, DropBox or other file-sharing web services to communicate quickly and efficiently with your paralegal and expert witness
5. Consult Rule 26 for the contents of the disclosure including the expert's name, qualifications, summary of testimony and other details that the rules or the court require
6. Always remember to supplement any disclosures about your expert or your expert's testimony regarding any material changes, as provided under FRCP rule 26(e)
7. Failure to properly supplement any pre-trial disclosures can result in sanctions under FRCP Rule 37(c)

B. ADMISSIBILITY ISSUES

1. Under FRCP Rule [32\(b\)](#) an objection may be made at any hearing or even at trial as to the admissibility of any deposition testimony, subject to certain exceptions
2. Under FRCP Rule 32(d)(3), objections to the relevance, materiality, or competence of a witness or a witness' deposition testimony can be made at any time and are not waived for failure to raise them
3. These governing rules of procedure correspond directly to a number of Federal Rules of Evidence:
 - a. Rule [402](#) governs the general admissibility of relevant evidence
 - b. Rule [403](#) governs the admissibility of evidence that may be unduly prejudicial, confusing, a waste of time or otherwise inappropriate to present at trial
4. FRCP Rule 26(b)(4) deals specifically with trial preparation for experts

C. QUALIFYING YOUR EXPERT

1. FRE Rule [702](#) prescribes when an expert witness' testimony is necessary
2. FRE Rule [703](#) broadly describes the bases on an expert's opinion and it is here that the Daubert factors are relevant for federal court (Frye standard for DC courts)
3. Review these rules with your expert and explain that at the crux of his testimony is the data and methodology on which he relied to form his opinions. As a result, this is what will be the most vulnerable aspect of his substantive testimony, as opposing counsel will try hard to question the reliability of the expert's studies or methods
4. Ask your expert if there are multiple ways of forming his opinion to prepare for questions about validity of opinion raised by opposing counsel

PREPARE YOUR EXPERT FOR THE COURT

A. SUBSTANTIVE LAW ISSUES

1. Discuss attorney–client privilege with the expert witness
2. FRCP Rule 26(b)(4)(B) provides protection for any drafts of expert reports or disclosures
3. FRCP Rule 26(b)(4)(C) offers protection for communications between the attorney and expert witnesses, but only for experts who have to provide a written report under 26(a)(2)
4. Discuss the ways the witness can be impeached under FRE Rule [608–613](#)
 - a. Character for truthfulness
 - b. Credibility
5. Briefly explain to your expert the difference between the legal merits of the case and the factual issues that he is there to help the jury decide

B. DIRECT EXAMINATION

1. Instruct your witness to avoid using “absolutes”
2. Instruct the expert not to frame answers in a way to appear partial to one side or the other to avoid appearing biased
3. Ask open–ended questions that will allow the expert to elaborate on the most important points of testimony
4. Take the lead on how to engage the jury; explore best storytelling tips
5. Also ask anticipated cross–examination questions

C. CROSS EXAMINATION

1. “Yes” or “No” Questions
 - a. Let your witness know it is perfectly fine to tell the questioning attorney that such a simple answer cannot be provided in that certain context
 - b. Or say “in some circumstances,” if that is the case
2. “I Don’t Know” Answers
 - a. Remind your witness that “I don’t know” is a perfectly acceptable answer, if that is the truth
 - b. “I don’t know” is NOT an acceptable answer, such as when the question directly relates to a basis or methodology of your expert’s opinion
3. Getting Cut Off
 - a. Instruct your witness to go ahead and include any important portion of testimony that needs to be included
 - b. Even if it means answering the next question by stating that the previous question was not completely or accurately answered
 - c. Also remind your witness to leave the door open for clarification on re–direct
4. Keeping Emotions in Check
 - a. Remind your expert not to get defensive if they feel attacked by a line of questioning
 - b. If it’s objectionable, you as the attorney will take care of it
 - c. Remind your witness to “stick to their guns”
 - d. Remind your witness to stop, breathe and think about the question being asked before providing an answer

LIGHTS, CAMERA, COURTROOM

A. Demeanor

1. Do not over-prepare the witness as it makes the testimony seem fake, fabricated or too “rehearsed”.
2. This means [avoiding buzz-words](#) and key-phrases.
3. Remind your expert to maintain eye-contact with the jury.
4. Instruct your expert to keep hand motions to a minimum unless necessary for demonstration
5. Maintain an even and consistent projecting volume when speaking to the jury
6. Remind the expert to answer clearly. This means avoiding “uhm” and “nu-uh”.
7. Curtail other distracting habits such as:
 - a. Nail-biting
 - b. Fidgeting with pens or pencils
 - c. Rocking back and forth in the witness seat
 - d. Playing with watch or jewelry

B. Dress

1. Make sure your expert dresses professionally and appropriately for court.
2. Tell your expert to avoid wearing any flashy jewelry or extravagant ties and scarves, as these can be very distracting. Remember the witness is there to testify, not model for a fashion show and the worst scenario is one where a juror remembers more about the expert’s clothing than their testimony.
3. If possible, do dress rehearsals with your witness.

C. Demonstrations

1. Practice running through the use of any and all devices intended for use at trial.
2. Remember all necessary wires, chargers, adapters, converters, flash-drives and any other accessories
3. Explore the particular courtroom set for trial and make sure that the facilities can accommodate the technology you plan on using
4. For an in depth- look at a number of very cool and extremely helpful trial preparation and presentation apps, look [here](#).