

# How jurors perceive expert witnesses

Jeremy Rose

*You spent money finding and hiring an expert witness* for your case. He had stellar credentials, extensive experience in the right area, and supported your arguments 100 percent. He was on the stand for two days, and in your view, he scored big points with the jurors. But you lost the trial, and when you interviewed the jurors, you discovered that they didn't buy what your expert had to say. In fact, he was one of the reasons you lost.

What went wrong?

More to the point, how can you figure out in advance whether jurors will like and believe your experts? Post-trial interviews consistently reveal that jurors use different criteria than attorneys do when it comes to evaluating experts and that your idea of what is effective may be completely different from theirs.

An expert who is valuable in helping you understand your client's case and developing strategic arguments may be the wrong person to testify on the stand. The key to understanding what makes experts effective in front of jurors is knowing how ju-

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**Selecting experts may involve more than you think. The author suggests considering experts from the jury's perspective.**

rors perceive the role of experts in trial.

Jurors expect experts to be teachers. This may seem obvious, but it is essential to keep in mind that jurors want experts to explain concepts to them so they can make their own decisions. Two things hamper experts' effectiveness: explaining concepts poorly and making jurors' decisions for them (that is, arguing rather than explaining). These problems can be dealt with when you are choosing experts to hire or preparing them for trial.

## **Hiring the right experts**

Several factors should be looked at closely when hiring experts. You may find some extremely useful in preparing for the trial but decide against having them testify. When deciding whom to put on the stand, keep in mind the following factors:

**Credentials.** The natural starting point for selecting experts to testify is their credentials. Be warned, though, that the length of an expert's résumé may impress you, but it may mean nothing to a jury. It can be quite a shock to learn how quickly

jurors can dismiss highly qualified experts and throw out all their testimony. Jurors routinely tell lawyers and jury consultants, "The expert had a long résumé, but it didn't make any difference to me."

This does not mean that credentials mean nothing to a jury: It means that the length of a résumé is not the most important factor. Experts who win the war of credentials with the opposing side's expert usually win on the basis of how much hands-on experience they have with the topic in question. For example, jurors find treating doctors more persuasive than expert doctors. In one post-trial interview, a juror said, "The defense experts made all these conclusions about women they'd never met."

In the same vein, jurors find engineers who have actually worked with the equipment at issue more persuasive than academics who may have written books on the subject but who have not spent much time in the trenches. Jurors are quick to pick up that a witness may know everything about a certain topic, but it's not the right topic.

They can also distinguish between an expert who has studied the case and one who has given only a cursory glance at the evidence before forming an opinion.

For these reasons, experts with less experience on the stand can actually have more credibility than those who have been professional witnesses for years. In jurors' eyes, the more time professional experts have spent on the stand, the less time they have spent in the "real world."

Inexperienced experts are also less likely to be perceived as "opinions for hire." These experts are more likely to be seen as people who are called into the courtroom because of their knowledge about a particular case issue. Well-experienced experts can be highly effective in court, of course, but their area of expertise should be considered as closely as their trial experience.

*Teaching skills.* A juror in a complex contract dispute once raved about the first expert witness to testify: "The first witness—the teacher—was really very good, and she was a teacher. She was excellent. She laid the groundwork for the whole jury trial." However, as we all no doubt remember from high school, there are good teachers and bad teachers.

An expert who can explain concepts simply and clearly to you will likely be able to do the same for the jury. But one who is prone to say, "Well, actually, it's more complicated than that"—and respond to every question with an answer so complex it generates five more questions—will probably leave jurors baffled.

Even teachers who do well in the classroom may not necessarily do well in the courtroom, since the "students'" motivation is different. In the classroom, the teacher holds the upper hand, and the students have good reason to listen and learn. In the courtroom, the jurors hold the upper hand, and they have nothing to lose by dismissing an expert and ignoring his or her testimony, particularly if the opposing side has an expert who does a better job of explaining the issues in a way that serves their client.

*Personality.* If experts are hired based on expertise, their personality should not mat-

ter. But, of course, it does. The plain fact is that if jurors find witnesses egotistical, long-winded, or annoying, they will not listen to their testimony. If you find an expert annoying, chances are very great that jurors will, too.

In one case, the attorneys preferred not to eat dinner with their expert because they found him to be a poor dinner guest: long-winded and argumentative. Not surprisingly, the jurors felt the same way about him after hearing him testify on the stand.

Personable experts can score big points with the jury. The personality traits jurors respond most favorably to are openness, a relaxed manner, a sense of humor, and enthusiasm. Most important, effective experts convey the sense that they really want ju-

**No loss**  
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rors to understand the facts and concepts that are at issue.

**Expert pitfalls**

Once you have hired experts, the issue of how effective they will be on the stand remains. What makes experts effective is related to the ambiguous feelings many jurors have about experts in general.

On the one hand, jurors sometimes feel they are being asked to make a decision they are not qualified to make, especially in complex cases. Jurors are grateful to experts who explain case issues simply, clearly, and in a way that helps them make a reasonable decision. On the other hand, jurors are disturbed by the concept that an attorney can hire someone to back up almost any position. This concern is reinforced when both sides bring out highly qualified experts who presumably know everything there is to know about the field in question but who contradict each other on every point. The notion of the "hired gun" runs counter to jurors' sense of justice.

Jurors are likely to question experts' motives for testifying, and that means that the risk of them seeing an expert as a "hired

gun" is always present. A motivation that jurors are more comfortable with is an expert's desire to help them understand what they need to understand in order to make a just decision.

**Good experts, bad experts**

*Explanation versus advocacy.* What jurors want from experts is explanation. When they feel they are getting argument instead, their tendency is to begin counterarguing in their own minds, to resist the experts' efforts to be persuasive. For persuasion to work, it must be self-persuasion. In other words, it is what listeners tell themselves that is most compelling. If they feel experts should not be advocating in the first place, jurors tend to tell themselves why the experts are wrong and why they should not be acting like lawyers. As a result, the jurors will not hear what the experts are saying.

In a recent case, jurors were so offended by the expert's advocacy and so suspicious of his financial motives for being an advocate (they suspected that in addition to his high fees he would profit from the verdict somehow) that they completely tuned him out. They learned what he had been trying to say only after hearing it summarized by the other side's expert, someone they preferred because he gave the appearance of answering questions in a straightforward manner.

Since jurors are so uncomfortable with experts acting like lawyers, they are relieved when they hear an expert who does not appear to be arguing for a particular point of view, but who is simply explaining the facts. In one case, a juror explained why the plaintiff's experts won the credibility battle: "They didn't have an ax to grind. They are just everyday Joes out on the job. They just called it as they saw it."

*Investment in the case.* Experts who are perceived as not being invested in the case outcome and who are not overly aggressive, arrogant, or defensive on the stand are perceived as more credible. Emotional investment is a negative. One juror in a class-action suit was critical of a plaintiff's expert because "when the defense lawyers were questioning him, he started to get a little irate. He got a little more emotional than

he should have." As this comment indicates, experts who become defensive and fail to remain levelheaded during cross-examination can lose their effectiveness.

*Good teachers versus bad teachers.* Jurors love experts who do a good job of teaching them what they need to know. Probably the most important key to effective teaching is for experts to have a good understanding of what laypeople do and do not know about the subject at hand. Assuming that jurors know more than they actually do about contract law or neurology or the Chicago Board of Trade can leave them confused. The longer experts talk without laying out the basics, the more likely they are to lose jurors' attention. On the other hand, there is a danger in being too patronizing, and once jurors are insulted by a simplistic explanation, it is difficult to get back in their good favor.

For experts and attorneys, it is easy to forget what you didn't know or understand before you began learning about a subject. It is hard to gauge what level of explanation is necessary as a starting point. Experts who are too involved in a subject tend to jump right in the middle of an explanation without laying out the necessary foundation first, and they fail to translate jargon into plain English.

At the other extreme are experts who love to teach too much. They overwhelm jurors with excessive information. This makes it easier for jurors to get lost in details and makes it more difficult for them to track the expert's main points.

Good "teachers" have a limited set of main points and lay those out clearly from the outset, perhaps with a simple chart. This map makes it clear where the experts are going and how they are getting there. Good teachers use arguments that are simple enough that jurors can recall and repeat them in deliberations.

*Time wasting.* Jurors' biggest complaint about trials is that they waste time. Once jurors are seated, they have probably already spent hours or even days waiting for jury selection to begin, and their patience is running short. Although jurors are usually interested in the workings of a trial and pay attention to testimony, they are quick to pick up on when their time is being

wasted. Long-winded experts with no apparent point to make can be unforgivable in jurors' eyes. When asked what they like about effective witnesses, jurors often say that they were concise.

*Expertise versus common sense.* Jurors know why they are brought into a courtroom to decide a case: to apply their common sense. But there is a tricky relation-

## Post-trial interviews reveal that jurors use different criteria than attorneys do to evaluate experts.

ship between jurors' common sense and experts' specialized knowledge.

The expert's job is to take over where common sense leaves off—to explain concepts that jurors would not know about from their everyday lives. Jurors rely on experts to tell them what they don't already know. Experts must not, however, assume that this means jurors' minds are empty receptacles eagerly waiting to receive their knowledge and take their opinions at face value. One juror summarized this attitude of some experts: "Here I am. Just believe what I say, and that's all there is to it."

In reality, experts must explain novel concepts in a way that matches jurors' ideas of common sense. Experts who contradict jurors' common sense do not stand a chance, regardless of how much more the experts may know than the jurors.

Analogies are crucial as a means of linking abstract knowledge with common-sense notions, but a bad analogy can hurt as much as a good one can help. Since it is difficult to distinguish between a good analogy and a bad one, it is important to test the analogy. If you do a mock trial, incorporate the analogy into the presentations. If you don't conduct a mock trial, run the analogy by your colleagues.

Often experts must explain the counter-intuitive and tell jurors why commonsense notions are wrong. The explanations must

appeal to some level of common sense, and the experts must be careful not to ask jurors to deny their own reality.

In a criminal case involving a nighttime shooting, one crucial case issue was how well the defendant, who had just woken up, was able to see in the dark. An expert testified on how long it takes for eyes to adjust to the darkness, but his testimony did nothing to persuade a young mother:

I'm used to getting up in the middle of the night with the children and fussing. I don't believe that guy that has all these degrees from Tulane on how it takes 45 minutes for full night [vision] adaptation. I don't believe it. I don't care what degrees he has. All you have to do is be a mother [who gets up] in the night with the moon. No night-lights, nothing. I know.

*"Trust me."* Since experts, by definition, know and understand concepts that jurors presumably know very little or nothing about, they are saying, to some extent, "Trust me." As noted above, jurors don't necessarily find impressive résumés meaningful and often question experts' motives, so trust is not necessarily a given.

Jurors are not just evaluating the witnesses' expertise, they are also evaluating their honesty and character. Due to the "hired gun" factor, questions about why experts are testifying and how they feel about it take on more importance than how much the experts know. Factors such as how relaxed the experts are and whether they make eye contact with the jurors can have a large impact in building credibility.

A juror in a civil price-fixing case described an expert she found credible:

He was always facing the jury and talking right at us and just kind of had humorous mannerisms about him. He seemed to be believable. . . . I guess we kind of keyed in on the character of people as the days progressed. . . . I don't think we formed any opinions as to the outcome of the verdict, but we formed opinions as to the personalities during the day.

Conversely, a juror who thought an expert had been paid to give certain testimony explained that this was in part due to the witness's demeanor during cross-examination, when he would not make eye contact with the attorney questioning him. Other jurors describe experts who appear

to testify only so they can pick up their check and go home. Rather than show the kind of neutrality that jurors value, they show apathy.

If witnesses testify by videotape, jurors can be so bothered by the implication that it was not worth the experts' time to attend the trial in person that they pay little attention to the content of the testimony.

**Preparing expert witnesses**

Given all these pitfalls, attorneys may feel nervous about how their experts will perform on the stand. Attorneys may also be sensitive to the possibility of alienating experts by suggesting too bluntly that they could use some coaching. These techniques can help prepare experts to testify.

*Use visual aids.* A good way to start working with expert witnesses is by asking them to prepare visual aids. Have the experts sketch out pictures of their preliminary concepts. This helps them see the components of what is being taught, the

best order for presenting the information, parts that may not be necessary for understanding key issues, and so on. You may or may not use the final versions of the visual aids at trial, but they are useful tools for honing testimony.

If the visual aids are used in the courtroom, they can have advantages for both the experts and the jury. Some jurors are visual learners and will understand and remember what they see more than what they hear. For experts, visuals can have simple benefits, such as allowing them to leave the witness stand and move around a little.

Effective visual aids are not "busy." As the saying goes, "less is more," and the simpler the content of each visual aid, the greater the impact. For overhead transparencies, large type (at least 24 point) is recommended, and if an expert cannot fit all that he or she wants to say on one page in that size type, the expert is probably trying to say too much. A board can be an

even stronger comprehension aid, since it can remain visible during the expert's entire testimony. For boards, the rule is simple: If a person with fair to poor eyesight cannot read every element on the board from across the courtroom, there is too much on it.

*Give a comprehension test.* It is hard to judge what an average jury will find too difficult or insultingly easy to understand. The best way to find out what is comprehensible and what is not is to test it in front of a lay audience. If you can, arrange for the experts to do a run-through of their testimony in front of an audience, ideally one that resembles the jury pool. The object is to measure what the audience did and did not understand about the testimony.

*Get detailed feedback.* There are many formats for testing a lay audience's reactions to experts and their testimony. On a small scale, you can bring mock jurors into your office to hear the experts' testimony, or a trial consultant can observe the experts

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and give his or her reactions.

For a more effective test, you can incorporate experts' testimony into a full-scale trial simulation, where the testimony can be heard in the context of the whole case, perhaps even with cross-examination. Presenting to a live audience will give experts who are uncomfortable appearing in court a chance to overcome their anxiety and practice the trickier aspects of addressing answers to both the attorney and the jury.

When presenting expert testimony to an audience, it is important to do so in a neutral context. In a focus group setting, audiences tend to try to figure out what you want to hear and then tell it to you. So if they get the message to "take this guy down a few notches," they will probably be happy to comply, but it will not be an accurate measure of how a jury may respond to the same witness. But, if the audience gets the message to "tell us what you really think," the feedback can be invaluable.

#### The fee question

Jurors know that experts get paid handsomely, but they are not necessarily bothered by this. The degree to which the jurors consider experts mercenaries will have more to do with their demeanor on the stand and their degree of advocacy than with how much they are paid.

Most jurors see experts as a necessary expense, but they are still conscious of how much the customer (the attorney, the plaintiff, or the defendant) is getting for his or her money. This ultimately goes back to jurors' perceptions of experts' role. If experts are acting too much the expert or not providing good explanations of important concepts, jurors may think the experts' fees are a waste of money. They may even start to think of more fruitful ways that the money could have been spent.

In a toxic tort case in which few of the plaintiffs sought medical attention despite claiming they were sick, jurors felt that the amount spent on the expert should have been spent getting the plaintiffs the care they needed.

Despite the pitfalls, jurors can be impressed with good expert witnesses and will be grateful to have their testimony as a basis for making a decision.

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