



COUNTERPOINT
The Journal of Science and the Law

The Expert Witness as Educator

The CACDL Seminar
November 10, 2018

Jan Semenoff, B.A., EMA

Susan Reschny, Ph. D.

Counterpoint – The Journal of Science and the Law

Office toll-free (888) 470-6620

jan@Counterpoint-Journal.com

www.counterpoint-journal.com

Contents

The Expert:	2
Why Use an Expert?	2
Daubert, Gatekeeping and the “Scientific Method”	3
Voir Dire	4
Direct Exam	5
Questioning the Expert	6
The Scientific Method	8
Juries: Possible Barriers to Justice / Science and Adults	9
Explaining Science or Technology – The Expert as Educator:.....	10
Recognizing Barriers:.....	10
Perceived Jury Leaders:.....	11
The Conundrum of the Paradigm Shift.....	12
Communicating to the Jury	12
The Qualities of the Expert Witness.....	13
Some Helpful Pointers from a “So-Called Expert”	14



Part 1 - The Expert Witness as Educator

The Effective Use of Scientific Testimony at Trial

Jan Semenoff, BA, EMA
Susan Reschny, Ph. D.

Counterpoint Journal
1(888) 470-6620
jan@counterpoint-journal.com
counterpoint-journal.com

The Expert:

Why Use an Expert?

First, you can't testify. You should understand the material so that you can effectively cross examine the opposing expert, and ask pointed questions of YOUR expert, but you can't testify. Therefore you will need someone who by virtue of education, training, skill, or experience, is understood to have knowledge in a particular subject beyond that of the average person

Federal and state rules of evidence define the role and use of the expert witness. An expert witness or professional witness has specialized knowledge sufficient that others may officially (and legally) rely upon the witness's scientific, technical or other opinion. This opinion about an evidence or fact issue within the scope of their expertise, referred to as the *expert opinion*, is offered to the court as a means of assistance to the fact-finder.

In England and throughout continental Europe, the expert witness is seen to be totally independent. They are appointed by the court, with the parties unable to seek to influence or manipulate their views. They address their letters of opinion and expert testimony directly to the court, even though they are paid by the party commissioning their report and testimony. Their obligation is to "science."

In the United States, an expert testifying in court must satisfy the requirements of Federal Rules of Evidence 702. Generally, under Rule 702 or its state law equivalent, an expert is a person with "scientific, technical, or other specialized knowledge" who can "assist the trier of fact" which is typically a jury. A qualified expert may testify "in the form of an opinion or otherwise" so long as:

1. The testimony is based upon sufficient facts or data,
2. The testimony is the product of reliable principles and methods, and
3. The witness has applied the principles and methods reliably to the facts of the case."

4. The expert is also constrained to testify to matters in a recognized scientific field of endeavour, and only then to matters that are generally accepted within the relevant scientific community.

Daubert, Gatekeeping and the “Scientific Method”

In general, there are two different legal paradigms that govern the admissibility of expert evidence: the older *Frye* standard (1923), and the newer *Daubert* standard (1995). The *Frye* standard is a test to determine the admissibility of scientific evidence before the courts. In the majority of jurisdictions, the *Frye* standard has been superseded by *Daubert*. The *Daubert* standard is a rule of evidence regarding the admissibility of expert witnesses' testimony during all federal and some state legal proceedings. In regards to this standard, a party may raise a *Daubert* motion, which is a special type of motion *in limine* raised before or during trial to exclude the presentation of unqualified evidence to the jury. The *Daubert* trilogy refers to the three United States Supreme Court cases that established the *Daubert* standard:

Daubert v. Merrell Dow Pharmaceuticals, which held that Rule 702 did not incorporate the *Frye* "general acceptance" test as a basis for assessing the admissibility of scientific expert testimony;

General Electric Co. v. Joiner, which held that an abuse-of-discretion standard of review was the proper standard for appellate courts to use in reviewing a trial court's decision of whether expert testimony should be admitted;

Kumho Tire Co. v. Carmichael, which held that the judge's gatekeeping function identified in *Daubert* applies to all expert testimony, including that which is non-scientific.

In *Daubert*, the Court established the following guidelines for admitting scientific expert testimony:

- *The judge is a gatekeeper*: Under Rule 702, the task of "gatekeeping", or assuring that scientific expert testimony truly proceeds from "scientific knowledge", rests on the trial judge. This puts a great deal of weight on the judge's decision and requires implicitly that the judge is capable of assessing the veracity of a specific scientific opinion, often in light of conflicting testimony and dissenting opinions. *Can judges really be considered valid scientific arbitrators?*
- *Relevance and reliability*: This requires the trial judge to ensure that the expert's testimony is "relevant to the task at hand" and that it rests "on a reliable scientific foundation". Concerns about expert testimony cannot be simply referred to the jury as a question of weight. Furthermore, the admissibility of expert testimony is governed by Rule 104(a), not Rule 104(b); thus, the Judge must find it more likely than not that the expert's methods are reliable and reliably applied to the facts at hand.
- *Scientific knowledge = scientific methodology*: A conclusion will qualify as scientific knowledge if the proponent can demonstrate that it is the product of sound scientific methodology is derived from the scientific method. The proponent always has the burden of proof.
- *Relevant factors*: The Court defined "scientific methodology" as the process of formulating hypotheses and then conducting experiments to prove or falsify the hypothesis, and provided a

nondispositive, nonexclusive, "flexible" test for establishing its "validity", i.e. the "scientific method":

1. Empirical testing: the theory or technique must be falsifiable, refutable, and testable.
2. Subjected to peer review and publication.
3. Known or potential error rate
4. The existence and maintenance of standards and controls concerning its operation.
5. Degree to which the theory and technique is generally accepted by a relevant scientific community.

In 2000, Federal Rule 702 was amended in an attempt to codify and structure the "Daubert trilogy." Rule 702 now includes the additional provisions which states that a witness may only testify if:

1. The testimony is based upon sufficient facts or data
2. The testimony is the product of reliable principles and methods, and
3. The witness has applied the principles and methods reliably to the facts of the case."

Voir Dire

Please, on behalf of experts everywhere, don't let your expert become the opposing counsel's piñata.

Certainly, for the expert at least, one of the most critical events at trial is the *Voir Dire*. This trial within a trial establishes the admissibility and scope of the expert's testimony. However, it is my observation, that this is the point at which the opposing counsel will undoubtedly attack the offered expert. Tactics include such items as:

1. The history of the witness. Personal histories of past testimonies, transcripts and personal events are open for examination.
2. The educational experience is also up for examination. I have seen Ph. D's with more degrees than a thermometer challenged as to their academic credentials.
3. The fact of payment for a witness. Certainly, as we are all well aware, the Judge and the lawyers involved are not performing their duties *pro bono*. This line of personal attack should properly be objected to, as the fact of payment only speaks to the bias of the witness, and not the admissibility of their evidence.

The defense attorney, specifically, should however ensure one situation does NOT occur. In interests of economy, often the defense team only has the means to hire ONE expert. Then, that expert is put in the position of having to speak to multiple issues. This certainly can be problematic. An expert in toxicology may have no real expert experience in the operation of a breath test device. Conversely, an expert in breath alcohol devices may have only a rudimentary knowledge of Standardized Filed Sobriety Testing.

Please, on behalf of the experts – don't put your expert in this precarious position. Never blindsides an expert by trying to have them declared an expert under 702 for an area outside their expertise, and

certainly NEVER without discussing their expertise beforehand. Remember, the situation that arises when the trier of fact does not allow an expert to testify will undoubtedly follow that expert from court to court for some time, perhaps the rest of their career. It is unethical to put the expert in that precarious position merely for the benefit of a single client. Long term professional goals are important, both for the lawyer and the expert witness.

In my opinion, one of the mistakes attorneys make is based on the notion that they know their expert, and perhaps the associated subject matter quite well, forgetting that the judge and jury don't know the expert or material at all. More time should be spent during *voir dire* in establishing the expert's knowledge, training and vast experience in the subject matter at hand. The idea is to establish a strong favourable connection with the jury. It is imperative that the jury holds your expert's testimony in high regard.

Direct Exam

It is extremely important to know your material and prepare carefully. Your expert witness is your resource person. Use them to your best advantage. Learn from them – they should be more than willing to help you understand the background science of the case. You need to know the science and the technology almost as much as your expert does – not necessarily to handle to direct exam, but to help establish the credentials, the credibility and the reliability of the expert¹. Asking questions that re-directs the expert is a hazard.

In my experience, a laser-beam focus is the best approach. Hone-in on the issue identified and focus your examination in that direction. The “*infinite monkeys with typewriters produce Shakespeare*” approach dilutes the issue at hand. I am concerned that it gives the impression to the jurors that the expert is merely a mad-dog howling at the moon. The expert, when used effectively, should be seen by others as the most reasonable person in the room. Their testimony should be the most reasoned, the most logical, backed up by the published facts of peer-reviewed science, and be the most plausible. While expert scientists working for the state may come to see their function as helping the police, the defense expert must be perceived as impartial. BOTH sets of experts must remain impartial to the case at hand, and testify with the notion of providing verifiable, accurate, and reliable information to the court.

I often see the experts from both sides jump right into the heart of their testimony, without establishing the proper framework. Take the time to instruct the jury on such issues as the workings of the breath test device, the underlying physiology or scientific principles, and how the calculations are performed. Remember, the judge, and the lawyers involved may understand these issues, and have heard them countless times before. The jury, often with little scientific literacy will be struggling to understand the

¹ Having said that, it is your obligation to learn the basics of the science and technology involved. The expert, a qualified professional with a caseload equaling yours, cannot be expected to teach fundamental or rudimentary issues in alcohol testing, or any other discipline for that matter. I once had an attorney call me up and start the initial consultation with the question, “So, how does an Intoxilyzer work?” The criminal lawyers should have at least some basic training in scientific reasoning, methodology and language in order to effectively present their case and offer a duly diligent examination of the evidence of the opposing side. If they do not have this fundamental understanding, they should not accept the client. *The physician's creed of “do no harm” may be an appropriate reminder in this regard.*

concepts. Even if these often-complex concepts are presented in a classroom style lecture, they may be lost when the experts launch in with undecipherable technical jargon, acronyms, and advanced level science. When people don't understand concepts, they have a tendency to tune-out.

Questioning the Expert

With regard to the way questioning occurs during direct examination, I feel compelled to make one point. When you are crossing YOUR expert, ask open ended question as much as possible. I feel that, as an example, *"Tell us about the mouth alcohol detection system on the..."* is a more effective question than the statement, *"So, in your opinion, the slope detector doesn't work?"* Let the expert explain concepts, connect with, and *educate* the jury. I think the effect of having the expert continuously answer in the affirmative diminishes their effectiveness and gives the appearance that they are little more than a "Yes-man." If the person can answer the question "yes or no", then it is *not* a good question for an expert.

I've seen this last issue firsthand on a couple of occasions. It is frustrating for the expert, who needs to explain issues to the court, to sit there and repeatedly answer, "Yes" for all the questions. I had one event a number of years ago where I was suddenly aware while testifying that all I was doing was answering "Yes" to any question put to me. I started trying to vary my responses; I'd alternate between, "Yes", "That's correct", and "I certainly believe so." This kind of direct examination is damaging to your case, damaging to your witness in the eyes of the jury, and ultimately is an ineffective use of a highly competent, and costly, expert witness. *You hired an Expert, not a "Yes-Man" ...*

Finally, I want to expand upon the notion of the expert appearing as the "most reasonable guy in the room." I think the expert should be logical, willing to concede the patently obvious, and most of all reasonable. Let the other side's expert try and defend an absurd stance. An expert should not attend court, from either camp, with an axe to grind, or an untenable position. Often, the state expert and I will agree upon about 95% of our testimony. It is the thoughtful and considered disagreement in the other 5%, backed with data, observations and a logical and plausible rationale that establishes *reasonable doubt*.

In the next article, we will look at junk science, good application of the scientific method, and how juries, in general, understand scientific issues.

Part 2 - Junk Science

We live in a time when “alternate facts” and “fake news” are the perceived norm, when actual scientific findings are questioned as to their reliability and applicability, and where “junk science” makes its way onto the world stage to shape public opinion on matters of significant importance.

For our purposes, “junk science” is defined as an improper or inappropriate application of scientific theory not supported by the general scientific community, or so novel in its approach that it has not yet been fully vetted and accepted after peer-review.

Appropriate application of *Daubert* criteria leave us in a position that the only antidote to junk science is scientific literacy. There can be no doubt that the expert scientific evidence presented by some is little more than dogma, full of bias, and with intent to present a one-sided view. This cannot be the position of your case. Alan Gold writes:

Appellate courts in North America are recognizing that there is really only one relatively successful antidote for a system that has in recent times appeared to suffer a bad case of “junk science,” of inadequate, unreliable, and even worthless opinions that have managed to beguile their way into courtrooms disguised as expertise. That remedy is scientific literacy: a knowledge of science and its methods sufficient to distinguish good science from bad and expose the latter².

He continues:

Scientific literacy is essential for justice to be done. It is essential if it is to be the case that only probative opinions are to be admitted and only valid inferences to be drawn by a trier of fact. The structured questioning of a well-briefed and scientifically opposing counsel can be a searching and rigorous examination of expert evidence, especially when accompanied by the quality logical reasoning of a scientifically literate fact-finder. There is simply no close contender for the task of successfully excluding junk science and bogus experts from the courtroom³.

The National Academy of Sciences recent study on the “health” of forensic science in the nation points out this issue with justifiable concern. Given the identified issues with education and training, best-practices and methodologies, coupled with a general lack of oversight in the forensic science labs across the nation, perhaps a greater emphasis should be given the Congressional Committee’s recommendations.

In *Melendez-Dias v. Massachusetts*, Mr. Justice Scalia comments on the National Academies’ report:

Nor is it evident that what respondent calls “neutral scientific testing” is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police

² Gold, Alan D., *Expert Evidence in Criminal Law – The Scientific Approach*, Irwin Law, 2003, page 17.

³ Ibid, Gold, page 18.

departments, where the laboratory administrator reports to the head of the agency." National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 6-1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." *Id.*, at S-17. A forensic analyst responding to a request from a law enforcement official may feel pressure--or have an incentive--to alter the evidence in a manner favorable to the prosecution.

He goes on to say:

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Metzger, *Cheating the Constitution*, 59 *Vand. L. Rev.* 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 *Va. L. Rev.* 1, 14 (2009). And the National Academy Report concluded:

"The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." National Academy Report P-1.

The same is true of many of the other types of forensic evidence commonly used in criminal prosecutions. "[T]here is wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material." National Academy Report S-5. See also *id.*, at 5-9, 5-12, 5-17, 5-21 (discussing problems of subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and tool mark and firearms analysis). Contrary to respondent's and the dissent's suggestion, there is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology--the features that are commonly the focus in the cross-examination of experts.

The Scientific Method

"Science" is a process, not a product⁴. *What, therefore, makes science "good science" as opposed to "junk science"?*

1. Science is the ability to observe and describe phenomena and draw conclusions and inferences from what has been observed, measured, reported and thoughtfully considered.
2. Science integrates observations with data to draw conclusions that are confirmable.
3. Science formulates hypotheses based on results of verifiable data.
4. Science tests these hypotheses under controlled, observed, confirmed and repeatable conditions.

⁴ *Ibid*, Gold, page 80.

5. Science aims to minimize errors, either observational, computational or generated by measurement, technology or the testing process itself.
6. Science records the results without bias. The testing must be clear cut and free from interference from the observer, however unintentional.
7. Science must be transparent. Science does not hide its processes, technologies or methodologies.
8. Science invites criticism, the opposing view, and the opportunity to prove one's position, in the face of opposition, based upon a logical and clear interpretation of the observed facts. Good science welcomes cross-examination.

I am alarmed by routinely seeing opposing views by experts completely disregarded based on personal bias and scientific ignorance. I accept as factual that peer reviewed works should be considered authoritative. However, the onus this places on the authors of such works is to interpret their findings according to the results obtained, not the results desired. My advice is to read more than just the synopsis or abstract of the article presented. Often, the data supports an entirely different conclusion than the one presented in the abstract. The duty of the unbiased scientist should be to present the findings, materially, without bias or favor on the position of the author. To do any less is an affront to the scientific process.

Juries: Possible Barriers to Justice / Science and Adults

"I can't understand the science, so I'm tuning out now... Wake me when it's time for us to vote guilty..."

According to Dr. Jon Miller, Director of the Center for Biomedical Communications, "70 percent of Americans cannot read and understand the science section of the *New York Times*" (Science Daily, 2009⁵). If this statistic is valid, how do we know that jury members understand the science, intrinsic in breath or blood alcohol testing? How can jury members make an informed decision if they do not understand the basic scientific concepts? Considering that juries are selected from the general public, a wide variety of backgrounds and experiences will come to play in their perceptions of the case presented.

Science literacy has become a target for educators in North America. Miller comments:

While science literacy has doubled over the past two decades, only 20 to 25 percent of Americans are 'scientifically savvy and alert.'... Most of the rest 'don't have a clue.' At a time when science permeates debates on everything from global warming to stem cell research, people's inability to understand basic scientific concepts undermines their ability to take part in the democratic process. (Dean, 2005⁶)

Miller's assertion raises a number of issues for both lawyers and their expert witnesses.

⁵ <http://www.sciencedaily.com/releases/2007/02/070218134322.htm> as of September 16, 2009.

⁶ http://www.nytimes.com/2005/08/30/science/30profile.html?_r=2 as of September 16, 2009.

Explaining Science or Technology – The Expert as Educator:

When giving testimony, experts must be sure to use clear and concise language. The jury must be taught the scientific concepts. No assumptions about previous knowledge should be made. If 70 percent of Americans do not understand the science section of the New York Times, simplistic explanations and demonstrative learning aids must be prepared. It is worth noting that newspapers tend to have the approximate reading level of grade six. Solomon (2002⁷) states:

Trials are about language. Word meaning, language perception and semantics ultimately dictate real understanding during jury deliberations and directly impact the completion of the verdict form! Our research demonstrates that jurors typically do not understand the real meaning of most case related language, and that this problem is magnified where the entire matter is foreign to them. Of course, these same terms are used by attorneys [and experts] with abandon! The result is confusion, or worse yet, *misguided decision making*. (p.6)

Jurors need to understand the language and the scientific concepts in order for justice to be served. As such, the expert must, at all times, be a good communicator, and an excellent educator in terms of their ability to effectively communicate complex ideas. The use of graphic organizers and visual representations of the science and issues at hand is highly effective, especially for visual learners.

Recognizing Barriers:

According to Laurel Armstrong-Buisseret⁸, an adult learning science practitioner, “probably one of the main barriers [to adult learners studying science] is fear of the subject. How many learners say they hated science (or their science teachers) at school?” If jury members did not have positive experiences in science classes, they may instantly put up barriers to the information you are trying to impart. These barriers are even more difficult to manage in a courtroom setting, where jury questions are not easily addressed. If jurors do not understand the language or the science, they are more likely to tune out the information and rely on others on the jury, or worse, a “gut” opinion based on their understanding of the science from their exposure to the media in establishing a finding of guilt or innocence. Exploring ways to overcome this barrier will be necessary at trial.

This points to the need for the expert to create a positive “learning” environment. The explanations given, often of complex issues and ideas, must be presented in a manner that is both persuasive and realistic. “Talking-down”, “talking over the heads” and excessive use of jargon will only serve to frustrate and alienate the juror from the message being presented, thus accentuating the barrier, and reinforcing the notion that “science is too hard.”

It may be helpful for the trial attorney to remember their own issues in understanding the complex scientific ideas the first time they were presented. I often teach attorneys from across Canada and the

⁷ http://www.doar.com/apps/uploads/literature62_HowJurorsMakeDecisions.pdf as of September 16, 2009.

⁸ <http://www.excellencegateway.org.uk/162461> as of September 16, 2009.

United States on the fundamental principles and operations of breath alcohol devices. I've commonly heard the following type of statement, remarked privately during a break in an embarrassed whisper: *"I don't think I will be able to do this course. I didn't do well at (insert: biology, chemistry, physics, science here) in school, and that's why I became a lawyer."* The jurors, many with far less academic educational experience, have a similar sort of visceral reaction when it comes to understanding "science."

Perceived Jury Leaders:

If it is believed that jurors may have limited science background, and perhaps emotional barriers to this area of knowledge, how do jurors determine validity in an argument and therefore conclude guilt or innocence? Solomon (2002⁹) suggests that jurors don't necessarily decide for themselves. Faced with overwhelming jargon, or technical material, jurors may look for an "expert" within their group, and this person may not truly perceive the concepts either. He comments:

Jurors typically look to fellow jurors with perceived or real subject matter expertise. It may be a trivial relationship (and this has happened), such as a juror who worked as a typing clerk in a courthouse! More typically, it will be someone who works in an area that relates to the issue at hand. For example, in a contract case, this person will have an extraordinary influence during deliberations because the subject matter of the case is so foreign to other jurors. (p. 5)

It is important to recognize that those jurors who are perceived to have background knowledge in science or technology may be deciding the verdict for the entire group.

⁹ Ibid.

Part 3 - The Expert as Educator

The Conundrum of the Paradigm Shift

When the expert witness presents a contradictory view, or indeed a new view, the juror may experience a fundamental shift in their core beliefs. To many jurors, the notion of DNA evidence, as an example, is an absolute one. Their core beliefs in this science are shaped by their exposure to its inner working through popular media. *If CSI Miami did it, it must be correct!* Now comes the expert, with chart and indecipherable diagrams in hand, to say that, *“No, it doesn’t always work this way!”* Who is the jury to believe?

In breath alcohol testing, many similar assumptions are made. The term “Breathalyzer” has become synonymous with a known and proven science – one that most of us have grown up with (it was invented in 1954). Surely the newer technologies of the Intoxilyzer, Intoximeter or Datamaster have vastly improved upon this established science. As one judge commented in a recent trial I participated in, *“Well, its’ not like they can run down to Radio Shack and just buy the parts to make this thing. This is a **highly complex scientific instrument...**”* The expert faces an uphill battle in overcoming these core beliefs.

The job of the expert, in concert with the defense attorney, is to incrementally shift these paradigms, identifying each fallacy, and educating both the jurist and the juror as to the science as really published. The focus must be on the methodologies used, variables with the breath testing device, and the accuracy, precision, reliability and specificity of the readings obtained. The correct and legal focus should be on examining the government’s evidence, without a presumption of truth for that evidence. Healthy scepticism, coupled with substantiated beliefs based on published peer-reviewed works, is at the core in establishing the presumption of innocence.

Communicating to the Jury

Throughout these articles, I have tried to portray some of the necessary qualities of the effective expert witness. Not to put too fine a point on the matter, the most important quality is the ability to *effectively communicate complex ideas in a straightforward and understandable manner*. I have observed expert witnesses launch directly into the meat of an issue with the assumption that they are speaking directly to the examining attorney or the court, or worse, a fellow technically-trained expert. They are not. They are talking to the average person who may have barriers to understanding and learning.

The effective expert is a great communicator to the jury. Remember that juries are often illiterate to the law and the science, out of their element, perhaps with a hidden agenda undiscovered in *voir dire*, yet with the power to render a decision of consequence. Regardless of the academic credentials of the expert, if they cannot convey their message effectively, their message will be lost in confusion, open to misinterpretation, and subject to misquotation by opposing counsel during closing arguments.

The Qualities of the Expert Witness

So, ultimately, what are the qualities of a successful expert witness?

- **Unimpeachability** – the expert who, for many years has espoused a view, only to adopt an opposing view upon change of employment, is open to attacks during voir dire and cross examination, and may be damaging to your case. This is not to say that opinions cannot change – far be that from the case. Accepting new opinions based on new observations or research is the hallmark of good science. Flip flopping for the appearance of financial gain invites ruin on cross examination.
- **Clarity** - The ability to effectively and clearly articulate a position, often in the face of opposing views and opinions.
- **Composure** - The ability to maintain a professional demeanor upon vigorous cross examination.
- **Integrity** – The responsibility to depict facts and opinions benignly, without interest in the outcome.
- **Positive perception by the jury** – This factor cannot be discounted. The expert runs the risk of appearing over-confident, indecipherable, arrogant, or “ivory-towered.” The “egg-head” that can’t be understood, who uses terminology and acronyms without appropriate explanations creates a barrier between themselves and the jury. Their message will be lost in the noise that is created by this confusion.
- **Objectivity** – The expert should have an opinion not based by any vested interest in the outcome of the trial. Certainly, this places the experts on both sides in a conundrum. Human nature, and the adversarial nature of the court process, exacerbate this issue. Bias, from either point of view, must be avoided at all costs. Forensic scientists employed by the state can come to see their role as “helping” the police. Defense experts likewise may come to see their role as being intrinsic to the acquittal of the accused. Neither position is tenable. The “witness for hire” role leads to the promotion of junk science before the courts.
- **Mastery of the material** – The expert should have a fundamental and deep understanding of the literature, the issues and the processes involved. However, true mastery may also mean asking more questions at every point. An inquisitive approach is perhaps better than the “know-it-all.”
- **Experience counts** – the expert who has little experience in the rough and tumble, thick-hide required world of the courts may have a difficult time managing cross examination. As well, the real-world experience of a practitioner or technician may hold more weight for the jury than the academic who has not dealt with issues in a real and practical way.

Some Helpful Pointers from a “So-Called Expert”

I was referred to in court, with an insult intended, I presume, as a “so-called expert.” The prosecutor also referred to me as, “the gentleman from Canada”. Not to be outdone, he combined the two, and referred to me as, “the so-called gentleman”. Here are some observations from the “so-called expert” (or “so-called gentleman”, if you are inclined):

- **Know the material!** I once had an attorney brush off any attempts to meet before trial. The day of trial, about an hour or so before it began, I was summoned to the attorney’s office, and asked, “*What should I know?*” I attempted to outline the science and technology issues, but it was probably too late to start the educational process. The direct-examination and cross-examination went well enough. However, things started to unravel during closing arguments. It was clear that the attorney did not understand the intricacies of the argument being made. The judge pointedly asked, “*I don’t understand... Draw me a line from A to B to C to acquittal?*” Unfortunately, the attorney did not know the issue well enough to articulate the position being taken, resulting in confusion in the judge, and an adverse finding.
- **Ask open ended questions** designed to elicit concise and thoughtful testimony from your expert. The use of questions, in which the only appropriate answer is either “yes or no” should be avoided. Try and establish questions that showcase your expert’s strengths and abilities. Don’t create, in the eyes of the judge or jury, that your expert is simply your hired “yes-man”.
- **Know your expert.** Some are uncomfortable in the courtroom. Some thrive on the unknown. Try, as much as is possible, to create an environment that shows your expert in the best possible light.
 - This also means knowing your judge, and the opposing counsel. Will your judge be amenable to a specific issue or line of questioning? Will the opposing counsel attack the expert out-of-hand, or take a more rational approach? Often the judge will outline the scope of the testimony to come after *voir dire*. Develop your line of questioning within that established framework.
- **Have a focus and a strategy** that has been thoroughly discussed beforehand. Be careful about blindsiding your expert on the stand.
- **Provide, where appropriate, full disclosure to the expert.** Nothing is more embarrassing than being confronted with facts not previously disclosed. Also, those undisclosed facts may have changed the expert’s initial opinion from what was put forth.
- **Remember that the expert is not an expendable commodity.** Credibility is an important trait. Throwing your expert under the bus for your client will probably do two things. First, you will never be able to use that expert again. More likely, you will never be able to use ANY expert again.
- **Tailor your expert’s expertise to that of the facts or issues at bar.** Don’t try to pigeonhole your expert to speaking to issues beyond their scope and experience.
- **Use a teamwork approach.** The best relationships, and the best success rates achieved are when you work together with your expert as a team, drawing upon each member’s strengths while minimizing their respective weaknesses.

- **Remember that your *pro bono* event is not necessarily of concern to the expert.** Expert witnesses typically only are required to address contentious issues. We are only called in when the case is difficult. Your *pro bono* event is your business, not your experts.
- **A reasonable budget** is required for travel and accommodation, in addition to regular expert fees for reports, studies, research and testimony. Many experts are bona fide “road warriors”, and as such, should not be expected to take the Greyhound and sleep on your basement floor. Appropriate business accommodations should be the standard.
- **Have an understanding of scheduling issues.** Many experts are booked months in advance. Setting a trial date without consulting the expert, only to require a letter from the expert explaining the previously booked date is inappropriate. As well, sending a file at the last minute with an expectation of completion for a filing deadline should be a last resort.

Experts walk a fine line in an approval-based profession. They need to be impartial yet promote a specific position or point of view. They need to be perceived as having expert-level knowledge without appearing biased, overbearing, or difficult to understand. They need to communicate complex ideas clearly, and not speak over the heads or talk down to their audience. The role of the retaining attorney is to provide the necessary framework and support to create a positive team that effectively uses the resources of the expert.

Jan Semenoff, B.A., EMA

Susan Reschny, Ph. D.

Counterpoint Journal

Office toll-free (888) 470-6620

jan@counterpoint-journal.com



Counterpoint-Journal.com

A special thanks to attorneys Mark Brayford, Wayne Foote, Bruce Kapsack, and Justine McShane for their review and helpful comments.