



Expert testimony that persuades

The expert can be persuasive if your direct allows him to simplify the complex and satisfy jurors' curiosity

By JOHN P. BLUMBERG

Question: How do you turn a jury of laypersons into geniuses who will understand complicated medicine or engineering or science?

Answer: You can't.

The secret: When you have finished this article, you will know how to translate the unfathomable into concepts that the jury can understand and accept. How? By designing the direct examination of your expert in ways that will capture attention, establish credibility, and provide a framework for comprehension.

The Evidence Code allows a person with "special knowledge, skill, experience, training and education" to explain and describe a specialized or unfamiliar subject, and render an opinion if the subject matter is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (See, e.g., §§ 720, 721, 801 and 802.) The expert's testimony must include the reasons for the opinion. Sounds simple, right? What could possibly go wrong? The problem with competent expert testimony isn't that it fails to adequately address the issues; the problem is that jurors either can't understand it, don't care about it, or are inclined to reject it.

The starting point

Twelve people are gathered together in chairs that are set up in a semi-enclosed space. They have one thing in common: they are adults who either vote or hold driver's licenses, which are the two sources from which the jury commissioner can identify potentially eligible jurors. They possess widely-varying levels of

education and sophistication. They are usually not doctors or scientists. These folks will be asked to make a decision about your case. Usually, before the decision has to be made, they will have heard experts give explanations and render opinions. Then, the judge reads them CACI 219:

As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert's testimony. In deciding whether to believe an expert's testimony, you should consider:

- The expert's training and experience;
- The facts the expert relied on; and
- The reasons for the expert's opinion.

Of course, both sides have introduced expert testimony and, nearly always, the experts have rendered opinions that are diametrically opposed to each other. The defendant did/did not breach the standard of care. The event did/did not cause harm. The judge will read CACI 221:

If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters that each witness relied on. You may also compare the experts' qualifications.

The problem

If jurors have no subject matter experience in medicine, science or biomechanics, how can they possibly decide which expert opinion to believe? Before they became jurors, these citizens lived

normal lives where they frequently made decisions about unfamiliar things. When shopping for breakfast cereal, soup or cleaning products, they had to decide between competing products. When employing parenting skills, they had to accept or reject advice, such as "spare the rod, spoil the child." When competing shows are on television, they had to decide which one to watch. (Well, maybe not, since they could use their DVR to watch one later. But they might have to choose between Fox News and CNN.) The point is that they had to constantly make decisions and choices. And to do so, they employed common methods, such as, "Which makes more sense to me?" So, their decision-making process was based on existing knowledge and relatable experience. Stated another way, they drew on something they already knew about to understand something new and unfamiliar. These mental shortcuts are called *heuristics*. (For more on this subject, read *Thinking Fast and Slow* by Daniel Kahneman.)

Case-in-point: My adult son is employed in the field of educational video games. My understanding of this field is limited. (Meaning, I don't understand it at all; not a clue.) He was explaining to me about the process of how a third-party creator of a game gets a company to use it "on their platform" and then sell and market it. I got lost when he said "on their platform." So, I tried to understand it by comparing it to what I did know. I'll skip over the many questions I asked in trying to understand. (Imagine the Wright Brothers' grandmother trying to understand Orville and Wilbur's description about their flying machine.) But,



finally, I asked my son if it was “sort of like the process where an author sells his book to a publisher who edits it, prints it and markets it.” My son patiently explained that there was more to it, but I was satisfied that I now had a frame of reference to understand what he does for a living. (I wouldn’t have had this problem if he had become a lawyer!)

My experience in trying to grapple with a new and perplexing subject by reference to what I did understand is similar to how a jury needs help to understand the unfamiliar. But before the jurors will be motivated to understand the subject matter discussed by an expert, you will have to (1) get and keep their attention, (2) answer their unspoken questions, (3) inspire and satisfy their curiosity, and (4) help your expert simplify the complex.

Attention

“Attention” has two aspects: (1) getting it, and (2) keeping it. If a juror is not paying attention, your expert’s message will be lost. Getting attention requires an understanding of how our ancestors avoided being killed by enemies or eaten by predators. Their senses were stimulated, whether it was smelling smoke, hearing rustling in the bushes or seeing a potential threat. When the stimulation occurred, they were alert and *attentive*. And, although we can’t create a threat to stimulate a juror’s attention, we can stimulate intellectual attention. This attention is governed by what I call “the ten-second, ten-minute rule.” The ten-second, ten-minute rule is discussed more fully in “*The What, Why and How of Persuasion*” published in Plaintiff Magazine, Vol. 5, No. 6 (July, 2011) and Advocate Magazine, Vol. 38, No. 8 (August, 2011).

You have ten seconds to capture the jurors’ attention and ten minutes before their attention span runs out, unless it is reignited. Let’s examine both.

The ability to capture and maintain attention in an opening statement or closing argument is much easier than in a direct examination, because you have the

ability to craft a story. But just as the attention of our ancestors was heightened by a sudden change in the environment, a juror’s attention will be heightened when an expert witness is called. That attention can be quickly lost by a boring recitation that follows the question, “Please tell the jury about your education, training and experience.” Paradoxically, the lengthier the expert’s qualifications, the more tiresome the recitation will be. So, the first principle of expert examination is to create immediate interest.

There is no rule that an expert’s examination must begin with a statement of qualifications. Instead, consider an attention-getting statement, such as “Dr. Jones, I am going to be asking you to explain whether there is a connection between repeated concussions and permanent brain damage.” With the prefacing statement, you have highlighted the subject matter the same way as a news headline. “Are you qualified to discuss that subject?” When Dr. Jones answers, “Yes,” the jury’s attention has been captured the same way that the headline spurred people to put a coin in the newsstand to read the story.

Curiosity and unspoken questions

The jurors are now silently asking themselves, “I wonder what his qualifications are,” and you have aroused their *curiosity*. Curiosity has been described as the mental pain that is caused by the realization that there is an absence of knowledge, and the need to erase that pain by finding out the answer. Curiosity and advocacy is discussed more fully in “*The What, Why and How of Persuasion*,” (*Ibid.*)

As long as that curiosity exists, you have the jurors’ attention. The next step in the expert-witness examination is to begin to satisfy the curiosity you have created. I thought of a way to do this during an arbitration when I had just called one of my expert witnesses. I asked, “So, why should the arbitrator pay any attention to

what you have to say?” The arbitrator looked up, a little startled, then smiled slightly. That’s what he had been thinking. And he listened a little more intently to what my expert said about his qualifications. So, ask your expert, “Dr. Jones, can you explain *why* it is that you are qualified on this subject?” As your expert explains his qualifications, the jurors’ curiosity results in the formation of silent questions, such as “why is that important?” and “what does that have to do with the issues?” Because these or other questions will be forming, your examination of the expert witness’s qualifications must provide answers.

A simple template can be adapted for almost any expert and addresses the question of “why should the jury listen to you?” Here are examples:

A medical malpractice expert

- Are you knowledgeable about heart surgery on children?
- What position do you hold where you use that knowledge?
- How many heart surgeries on children do you perform each year?
- Do you perform surgeries that are the same as plaintiff underwent?
- How many such surgeries have you performed?
- Are you involved in teaching others how to perform surgery? Describe.
- Have you ever written anything on the subject?
- For whom was the book/article written?
- Is your book/article considered to be reliable authority on the subject matter it covers?
- In your professional resume, how many of your presentations on the subject are listed?

A personal injury expert

- When you were in medical school, did you study about the lasting effects of concussions?
- When you were trained in your residency program, did you deal with the subject?
- Did you have exposure and hands-on experience in your fellowship?



• In your medical practice, have you evaluated and treated patients with this condition?

The above example converts “education, training and experience” from uninteresting theoretical qualifications to solid and relevant background that bolsters credibility and satisfies the requirements of Evidence Code section 720 (a):

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.

The expert's analysis methodology

It is natural to doubt a conclusion if there has been no explanation of the process by which the conclusion was reached. Accordingly, the next step in designing a persuasive expert examination is to satisfy the jury's suspicion that the expert's opinion has no real basis. The expert must be given the opportunity to educate the jurors about the analysis methodology that led to the opinion. An expert's methodology will differ, depending on the subject matter, but it is essential for the expert to explain, in simple and straightforward terms, that a method was employed. Then, the method is described in linear fashion, step by step, so that there is a confluence of protocol and evidence that leads to a logical conclusion. With each step, the jurors will be led through the process so that, hopefully, the ultimate conclusion will not only make sense to them, but they will have been able to predict the outcome. This is called, “the inescapable conclusion.” Here is an example of how to start this examination:

Q: Before reaching a conclusion, did you use any method of evaluation?

A: Yes, I did.

Q: Would you please explain how you went about the analysis of what happened?

A: First, I reviewed the records. Second, I reviewed the sworn testimony from everyone involved. Third, I measured what

happened against the standard of care, that is, what good doctors do in similar circumstances. Fourth, I reviewed the published medical literature on the subject.

Q: Why did you use that method?

A: Because it is the only honest and scientific way to reach a valid conclusion.

Q: Why can't you just start out with an opinion and then look for the evidence that supports it?

A: Because that can lead to a biased and invalid conclusion. You end up looking only for what will support your predetermined opinion and ignoring everything else.

The purpose for this pre-opinion preface is to build credibility into what will follow and to create curiosity, now that you have set the stage. The next step is for the expert to explain the reason for the evaluation method. Here is an example:

Q: What records did you review?

A: I reviewed the medical records, the x-rays, the laboratory tests, and the depositions.

Q: Can you please explain why it was important for you to review these things?

A: Well, the medical records contain an explanation of what happened after the accident and before any treatment was received. This is called “the history.” Then we see what medical tests were done so the treating doctors could arrive at a diagnosis of the patient's condition. Finally, the treatment records show what was done to help the patient. All of these things, together, tell the whole story.

Q: You said that you also read depositions. What was the importance of doing that?

A: Depositions contain testimony given under oath. I wanted to know what everybody involved said about what they did or what happened from their perspective.

Using publications

In many cases, it will be important to discuss publications that the expert has read and relied upon. There are two

important reasons for the expert to talk about publications. First, it will buttress credibility because it shows the depth of the expert's search for the truth. There is a widespread belief that scientific and medical journals and books are written by experts and contain important information. Second, it will set up your ability to cross examine the opposing expert using the text of the publications. Care must be taken in this process to stay within the boundaries of what is permitted by the Evidence Code.

An expert may rely on admissible or inadmissible evidence, so long as it “is of a type that reasonably may be relied upon by an expert in forming an opinion” (*Evid. Code*, § 801(b).) And an expert is permitted to say what he reviewed and even why it is important. In *Brown v. Colm* (1974) 11 Cal.3d 639, 644 (fn.4) the plaintiff's expert physician stated that his opinion was based on his review of medical literature. The Supreme Court said that “a professional physician may rely upon medical texts as the basis for his testimony.” Citing Wigmore, the court explained that, “a medical doctor possesses a professional experience which gives him a knowledge of the trustworthy authorities and the proper sources of information, as well as a degree of personal observation of the general subject enabling him to estimate the plausibility of the views expressed.” Similarly, in *Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893, 901, the Court held it proper that “Plaintiff's experts based their opinion testimony upon research papers and studies . . . in peer-reviewed journals.”

However, just because the expert can state what he reviewed and why he reviewed it, does not mean that the expert can read from or even paraphrase what is in the publication. That's hearsay.

The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent hearsay evidence.



(*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 789.)

Here is an example of how to elicit the expert's testimony regarding what publications formed the basis of the opinion:

Q: As part of the process of analyzing the subject, did you read any publications?

A: Yes.

Q: Why did you do that?

A: Because the medical and scientific articles and textbooks contain the combined knowledge and wisdom of many of the most reputable and experienced experts in the field. I believe that it's important to study the subject thoroughly before reaching a final opinion.

Q: What did you read?

A: I read two recent articles by Dr. John Jones on the subject of repeated head trauma.

Q: Did those articles contain information that was valuable in arriving at your opinion?

A: Yes.

Q: Would you say that the articles are reliable authority on the subject?

A: Absolutely. Dr. Jones is one of the most renowned experts in the field. And the journal is what is called "peer reviewed" which means that before it could be published, other doctors had to review it and confirm that it was a valid study.

The last question in the above example is the "set up" for your cross examination of the opposing expert. Evidence Code section 721(b)(3) provides that an expert witness "may not be cross-examined in regard to the content or tenor of any scientific writing *unless* . . . the publication has been established as a reliable authority by the testimony or admission of the witness *or by other expert testimony* . . ." (Emph. added.)

Accordingly, when your expert says that the publication is reliable authority, the foundation has been laid for you to use it in your cross examination. However, section 721 allows you only to read the pertinent text into evidence; the publication itself is not allowed to be received as evidence.

Practice Pointer: Before you decide to ask your expert what publication formed a basis of his opinion, make sure that the publication does not contain contradictory material that can be the basis for effective cross examination. When an expert admits to having referred to, considered or relied upon written material, the door is opened to cross examination. (Evid. Code §721(b)(1).)

Keeping it simple

Your expert witness may want to present a multi-faceted analysis but his testimony will be better received if you help him condense his explanation. Successful cases have a *theme*, and expert testimony should also have a theme supported by three points. Why three? Because the human brain has limits. *Cognitive load* is the concept that the brain has only a finite ability to process new information and that learning and recall is impaired by overloaded short-term memory. Human experience has demonstrated that people are able to understand and remember things that are grouped into three sections. The *rule of threes* has been applied for thousands of years and examples are found in the Bible and in classical Greek drama and rhetoric. It is practiced and applied in music, plays, stories, speeches and sayings. Whether it is an aspect of brain capacity or a memory device, the rule of threes is a tried and true method. But what if your expert has seven important points? Figure out a way to group them into three categories.

Stories and analogies

Do you want your expert's testimony to be memorable? Of course you do. But to be *memorable*, the expert must use techniques that will give meaning to difficult concepts and create a framework for recollection.

In a time of gods and goddesses, the Goddess, *Truth*, walked naked into a village to enlighten the people. But the people shunned and ignored her. Dejected, she wandered into a forest where she met the Goddess, *Story*, and

told her what had happened. "Take my cloak," *Story* said, "and go back to the village." When she returned to the village, the people welcomed her, listened and believed her words. The moral?

For naked truth to be accepted, it must have the cloak of story.

Stories have been the source of recall for the entirety of human history. Why? Because the world is a complex place and the actions of others can be confusing without context. So people look for explanations to make sense of the world. And those explanations are best understood in the framework of a story. Facts, by themselves, are not easily recalled. But facts that are part of a story *can* be easily recalled. It has been said that story is the union of idea and image. An expert's testimony that consists only of facts will not be memorable.

Earlier in this article, I suggested techniques to capture attention, establish credibility, create a framework to understand the analytical process, and avoid cognitive overload. The next step is to bring the story into the case. How? "Dr. Smith, what are the facts that you found to be important in understanding what happened?" In answering, your expert can now tell a compelling story. Most experts are not born storytellers; you will need to work with them so that cold facts become empathetic events. Instead of "the patient was seen in the emergency room and was noted to have a headache," the expert could say, "In the morning, Jason began suffering from a headache that kept getting worse as the day went on. When he was seen in the emergency room that night, he said it was the worst headache of his life."

Analogies are another technique your expert can use that will help the jurors understand the unfamiliar. "Analogies," Sigmund Freud reportedly said, "decide nothing, but they can make one feel more at home" and that a good analogy "may help to clarify the issues." Simply stated, an analogy is a comparison between two things that can highlight similarity. For



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example, in a breast cancer misdiagnosis case: “When the cancer began to grow, it was like a wildfire that couldn’t be controlled.” In a slip-and-fall case: “The wax on the floor was like an invisible sheet of ice.” In the cancer case, the jurors might not understand oncology, but they know about wildfires. And in the slip-and-fall case, they might not know about coefficients of friction, but they know what happens when they slip on ice. Once the jurors can relate the subject to something they understand, it will be like an anchor (notice the analogy?) that will make them more secure in their understanding. Again, you will need to work with your expert to arrive at analogies that can be used in his or her testimony.

Conclusion

In opening statement, you can tell

the jurors what the evidence will be, and you can even couch it in a story. And in summation, you can tell the jurors what the evidence was, and how the law applies to the evidence. But the only evidence will come from the witnesses, and the only explanation of the evidence will come from your expert witnesses. If your expert witness has been able to establish his credibility, gain the trust of the jurors, and explain the facts in a way that is understandable, your chances of success will be greatly increased.

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