

# Best Practices for Using Experts When Trial Time Is Tight

By John North, Laura Fahey Fritts and Josh Curry



Increasingly, courts are imposing time limits on trials. In patent cases, these time limitations can be aggressive. As a result, trial counsel must often streamline its presentation of complicated technical information while preserving its ability to present the evidence and testimony necessary to win.

Expert witnesses can help counsel achieve these competing objectives. When used effectively, experts can educate the judge or jury within the imposed time limit without jeopardizing the case. Presenting cogent, credible and understandable expert testimony in a concise manner plays a key role in the outcome, regardless of whether the case is tried before a judge or jury. Counsel should consider employing the best practices outlined below in any technology case, especially when faced with limited trial time.

**Start the selection process early.** Counsel should consider the selection of experts and develop the substance of expert testimony early in a case, preferably at the very beginning. Work with experts should not be relegated until the close of fact discovery. Developing a well-oiled team of inside and outside experts and testifying and non-testifying experts cannot be done overnight.

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**Carefully consider inside and outside experts.** Many cases need both inside and outside experts. Selecting the right inside and outside experts for the case is vital. It is extremely helpful if the client can identify an inside expert to explain how the technology at issue relates to the client's business. Make this inside expert a critical link to the

client. Early on, engage outside testifying experts who specialize in the litigated area and use them to develop the case. Doing so increases the expert's ownership of his or her report and helps the expert focus on the central elements to be presented to the court or jury when the trial date arrives. Non-testifying experts can be useful to further develop and test the novel or risky case theories. Additionally, if the need or opportunity arises, non-testifying experts can be switched to testifying status.

**Develop a detailed and focused trial plan.** List the expert witnesses, including expert witnesses to be cross-examined. Prioritize the importance of each expert's testimony and allocate time accordingly.

**Eliminate unnecessary or cumulative testimony.** Concentrate on the core evidence that the fact finder must hear or see. As the trial proceeds, consider what forthcoming evidence or expert testimony must still be presented and revise the trial plan to ensure effective time use throughout the trial.



**Practice, practice, practice.** A clear, crisp expert presentation on direct serves the client's interests better than a long, boring one. With a strict time limit, an effective expert presentation must be executed concisely. This requires practice.

**Use summary demonstratives.** Summary demonstratives not only explain the evidence, they also decrease the amount of expert testimony required. Still, make the case through the expert— demonstratives alone are not evidence.

**Set time limits for each witness and stick to them.** Identify one person on the trial team to track the time used with each expert. Remember that more time spent with one expert will leave less time for others.

**Prepare the expert for succinct cross-examination.** The expert should provide succinct answers to opposing counsel's questions. This reduces the chance that the court will charge the expert's cross-examination time against the client for being uncooperative or evasive.

**Be short and crisp when cross-examining the opposing expert.** Focus on the core issues, make each point quickly, and then sit down. Often two or three points suffice. On a few occasions, no cross-examination sends the right message.

**Hold little back for rebuttal.** At the end of a long trial, or even a relatively short one, the fact finder may be tired and unreceptive. To ensure the arguments are heard and register with the fact finder, deliver key expert testimony early. Going out on a high note helps, but only when there is time to hit it.

**Promptly advise the court if the time limit becomes impossible.** Unforeseen events can throw off even the best-planned trial strategy. Should this happen, the parties and the court should work together to reach a reasonable solution that does not sacrifice the fairness of the trial.

**Make an offer of proof if needed.** If time is running out and the court denies a request for more, submit an offer of proof so the appellate court can review the evidence the expert would have presented. To win reversal on appeal, a party must show prejudice from being denied more time. If further trial developments show prejudice, renew the objection and present the reasons succinctly. Building this record provides a chance to fix the error before it adversely affects the case. It also gives the judge a chance to reconsider and potentially avoid reversal.

Trials were designed to seek the truth and provide justice. This remains true in complicated technology cases. Court-imposed time limits should neither interfere with this goal nor with a party's ability to coherently present expert testimony to a judge or a jury.

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