

## *Turning an Expert Witness into a Great Witness*

BY DOUG CARNER

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Over the years, I have seen seasoned experts become directionless as opposing counsel and retaining counsel fight to shape the facts. This usually results from experts clueless to their attorney's narrative, and attorneys unaware of what the witness knows.

Witness testimony involves more than the timely recitation of facts. Long before the trial, your expert needs a clear understanding of where they fit into your story and what to expect at trial. Their skills were employed as a trier of fact and opposing counsel will attempt to discredit their findings or diminish its weight with the jury.

Meet with your expert well before the trial to ensure that they understand the trial process and have a clear strategy for answering questions. Familiarize them with the questions to expect during both direct and cross examination – including potential attacks on their professional and personal credibility. Record your trial preparation and have the expert review the video to strengthen their responses and body language. This is also a good time to suggest clothing changes. For example, a suit and bow tie can add a nerdy nod of credibility.

Ask your witness if there are any case facts, background vulnerabilities, or credibility issues that have not been covered. Discuss the use of charts or diagrams to help present the case facts. Tell the expert of any relevant opposing counsel strategies or tactics they should expect. For example, your opponent may have a tendency to challenge witness qualifications more than their conclusions.

Even seasoned experts need help to avoid stating potentially damaging or unnecessary information. Remind the expert to listen carefully to each question and only answer what is being asked – nothing more. They must trust you to ask follow-up questions when you need the jury to hear more details. Tell them to pause briefly to provide you with ample time to object. If an objection is raised, they should await the judge's ruling or the Attorney's rephrasing before providing their answer.

While it is okay for your expert to work additional facts into their response, they must not focus on key buzz words or phrases. If they sound scripted, it will harm their perceived credibility. They should just stick with what they know to be true and not be concerned with any thematic concepts or

legal theories. If the opposing counsel's question steer the facts to an incorrect conclusion, the expert can state the correct facts in their response.

Expert should avoid complicated or excessively technical answers, unless that is the only way to convey their facts. Likewise, they must avoid talking down or over-simplifying their answer. The goal is to engage and educate the jury, not bore or frustrate them. This can be especially challenging for experts with large egos and a love of their own voice. Large egos and a desire to please the attorney can also encourage experts to speak beyond their qualifications, thus jeopardizing their overall credibility.

Unless it is 100% accurate, experts that use absolutes like "always" and "never" may regret saying those words during cross. They should avoid long answer that begin with the words "Yes but" or "No but" or they may be interrupted before providing their full answer. A better option is to begin their response with something like "That question cannot be answered with a simple yes or no, but..."

Regardless of their personal feelings for your case, remind the expert that they are not the hero, nor the client's advocate. They must remain professionally impartial, regardless of any personal feelings, and advocate for the facts. They should simply stick to the facts and leave the advocating to you. If opposing counsel doesn't ask the "right" question, you will ensure that the jury gets the facts during your redirect.

Remind the expert to avoid becoming emotional or defensive with the person asking the question, and to never guess on things they don't know. They should just state what they know as fact and, if asked a question where they don't recall the specific details, respond with "I don't recall" instead of the more damaging "I don't know". The goal is for the witness to tell the truth in as few words as possible and be okay with any awkward silence. A long-winded answer gives the opposing counsel a chance to embarrass your expert by asking, "Was that a yes?"

Teach your expert to retain eye contact with whoever is asking the question and then look at the jury during answers that require a longer response. They should remain confident with an open body language (e.g. no crossed arms, clenched fists or angry facial expressions). The opposing counsel may present the expert with a document during cross in order to invade their personal space. If timed correctly this can make the expert anxious, which the jury could perceive as a lack of confidence. To counter this, the expert should remain relaxed and, when their opinion is soundly based, own it with conviction.

The goal is to help the jury's perception of the expert's credibility as they weigh their testimony. With proper trial preparation, you and your expert will be ready to deliver a strong and compelling case.

*We asked two experienced trial consultants to comment on this article as it relates to litigation advocacy. On the following pages, Stanley Brodsky, Elaine Lewis and Ellen Finlay offer their perspectives.*

## *Psychological Cautions in Expert Witness Preparation*

RESPONSE BY STANLEY L. BRODSKY

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The article by Doug Carner (2012) in this issue offers many constructive suggestions on how attorneys and trial consultants should go about preparing the experts with whom they work. He describes several logical steps in meeting with experts and promoting their credibility. At the same time, he prescribes many activities without presenting the psychological cautions that should accompany such actions. I see five important cautions that should accompany the Carner advice.

- 1. Clothing.** To begin with, it is demeaning for attorneys to suggest how experts should dress. Experienced and novice experts alike know that they should wear their nicer professional clothing to court. Take the Carner example of the bow tie to promote nerdy credibility: there are few men and virtually no women who are comfortable wearing bow ties. Uncomfortable witnesses are often bad witnesses. Forget the bow tie.
- 2. The I Don't Know Response.** Carner advises that experts who don't recall details should say, "I don't recall" instead of the more damaging "I don't know." Of course, people who do not recall details may say they do not recall. However, I disagree with his characterization of "I don't know" replies as damaging. Quite to the contrary, a straightforward and non-defensive statement of "I don't know" can enhance credibility. It shows that the expert knows what he or she does not know and is willing to admit it. It can reflect a comfortable humility about the limits of expert knowledge.
- 3. How Much to Say.** One Carner observation is that, "Even seasoned experts need help to avoid stating potentially damaging or unnecessary information." I disagree on two bases. First, this may be somewhat true for novice experts who do not appreciate the need to listen to questions and then answer what has been asked. It is not applicable to wise and seasoned experts. Second, the advice portrays experts as committed to the advocacy role of the attorney. Good experts answer responsively and give information even if it is damaging. It is their commitment because they are under oath and because they serve the court objectively.
- 4. Narcissistic Experts.** I like the advice that experts should not try to be heroes. In my forthcoming book (Brodsky, in press) and in the excellent commentary by Gutheil and Simon (2005), narcissistic experts are described as expert witnesses who think the proceedings are all about them. They take every challenging inquiry as a personal af-

front. I would go further than Carner. Instead of instructing experts not to be heroes, I would avoid retaining experts who approach their tasks with such narcissistic self-preoccupation.

- 5. Opinion Testimony.** My final comment is in response to the statement that experts should simply stick to the facts and leave the advocating to the attorneys. I disagree. Expert witnesses differ from lay witnesses in the sense they are allowed to offer opinions. It is the job of the experts to advocate for their own findings and their own opinions, whatever they are. That means experts should explain, interpret, and actively defend their conclusions and opinions.

In conclusion, I propose that the Carner article should not be called, *Turning an expert witness into a great witness*. That is a grandiose and rarely attainable aim. It is more reasonable to think of preparing experts to be informed and adequate witnesses. That goal is well within the reach of most attorneys and trial consultants.

### *References*

- Brodsky, S.L. (In Press). Testifying in court: Guidelines and maxims for the expert witness, Second edition. Washington, DC: American Psychological Association.
- Gutheil, T. G.; Simon, R. I. (2005). Narcissistic dimensions of expert witness practice. *Journal of the American Academy of Psychiatry and the Law*, 33(1), 55-58.

## *Turning an Expert Witness into a Great Witness*

RESPONSE BY ELAINE LEWIS

*Elaine Lewis is President of [Courtroom Communications LLC](#). She is a member of the American Society of Trial Consultants, American Federation of TV and Radio Artists, Screen Actors Guild, and Actors Equity Association.*

From the title of this article, it would seem Mr. Carner's objective is to offer some tips on how to turn expert witnesses into not just good witnesses, but great witnesses. If that was his intent then I believe he has not succeeded. His article is simply a listing of the traps and pitfalls inexperienced experts stumble into when they have not been well prepared. There are no tips or witness preparation insights. Rather, this article appears to be observations of a trial tech support person who has spent long hours in trials watching experts falter. For example, we are told an expert "should remain relaxed" but there is no suggestion on how to accomplish this.

Mr. Carner notes that so many expert witnesses:

**Don't appear to know how their testimony fits into the case.**

**Haven't been trained in how to listen carefully and answer only the questions asked.**

**Talk too much.**

**Get defensive.**

**Guess.**

**Don't know where to look.**

**Don't understand their role is to educate the triers of fact and not to try to demonstrate how smart they are.**

**Haven't been warned about the traps of "always and never".**

**Don't wait for objections.**

**Don't understand that they can explain in a re-direct examination.**

**Haven't practiced how to use graphics and visual aids.**

**Etc. etc. etc.**

The problems listed are nothing new. They are typical of any unprepared witnesses – expert or fact. In truth, by detailing the many failings of the expert witnesses he has observed, this article by implication is a critique of how attorneys prepare, (or rather neglect to properly prepare) their witnesses. Essentially the author is giving a shout out to attorneys that if they don't prepare their experts well the case will suffer for it at trial.

Assuming this article is directed to an audience of trial attorneys, I find it too basic. I don't believe it is necessary to tell any litigator that the skills of their expert were employed because "a trier of fact and opposing counsel will attempt to discredit their finding or diminish its weight with the jury." Further, I am sure all litigators recognize a bad witness when they see one. It is not necessary to list the things that make an expert a bad witness.

I think the only take-away from this article is that too many experts are not well prepared. Missing advice from the author as to how to fix the problem, I offer the following coda:

*In my experience preparing expert witnesses, I find that attorneys are often so focused on content of the case that they neglect working on how the expert is to deliver that content. No matter how good the substance, if it is not presented effectively its impact will be lost. Clearly attorneys who use experts should spend enough time training their experts in effective trial techniques in addition to reviewing case materials. If there is not enough time for both, I suggest hiring a witness preparation professional to help out with the job.*

*Ellen Finlay responds:*

*Before forming Jury Focus in 1998, Ellen Finlay, J.D., a 1986 graduate of the University of Texas School of Law, practiced law in Houston and was a shareholder in Thompson & Knight. Jury Focus provides trial consulting services throughout the U.S.*

In reviewing Mr. Carner's brief article, I am struck that his comments do not reflect an appreciation of the truly daunting task that is witness preparation, especially the preparation of testifying experts. For purposes of this response, I have chosen to refrain from commenting on the majority of his suggestions, even if I disagree with the wisdom behind his assertions (e.g., whether a bow tie adds a "nerdy nod of credibility"). Instead, I've chosen to focus on the common thread throughout his article - the recognition that it is not wise to simply throw experts in to the witness chair and expect them to shine without making sure they are fully prepared for their time under the spotlight.

Because I tried cases for twelve years before entering the trial consulting profession in 1998, I cannot help but be empathetic when it comes to the plight of trial attorneys because I experienced the obstacles they face when gearing up for trial. For example, I know that most attorneys are taught to prepare witnesses in a very cookie-cutter fashion. Attorneys are taught to instruct witnesses to testify, "I don't recall" if they are not absolutely sure about the answer to questions seeking important as well as trivial information. Very few attorneys have had the opportunity to observe more than one or two juries dissect the performance of their witnesses. As a result, they do not appreciate how much most jurors loathe the phrase "I don't recall" if it is used more than once or twice. This response is not the appropriate time to discuss attorney misconceptions about witness testimony, but certainly an attorneys' approach to witness prep can be counterproductive.

I also know from my time in the trenches as well as my time helping my clients that most attorneys do not set aside adequate time to prepare direct examinations of their witnesses, including their experts. Throughout law school and our years as practicing lawyers, most trial attorneys obtain virtually no meaningful training in the preparation of direct examinations. Most attorneys graduate law school prepared to conduct cross-examinations. We've watched crosses on television and at the movies since we were children. And let's face it, cross-examination is much more fun than direct. I've had the opportunity to judge a number of law school mock trial exercises and it can be painful watching young, inexperienced attorneys attempt to navigate their witnesses through a direct. But these young Clarence Darrow's in training are magically transformed once they get to cross opposing witnesses.

This is important because preparation of a good direct is the most effective way to communicate your story to both the jury and your own witnesses. A well crafted, methodical direct is critical to providing a road map to the jurors. And working through the draft direct with your witnesses helps them understand what you are trying to tell the jury. The draft direct also helps witnesses understand when they should speak openly and directly to the jury about a given topic versus when they should recognize the constraints of cross and answer “no” or “yes” or “that is correct.” If they know a topic will be covered in direct or redirect, they are less likely to try to force it into an answer during cross where it may not be appropriate or where it may serve to undermine their credibility or likeability.

I sometimes hear attorneys worry that a witness may seem “too coached” if they are put through an actual direct during witness prep. In my opinion, this perception does not result from the use of an actual direct examination during witness prep but instead results from the tendency to hyper-focus on a few key questions or phrases. Yes, jurors do notice when you use the same phrase over and over or when the expert parrots the same phrase the attorney used during opening. I tried one case in the mid-90s where both opposing counsel and his expert used the phrase “footprints in the sand.” I thoroughly enjoyed hearing the jurors repeat the phrase in a mocking tone after the verdict came in.

Of course, handling experts is typically more difficult than handling other witnesses. First, most experts have limited availability so that their prep is often crammed into a night session during the middle of trial. Second, testifying witness hourly fees can be extraordinarily high which may lead attorneys and their clients to severely limit prep time. Third, testifying experts often mistakenly believe they don’t need much prep and can become openly hostile when anyone, including an outside consultant, tries to work with them prior to trial. I suspect every jury consultant can tell war stories about working with these types of egotistical witnesses and there is simply not enough space for me to do justice to this topic. Fourth, many experts have a difficult time accepting that cross is not the appropriate time to do battle with opposing counsel. They forget, at their peril, that most trial attorneys excel at cross. Lastly, attorneys often lack the imagination, creativity or experience to identify what tools or props the experts might need to bring out their inner teacher.

“Turning an expert witness into a great witness” is a daunting task. The logistical challenges associated with expert witness testimony are just a fact of life for most trial attorneys, and those challenges are only compounded by the personality characteristics that sometimes lead a person to rise to the top of their field to become an expert. While it is impossible to fully cover witness prep in this article (or any article for that matter), advance preparation of a well thought-out direct is a good starting point for the process of prepping an expert. Once the story line has been fleshed out and detailed, it is much easier to help the expert hone his or her testifying skills and handle the types of issues identified in Mr. Carner’s article.

### *Reply from Doug Carner to the trial consultant responses:*

I agree with Ellen Finlay regarding the time commitment required for proper witness preparation and, due to the brevity of the article, I chose to focus on only the most damaging witness pitfalls versus the equally important suggestions and scenarios desired by Elaine Lewis or the psychological concerns raised by Stanley Brodsky. Addressing all of those points would make for an excellent, and much longer, follow-up article.

*-Doug Carner*