



Success in the courtroom depends on a good expert witness. (Photo by: Nikolay Mamluke / Dreamstime.com)

## **Guidelines for choosing an Expert Witness - Read this before they take the stand**

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By Noelle C. Nelson

Whether you are representing plaintiff or defense, you will almost inevitably need to hire expert witnesses. The problem is that not only are expert witnesses considered “hired guns” (this has been true for a number of years), but experts are increasingly expected by jurors to look, walk, talk and behave like the polished actor portrayals on such popular shows as the “Law & Order.” As lawyers know all too well, few expert witnesses can pull off such poise, posture and presence under any circumstance, much less under the intense cross-fire of opponent’s examination.

The following guidelines will assist both plaintiff and defense attorneys in choosing and preparing juror-sympathetic experts.

### **Make sure your expert looks the part**

Try to meet your experts in person so you can assess whether they look professional and credible in their field. If you can’t meet an expert before trial, make sure you have reviewed photographs on the expert’s website or brochure. As wonderful as your expert may sound on the telephone or via email, there is no substitute for your own eyes and what your common sense tells you after actually seeing the individual.

For example, an expert in the entertainment industry can have a contemporary, faddish hairstyle, wear black T-shirts under their jacket, be flamboyant in gesture and mannerisms and yet be completely credible to jurors. A physician with the same get-up is likely to be distrusted and regarded as highly suspect.

Certainly, experts can be encouraged to dress differently or change hairstyles, but it is much easier if you do not have to spend precious time on these matters.

### **Make sure your expert's speech and speaking style is juror-sympathetic**

Many experts spend the majority of their time in laboratories, in the field or buried under masses of written material. This work environment is often not conducive to effective oral presentation. Accustomed to television sound bites, jurors expect to hear succinct-style descriptions from not only actors portraying experts on television, but from real experts on the stand.

Experts who cannot convey their expertise in anything other than jargon filled, convoluted sentences will not sway jurors. These experts lose jurors somewhere after the first run-on sentence, laden with industry-specific words or academic parlance. Unfortunately, an expert's written report does not necessarily reflect his or her speaking style. It is unwise to rely on written communication to determine an oral communication style.

To test oral communication skills, ask your expert an open-ended question. Listen with the uninformed ears of a juror (as best you can). If you hear sentences containing more than one or two thoughts (at most), this may not be the expert for you. If you hear a surplus of words that belong in textbooks, not in real life, this expert may not have the persuasive power you require. If the expert cannot easily include brief layperson's descriptions of technical terms or processes, the expert will need serious prepping or you will need to consider someone different. Experts who mutter, are overly ponderous, use long pauses between thoughts, have rapid-fire deliveries or string random words and thoughts together are ineffective. Jurors will not make the effort to understand these experts.

### **Make sure the expert has good eye contact**

Experts who cannot engage good eye contact with you when speaking, are not likely to engage good eye contact with jurors. Eye contact is critical to jurors' accepting the sincerity and believability of a witness. Experts who stare at the ceiling to collect their thoughts or stare out into space for long periods as they mull something over are not going to find favor with jurors.

These behaviors are fixable if the expert is willing to work on them, but that is a big "if." Again, it is much easier and less time-consuming for you to select an expert without these distractions rather than face endless prep sessions.

### **Make Sure the Expert Can Work Well with Visuals**

Experts must be able to easily and comfortably refer work with charts, diagrams, drawings, models, evidence, "day in the life" and other visual aids. Don't assume all experts are adept at working with visuals. Find out before hiring by asking them to demonstrate working with a model or chart, or be sure to include this type of preparation during your pre-trial sessions.

All of the above guidelines are true regardless of the nature of the case or which side you represent. When it comes to presenting damages, however, there are separate guidelines for plaintiff and defense experts.

### **Presenting Damages – Plaintiff Experts**

Plaintiff experts must be able to talk about pain and injury in words jurors can relate to. By connecting with a plaintiff's pain, the jury is more likely to award the damages you request. Experts are used to talking in objective, technical terms used between scientists. To be effective in the courtroom, experts must be able to describe the situation objectively in more emotional, descriptive terms.

For example, a neuropsychologist must explain axonal shearing (brain injury). He will describe the process in technical terms, but must be able to describe the effects for the person suffering from the injury in "real life" vocabulary. "Memory loss" is a good description, but "can't remember more than a couple of words at a time" or "can't repeat back to you a question you just asked him," is much more gripping.

As a plaintiff's attorney, your job is to work with your experts so they can convey the plaintiff's experience even if the expert is only describing the generic experience of anyone suffering from the condition.

Be aware of terms that have a different meaning for jurors. "Discomfort," which physician experts regularly use as a word for pain, doesn't mean "pain" to jurors. It means something much less important. "Discomfort" for jurors may mean what they feel after eating a little too much, while "pain" is what happens when suffering from food poisoning.

### **Presenting Damages – Defense Experts**

Defense experts will usually do best in appealing to logic, whether the logic involves accident/injury reconstruction or the need for a life-care plan after a traumatic injury.

Defense experts will fare well with the jurors if they present an alternate damages view from an educational perspective rather than from a defensive or argumentative one. This also saves a defense expert from coming across "cold" or "unfeeling" toward the damaged plaintiff. Educating jurors can be done with considerable compassion.

When selecting defense experts, choose individuals who remain calm, preferably with a soothing or pleasant voice, can think fast on their feet and use sound logic in presenting their point of view.

Attorneys may spend months carefully crafting their case only to see their expert blow the case apart at trial with an unconvincing presentation. With proper expert witness selection and preparation, your experts will play a huge role in successfully moving your case forward.

### **About the Author**

Noelle C. Nelson, Ph.D., is a California trial consultant who provides trial/jury strategy, witness preparation and focus groups for attorneys. She authored "Connecting With Your Client" (American Bar Association) and "A Winning Case" (Prentice Hall).