

Top Mistakes on the Witness Stand and How to Avoid Them

Troy B. Froderman
Polsinelli Shughart, P.C.



Overview

- Goal of expert witness testimony:
 - Advocate your client's position
 - Persuade the Jury that the opposing party is wrong
 - Teach
 - Lead the jury to the appropriate decision



OVERVIEW

Things that destroy an expert's effectiveness

- Most Obviously
- Cross Examination
 - Opposing counsel will attack the expert's ultimate opinion and if that fails . . .
 - Attack the expert's "pedestal"
 - Ad hominem attack against the expert's competence, integrity, and thoroughness
 - Because the expert is flawed, the opinions of the expert must also be flawed



OVERVIEW

Destroying your own credibility

- The expert's own presentation can turn off the jury before the cross examination even begins.
 - Studies indicate the average juror's attention span is between 30 to 90 seconds.
 - Do not give the jury a reason to shut you out.



Other Mistakes

- Poor teamwork with the legal team can jeopardize your effectiveness.

Don't Be This Guy



Your Own Worst Enemy

- Avoid jargon
- Do not recite your CV – Your mom is really proud of you but the jury does not really care about irrelevant class rankings.
- You were hired to persuade people. It may be possible to do both, but if you must choose between looking impressive and being likable, it is better to be liked. You should think of yourself as a personable teacher, not as the ultimate arbiter of fact.
- Act the part. You aren't a salesman, you aren't a comedian, you aren't a pretentious S.O.B. (and if you are – dial it down while in the presence of the jury)

Your Own Worst Enemy

- Don't be a jerk.
 - Respect the judge
 - Smile at the bailiff
 - Smile at the jury
 - Watch out for nervous ticks and crutches

Your Own Worst Enemy

- Simplify Simplify Simplify!
- Do not overestimate the jury
- BUT
 - No one likes being treated like an idiot and no one wants to feel stupid. Make it possible to understand.

Your Own Worst Enemy

- **When it is possible to be definite, be definite.**
If you always start an answer with "I believe" or "In my opinion," the effect may be to suggest that your opinions are imprecise and that it is perfectly reasonable for people to disagree with you.

Your Own Worst Enemy

- A good expert builds his or her testimony, starting out with an introduction to complex matters and moving to a more detailed conclusion. The jury is just along for the ride. They don't feel like the expert told them what to think, but instead the expert's opinion was the only logical conclusion.

The Attorney/Expert Relationship

- Of questionable intelligence, your attorney may not be very good at math and if he/she were proficient in finance, they would be investment bankers – not attorneys.
- DON'T assume the lawyer understands what you are talking about. Before you testify, make sure you are both on the same page.

The Attorney/Expert Relationship

- Watch out for adlibs – best to know the preference of your attorney before you improvise
- Try to maintain a conversation
- If you do not understand the question, imagine what the jury is thinking. Correct the attorney when necessary

The Cross Exam

- Don't be an ass.
- Arguing reduces credibility with the jury
- Understand and accept that opposing counsel is going to attack you and your ultimate conclusion – don't take it personally and don't get defensive.
- Although you shouldn't be argumentative, never be a wet noodle.
- Watch out for the set up - if you are answering yes to every question, something is probably wrong.

The Hanging Curve

- A good cross exam does not allow the expert a chance to explain.
- The questions in most instances will be leading and will require either a “yes” or a “no”
- Answer the question that is asked. On redirect, you will have a chance to explain
- BUT, if opposing counsel slips and leaves the pitch hanging (open ended question asking for an explanation) – knock it out of the park.

Conclusion

- The skills that make for interesting dinner conversation carry over to expert witness testimony
- Relax, have fun, listen, persuade without preaching, be respectful, be nice, disagree with opposing counsel without being disagreeable.
- And most importantly

NEVER introduce yourself to
the jury as slim shady.

Additional Resources

- **Expert Testimony: A Guide for Expert Witnesses and the Lawyers Who Examine Them** by Steven Lubet and Elizabeth I. Boals (Sep 12, 2012)
- **The Expert Expert Witness: More Maxims and Guidelines for Testifying in Court** by Stanley L. Brodsky (Jan 1, 1999)
- **Feder's Succeeding as an Expert Witness, Fourth Edition** by Harold A. Feder and Max M. Houck (Jun 5, 2008)
- Special thanks to The League on FX