



What Makes an Effective Expert Witness

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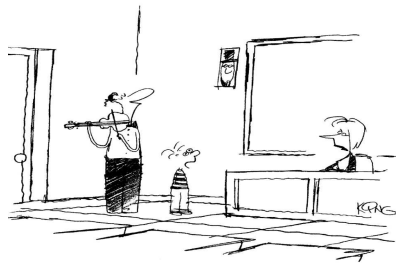
The Expert's dilemma: Truth vs. Advocacy



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The Expert's Dilemma



"I've hired this musician to play a sad melody while I give you a sob story why I didn't do my homework. It's actually quite effective."



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The Expert's Dilemma

- Nationwide we see that approximately 70% of jurors Agree or Agree Strongly that:

“Most Expert Witnesses Will Say Whatever Their Lawyer Wants Them To Say”



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The Expert's Dilemma

Who Are You?

An Advocate Hired by 1 Party in a dispute	Aiming to give testimony that above all helps your client's case
OR	
An objective, neutral expert	A witness for the truth, which exists independent of any party's interests



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The Expert's Dilemma

- Americans want to believe that a trial is about uncovering the truth
- Jurors, like all of us, have systematic biases and limitations in their information processing that skew their abilities to evaluate what is true



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The Expert's Dilemma

- You have to be an advocate on behalf of what you believe is the truth *but...*
- You are using “the truth” for the purposes of persuasion



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The Expert's Dilemma

- You have to persuade the jurors through your performance that you are not persuading....
- ...but are being an **advocate for the truth**



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The Expert's Dilemma

- Most jurors are overwhelmed with multiple versions of the truth
- If not given clear principles for evaluating competing claims, jurors write off all the expert testimony at a trial as advocacy-oriented “spin”
- Jurors seek experts who give them a clear answer to the question: “How can we figure out whose version of the truth is the best?”



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15 Mistakes experts make in testifying




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Mistake 1: Failure to establish general acceptance in the field

- **The expert's methods, in order to be admissible in California, must be generally accepted in the field**
 - Remember the court can keep an expert from testifying
 - Failure opens the expert up to a Kelly/Frye challenge and a special evidentiary hearing may be held
- **Needed to establish credibility with the jury**




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What can an expert testify to?

- **Scientific, technical, or other specialized knowledge that will assist the trier of fact in understanding the evidence or determining a fact at issue**
- **A witness qualified as an expert by knowledge, skill, experience, training, or education may testify to an opinion if:**
 - The testimony is based upon sufficient facts or data
 - The testimony is the product of reliable principles and methods
 - The witness has applied the principles and methods reliably to the facts of the case



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The General Acceptance Test

- Courts will go a long way in admitting expert testimony deduced from well-recognized scientific principles or discovery
- However, the thing from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs.



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Mistake 2: Failure to answer counsel's question directly

- Direct examination is a set of “soft-ball” questions
 - Answer directly
 - Don't go on too long (give 3 or 4 sentences) and pause to let counsel ask the next question, even if it is “and what did you do next?”
 - Make the discussion conversational



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Mistake 3: Use of jargon which goes undefined or unexplained

- Only use technical terms after they have been defined
- Consider providing a glossary
- Do not talk down to jurors
- Most jurors operate at an 8th grade reading level
- Offer a definition or explanation before counsel needs to ask for it
 - For example, “When I use the term x, I mean ...”



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Mistake 4: Reliance on information provided by counsel rather than directing counsel as to what information to provide

- **The expert is supposed to know more than counsel and is supposed to be independent, therefore the expert must tell counsel what information or data to provide in order to do the job successfully**
 - Relying on counsel means that the expert is neither independent nor doing the best possible job



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Mistake 5: Lack of first hand knowledge of the material on which the opinion is rendered

- **If the expert used colleagues, associates or others to do the work, the expert must show that s/he directed the work personally**
- **The expert told others what to do, how to do it and reviewed the results of their work**



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Mistake 6: Failure to admit obvious bad facts or results

- **Jurors are able to see when there is something obvious that the expert should admit to**
 - By fighting the obvious, it hurts credibility and draws juror attention to the issue
 - Admitting to the obvious bad information usually means that the jurors will not even remember the issue



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Mistake 7: Changes testimony

- **What ever answer is given, stick to that answer**
 - This is particularly true on cross examination



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Mistake 8: Anything is possible

- **Of course anything is possible, but do not go along with some hypothetical that does not match expert's prior testimony or that conflicts with the facts in the case**
- **Why the scenario presented is not possible, given the specific facts of this case**



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Mistake 9: Getting paid for your testimony

- **Experts are paid for their time, not their testimony**
- **Do not be embarrassed about your hourly fee or how much you have billed to date**
 - If you work for a firm, your firm sets your hourly billing rates at \$.....



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Mistake 11: The other side's expert is not the villain

- **If the other side's expert has done things you agree with, do not be afraid to agree with certain aspects of that expert's work**
 - Be clear where your work and the other side's expert's work differ, and why
 - What mistakes has the other side's expert made and why



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Mistake 12: Do not appear to follow a ping-pong game when looking at the jury

- **Do not look at the jury as you give every answer**
 - On longer answers, look over at the jury, not looking at any one juror for more than a brief couple of seconds
 - Follow counsel's direction: "tell the jury about...", "explain to the jury..." which is a great clue when to look at the jury
 - When finished, look over to counsel as a signal that the answer is finished and counsel can proceed to the next question



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Mistake 13: On cross examination, failure to look counsel in the eye when answering

- **People generally cannot look someone in the eye and lie to the them**
- **Looking the cross-examiner in the eye shows strength of character and self-confidence in one's work**



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Mistake 14: On cross-examination, agreeing with counsel when it is not necessary

- **“We can agree that...” The expert never wants to agree with counsel**
 - Give an answer that repeats the issue if in fact you do agree
- **Stand up for your position**
 - You disagree with other side’s expert
 - Don’t be intimidated



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Mistake 15: Arguing with opposing counsel

- **You can disagree with counsel, but do not get into an argument**
- **Fighting about the meaning of technical or ambiguous terms**



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**What Turns Jurors Off?
Or What To Be Careful Of**

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Over-Rehearsed Testimony

- **“Both he and the other witness seemed programmed. It was like they knew what the questions were going to be, and they were ready with the answers. He came across like a professional witness and was not very genuine.”**
- **“Her testimony sounded like she was reading from a script.”**



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Unenthusiastic Testimony

- **“He kept looking up at the ceiling and yawning. I thought about saying something to the bailiff or judge to keep him awake.”**



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Failure to Examine Relevant Evidence Personally and Directly

- **“The fact that ... he had not reviewed the documents really took away his impact for the plaintiffs.”**
- **“I believed everything he said, but it was not really applicable to the case. He spoke more from a theoretical perspective and not more specifically about this case.”**



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Overly Technical Testimony

- **“I couldn’t understand a thing he said. He was too technical and didn’t speak in layman’s terms enough.”**
- **“He became annoying, almost nit-picking. He was very painstaking. During the deliberations, someone said he couldn’t answer questions without looking at his notes.”**



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Rambling and Irrelevant Testimony

- **“The witness did not stay on the subject and offered too much information. It was glaringly obvious that he was doing cartwheels to bring his scientific opinion to the point where he could say these 2 inventions were different... He seemed to be totally out of control.”**



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Evasive or Combative Answers

- **Combativeness and evasiveness two sides of the same coin**
- **Both signal insecurity in your expertise – fear that your results will not stand up to scrutiny**
- **Jurors will not trust insecure experts**



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Mistaken and Self-Contradictory Testimony

- **“The witness used inappropriate numbers, didn’t do deductions properly, presented things in a roundabout way, and gave a lot of incorrect information.”**



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Arrogant Self-Presentation

- **Arrogance a sign you do not listen and have faulty evaluation processes**
- **Jurors learn better from people who respect their intelligence rather than talk down to them**



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Other Behaviors that Weaken Credibility

- **Appears ill at ease or nervous**
- **Uses indirect eye contact**
- **Crosses arms defensively across chest**
- **Quibbles over common terms**
- **Drinks a lot of water**
- **Looks to attorney for assistance in cross**
- **Uses defensive tone of voice**
- **Uses lots of “ah’s” or “uh’s”**



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Recommendations For Improving Expert Persuasiveness



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Improving Persuasiveness


- **The best experts are the best teachers**
 - Be prepared to teach about basic valuation concepts
 - Use visuals to explain concepts, information, data and conclusions



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Improving Persuasiveness

- Give brief, short answers
- Provide your reasoning for coming to an opinion
- Admit when you don't know something
- Don't let opposing counsel get away with misstatements



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Improving Persuasiveness

- **Be dynamic**
 - Be active
 - Smile
 - Speak in an engaging and dynamic tone of voice
 - Don't speak too softly or too loudly
 - Change tone of voice
 - Change tempo while speaking



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Improving Persuasiveness

- **Convey Trustworthiness**
 - Be consistent in behavior, body language, dress, and speech
 - Treat others with respect
 - Treat others as equals
 - Consider a range of scenarios – take a wide view of the evidence
 - Do not evade tough questions on cross



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Improving Persuasiveness

- Be sure that you are clear about the scope of your assignment
- Make sure you spend sufficient time with your counsel discussing his or her expectations of your testimony
- Ask counsel what the trial themes are
- Understand the broader context of your testimony



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Improving Persuasiveness

- Make sure you know how your attorney is planning to argue damages in closing
- Ask to see the jury instructions jurors will be using to decide damages
- Remember that jurors are anxious about deciding damages—give them tools to handle their anxiety



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Will you be more persuasive if jurors like you?

As an expert, being likeable is less important than being:

- Competent
- Prepared
- Clear
- Relevant
- Respectful of the jury, opposing counsel and the process
- An effective teacher



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