

The Technical Expert Witness:

Honest, objective, and effective litigation support

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by

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Read Me

- The author is not a lawyer; he is not dispensing legal advice.
- Unless stated to the contrary, my observations and comments refer mainly to the Federal Court system and processes.
- This presentation is intended only as an introduction to the nature and function of the Expert Witness - an expert must always accept and comply with the direction of his or her retaining lawyer.

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Introduction

- **An Expert Witness is an important participant in many types of litigation.**
- **An Expert Witness' expert report and testimony can carry great weight.**
- **An Expert Witness should be:**
 - *A truly knowledgeable person in his or her field,*
 - *An exceptional communicator,*
 - *A fair and objective person.*

Some Definitions

- An Expert Witness is a recognized authority in his or her field (generally, a narrow specialty), who testifies on behalf of one of the parties to a litigation.
- An Expert Witness is a person who by virtue of education, training, experience, practical know how, etc. can assist the *trier of fact* to understand and interpret issues and facts relevant to the litigation.
- An Expert Witness is one who is permitted to give testimony in the form of opinions and conclusions.

Basic Qualifications*

- **A recognized authority in your field**
- **A very good to excellent communicator**
- **A high EQ (emotional quotient)**
- **Free of past behavior that might compromise your credibility**

***Many lawyers would prefer a Nobel laureate, teaching at Harvard or MIT, consulting for the President, and charging only \$50/hr - but they generally must settle for one of the rest of us most of the time!**

**The lawyer wanted
an Expert Witness
with blond hair and
blue eyes.**



Be Prepared

- **Maintain an honest, accurate version of your resume (one only).**
- **Maintain an honest, accurate list of your publications.**
- **Maintain an honest, accurate list of the cases on which you've worked as an expert (include law firms).**

[Have I mentioned honest and accurate?]

- **Maintain an appropriate fee schedule.**

Types of Experts

- **Consulting Expert** (works behind the scenes to support the litigation; need not be disclosed)
- **Testifying Expert** (must be disclosed; testifies at deposition and trial)
- **Judge's Expert** (helps the judge understand non-legal issues; must be free of conflicts with litigating parties)

Top 10 Duties & Responsibilities

- **To follow without exception and in good faith all direction of the client's legal team.**
- **To support the client's legal team in an ethical, fair, and objective manner.**
- **To maintain a professional attitude and a calm and rational demeanor, regardless of provocation.**
- **To admit in timely fashion when you are wrong or have made a mistake.**
- **To analyze and explain in human-comprehensible language all issues in your domain of expertise and in a manner consistent with your field.**
- **To hold confidential protected litigation materials.**
- **To review and analyze with care all litigation material provided to you.**
- **To write an expert report.**
- **To testify at deposition and trial.**
- **To support all appeals.**

Top 10 Expert Witness DON'Ts

- Don't lie about anything, ever.
- Don't keep secrets from the client's legal team (see above).
- Don't agree to testify on subject matters for which you are not an expert (raspberry jam effect) or on which you do not believe.
- Don't exaggerate or fudge details - stick with the facts in evidence.
- Don't be intimidated by the process - you are the expert.
- Don't write, FAX, e-mail or communicate in any other way, unless explicitly instructed to do so.
- Don't do research and/or analysis you have not been asked to do - respect the guidelines imposed by the client's legal team.
- Don't ever permit your compensation to be tied to the outcome of the litigation.
- Don't let the client's legal team form your opinions - if they insist, resign from the case.
- Finally, never compromise your integrity for any reason or any way.

An Expert Witness is NOT

- **A member of the client's legal team.**
- **An advocate for the client.**
- **A lawyer or legal expert (unless you are).**
- **A hired gun who will do anything, say anything for a fee.**

Communicating

**"Communication is not a skill,
it is the skill."**

**"If you're so smart, why can't you
speak clearly?"**

[Harry Beckwith, *The Invisible Touch*, Warner Books (NYC), 2000]

Who Decides if You're an Expert?

- **Initially, the lawyer (or legal team) that retains you.**
- **Ultimately, the judge.**
- **You must be deemed an expert to testify.**

Qualifying and Introducing Expert Testimony*

➤ Frye Test - the original standard

source: Frye v. United States / 293 f. 1013 (D.C. Cir. 1923)

The theory or methodology must be generally accepted by the relevant scientific community.

➤ Daubert Test - the new standard

source: Daubert v. Merrell Dow Pharm. / 113 S. Ct. 2786 (1993)

Establishes the judge as the scientific evidence "gatekeeper."

Relevancy - Does it assist the trier of fact?

Reliability - Is it real scientific evidence?

➤ Voir Dire

source: "to tell the truth" (*French*)

A process (preliminary questioning) at trial by which the competence of an expert to testify may be challenged.

*See, in particular, Federal Rules of Evidence 702 and 104a (2003) and Commentaries.

Lawyers & The Legal Process

- Lawyers are people too - so forget the stereotypes, drop the attitude.
- Your retaining lawyer may not always be right, but he or she is always in charge.
- The Law and its implementation may seem archaic and overly structured, but it is the result of thousands of years of reasoning and trial by some of history's greatest intellects - it deserves respect.
- The Expert Witness must adapt to the process, as instructed by his or her retaining lawyer or legal team.

Outline of the Process for Patent Litigation*

- Expert retained (by letter contract if you please).
- Expert signs protective order and confidentiality documents.
- Expert briefed by client's legal team.
- Expert receives and carefully analyzes relevant documents (including, for example, patents in suit, file wrappers of these patents, product manuals, the complaint, interrogatories, depositions, and opposing expert's report).
- Expert functions as consultant to the client's legal team on all technical matters.
- Expert helps client's lawyers to prepare claim chart (Markman process support) and to formulate deposition questions.
- Expert prepares an expert report (may be more than one) - the basic function depends on whether infringement or validity are at issue.
- Expert is deposed (may be more than once).
- Expert testifies at trial.

****The litigation process has four possible outcomes: settlement, summary judgment, verdict, or dismissal (in approximate order of the Expert's influence)***

Expert Reports

- **An expert report expresses the opinions of the expert; its form and content will often differ from ordinary scientific or engineering reports.**
- **An expert report must apply in an objective and consistent manner a theory and/or methodology to the facts of a particular case.**
- **The client's legal team will set the parameters for the content of the expert report; a jointly produced table of contents helps to avoid misunderstandings.**
- **An expert report should be the unbiased work product of the expert alone - never let the client's legal team write the report for you or determine your opinions.**
- **The judge will determine the admissibility of and the weight to be given to your expert report.**

Testifying at Deposition

- **An important and essential part of the discovery process.**
- **The deposing lawyer wants to know what you think, what opinions you've formed, what expertise you really have - you must answer his questions, even unfair hypothetical ones.**
- **The deposing lawyer wants to discredit you, lock you into positions favorable to his client, generate "sound bites" for use at trial.**

Top 10 Deposition Rules

- You must follow your lawyer's instructions to the letter - he or she will prep you (a rehearsal of sorts).
- You must be well prepared - depositions are forever, no second chances.
- Listen to the question carefully and pause before you answer - you don't have to answer a question you don't understand (especially, compound questions).
- Listen to your defending lawyer's objections - it's his or her only means of guiding you, alerting you to trick questions or traps.
- If you have written an expert report, anchor yourself to it firmly - it's your "best evidence."
- If possible, the best answer to most questions is : "Yes," "No," "I don't know," or "I don't recall" - unless a good reason exists to give a more detailed answer.
- Don't teach (see above).
- Don't be trapped by hypothetical questions - make sure you agree with proffered assumptions, add your own if necessary, and summarize it all before answering (often conceding to nonsense).
- If you grow tired or become confused, ask for a break - it cannot be denied.
- Stay calm, and, above all else, *be truthful to a fault.*

Testifying at Trial

- **The Expert's most important role.**
- **Preparation must be even more intense than for deposition.**
- **See Top 10 Deposition Rules.**
- **Stick to the "script" (your pre-testimony prep - no epiphanies or flashes of insight on the stand!).**
- **Treat the Judge (and all other Court personnel) with respect and courtesy.**
- **Remain calm and focused during cross examination (give your answers to the jury).**

Conclusions & Recommendations

- The Expert Witness plays an important and honorable role in both civil and criminal litigations.
- Not every one is qualified to be an Expert Witness - real expertise is only a necessary condition.
- If given the opportunity to be an Expert Witness, accept the assignment - you will find the challenges demanding and stimulating.
- Above all, never compromise your integrity and never allow yourself to be defined as a "hired gun."