Editor Note: The following two articles are presented as a response to an overview of the literature on expert witness preparation by Tess Neal in our March issue. In these articles two experienced ASTC member trial consultants present their perspectives and strategies for the preparation of expert witnesses.

REDEFINING CREDIBILITY: Turning Expert Witnesses into Teachers

By Richard Gabriel

Attorney: *"Sir, what is your IQ?"*

Witness: *"Well, I think I can see pretty good."*

The New York Times published an article last year, decrying the American advocacy system that creates a partisan atmosphere for expert witnesses as opposed to more neutral use of experts in European and Australian courts. In the recent Phillip Spector trial, a prosecutor's closing remarks about "pay to say" expert witnesses for the defense could serve to undercut experts that his own and other local law enforcement offices have used in the past or may use in the future. Other recent articles in national newspapers and editorials echo the general public's skepticism about the objectivity of expert witnesses. Assuming that the expert can pass the Frye, Daubert and Kumho Tire tests, judges and juries routinely dismiss expert testimony for credibility concerns, incomprehensibility, or simply by being cancelled by another expert's testimony. All of these issues make for difficult testifying conditions for an expert witness, to say the least.

This leads to a number of important questions for the attorney and the expert in presenting testimony in trial:

- What exactly is *credibility*?
- Is my expert an advocate for me?
- How objective do I really want my expert to be?
- How broad or narrow should be the scope of their testimony and their expertise?
- In the overall case, what is the expert being used for?
- How do we best communicate the expert's background, their methodology, their findings and conclusions?

Normally, we spend a great deal of time discussing expert credibility in terms of how an expert's background education, training, and accomplishments compare with opposing experts, methodological concerns of how they arrived at their opinions, their "objectivity", how much money they were paid or their demeanor while testifying. While all of these factors play a role in juror evaluations of an expert, this article will focus on one primary area of improving expert witness credibility: improving how an expert teaches the fact finder.

IMPROVING HOW THE EXPERT TEACHES THE FACT FINDER

In speaking with jurors in post-trial interviews and participants in mock trial debriefings, some of the negative terms that I have heard jurors use to describe expert witness testimony fall into these main categories:

- The Ivory Tower: "arrogant", "condescending"
- The Swordsman: "combative", "defensive", "hostile", "nitpicky"
- The Waffler: "uncertain", "inconsistent"
- The Automaton: "stiff", "robotic", "confusing", "unintelligible"
- The Salesman: "overzealous", "slick"

Under all of these negative terms lies one fundamental problem: the lawyer and the witness did not have the intention of truly communicating with today's jury. Let's face it, jurors these days are more concerned with collapsing careers and 401K's than whether an expert went to Cornell or Dartmouth or whether their article on "Transapical Aortic Occlusion" was peer reviewed.

Jurors are their own experts these days. They Google, they Twitter, they watch the Learning Channel and CSI. They are bombarded by opinions of media pundits, bloggers and comment themselves on news stories they read on the Internet. They work long hours, have long commutes, and alternate between shuttling their kids to soccer and piano lessons and helping them with hours of homework every night. Yet we expect them to patiently absorb hours of testimony about *Securitized Credit Enhancement* with rapt attention.

The standard approach in direct examination is to take the expert through their education and professional accomplishments, thus establishing their *credibility*. After this has been established, the attorney and the expert then describe the expert's fundamental opinions, justifying their methodology with some interspersed background on the field of expertise or standards for their practice, while criticizing the conclusions of the opposing experts.

Given our harried and demanding juror described above, they have some inherent resistance to the structure of this testimony. First, jurors have some inherent skepticism about the objectivity of paid opinions. Second, although degrees, publications, and general achievements in their field of expertise are important in the selection of experts, they are not the primary credibility characteristics for jurors. Third, jurors struggle with the density of medical, engineering and other technical information, conflicting case stories, and complex legal instructions.

In post-trial interviews and jury research projects that I have conducted across the country over the years, three main characteristics are cited most frequently by jurors in their positive reviews of expert's testimony:

*1) **Relevant** experience;*

2) Ability to use a recognizable methodology; and most importantly,

3) *Ability to teach that methodology and communicate the resulting conclusions.*

1. Relevant Experience: Attitude is Everything

A jury has sat through a complex patent trial on telecommunications equipment and it is finally time for the damages expert to get up and tell the jury what it is all worth. But before the dissertation about royalties formulas have left his or her lips, a question jumps into the juror's thought balloon, "What makes him such an expert in this?" and then, "What are these numbers based on and what do they mean." It is in answering these basic questions that a damages expert succeeds or fails.

WHAT MAKES AN EXPERT'S EXPERIENCE RELEVANT TO JURORS?

Let's face it, math was not the favorite subject of most jurors in school. Because jurors are looking for something familiar to make sense of complicated damages testimony, any practical work experience that mirrors the damages analysis helps them to understand that the expert has *personal and practical* experience in his or her expertise, as opposed to a purely theoretical or academic expertise. For example, if an economic expert's father ran a grocery store, she can talk about watching him balance the books and keep track of inventory. If an expert worked just out of college in a manufacturing plant for awhile, jurors may feel that he has an on-the-ground appreciation for the direct issues facing a manufacturer in a case involving packaging equipment.

Additionally, if the expert has participated in any study or research project or has personal expertise in an area that amplifies their damages opinions, this can help to distinguish them from the opposing expert. For instance, if a damages expert has a business valuation background, jurors may find that this gives the expert a more global picture on the impact of contractual and business claim rather than a pure accounting perspective.

By talking to the expert about their personal background, experiences, and course of study, it allows trial counsel to help the expert amplify and create jury meaning to their testimony. In short, jurors want to know that the expert is engaged in more than a dry intellectual formulaic task. They want to know that the expert has a personal interest in the subject matter and has participated in the field in various forms over their career.

2. Recognizable Methodology: Can the Jury Really Understand?

Attorney: *"Doctor, as a result of your examination of the plaintiff, is the young lady pregnant?"*

Witness: ***"****The young lady is pregnant – but not as a result of my examination."*

Although jurors play a largely passive role during a trial by sitting and listening, most research suggests that we all retain information better when we interact with that information. One of the best ways to get jurors to interact with the expert's testimony is to make his or her methodology both easy to understand and easy to use. By walking the jurors through a point-by-point re-enactment of the expert's methodology, it allows the jurors to see what the expert is seeing as they are analyzing the subject matter. In essence, you are making the juror the expert. This transference is important because you need them not only to understand your expert but to actually stand in or become the expert in deliberations. As you are walking the expert through the steps of their methodology, it is also important to ask them about what they were thinking as they looked at the data or results that they were seeing. For example, by allowing them to describe their impressions and reactions as they started going through their damages calculations or as they read the opposing expert's report, it allows the jury to understand *how* the expert formed their final conclusions.

The second point in conveying a recognizable methodology to jurors is creating familiar examples and analogies for the jury. Whether invoking the often used "recipe" analogy for a patent, talking about lottery odds, or

speaking about home or car loans, jurors use analogies to understand the methods and reasoning used by experts because these anecdotes touch on an experience the jurors themselves have had. The greater the familiarity, the greater the acceptance.

3. Effective Teaching and Communicate Skills

Attorney: *"Is your appearance this morning pursuant to a deposition notice which I sent to your attorney?"*

Witness: ***"****No – this is how I usually dress when I go to work."*

In all of our studies of reactions to expert witness testimony, the one quality that determines witness effectiveness is the strength of the expert's communication's skills. Again, we measure effectiveness by how much of the expert's testimony is understood, retained, and persuasively used by jurors in deliberation. For our purposes, we will look at discreet behaviors to analyze what makes a good teacher and good communicator.

What Makes a Good Teacher?

First and foremost, most jurors have experienced at least one good teacher in their lives. Most good teachers have an innate curiosity about the way the world works and come to their subject matter with the spirit of inquiry. It is in this spirit that a good teacher conveys mastery over their subject matter by having a comprehensive understanding of the field they are in. This understanding allows them to anticipate opposing expert's methods and the cross-examination they will face in explaining their own methods and conclusion. This mastery means not only that the expert knows the literature of current research, trends, and clinical practice in their field, but is also familiar with other alternative, even unorthodox, methods used in the field. Given that jurors are novices in stem cell technology, securities, manufacturing process, insurance contracts, and royalty formulas, it is important that the expert not be too dismissive of what he or she deems to be a ridiculous or even fictitious method of the opposing expert. By explaining carefully why the field has undertaken certain recognized practices, this allows the jury to understand the reasoning behind the experts methodology. Then they can show the inaccuracies or false assumptions that underlie the opposing expert's methods.

A good teacher understands that a student needs context in order to appreciate the significance of the opinion or finding. In an antitrust case involving Hatch Waxman allegations, an expert may testify about whether a pharmaceutical company's conduct constituted anti-competitive behavior. However, without appreciating the guiding principles and intentions behind the Hatch-Waxman legislation, jurors will easily refer to their own experience and understanding of competitive business conduct, perhaps courtesy of Donald Trump's The Apprentice. Therefore, if allowed by the Court, they need to preface any conclusions about the business conduct with a basic tutorial about Hatch-Waxman.

More importantly, a good teacher knows how to set the rules. The more complex the case, the more jurors (and judges) look to the expert to give them a framework for the case. Experts who can clearly articulate and establish the industry norms gain a credibility advantage and position the case more advantageously. For example, the first expert who can set the "standard of care" in a medical negligence case gains the upper hand. By testifying to even the most elementary standards of documenting a medical file, the expert essentially become the voice of authority and establishes the stone tablet commandments by which all conduct is measured.

Good teachers also anticipate questions that a student may have about the subject matter. In this mindset, they are always stepping into their audience's shoes and saying to themselves, "If I were listening to this for the first time, what questions would I have?" They then make sure they answer those questions, no matter how basic or obvious they seem.

Finally, a good teacher appreciates that different students have different learning styles. Some are visual learners who need a great deal of graphic or demonstrative evidence to understand the points being made. Some students are auditory learners who listen carefully to material, need a great of data and like to compare and contrast differing opinions. Some students are kinesthetic learners who like to use models, hold documents in their hands, and get a hands-on feel for the subjects they are learning about. An expert can appreciate these and other styles and create a mixture of tools to convey their information. Some will stand up (if allowed) and walk jurors through a white board calculation of damages, some use PowerPoint to illustrate their process, some will use models of the product in question. If the expert can use a combination of these methods, it will break up potentially hours (if not days) of static, talking-head testimony. Again, an expert as a good teacher recognizes when they have the attention of their audience. By using multiple media to convey their message, the expert creates more inherent interest in their testimony and easier access for the juror.

What Makes a Good Communicator?

Talking about good communication is like talking about good art or good music. Nobody knows exactly what it is but they know it when they see it. However, there are some behavioral and personality components that many excellent presenters employ to effectively get their message across to their audience.

First, good communicators (like good teachers) always have a passion for the subject matter they are presenting. Aside from a purely professional or academic interest, experts who resonate with jurors seem to have a personal connection that drives them to a particular level of excellence in their chosen field. Second, effective experts, like good lawyers, have the ability to tell a good story. Good storytellers have an appreciation for narration. That is, they know whether their audience has enough information to understand and appreciate their message without getting confused or distracted from the central theme and through-line of their story. Good storytellers also know that even the driest subjects can be made interesting by highlighting the conflict, the characters, the action, or the environment within the story.

Experts who have well-tuned communication skills have the ability to break down complex subjects or concepts into simple, understandable language. This can be called the Teen Test. Unconsciously, these experts do an immediate translation of complicated concepts as if they were speaking to a group of teenagers. Needless to say, this should not be done in a condescending manner. However, witnesses will always gain credibility points if the jury feels that the witness is truly trying to help them understand the subject matter.

Similarly, experts who have excellent communications skills have the ability to organize their material for optimal jury or judicial retention. As an exercise, have the expert list for you the three to five major conclusions in their report. Although they may assure you that they have 17 main points, many of those points can be grouped under one of those three to five major topic headings. We call this the "journalism" approach and it sometimes runs counterintuitive to the way an expert organizes his or her material. First, have the expert describe what the one line headline is to their story on this major point. Then, have them describe for you the sub-headline. Then, the first paragraph on their major point should

summarize what they have to say about the point. Then, the body of the story can create increased detail, research, and history of the opinion. This journalistic approach takes advantage of that golden "primacy" time that we have spoken so much about over the years – that people listen best to what is presented first.

This method of organization is useful to the jury because it allows them to better take and organize their notes of the expert's testimony and better use that information in deliberations. When we test this method of organizing an expert's testimony in a mock trial, we look for jurors in deliberation saying, "Expert Y had three main points on this issue. They were…".

Finally, this method assists the expert in organizing her thoughts for cross-examination. Because, no matter how vociferously they are attacked about their methods or conclusions, she can still come back to her three to five major points.

As described above, a good communicator is also a good teacher. As such, the expert knows the juror will always gravitate toward boredom. No matter how fascinating the expert finds regression analysis, jurors will always be pulled toward that glazed expression that says, "I wonder what I should have for dinner tonight?"

To anticipate this natural state, the good communicator uses as much media variety as possible to communicate their conclusions. This means more than just good visuals. Where allowed, an expert should try and use a visual presentation system (Sanction, Trial Pro, Trial Director etc.), use blowups or magnetic boards, draw on a white board or flip chart, and create live demonstrations to create interest in their presentation. The more variety, the more jurors will pay attention. These visuals should seek to visually recreate the verbal testimony of the expert. As a matter of fact, we sometimes go through a "storyboarding" exercise taken directly from the film industry. That is, we sit down and create a series of images that tells the expert's story. Another exercise is to have the expert identify the three most important points in his or her testimony. We then design a graphic (not a bullet point chart) to accompany those main points.

Similarly, a good communicator uses vocal variety to convey interest in their message. Changes in pitch, intonation, emphasis, loudness, and pace of speaking all communicate nonverbally that there is something new being communicated. It nonverbally creates punctuation and accentuates the speaker's content.

Nonverbally, most experts have learned how to make eye contact with jurors during their testimony. However, this can be overdone. Jurors have sometimes reported in post-trial interviews that the expert seemed to be pushing too hard by automatically turning to the jury after every question. It will seem more natural for the expert to respond to the attorney on shorter, simpler responses and include the jury in the longer responses. This will make the testimony seem less contrived. Finally, even if a witness is confined to the witness box in Federal Court, use of posture and gesture can also help to underscore the important points in an expert's testimony.

Again, good communication is in the eye of the beholder. However, jurors respond positively to experts who convey, through their attitude and demeanor, a certain confidence, quiet strength of conviction, humility, eloquence, grace, and good nature.

Expert Testimony Sequence

Jurors have a short attention window during which an expert needs to establish rapport and credibility to convey their main points. Again, if we were to look at the juror's thought balloon, it would contain questions like, "Who is this guy? What is he talking about? And what does this have to do with the rest of the trial?". And although it is necessary

to qualify your expert, we advise the following sequence in an expert's testimony in order to optimize jurors' short attention window during an expert's testimony.

1. *Short* background of the expert. As previously described, this should not only include academic or professional accomplishments and designations but personal history that can relate to specific jurors and the individual issues in the case. This background should also include a question about why the expert likes doing the work she does and what her main focus has been in her career.

2. Briefly define the expert's role and what she was retained to do in the case.

3. Summarize the expert's conclusions.

4. Go through the methodology and approach employed by the expert to arrive at their conclusions. This can also include a critique of opposing expert's methods, conclusions, and testimony. Although the expert might not respect the opposing expert professionally, given that the jurors do not have a background in the field, it is always safer for the expert to acknowledge the opposing expert's view but still strongly critique his methodology and conclusions.

5. Periodically intersperse the methodology and approach testimony with professional experience, research, publications, and accomplishments.

6. If possible, summarize conclusions again.

Using the Dynamic Tension in Expert Testimony

"He was just open and honest. He would tell the defense attorney that he was wrong and that the plaintiff could be right in certain spots. They were just more credible than the plaintiff experts. The plaintiff experts seemed like they'd say what you want to hear and when the defense got to them, they'd fall apart."

- Mock juror comment on a defense medical expert

An attorney wants to retain a product liability expert to support her manufacturing defect case. The expert wants to be retained to testify and wants to be called back to testify in other cases. He wants to be cooperative but is feeling uncomfortable with some of the claims the attorney is asking him to support. He pushes back in a couple of preparation sessions, telling the attorney he is not willing to go that far in his testimony. While this may be difficult for the attorney in making a substantive record for her case, this tension can actually be a beneficial source of credibility for both the witness and the attorney in this case.

As we have discussed, jurors are already primed to be suspicious about the lack of objectivity of an expert witness. If jurors perceive that there is some resistance between both the attorney and the witness, they will have harder time believing that the expert is just a "paid mouthpiece" for the attorney. We can accomplish this through two very simple methods:. First, the attorney and the witness can agree on areas where they disagree. Obviously, these should not be areas that are germane to the primary issues in the case. Jurors know that the lawyer is an advocate. They can safely push the envelope in a safe subject area to allow the witness to reign in the attorney and say, "No, I don't think I would go that far. Here is what I think is a more accurate scenario." The second area is for the attorney to step into opposing counsel's shoes and "cross-examine" his own witness to preempt an anticipated attack. This allows the attorney to play the skeptic (something the jurors are already doing) and to test the soundness and objectivity of the

witness. This sometimes leaves opposing counsel with very little fodder for their cross-examination. Both of these examination methods reinforce the independence of the attorney and the expert.

In planning expert testimony, careful consideration should be given to how different courts deal with experts. Some courts have started having experts testify back to back as opposed to testifying in the case for which they were retained. This requires different preparation and planning. There is even some initial discussion about the Courts using a method from Australia with the unfortunate name of "hot tubbing" where experts testify together at trial, ask each other questions, respond to questions from the judge and the lawyers, and find agreement while clarifying the issues. While procedurally unprecedented, this method may gain some support if the courts feel it will improve the clarity and objectivity of the expert testimony in a case.

Conclusion

Jurors do have an innate curiosity. They have a lot of time invested in the case and they want to learn something during a trial. It is important for the expert to understand the innate skepticism and inherent boredom of jurors in order to become their best teacher in the subject matter. By being creative in structuring and conveying the substance of the expert's testimony, the expert becomes the translator for the jury in their journey into a foreign land. The expert allows them to learn, retain, and use the information to become your best advocates in deliberation. By doing this, they become your experts for other jurors and help to teach and communicate your best message.

Richard Gabriel is President of Decision Analysis, a trial consulting company with offices in Los Angeles, Chicago & San Francisco. He is co-author of Jury Selection: Strategy & Science published by Thomson-West and a regular columnist on trial strategy for Lawyers USA.

Citation for this article: *The Jury Expert,* 2009, 21(*3*), 85-92.

Editorial Exuberations

Spring is in full swing when it seems like the new calendars just went up on the wall. Our May issue is the biggest we've assembled yet both in size and in the range of ideas/perspectives incorporated. Thanks to your reading and suggestions we are continuing to evolve and expand. *The Jury Expert* is also on Twitter with daily links relevant to litigation and a few fun things to mull over your morning libations. Keep the feedback, ideas, and suggestions coming!

We are pleased to have a lengthy feature on the controversy about Generation Y and the prevalence of narcissism. We are publishing this issue on the heels of a heated debate in the blawgosphere on Generation Y in the legal workplace (see a summary of that controversy here). In a departure from our usual style of one author and several trial consultants reacting to the piece--in this case we have two articles (one saying narcissism is on the rise in our young people and the other begging to differ). Three experienced trial consultants with special interests in generational issues provide feedback on the articles and how this controversy relates to litigation advocacy and then both authors respond. This feature doesn't resolve the differences of opinion between the researchers but we hope it gives you a sense of how to use (or not use) generation and/or age in jury selection, case sequencing and narrative.

Our second academic feature is one of which we can all be proud. It's an exploration of just how the process of deliberating on a jury makes us better people and better citizens. How nice to hear something uplifting about the jury process for a change! Two past Presidents of the American Society of Trial Consultants respond to this article (ten years in the making) and then the authors follow-up with additional thoughts.

In addition, we have pieces on a wide range of issues from trial consultants: deception, juror stress, technology in high profile trials, questioning the child witness, using a simple mnemonic to aid you in organization in voir dire, and how to prepare expert witnesses. And of course, our favorite thing (two again this issue). It's a lot to ponder. Come back and visit the website and read to your hearts content! That's why we're here. Use us. --***Rita R. Handrich, PhD***

The Jury EXPERT
The Art and Science of Litigation Advocacy

The Jury Expert [ISSN: 1943-2208] is published bimonthly by the:

American Society of Trial Consultants
1941 Greenspring Drive
Timonium, MD 21093
Phone: (410) 560-7949
Fax: (410) 560-2563
http://www.astcweb.org/

The Jury Expert is also on Twitter! @thejuryexpert

The Jury Expert logo was designed in 2008 by:
Vince Plunkett of *Persuasium Consulting*

Editors

Rita R. Handrich, PhD — Editor
rhandrich@keenetrial.com

Kevin R. Boully, PhD — Associate Editor
krboully@persuasionstrategies.com

Ralph Mongeluzo, JD -- Advertising Editor
ralph@expertvisuals.com

ASTC
AMERICAN SOCIETY OF TRIAL CONSULTANTS