



Insights from Trial Analysts:

Preparing Expert Witnesses for Trial Testimony

During the past 20 years we have assisted lawyers in preparing a variety of different types of cases for trial in venues across the country. The transition from discovery and motion practice to trial preparation is usually hectic and sometimes loosely planned. When lawyers turn their attention to witness preparation, they often focus more attention on fact witnesses with the assumption that expert witnesses will perform well because they are professionals. However, experience as an expert witness does not necessarily translate into an effective courtroom presentation for a particular trial. Moreover, many experts who are retained because of their specialized knowledge may not have extensive experience testifying in court.

Expert witnesses tend to be performance-oriented and recognize that their value is largely dependent on their effectiveness at trial. We find that expert witnesses are receptive to witness preparation activities and suggestions that will improve their performance. Consequently, this paper discusses several strategies for preparing expert witness testimony and enhancing the effectiveness of their trial presentations.

Credibility Assessment

Scholars of communication have long argued that there are two primary dimensions of a speaker's credibility: expertise and trustworthiness. Expertise relates to the experience, skills, knowledge, and insights that a witness may possess, while trustworthiness relates to witness honesty and integrity. It is important to recognize that credibility is a perception

formulated by jurors and judges as they evaluate the content and demeanor of witness testimony. Effective expert witnesses understand that credibility is not an attribute they possess, but rather an impression they are able to create in others. Moreover, judgments about credibility are affected by the relative expertise and trustworthiness of the target audience – jurors and judges – as well as the expectations that those receivers have of the witness. For example, the perceived expertise of an economist is affected by a juror's own level of financial acumen. While jurors who have training in finance and accounting may be prepared to comprehend technical economic testimony, such jurors may also hold the expert to a higher standard than jurors with less financial acumen. Of course, we know from observing mock jury deliberations that jurors who profess a heightened level of expertise with the subject matter tend to assert themselves as local experts during the deliberations. As jurors assert their own expertise, they tend to diminish the perceived expertise of the testifying expert.

Similarly, jurors who tolerate a certain level of dishonesty or concealment in their personal or professional lives will be less critical of an expert who fails to tell the whole story than jurors who profess strict adherence to honesty or a practice of complete disclosure. For example, a mortgage broker specializing in sub-prime loans may have different standards for assessing the trustworthiness of an expert witness than a child protective services investigator. In this regard, differences among jurors' personal experiences and

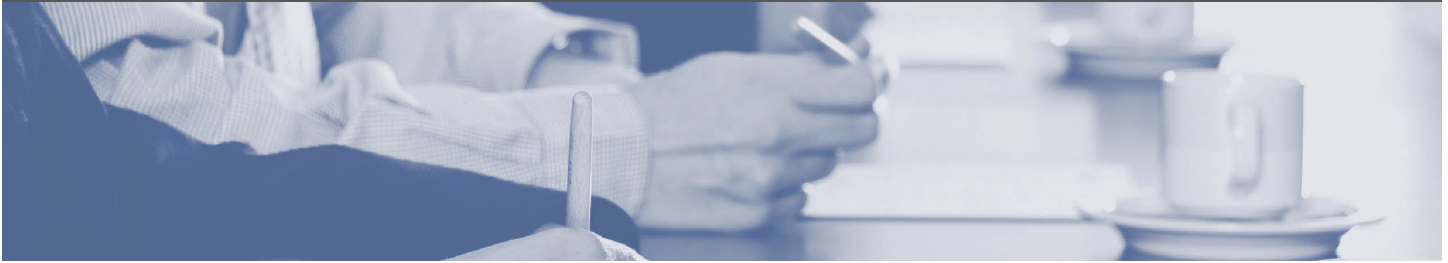
expectations contribute to the variability in their judgments about witness credibility.

Address Concerns About Bias

Trial teams often describe technical cases as a "battle of the experts," while jurors are often more interested in testimony from fact witnesses. Fact witnesses are often perceived as more genuine than expert witnesses because they provide a contemporaneous view into the events and issues that led to the dispute. Moreover, jurors begin trial with the expectation that testifying experts are biased and then look for evidence that confirms or disconfirms that expectation. Evidence that confirms a bias causes jurors to discredit the testimony, while evidence that violates the expectation of a bias enhances the credibility and importance of the testimony.

"...jurors begin trial with the expectation that testifying experts are biased..."

Jurors and judges begin trial with two sets of biases that reflect expectations about the position an expert witness will adopt at trial. A *knowledge bias* reflects the judgment that an expert witness does not possess complete or accurate information about the topic. For example, given limited information about an expert witness who testifies for industrial companies in environmental cases, jurors may perceive that the witness has a pro-business perspective that limits the scope of issues considered and the scrutiny applied to them. Similarly, an economic expert who lives in New England may be



perceived as having a knowledge bias that does not include an understanding of the local economy in a rural Alabama community where the case is being tried.

A *reporting bias* reflects a belief that the witness is unwilling to report complete or accurate information about the topic. Reporting biases are particularly problematic for witnesses who have a long-standing affiliation with a specific company, group, or industry. For example, witnesses who routinely testify for plaintiffs in asbestos cases will be perceived as willing to overstate the effects of limited exposure while those who testify for hospitals in medical malpractice cases may be perceived as unwilling to question the hospital's standard of care. Every expert witness should have concerns about a perceived reporting bias because jurors routinely believe that experts are paid to provide an opinion that supports their client's position in the case.

Given concerns about knowledge and reporting biases, witness preparation sessions should focus on establishing the objectivity of the expert. Credentials are important and jurors respond favorably to testimony that a particular witness is well-regarded by professional peers. However, when pressed for time during trial, the background and credentials of experts are sometimes given short shrift. Bear in mind, however, that this information is very important for jurors who are looking for shortcuts to processing detailed information as they form judgments about the objectivity of the witness.

Concerns about bias are exacerbated when witnesses stumble through questions about how much "they are being paid for their testimony." While expert witnesses should provide specific responses to questions about compensation, it is important

to restate the purpose of the engagement. Witnesses are paid for their analysis and conclusions, not for their testimony. In this regard, it is important to describe the work that was performed and underscore the amount of time that work required. Jurors are less concerned about compensation issues when they understand that an expert worked diligently to formulate an opinion and prepare a technical report. Moreover, some jurors will ascribe greater expertise to witnesses who receive large hourly compensation. Consequently, it is important to respond quickly and confidently to questions about compensation.

Jurors are looking for evidence that an expert's findings resulted from a careful consideration of all of the evidence and a strict adherence to industry standards and procedures. Jurors want to know about every approach or perspective that was considered in the analysis. Most important, jurors need to understand the importance of adherence to industry standards. Because industry standards are usually perceived as objective, analyses that conform with industry standards are seen as fair and reasonable. In this regard, testimony about the process is often as important as the opinion that was reached.

"...analyses that conform with industry standards are seen as fair and reasonable..."

Another way to diminish the perception of bias is to acknowledge the position adopted by an opposing expert, examine the merits of the analysis that led to that position, and provide an argument that refutes the conclusion of the opposing expert. Such an analysis enables your expert to summarize the arguments jurors need to refute the opposing expert opinion and creates the perception that your

expert carefully considered alternative perspectives before reaching an opinion.

Understand Juror Information Processing

It is important for expert witnesses to understand and facilitate juror information processing. Research has identified two approaches that people adopt when processing information in persuasive contexts. *Systematic processing* involves a careful scrutiny of evidence and arguments in the case. It requires the cognitive ability to process the information and the motivation to engage in the cognitive effort required to carefully scrutinize message content. Systematic processing is compatible with a traditional model of persuasive communication – message recipients carefully evaluate the evidence and arguments before accepting or rejecting the conclusions of a witness.

However, because jurors sometimes lack the motivation and often lack the cognitive ability to process complex testimony, they often rely on *heuristic processing* to process witness testimony. When engaged in heuristic processing, jurors make judgments about whether to accept or reject an expert's conclusions based on simple decision rules. Of course, perceived expertise and trustworthiness are two general heuristics that jurors employ, but other case-specific decision rules may be more influential. For example, a juror who is not capable of scrutinizing the details of an accounting fraud audit may rely on the belief that Generally Accepted Accounting Principles were followed and that the expert's findings were based on those principles. Alternatively, jurors might not be able to understand the scientific standards for dose reconstruction analyses in environmental cases, but they may



be persuaded to accept the conclusions of an expert who followed scientific protocol.

It is important for expert witnesses to recognize that heuristics play an important role in jurors' evaluation of case issues and in their willingness to accept an expert's testimony. Because the use of these simple decision rules requires very little cognitive effort, heuristics should be viewed as a default processing strategy, always operating in the background of jurors' minds. When jurors also engage in systematic processing, the details of an expert's analysis become paramount and heuristics become less important. Hence, expert testimony should strive to fulfill two objectives: 1) Provide jurors with heuristics that will enable them to adopt the expert's conclusions without examining the details of the testimony, and 2) Facilitate systematic processing by educating jurors about the objectives, procedures, and evidence supporting the expert's conclusions.

Expert testimony that facilitates only heuristic processing misses the mark. Too often, expert witnesses are encouraged to discuss their credentials, provide a brief discussion of the analysis they performed, and quickly move to a presentation of their findings and opinions. While this approach may be effective for jurors who rely on heuristics to determine whether to accept the expert's conclusions, it may not be sufficient for jurors engaged in systematic processing.

In this regard, it is important not to shy away from a detailed discussion of at least some portion of the analysis performed by the expert. Some jurors want to learn the details and will be reluctant to accept an expert's conclusions unless they have an understanding of the analysis that led to those findings. While it may be impractical

to present a complete discussion of every aspect of an expert's analysis, a detailed discussion of a representative portion of the analysis will be appreciated by jurors

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who are motivated to scrutinize the details. Consequently, it is important to structure expert testimony that will facilitate both heuristic and systematic processing.

Understand Juror Psychology

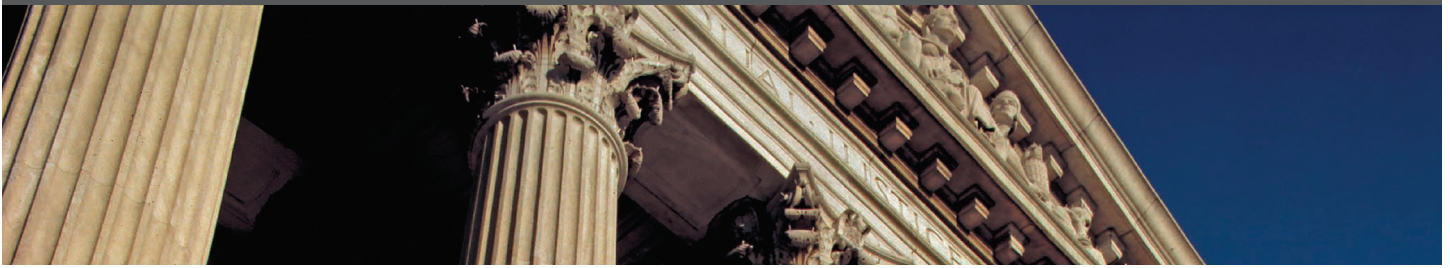
Expert witnesses live in a world of data and numbers and they rarely have any direct interaction with a jury of your client's peers. What is logical and rational for an expert witness may not appear cogent to a juror who is viewing the case from a completely different perspective. Expert witnesses generally have limited exposure to jury psychology. Consequently, it is important for the trial team to help experts understand the characteristics of the jury panel and their likely reactions to the expert testimony.

Economic experts routinely develop damages models based on projected earnings and business losses, but they often fail to appreciate how skeptical jurors become of models that are based on assumptions and projections. The more abstract the assumptions, the more skepticism they engender. This does not mean that jurors will reject a theory that develops projected business losses, but experts should understand the extent to which jurors demand evidence that an economic analysis is grounded in reality. For example, jurors in a power plant contract case are more likely to accept an analysis of lost earnings that is based on prior performance at the plant

than a projection of anticipated earnings from a new facility whose construction was never completed. Although an economist may be comfortable presenting an economic analysis in either scenario, jurors are likely to perceive a dramatic difference between the two situations.

Moreover, the size of the damages request must be commensurate with the perceived significance of the case. Jurors hearing testimony about a “major patent” are sometimes surprised when a relatively modest request for damages is presented. A party seeking to enforce its patent rights may be primarily interested in obtaining an injunction against an alleged infringer. If the intervention occurs soon after an infringing product is introduced into the marketplace, there may be limited economic damages. When this occurs, experts run the risk of creating incongruent impressions with jurors. On the one hand, an expert may tout the revolutionary impact of the invention, while the same or a different expert presents a relatively modest model for monetary damages. While this testimony may be rational and logically consistent, the modest request for damages may undermine the credibility of testimony touting the importance of the invention.

Feedback from focus group research, a demographic analysis of the trial venire, and a discussion of juror experiences and expectations provide experts with valuable information needed to frame the presentation of their analysis and findings. Moreover, in cases where multiple experts will testify, it is important to integrate the discussion and presentation of expert testimony. A conference involving experts and members of the trial team is an invaluable tool in the trial preparation process. Discussion among experts facilitates critical analysis and



enables experts to ask probing questions that challenge underlying assumptions.

Create Memorable Testimony

Jurors are likely to recall two or three things about each witness. While a witness' overall testimony may influence individual verdict preferences, only the most memorable aspects of that testimony are likely to be recalled and discussed during deliberations. Given this reality, one imperative in witness preparation is to identify the two or three most important aspects of an expert's opinions and ensure that those issues are highlighted throughout the testimony. Preparation for expert trial testimony should begin with an understanding of the talking points that must be conveyed to the jury. Then the testimony outline can be structured around those points.

"...if the testimony is not memorable, it will not be persuasive during deliberations."

There are a number of tools that will enhance the salience of key points. Demonstrative exhibits and anecdotal examples are standard tools. However, computer generated simulations can be quite persuasive in cases where it is important to establish a sequence of events or a fluid process. Animations that depict the movement of a plume in a geological formation can help jurors view in three dimensional space the proximity of a plume to water wells of interest. Similarly, animation of an accident reconstruction can become a visual representation of the accident.

It bears mentioning that memorable testimony does not require a computer animation. Experts who have a penchant for teaching are often quite effective when permitted to leave the witness stand to

explain a concept to the jury using a dry erase board. The most effective approach depends on the nature of the case and the attributes of the witness. The key is to play to each expert's strength with a recognition that if the testimony is not memorable, it will not be persuasive during deliberations.

Communication Skills Training

Communication skills training is particularly important for expert witnesses. As mentioned previously, expert witnesses are generally receptive to suggestions for improving their credibility and demeanor. Moreover, experts with little or no courtroom experience will be receptive to suggestions that will reduce their anxiety and bolster their credibility.

Communication skills training is a person-specific activity. While there are a general set of guidelines for verbal and nonverbal behavior that can be provided to every expert, specific recommendations for enhancing credibility are dependent on the style and demeanor of the witness. Sometimes it is important for a witness to talk less, while other witnesses need encouragement to provide more detailed responses. Some witnesses are too argumentative, while others are not assertive enough. Witnesses sometimes need assistance improving the precision of their language or developing an analogy or example to illustrate a key point. In this regard, the simulation of direct and cross-examination testimony permits the attorneys and witness consultant to provide specific feedback necessary to sharpen an expert's testimony at trial.

Summary

This paper was designed to introduce the concept of credibility assessment and

provide an understanding about juror information processing and the concerns jurors develop about the bias inherent in testimony from hired experts. Experts who understand these issues will be better prepared to develop trial testimony that is both credible and memorable. While communication skills training can enhance the delivery of expert testimony, it is equally important to focus on strategies for appealing to jurors with varying levels of cognitive involvement and capability.

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