The Testifying Expert: Jurors’ Perceptions

BY LEANNE N. CUPON, DC, DABFP, AND WARREN T. JAHN, DC, MPS, DABFP

A survey in the 1993 Personality and Social Psychology Bulletin of 529 civil trials found that 86 percent involved expert testimony. This survey highlights the strong role the expert witness plays in the current legal system. This role, though, is changing under accelerated technological advances, the latest scientific theories, Daubert challenges, and alternative forms of dispute resolution. Lawyers are concerned about jurors’ perceptions of expert witnesses because of the critical importance of expert testimony in litigation involving forensic science (application of medical facts to legal issues and proceedings).

This article reviews juror perceptions of expert witnesses, based on jury research conducted before litigation, post-trial juror interviews, and published jury research literature. Basic rules of testimony are offered.

1. Live testimony is preferred by jurors to videotaped deposition testimony. It is far more difficult for jurors to comprehend and pay attention to a videotaped expert. Experts who are seen as more objective in their testimony and who acknowledge the limitations of their professional evaluations are more credible.

2. Jurors actively assess the consistency of an expert’s testimony. They may ask themselves, “Does the expert witness avoid statements during testimony that contradict other aspects of his/her testimony? Is the expert’s testimony consistent with the overall framework of the case, with the expert’s previous deposition testimony, and with the expert’s published research work? Inconsistency reduces the expert’s credibility with jurors, who then tend to discount it.

3. Some jurors may have greater familiarity with the subject matter of a case than do other jurors. These jurors may become the “experts” during deliberations. Expert testimony that contradicts the expert jurors’ knowledge is perceived as less credible by them, and they may communicate their opinion to the other jurors.

4. Comprehensibility is an important factor in the perceived credibility of the expert witness. Jurors will not be influenced by an expert they cannot understand. When expert testimony becomes increasingly technical or complex, jurors are less willing to make the effort to understand it. The more passive and inattentive the jurors’ own thinking and analysis of the expert’s testimony, the more susceptible the jurors become to counterfactual arguments offered by attorneys. Counterfactual arguments can be persuasive because they offer jurors psychological relief from the burden of trying to understand difficult case facts based on scientific or medical data offered by the experts.
Experts who cannot communicate the points they are making come across as evasive or boring. Experts who over-explain, utilizing more detail than jurors feel they need, lose jurors’ attention. Jurors appreciate expert witnesses they can understand. Experts are more likely to be persuasive when they adjust their vocabulary and the detail of their explanations to the level of a lay, non-professional audience. Easy comprehension by jurors reduces the influence of counterfactual arguments by opposing attorneys and also reduces the influence during deliberations of jurors who consider themselves experts.

5. The expert’s history of previous court testimony and the size of the fee lead to the perception that the expert is a hired gun. The jurors may perceive that the expert’s testimony is influenced by money. It is important to keep in mind that most jurors have no personal experience with what experts typically are paid for their time out of the office (giving expert opinions), other than inferences they have made based on the events surrounding the trial and comparisons of what experts make, versus what jurors earn. Thus, the lowest fee reported by a trial expert becomes the “anchor” by which the jurors evaluate the fees reported by the other experts. The greater the comparative difference in fees, the greater the perceived influence of the earned fee on the highest- or higher-paid expert.

6. Jurors tend to be more convinced by a more credentialed expert. Does being the more credentialed expert nullify the effect of being the higher-paid expert? In one study, researchers conducted an experiment to test the effect of level of pay (lower vs. higher) and credentials (lower vs. higher) on mock jurors’ perceptions of plaintiff expert testimony in a toxic tort case. In this case, the higher-paid/higher-credentialed expert was perceived by mock jurors as the least effective expert. The mock jurors were most convinced by the lower-paid/higher-credentialed expert. The lower-paid/lower-credentialed expert was perceived to be a hired gun. A follow-up laboratory study examining the effects of pay (lower vs. higher) and frequency of prior testimony (novice vs. frequent testifier) was performed to test their hypothesis. Credentials of the expert were held constant. Using the same toxic tort case, the researchers found that the proportion of mock jurors who were convinced was highest for the higher-paid/novice plaintiff expert (described as testifying previously in one case), followed by the lower-paid/novice plaintiff expert and the lower-paid/frequently testifying plaintiff expert. Mock jurors were least convinced by the higher-paid/frequently testifying plaintiff expert. Health care providers that function as expert witnesses must not become “spin doctors.” They are expected to be objective and not adopt a position as advocates or partisans in the case. The experts’ opinion should be compelling but not overly persuasive.

The expert witness should consider some basic rules:

1. **Make sure that you understand the issue(s).** Determine what the key legal or policy issues are and what burden-of-proof issues may be present. Make sure that you have a command of the specific data and facts surrounding the specific event or circumstances.

2. **Use plain language.** Avoid jargon, colloquialisms, clichés, and slang, as well as excessively formal, flowery, or verbose language.

3. **Answer the question(s).** Use clear, concise, and definite language. Address uncertainties explicitly, and explain the impact of these uncertainties on your opinions. Don’t purposely hedge or be ambiguous. Restrict your opinions to those observations, clinical findings, outcome assessments, data, and supporting literature that are relevant. Your opinion should be based on scientific or document investigation, not circumstantial evidence or unreliable testimony (junk science). Try not to introduce new issues that may be of only academic importance or completely irrelevant. Avoid making comments that are subjective, personal, or inappropriate.

4. **Explain why.** Give the reasons why your observations, clinical findings, outcome assessments, data, and supporting literature are relevant.
Explain why and how you came to your conclusions. Identify all relevant sources of information and all sources of evidence-based authority. Demonstrate that your opinion is based on factual data; well-designed, valid studies; or the consensus of other experts in the field. Explain that your conclusions are based on generally-accepted premises or data that would survive peer review.

5. Update and/or obtain specialized forensic science knowledge, skill, training, or experience to assist the trier of fact in matters that exceed the common knowledge of ordinary people or peers.

In conclusion, studies have indicated that jurors are more likely to focus on and be influenced by peripheral factors such as fees, frequency of previous court testimony, credentials, physical appearance, or demeanor when they are unable to comprehend and assess the content of expert testimony. Additionally, a hired-gun effect is most likely to occur when jurors cannot understand what the expert is trying to tell them.

*Editor's Note: See JACA, Vol. 56, No. 9, pp. 34-37, “Chiropractic and the Daubert Expert Witness.”

References