Lay And Expert Testimony: Tactical Use Of Employee Witnesses

Law360, New York (April 5, 2016, 10:40 AM ET) -- The outcomes of trials are increasingly dependent upon expert testimony. As a result, comprehensive knowledge of the procedures required to properly identify expert witnesses is crucial. Failure to abide by the Federal Rules may result in an unexpected and unnecessary failure of proof at trial.

Perhaps nowhere are the expert witness procedures more complex than in the case of parties’ employees who have expert knowledge of some kind. The procedures are complicated by the analyses required to determine which opinions are expert and which are merely percipient. Thus, practitioners should be familiar with the scope of permissible opinion testimony by employees not designated as experts.

Another question when preparing for trial is whether to use the employee with specialized knowledge as merely a lay witness, or to have that employee designated as a non-retained expert. The choice encompasses several smaller strategic decisions. In addition to saving expert fees and avoiding the burdensome expert report requirement for retained experts, a non-retained employee expert can educate a jury in a way that is perceived as more authentic and neutral. Further, if there is any concern that the employee’s testimony may veer off of purely “lay” opinion and into areas that may be considered “expert,” a safer option may simply be to designate the employee as a non-retained expert and avoid any surprises at trial.

Lay vs. Expert Testimony

The general rule is that lay witnesses, including employees, are barred from providing expert opinion testimony at trial pursuant to 702 and 703 of the Federal Rules of Evidence. Rule 701 of the Federal Rules of Evidence permits a lay witness to testify in the form of an opinion when the testimony is “rationally based on the witness’s perception; helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” However, the Federal Rules Advisory Committee Notes make clear this does not prohibit an employee who is an expert in the field from providing first-hand, percipient testimony.

The Advisory Committee distinguishes expert testimony based on “scientific, technical, or other specialized knowledge” from lay testimony based on “particularized knowledge.” A classic example is an employee who is an accountant or auditor. That employee is not prohibited from
testifying about a party’s damages simply because he or she has specialized training. On the contrary, the Advisory Committee Notes on the 2000 Amendment to Rule 701 expressly contemplate that a lay witness may testify to a party’s damages without designating the witness as an expert, stating: “For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert.” citing See, e.g., Lightning Lube Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993).

Courts have repeatedly held, a lay witnesses may testify as to a party’s damages without the need for expert testimony and without requiring a party to designate an expert witness on damages, and the mere fact that the underlying facts and data seem “technical” in nature does not transform a lay witness’ testimony into expert testimony when those facts are within the personal knowledge and experience of the witness. For example, in United States ex rel. Technica LLC v. Carolina Cas. Ins. Co., No. 08-CV-01673-H (KSC) (S.D. Cal. Apr. 12, 2012), the court recognized that Rule 701 “does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own experiences” and thus permitted plaintiff’s president and CEO to testify regarding plaintiff’s claimed re-rental charges because the witness’ testimony “was based on his particularized knowledge gained from years of experience within his field, and his testimony was both helpful and relevant.”

Practitioners should asses whether an employee who may have expert training in a particular field will be limiting their opinions to that which he or she has contemporaneously experienced, participated in, or played an active role in obtaining. If in evaluating the employee’s testimony there is a chance that the employee may need to venture into areas concerning comparison to similar businesses or industry standards, this raises complicated questions about how to classify the testimony, which in turn can determine whether the court admits or rejects it in its entirety. As such, counsel should analyze whether strategically the employee should instead be designated as a non-retained expert.

Designating a Non-Retained Expert

Counsel may make the decision to rely on the client’s employees to provide opinion testimony. Common examples are engineers, software developers and accountants with specialized knowledge, skill or expertise who are employed or retained by a litigant in the normal course of business.
The first issue practitioners need to address after selecting an employee to give technical testimony is how to designate that testimony under the Federal Rules of Evidence. Rule 26 requires different disclosures for retained or specially employed experts as opposed to non-retained experts (e.g., employee experts). See Fed. R. Civ. P. 26(a)(2). A retained expert or employee witness who is specially employed to give expert testimony must provide a full report, which includes a “complete statement” of all the opinions the witness will offer and the basis for those opinions, the “facts or data” the witness reviewed in forming the opinions, any exhibits the witness will use, and a summary of the witness’s qualifications as an expert, including a list of all publications authored by the witness in the preceding 10 years, the compensation to be paid to the witness, and a list of all cases in which the expert has testified in the preceding four years. Fed. R. Civ. P. 26(a)(2)(B). However, a non-retained expert has a less onerous burden that only requires providing a disclosure that states “the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703 or 705; and a summary of the facts and opinions to which the witness is expected to testify.” Fed. R. Civ. P. 26(a)(2)(C).

Federal Rule of Civil Procedure 26 does not define “retained or specially employed,” thus, case law is imperative to understanding these terms. Courts have determined that the critical issue in determining whether an expert is “retained or specially employed” is the scope of the proposed testimony. For example, in Amos v. W.L. Plastics Inc., No. 2:07-CV-49TS, (D. Utah Nov. 17, 2009), the court determined whether the plaintiff’s witness who was an employee at a major pipe manufacturer and intended to testify about the procedure for banding and loading pipe was an expert. The court concluded she was not a “retained or specially employed” expert, because she was testifying without pay, and because her testimony would be limited to her personal knowledge and not address whether defendant breached a standard of care, industry standard or safety standard. If she were to testify in that latter manner, it would require her to submit an expert report.

Further, Rule 26(a)(2)(C) governs the timing of expert disclosure. The rule provides all discovery must be conducted in the sequence directed by the court, or initial expert disclosures must take place at least 90 days before the trial date, with rebuttal expert disclosures occurring within 30 days of the presentation of an initial expert disclosure to which rebuttal is sought. In view of the disclosure requirements, practitioners should remember to timely designate the party’s employee as a “non-retained” expert witness and provide the required disclosures, otherwise the employee’s expert testimony may be excluded under Rule 37(c) of the Federal Rules. To the extent possible, counsel should determine early on if the employee witness will be testifying in the form of opinions or inferences which are not merely limited to the perception of the
witness. If there is any doubt, counsel should consider designated the employee as a non-retained expert to avoid exclusion of the opinions at trial.

**Key Takeaways**

Using an employee to explain the technology of a product, the accounting method in a business model, or market volatility can be an effective tool to educate and persuade the jury that a client’s version of the facts is the more reliable one. An employee expert can provide firsthand knowledge of the relevant facts and circumstances and explain why decisions were made in the moment, enhancing the plausibility of his or her opinions.

The Federal Rules make it clear that the distinctions between lay and expert and retained and non-retained witnesses are of great significance in how that testimony should be treated. Accordingly, early in the case, practitioners should assess the testimony they will want from an employee, or be able to elicit, and take care in deciding how, if at all, they want to designate the employee.

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