

# Ultimate Trial Guide for Expert Witnesses

A WHITE PAPER FOR THE EXPERT INSTITUTE BY RICH MATTHEWS

Jurors will see you as one of these three things:



*You very much want the second label.* Jurors do not automatically believe the expert witness; in fact, they typically have a fair amount of distrust for hired experts. So it is up to you to demonstrate your credibility and value to them.

When it comes to expert witnesses: **The best teacher wins.** That means clear language, memorable metaphors, good visuals, and educating the jury on the background and methods of your field, not just your conclusions.

## EXPERT TESTIMONY'S Role in Juror Decision-Making

If juries could post their relationship status with expert witnesses, it would be: *It's Complicated*. While jurors do listen to hired experts with skepticism and believe that lawyers can always find an expert to support their client's point of view –they also know that someone with credentials in your league will also be speaking during the trial.

However, expert testimony can set anchors for jurors on damages, for instance. The plaintiff and defense expert witnesses set the norms, the parameters of acceptable awards. Research shows that there is a very real effect when an *expert witness* – not just the *attorney* – offers a counter-anchor to the opponent's asserted damages figure.

## INGREDIENTS OF THE BEST EXPERT TESTIMONY:

### Confidence, Consciousness, & Concrete

It is mistaken and naïve to believe that “I’m only here to represent the facts, and the truth shall be manifest to all,” and go beige instead of projecting confidence. In reality, research shows that your confidence should be moderate. Too much confidence can come across as arrogance, which is off-putting to jurors. Too little confidence, on the other hand, can make you seem nervous and deceptive to the jurors.

Your testimony must be as concrete and relatable as possible. Abundant research shows that expert witnesses have more impact when they present concrete examples and anecdotes than when they merely summarize their findings from research or analysis. One part per million does not have much impact; relating it as 30 seconds out of one year does, though. Expert testimony when done well **creates powerful impressions**.

Remember: your job is to teach, and you need to maintain that patient attitude when the opposing attorney cross-examines you. Never let the opposing side's tactics and attitude make you see him or her as a bully, as that will trigger a cascade of emotional reactions inside you which will leak out and lessen your value. Rather, relentlessly see the opposing lawyer as a struggling student who does not understand your subject, and needs your patience and guidance.

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## EXPERT WITNESS PREPARATION—

# Ironically, Seldom Done Expertly

Let's assume that you are intelligent, knowledgeable in your field, and have much to offer a group of laypeople in understanding a topic comprehensively.

However, just because you have testified before does not necessarily make you good: previous attorneys and others might have taught you bad habits, failed to teach good habits, or were not themselves skilled enough to teach you. There is in fact little correlation between how many times you have testified and how good of an expert witness you are. In reality, practice does not make perfect; it merely makes permanence.

There is no getting around that a lot of practice of both direct and cross-examination with a good coach is the only way to make sure your testimony will give maximum value. Your confidence is a huge ingredient to juror perception of credibility.

Unfortunately, in the days and weeks before trial, trial counsel has several dozen important things to do, and usually does not prioritize spending hours with you doing a mock cross. Push your attorney for some practice time, and if not, then at least some time with their trial consultant. Trial consultants are better at understanding what gets through to laypeople, and how attorneys and their witnesses can best communicate their message. If your attorney client is worried about the costs of preparing you, then waive your fees for a few hours of prep if you can afford to. The preparation will be well worth it for you—especially as word gets around that you are a high quality witness.

## TESTIFY, MY BROTHERS AND SISTERS

First tip: Go to court and watch another expert witness testify. Ask yourself what makes this person more believable or less believable, more likeable or less likeable. The exercise is about noticing the components of credibility, which are likeability and competence. These are the two most important things, and if you can raise them to a conscious level and you'll surely be a more valuable expert witness.

Your credibility comes from doing these things well:

- 1 **Answering Questions.** Tell the truth and don't guess. Saying "I don't know" is a perfectly fine answer, especially if it is the truth. Avoid jargon and industry lingo, and know how to explain any terms that you might be forced to use. Never argue with the opposing attorney.

Research teaches us other points as well, such as:

- 2
  - › Give narrative answers that are long and descriptive. Jurors find this to be more dynamic and competent than a fragmented style of answer.
  - › Avoid qualifiers such as "I guess" or "I think," as they are powerless and essentially empty. So is excessive politeness. Be consistently polite, but within ordinary boundaries.
  - › Hedges such as "kind of," intensifiers such as "very," and hesitation words such as "well" are also powerless speech.
  - › While "I don't know" is always acceptable, a better answer in certain circumstances is, "Those assumptions were not part of this analysis, and I can explain why." Opposing counsel has only two choices: let you continue or not. Either way, your side gains value.
  - › For cheesy yes/no questions that are a favorite format of cross-examiners everywhere, an answer that you can give politely is, "[Pause] That cannot be answered with a simple yes or no, and I would like to explain why."
  - › Do not end your sentences in a rising tone -this can kill authority and credibility.

**Mind your body language.** Start with good posture; sit relaxed and upright, and lean forward slightly when you're talking. Make sure you are comfortable, as you want to avoid shifting posture too often.

- › Use "illustrating" gestures, such as nodding or shaking one's head, pointing, small and non-distracting pantomimes of what you're describing.

- › Keep eye contact with your questioner when he or she is talking, and make occasional eye contact with jurors when giving your answers. Make sure you don't stare at them or ignore them.

Never look at your side's attorney after the opposing attorney asks you a question. It looks weak - like you are looking for help.

## The Dual Morals of the Story



...and they both require great preparation.

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