

For The Defense

 DRI

The magazine
for defense,
insurance and
corporate counsel

July 2003

three-dimensional framework

Persuasiveness

expertise

objectivity

communicativeness

Persuasiveness of Expert Witnesses

page 20

ALSO

**Full Participation of Citizens
in the Jury System** page 12

The Appeal of Junk Science
page 16

**Committee Perspectives:
Drug and Medical Device**
page 24

2003 Annual Meeting
October 15-19 Washington, DC
Schedule and registration form inside

Factors Affecting Persuasiveness of Expert Witnesses

three-dimensional framework

expertise
objectivity
communicativeness

Persuasiveness

by **George R. Speckart**

This article presents an analysis of the persuasiveness of expert witnesses, with specific consideration given to the effects of the jury's knowledge of the expert's compensation and the frequency of testimony in similar cases. In this context, "persuasiveness" is defined as the degree to which a witness is successful in creating a favorable bias or disposition among jurors in a given case. The conclusions presented here are based upon a thorough perusal of post-trial interviews, and the author's experiences in pre-trial simulation research. They also reflect the consequences of using various specific witnesses in actual trial settings.

The article considers the significance of expert witness compensation and witness credibility from the standpoint of the defendant in a civil action; the conclusions are equally applicable to plaintiffs' trial strategy and use of expert witnesses. While the discussion assumes the presence of an expert witness in a live jury trial, the principles discussed herein are equally applicable to videotaped depositions.

As a foundation, this article begins with a description of a three-dimensional theory of persuasiveness as it relates to expert witness credibility. This theory comprises the three witness credibility dimensions of *expertise*, *objectivity*, and *communicativeness*. With those explanations as a backdrop, the effects of compensation and the frequency of testifying on the impact of expert witness testimony are then considered. The article concludes with a section of specific recommendations for enhancing the persuasiveness of expert witnesses.

Many familiar terms of witness credibility fit within the three-dimensional framework of *expertise*, *objectivity*, and *communicativeness*. For example, for a witness to be perceived as truly *objective*, as defined presently, he or she must also be judged to be "honest." In addition, if he is seen as honest and having a high level of expertise, he must also be perceived as "trustworthy." Others may supply their own terms to fit this framework, or may indeed object to it, because one of their favorite intuitive labels has not been included here. However, this three-dimensional framework represents a useful combination of parsimony and comprehensiveness in describing the performance of an expert witness.



George R. Speckart, Ph.D., is a senior litigation analyst at Courtroom Sciences, Inc. in Irving, Texas. In his practice, Dr. Speckart evaluates fact patterns, conducts research, analyzes results, and provides strategic input to lawyers.

A Three-Dimensional Theory of Persuasiveness Expertise

It will be helpful to first define some basic dimensions of witness expertise. In common usage the term "expertise" generally refers to a person's credentials, *e.g.*, educational level, experience, and aptitude. Just as important to expertise, however, are a juror's perceptions of the witness's *diligence*, *perceptiveness*, *accuracy*, and *consistency*.

Within the framework, an expert witness, to have *expertise*, should: be well-educated from a reputable university; have an impressive background of achievement outside of the university (experience); exhibit flexibility, creativity and intelligence (aptitude); demonstrate thoroughness and the ability to apply himself or herself completely to the consummation of a given task (diligence); have a broad, unconstrained awareness of the parameters of a given problem (perceptiveness); use precision in measurement, assessment, analysis and language (accuracy); and be able to utilize these qualities effectively across a variety of situations (consistency).

Objectivity

However, more than expertise is required of an expert witness to persuade a jury of his or her view of the case. Expert witnesses also have the burden of the requirement that they appear to be *objective*. In a rather extensive, longitudinal study assessing the dimensions of witness credibility, it was discovered that the most important quality an expert witness needs in order to convince a jury is *objectivity*. Most jurors expect a given witness to favor the side that retained the witness, but they must be convinced that the witness approached the investigation/assignment objectively. That is to say, the jury expects a credible expert witness to acknowledge that there can be more than one side to an issue.

Obviously, the jury's assessments of a di-

mension such as objectivity are not conscious, or at least not labeled similarly, by most jurors. (Indeed, some jurors have difficulty determining which side a witness favors. It is not unusual for a juror to say that he or she is "surprised that plaintiff's witness X hurt the defense case.") These naive and uninformed perceptions aside, in general most jurors must be convinced of an expert witness's objectivity in order to be influenced by this testimony.

Objectivity in the present context is the ability of the witness to consider equally two or more alternative, conflicting interpretations of a given problem (*e.g.*, the antecedent causes of an automobile accident). Note that there is a fine distinction between perceptiveness (part of the expertise criterion) and objectivity: perceptiveness requires only *awareness*, whereas objectivity requires that two or more conflicting viewpoints are given genuine, thoughtful *consideration*. Furthermore, the demonstration of objectivity requires that cross-examination questions be answered with an equal level of *expertise* (aptitude, diligence, perceptiveness, accuracy, and consistency) as direct examination questions.

Perhaps most importantly, demonstrating objectivity to a jury requires that the witness use *expertise* to empirically show to the jury why one of those conflicting views is in fact most probably correct. Objectivity also requires, for example, that the tests used for evidence be equally capable, on an *a priori* basis, of providing results that could support any of the conflicting theories of the case. In other words, objectivity requires that the tests are not "set up" in such a manner as to be capable of supporting only one side of the conflict.

Finally, the demonstration of objectivity requires that the witness be unencumbered by dislike, disdain, or any other subjective form of rejection of the plaintiff's case theory. His preference for the defendant's case must be completely a function of scientific evidence and rigorous application of his own preexisting expertise—in short, his desire to know the truth, whatever it turns out to be. Obviously, the expert witness who is perceived as objective will not normally be simply discounted as a "hired gun" or a "whore."

A common plaintiffs' attack, which is frequently used when the plaintiff's attorney does not understand the technical issues of the case, is that "the witness is a hired gun for the defendant." The plaintiff's counsel points out that the witness has testified many times before for the defendant. The witness is frequently asked how much he has charged for this case and/or how much he has made from the defendant in all of his past cases. The implication is that because the witness is a hired gun, he cannot be trusted to provide objective opinions. Post-trial interviews reveal that plaintiffs' jurors frequently accept this bias argument. Strategies for overcoming this appeal to the jury are discussed following the consideration below of the third credibility dimension, *communicativeness*.

Communicativeness

The third burden of the expert witness is that he or she be *communicative*. This quality encompasses the ability to clarify arcane or esoteric issues so that they are comprehensible to one of more ordinary sophistication. A communicative witness is sensitive to the fact that what is simple to him may be hard for someone else to grasp—indeed, the learned language natural to an expert is usually more akin to a foreign language to the untrained juror. Moreover, the communicative expert witness must give the impression that he cares whether others understand. Such caring encompasses a factor of "pleasantness" and is reflected in: the choice of terminology he selects to explain or make analogies; his use of lucid visual aids; and the pauses he takes to give jurors time to assimilate information. It is also reflected in eye contact, speech rate, volume, articulation, vocal inflections, and even posture. Finally, the pleasantness of a witness is communicated by an aura of likeability and confidence. Such attributes are influenced by tone, attractiveness, attire, mannerisms, and facial expressions.

Effective demonstrative materials will enhance the communicative aspect of credibility. Such demonstrative material may include models, computer simulations (animations), document blow-ups, photographic exhibits,

graphic charts with overlays, and various other forms of visual aids. The point is that the use of dramatic demonstrative evidence makes the material more memorable, and it makes the witness seem more communicative and therefore, more credible. As communicativeness increases in this fashion, compensation or the frequency of usage of the witness loses its salience in the minds and memories of jurors.

Often, the issue of communicativeness

**Only true experts
continue to appear
confident, articulate,
and non-defensive
when being attacked
by the attorney on
the other side.**

comes through most strongly during cross-examination. By the time the defense case is presented, jurors have figured out that all expert witnesses can appear intelligent on direct examination. Only true experts, however, continue to appear confident, articulate, and non-defensive when being attacked by the attorney on the other side.

The Effects of Knowledge of the Expert's Compensation

An expert witness who is perceived by the jury as being a knowledgeable expert, whose opinions appear to be objective, and who is able to communicate with the jury, will probably not be negatively affected by disclosures of his or her compensation amount or the frequency of participating in litigation as an expert.

What is the effect on the jury as it learns about the handsome fees being paid to the witness for his or her testimony? Will the knowledge affect the jury's view of the witness's objectivity?

The issue of objectivity is closely related to the effects of high compensation. Yet, post-trial interviews of jurors indicate that learn-

ing about high compensation will not have a negative effect, so long as the perception of witness objectivity was previously well-established. In other words, the salience of high compensation is lessened if the witness has the skill to communicate an aura of objectivity to the jury. (The "salience of compensation" refers to the psychological weight, or importance, of the money paid to the witness in the mind of the juror.)

The salience of high compensation is diffused also by the perception of high expertise. This phenomenon may be explained by the tendency of jurors to look for an explanation/rationale for the high fees being paid to the expert. To the extent that high expertise is perceived—particularly as a function of education and experience—there is a "reasonable explanation" for high compensation. If the witness has a mediocre education and/or limited experience, however, high compensation requires a different presumed explanation—that the witness has been "bought" by the defendant.

Next, the salience—or psychological impact on the jury—of the compensation is affected by the degree to which jurors are interested in the substantive content of the testimony. Post-trial interviews reveal that often, at the beginning of the defense case-in-chief, many jurors are still "looking for a missing piece of the puzzle." If the defense expert provides some or all of that piece, the high compensation is less of a concern to the jury.

To the extent that the jury has made up its mind that the plaintiff should win, it will listen less to the substantive input of the defense expert witness and more to the amount of money he or she has been paid. In such circumstances, compensation becomes salient because jurors are looking for a way to discount the witness's testimony rather than embrace the difficult psychological task of changing their minds.

The salience of high compensation is decreased when jurors are "educated" about the specific details involved in the utilization of an expert witness. Unfortunately, many jurors believe that an expert witness is someone who merely pontificates without having to do any real "homework." When the jury is encouraged to understand the

actual process involved in preparing for testimony—in particular, the amount of work involved in the application of a rigorous scientific investigation—it becomes more reasonable to assume that this could not feasibly be done without due compensation. The more difficult the work involved, the easier it is to psychologically “explain” high hourly compensation without inferring a loss of objectivity on the part of the witness. Within the framework, this process of education concerning the amount of homework done by the expert increases perceived diligence, which thereby increases perceived expertise and lowers the psychological importance of high compensation.

Thus, to the extent that perceptions of expertise, objectivity, and communicativeness are low, the salience of compensation received and frequency of testifying is increased. The higher the compensation and the lower the expertise, the more conspicuous is the compensation. Similarly, the lower the perceived objectivity, the more compensation is used to “explain” the content of the testimony. Also, if the expert is not a very good communicator, the jury will attend less to the substance of the testimony and more to the superficial aspects of the witness, such as compensation and frequency of testimony in other litigation.

The interaction between salience of the compensation and the three dimensions of witness credibility forms the basis of the following strategic recommendations. As long as the compensation is “reasonable,” *i.e.*, in accordance with the amount that someone could earn (or better yet, actually earns) elsewhere on a consulting basis, *the only significant consideration is whether the witness possesses the necessary skills to be perceived as expert, objective, and communicative.* If these three levels are not sufficiently high, the witness will be detrimental to the defendant’s case irrespective of compensation. If they are sufficiently high, the witness will be helpful despite compensation.

Specific Recommendations

The following are steps that the defense attorney can take to enhance the perceived levels of expertise, objectivity, and communicativeness of expert witnesses.

- Use expert witnesses who have gained their expertise working for an adversarial party, or in the case of product disputes, a competing or uninvolved defendant. For example, if Union Carbide is being sued, obtain an expert from Monsanto or Dow.
- When possible, make a point of informing the jury that a given witness has testified for plaintiffs as well as defendants. It is even better if the witness has, at some point in the past, testified against the defendant.
- Have the witness say that he investigates a case and offers an opinion, and that sometimes the defendant chooses not to have him testify after the investigation. Witnesses in product liability litigation sometimes indicate that they have investigated an incident and have concluded that they could not help their client on some occasions. This practice helps to establish the independence of the opinion.
- Establish during the plaintiff’s case-in-chief that all expert witnesses are paid witnesses. However, because defense witnesses are typically paid more, do not emphasize the hourly rate. Once the juror accepts the concept of paid testimony, it becomes less shocking when they learn about the amounts paid to defense witnesses.
- For repeating or serial litigation, increase the pool of available expert witnesses to be used by the defendant. While extensive utilization of a witness does not diminish credibility *per se*, there is a concern with “overextending” witnesses to the point that they cannot be completely thorough (diligent) in preparation for a given case.
- It is possible to enhance the *expertise* of new expert witnesses or even seasoned veterans by insisting on thorough investigations—again, diligence must be demonstrated to the jury.
- Likewise, it is possible to enhance the communicativeness of a witness by improving the way he or she uses demonstrative material—there is always room for creative, innovative approaches, *e.g.*, animations.
- The defendant needs to insist that trial

counsel be brought up to speed on the use of expert witnesses. On some occasions competent expert witnesses have complained that trial counsel did not work with them on their testimony. This puts the expert witness in a difficult situation as she may not know what to expect once she takes the stand. Experts have only their experience to guide them in terms of emphasis, clarity, and use of appropriate visuals. Given the demands on counsel’s time during a trial, working with and preparing witnesses is often ignored or relegated to an inexperienced, junior member of the team. When this occurs, even the most competent expert witness runs the risk of being perceived as a “hired gun” who just drops in, “does his thing,” and goes off down another trail for a repeat performance.

Many expert witnesses resist training in these three dimensions of credibility. Such is not normally the case with company or fact witnesses. Many experts, however, treat such training with the type of contempt with which they often treat juries and opposing counsel. This observation has been gleaned from years of working with experts across many types of litigation. As a general rule, experts are the ones with the least natural ability to portray objectivity and communicativeness to a jury. They believe that their credentials are the most important consideration in a trial setting.

Conclusion

The manner in which trial counsel uses and prepares expert witnesses for a specific trial poses a more serious danger to their effectiveness than does the amount they are paid or the frequency with which they testify in litigation. The witnesses must be challenged to be expert, objective, and communicative with their testimony in preparation for the trial. Ultimately, however, trial counsel is the link in the chain that must offer this challenge in each separate case. If a given expert decides to rest on his or her experience to carry him through a trial, then he should be replaced—not because he might be overpaid, but because he will be detrimental to the presentation of the defendant’s case. **FD**



Copyright 2013 Litigation Psychology, LLC. All Rights Reserved.

Crisis Communications

Records & Depositions

Litigation Psychology

Trial Consulting

4950 North O'Connor Road, Suite 100, Irving, TX 75062-2778

Phone 972.717.1773

Toll Free 800.514.5879

courtroomsciences.com