



# Beyond Expert Credentials: Every Aspect of Credibility Counts

by Charlotte A. Morris

## Combining Common Knowledge with Specialized Expertise

**E**XPERT TESTIMONY IS REQUIRED when the determination of standard of care or causation is beyond the ordinary experience and knowledge of the normal fact finder. But jurors are also instructed that they may use their own common knowledge and life experience to decide the case. In effect, our justice system seems to be talking out of both sides of its mouth: we bring experts to teach jurors the most complex aspects of our case, but jurors are ultimately free to use their own experience and common sense to decide it. Which means that either both will come together for a verdict in your favor, or they will compete with one another and your outcome is less certain.

## Credibility Counts

Beyond the legal requirements for expert qualification (which is serious business, but truly unrelated to the ultimate question of how persuasive an expert will be) it's important to evaluate

expert witnesses the same way you size up any other witness.

I assess all witnesses along three general components of credibility: trustworthiness, competence and likability. Each of these are characterized by a wide variety of traits, only some of which are shown below:

Trustworthiness	Competence	Likability
Dependable, Reliable, Consistent, Honest, etc.	Skill, Knowledge, Training, Reputation, Experience...	Warmth, Manners, Humor, Listening Skills, Empathy...

Most experts score off the charts in competence.<sup>[1]</sup> But be sure you are evaluating your potential experts on the other two elements of credibility from the time you first meet them. Keep a checklist in each expert witness file so you will remember to deliberately evaluate your witness along all three dimensions.

Do this every time you meet with your expert. It only takes a few minutes and you can track what you are noticing over time, while there is still time to help the witness communicate more effectively or to make changes to your line-up for trial if necessary.

It is easy for lawyers themselves to fall into “expert” mode when talking with experts, but if you do so you may be over-emphasizing the value of competence, or short-changing the importance of trustworthiness and likability. If your choice is between the expert with humor and humility and the one with a much longer list of publications on a CV – and you are sure that both will be qualified as experts and help you overcome a *Daubert* challenge or motion for summary judgment – choose the one jurors will *like* and *trust* the most.

Finally, make the majority of your calls with experts by videoconference. [Skype™](#) is free and witnesses can take their computers or tablets wherever they go; there are no good excuses for not doing so anymore and no call is too short. Take your own video camera (or your [iPad™](#)) to your initial interview with experts and record your conversations. While you’re talking literature and technical details, the video camera will capture the other components of credibility. Once back at your office, you can review the videotape and record your observations separate and apart from the substance of your discussion.

### The Mechanics Matter: Experts Are People Too

Your experts will communicate their important (and expensive) testimony by the same means all other human beings communicate, so you should also be evaluating them for both verbal and non-verbal skills. Jurors’ impressions and opinions will be based on everything they see and hear from an expert on the stand (or by video), not just the impressive curriculum vitae.

Just as you can rate your experts on components of credibility, you can also rate them on a wide variety of traits within categories of verbal and non-verbal communication, such as:

Voice	Speech	Non-Verbal
Volume, rate, pitch, pace...	Memory, vocabulary, interaction with opposing counsel, teaching skills...	Eye contact, posture, gestures, mannerisms...

As you make your observations, share them with your expert as you go. Be sure to compliment on things done well, and deliver constructive feedback on the things that are getting in the way of overall credibility.

If you feel awkward giving this kind of specific feedback to an expert, it may be a sign that you don’t have the rapport you will need to work well with that expert in front of a jury, or it may signal that you have an arrogant expert on your hands. As an experienced trial consultant, I’ve often been charged with giving feedback to expert witnesses. In my experience, most expert witnesses are grateful for the attention to detail because they value their own reputation and want to do well in every case.

If you are concerned about rules governing disclosure of your work with an expert witness and how it can be done with a trial consultant present in the prep session, be sure to review your local rules and [read up on the issue](#)<sup>[iii]</sup>. You can also send a video of your working session with a witness and allow the trial consultant to provide you with feedback that you can then pass along to your expert.

Finally, do not assume that because you have picked an expert with a lot of experience testifying in other cases that any other lawyer has done this preparation work for you. In fact, I recommend starting with an expert in the same place I would with any

### “Holy Mackerel, Man!” and Other Charming Excerpts from an Expert Witness Deposition

I recently consulted on a case and found all of these gems in a single deposition transcript. It highlights for me how often attorneys assume that experienced expert witnesses will not need careful preparation before giving crucial testimony in the case.

An engineer with dozens of cases to his credit, answered questions this way:

A: That is immaterial and irrelevant.

A: You asked me that question earlier.

A: What did I just say? Holy Mackerel, Man.

A: I love the way you guys ask those questions.

And my personal all-time favorite:

A: Object to form.

Even without the benefit of a videotaped deposition – which would have added all of the non-verbal flavor to an already spicy transcript – I could see the damage this expert did to his own credibility and potentially the credibility of the case itself. We cannot allow experts to jeopardize either and there are no excuses for even the smartest witnesses to compromise the integrity of their testimony this way.

other witness: using a series of open-ended questions that are not specific to expertise.

Some of these include:

- What are your strengths as a witness? What are your weaknesses?
- If you have testified in jury trials before, did you get any feedback from jurors about how you did? If so, what did you learn?
- What do you have to say that will help the case?
- What do you have to say that will hurt the case?
- What do you understand your role in the case to be? How does it compare to other witnesses, if you know?
- What do you believe to be the important theme(s) in the case?
- What do you most want the jury to know about you? What do you most want the jury to know about the case?

I am often surprised at how infrequently attorneys ask simple “getting to know you” questions of their experts. Remember that jurors themselves are experts in their chosen professions and experts are ordinary people too when they are not at work. Questions like those above have the effect of opening up and “normalizing” your super-experts, which makes them far more relatable to jurors at trial. Remember the components of credibility include the qualities of witnesses that make them likable and trustworthy. You will have to look for and encourage those traits or an expert will default to competency every time.

You may also be surprised to learn that some experts have no clue whatsoever how their specific testimony relates to your overall strategy for the case, have never considered how expert testimony compares to the testimony of other witnesses, or have no idea what your working case themes are. No witnesses (expert or otherwise) are going to be effective until you have helped them to internalize these ideas and incorporate them into testimony.

### **Give Your Expert a Stake in the Outcome**

To deepen experts’ commitment to your case, introduce them to your clients. If you can’t do so directly, use pictures and videos wherever possible to enhance the deposition transcripts your experts review. The most effective expert witnesses I have ever seen are those who feel a direct (if not also personal) connection to your case and your clients. If you find that an expert is not really that interested in knowing much about your clients, you have a good clue that the expert will fail on at least one major component of credibility (likability).

Beyond forming an emotional or psychological connection to your clients, your experts may be in a better position strategically to help you fight off contributory/comparative fault claims if they know – and understand – how and why your clients behaved the way they did. If your experts are not showing enough interest, prompt them with questions like these:

- What are you most curious about in this case?
- If you could ask my client anything, what would you ask?
- Have you ever known anyone (or a company) like my client who was in a situation like this before? What does it bring to mind?
- What do you most want the jury to know about how you think or feel about my client?

Experts who genuinely care about your client will use language in their testimony that reflects this. Listen for – and encourage – all the ways that your experts can give opinions that also convey care and concern for the individual (or anyone in a similar situation), rather than impersonal, general statements of a rule or standard.

### **At Trial: Arm Your Experts with Jurors’ Own Experiences**

After you have done the front-end work to prepare an expert to be effective in deposition and with a jury, you also have an opportunity to gather more information at trial that will be useful to the expert once on the stand.

If you plan your questions carefully, jurors will tell you about their expectations for expert testimony during *voir dire* without you ever mentioning the phrase “expert testimony.” Good jury selection techniques allow us to get jurors thinking about what they already know that will be important to – and consistent with – our expert testimony. The very best questions enable you to marry the “common” with the specialized knowledge.

From work experience alone – in any case, with every juror – you can start to establish what qualities make an expert credible. Obviously you want to encourage and positively reinforce answers that identify those traits you wish to highlight in your own expert:

- Are you qualified in your profession by: Your degree? Your training? Your experience?
- Tell us about each of those and which you hold most valuable or important in your work.
- Are there technical aspects of your job?
- Do you consider yourself an expert at what you do? Why do you think so? What did it take to become an expert?

- When you do not agree with other experts on the job, how do you resolve those differences?
- If you were wrong about something on the job, would it be difficult for you to admit it? On the other hand, if you felt sure you were right are you willing to stick to your guns?

You can also get jurors talking about the very ideas you want to advance through your witnesses and test jurors' willingness to accept and adopt the opinions of an outside expert.

- Are you required to comply with safety rules or standards where you work?
- Are you bound by any professional standards in your practice?
- On a scale of 1 to 10, how would you rate the importance of the rules and standards in your work? Why are they important in your job (or not)?
- Are those rules or standards handed down by outside experts or are they unique to your place of work?
- How often – if ever – do you seek the opinion of outside experts who may be able to see your situation at work more objectively and bring good ideas to the table?

Lastly, an expert witness will be prepared to tell jurors how and why the defendant either did or did not fall below the standard of care and caused (or didn't cause) the Plaintiff's harms and

losses. Hopefully your experts' opinions will match those pre-existing ideas jurors bring with them to the jury box, and to ensure this, you will need to ask jurors to tell you, for example:

- What makes a good doctor good?
- What makes a bad doctor bad?
- What's the difference between an accident and negligence?
- What's the difference between medical mistake and malpractice?

After you have gathered jurors' own ideas, beliefs and opinions on these and other important issues, talk to your experts and share those insights so that they can strike the same note when they take the stand. Having an expert put testimony in terms that are familiar to jurors gives your expert a huge advantage over a "smarty-pants" who doesn't know the importance of paying attention to the sensibilities of the jury.

The time and money you invest in expert witnesses is perhaps the greatest expense of any case. No matter how impressive the credentials, experts must relate as well to jurors as their testimony must relate to the facts and law. If you are not already tending to the expert's strengths and weaknesses that are distinct from technical expertise and specialized knowledge, you may be inviting jurors to substitute their common knowledge, life experience, or common sense for the testimony of an ineffective – but not inexpensive – expert witness. ©

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## Endnotes

<sup>[i]</sup> A highly competent witness may also be too cocky. See Morris, Charlotte A., "Preparing the Narcissistic Witness: Mirror, Mirror on the Wall." *The Jury Expert*, Vol. 20: Issue 3. September 2008. <http://www.thejuryexpert.com/2008/09/the-preparation-of-narcissistic-witnesses-mirror-mirror-on-the-wall/>

<sup>[ii]</sup> Trial consultants work as agents of the attorney-client. For more discussion see Davis, Stanley D., Beisecker, Thomas D. "Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?" *American Journal of Trial Advocacy*, Vol. 17: 581. See Also, *In re Cendant Corp.* Securities Litigation, 343 F.3d 658 (3d Cir. 2003).