

Expert Witnesses: You Can't Try a Big Case Without Them, and You Can't Kill Them

Why is the return on investment of expert testimony meager at best? And what can we do about it?

By Ross P. Laguzza

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Do you love your experts? Not me. I don't like them. Not even a little. Why not? First, this is nothing personal. I have met and worked with many expert witnesses over the years and have found some to be quite personable and fascinating people. Yet, as necessary a part of litigation as they are, I find them to be a burden. Here are a few of my top reasons why, and tips to help mitigate them.



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Jurors Don't Care about Experts

In the typical case, expert testimony plays only a small role in the decision calculus of the average juror. Most experts are seen as having limited relevance to the case or are testifying about things jurors think are common sense. Jurors also take note that both sides use experts and that the opposing experts rarely agree on anything. Jurors come into trial with the idea that experts are there to help them find the truth. Once they figure out that the experts are taking sides, jurors are less interested in what they have to say. Despite all of the time and money spent on experts, jurors rarely report that their decision turned on expert testimony. It is not uncommon for jurors to forget an expert entirely or to misattribute an expert's testimony to another witness or the other side's witness. This isn't to say that experts don't play some role in the final decision, but their contribution is typically inversely related to the investment. The good news: You don't have to worry about what the experts are paid. Jurors don't care about this either.

Experts Forget Who Their Audience Is

Experts are often very smart people and often enjoy solid reputations in their field. Sometimes they are the smartest people in the room—a fact that makes them exceedingly dangerous. Sometimes they decide that they are so much smarter than the cross-examining attorney that they are going to teach that attorney a lesson. Sometimes they believe they know exactly where a line of questioning is going and articulately get themselves in big trouble. Sometimes they are trying to show up the other side's experts. Sometimes they are trying to impress the judge. Sometimes they just like hearing themselves speak.

Frequently, however, they spend little time thinking about what really matters: providing jurors *access* to their testimony. When jurors feel that the expert is not willing to speak to them in a meaningful way, they begin to tune the expert out, not out of laziness or spite, but because the expert is simply requiring jurors to expend too much effort figuring out what the testimony is really about. This is why jurors often use peripheral factors (i.e., superficial rather than substantive information) to evaluate an expert witness. The best experts spend time working on their key messages and making sure that the audience can hear, understand, and remember these key messages. Now, this isn't about "dumbing things down" for the jury, as is often suggested. It's about helping jurors make sense of complex information. This is a different task and doesn't depend on patronizing your audience. Great expert performance starts with respect for the audience's experiences, expectations, and interests. A persuasive expert doesn't talk down to the audience. A persuasive expert meets jurors where they live and helps them feel competent about the information they are receiving.

Experts Are Often a Bit Less Than Scintillating

I know, I know . . . we can all think of that one expert in that one case who was really fascinating and held the jury in rapt attention. If you have tried more than one case in your life, then you realize how rare this experience was. When I work with an expert, before we talk about communication strategy or themes or anything, I talk to the expert about his or her life story, family, hobbies, and anything that is important to the expert—other than his or her field of expertise. I do this because it helps me evaluate the expert's general level of affect and how the expert talks about people and things he or she loves. I need to see what I have to work with because I want to use the spirit of this conversation to light up the expert's technical testimony. If the expert loves horses, then I try to help the expert bring that same energy to his or her testimony about standardized beta weights. I know . . . but I try.

Experts Can Be Introverts

Exceptionally smart people can be introverted. I know this is not surprising news. Perhaps when you are that smart, you find it difficult to connect with regular people. Or perhaps an introverted personality creates more space for intellectual development. No matter. These brilliant souls are often shy and reticent by nature. They also can be fearful of the trial experience. I have found that even experts who have testified many times are actually quite afraid of the process of testifying. Sometimes they hide their fear behind a façade of arrogance, bluster, or tedium, but at bottom, they are frightened. Most attorneys don't think about this and therefore don't recognize it when it is causing issues with their witness. Sometimes performance issues are incorrectly diagnosed, and everyone gets frustrated when the expert doesn't respond to coaching. How do you discover if your expert is dealing with fear? Ask your expert what worries him or her most about testifying. It works every time.

Trial Lawyers Over-Identify with the Experts

I have observed good trial lawyers spend so much time with their experts and commit so much time and energy to learning their areas of expertise that the lawyers start using the expert's terminology with ease. This is especially true in high-stakes patent cases in which the attorneys are often technically trained and have degrees in engineering and science. This is the point at which the lawyer also forgets about the audience and what the jurors need in order to feel competent with the expert testimony. During practice question-and-answer sessions, it's like a non-player listening to two experienced gamers talking about *Dungeons & Dragons*. The gamers know what they are talking about, but the rest of us will be left in the dark if somebody doesn't intervene. That somebody often is somebody like me, but it can be anyone on your team tasked with making sure you don't forget your audience.

Final Tips

All this being said, experts want to do well. They respond well to systematic training and a sound communication philosophy. When I work with experts, I teach them techniques to deliver their core messages while under attack. I give them a structure in which to understand how to create access for their audience. I find that smart people pick up on these techniques and systems very quickly and often experience significant improvement. The most important thing is not to assume that just because someone is a credentialed expert or has had successful testifying experiences that person will be effective in your case. I find that there is no shortcut. You have to start at the beginning in each case and help the witness craft his or her message and develop effective communication strategies.

Experts can be nice people, but I still don't like them.

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