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Litigation Support – "The Right" Expert

Imagine you're in the courtroom. Your expert is being sworn in and you have the jury's ear. They have re-positioned in their seats, taken a deep breath, and are ready for "another expert" to testify. Their attention is highest during those first few minutes after the expert witness takes the oath. The first four minutes are spent establishing your expert's credibility – his or her education, licenses, lectures, papers, organizations, yadda-yadda. The jury's attention is already starting to fade…

How can "the right" expert influence the energy of the jury?

First off, it is important to be cognizant of the jury's perception of an "expert". The very word "expert" has been watered down because of a number of societal and empirical influences:

1. Jurors are accustomed to more than one expert from the same field, offering varying opinions, thus automatically weakening an expert's "opinions" and credibility.
2. Jurors believe that experts can, in some cases, observe what their clients have asked them to observe (rather than offering information based solely on **unbiased** observations), thus discrediting their observations.
3. Jurors are skeptical – they feel it is their job to be skeptical. They are reading between the lines, looking for any possible reason not to believe the expert's observations and opinions.

The "Right Expert", coupled with diligent preparation by the right attorney can often be the two most influential factors in a case. But, what sets a winning expert apart from any other expert? Below are some observations noted by our case management team, our clients and some of our own "winning" experts:

- Winning experts win by teaching – not telling. Since jurors are inherently skeptical, winning experts will take the time to explain **in laymen's terms,** their approach including their methodology and the steps taken to reach their conclusion.

- Since the content of an expert's testimony is often highly technical, winning experts present with enough flair to keep the juror's attention. The "information age" is leading people to "a loss of patience and lack of deep thinking" (*The Guardian, Feb 28, 2014 Article written by Rob Weatherhead*). Jurors, younger jurors in particular, expect immediate understanding, validation and explanation. The selective use of technology, diagrams, presentations and illustrations capture juror's attention and strengthen the credibility of the expert's observations and opinions.
- A winning expert is likeable. There is nothing worse than an expert who has a C.V. longer than the Great Wall of China, but who turns off the jury through arrogance, or because he or she lacks the courtesy to communicate in laymen's terms.
- A winning expert listens to questions closely and takes time to think before answering. He / she remains calm, rational and confident particularly during cross examination and looping.
- Kevin Buckley, Litigating Partner from Mound, Cotton, Wollan & Greeengrass offers this advice, *"It is important to do goggle and Westlaw searches on the expert before they get to the stand so you have some idea of the information that may be used to discredit his or her testimony or to create a bias against them."* In this age of self-expression, blogging, tweeting and posting, people are offering their opinions freely about anything from apocalypse to alien invasions to conspiracy theories. A winning expert won't be made a fool by the opposition because of radical rants and tirades he or she has posted online.
- Winning experts do not get dragged into emotional traps set by the opposing counsel. They remain likeable and confident despite looping or attacks from the opposing side. Once an expert's emotions are stirred their credibility is compromised and when credibility is compromised, the entire testimony is in essence less compelling.

What can counsel do to boost the credibility of the expert witness?

Rich Matthews wrote an article in "The Expert Institute Magazine" (July 14, 2014 issue) entitled "The Difference Between an Expert and an Expert Witness". In this article he offers some tips for counsel, some of which are included below:

First, it is okay to refrain from calling your expert an "expert". Remember that jurors may perceive "experts" as hired guns who tend to parse words and offer only the evidence that is required to win a case. So, consider referring to your expert as "the investigating engineer" or "the engineer hired to determine the cause". Dennis Fitzpatrick, President of Clausen Miller suggests, *"Consider using a professional title to establish and maintain credibility: for example, refer to your University Professor with a PhD as 'Doctor Jones'. You may find this trend continues during cross-examination."* Imagine the opposing side calling your expert "Dr. Jones" while simultaneously trying to undermine his or her credibility. These subtle distinctions may invoke a more positive, less skeptical response from jurors than the word "expert".

Secondly, in a perfect world a good deposition can lead to early settlement. Many states allow experts to participate in depositions and since they are frequently videotaped, it is a good idea to practice how your expert appears and sounds on video. Counsel should be sure the expert

comes across in video in a positive way. Remember that if the suit does go to court the deposition video can be used in court.

Finally, although credentials are very important and necessary, if one spends too much time focusing on credentials straight out of the gates, you may lose the jury prematurely. You shouldn't have to sell your expert too hard – a winning expert should sell themselves through their ability to clearly break down their methodology, their observations and their opinions in laymen's terms while keeping the jury's attention captive.

"If you need to invoke your academic pedigree or job title for people to believe what you say, then you need a better argument." Neil deGrasse Tyson

Getting Back to Basics

We can rely on the Federal Rules of Evidence (information retrieved from Cornell Law's Legal Information Institute). Rule 702 recapitulates how experts should teach (not tell) the jury, judge and counsel in a way that demonstrates, educates and explains their observations, analysis and conclusions (opinions). The rule states that "A *witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:*

(a) *the expert's scientific, technical, or other specialized knowledge will* ***help the trier of fact to understand the evidence*** *or to determine a fact in issue;*

(b) *the* ***testimony is based on sufficient facts or data****;*

(c) the testimony is the product of reliable principles and methods*; and*

(d) *the expert has* ***reliably applied the principles and methods to the facts of the case****"*

In short, the right expert must possess the qualities of a good teacher including stellar communication skills, poise and confidence. They must be likeable, yet undoubtedly still an "expert". If counsel and expert witness are unwaveringly aware of the jury's pre conceived notions and their capacity to ascertain, together they can influence the triers of fact and experience a winning outcome.

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