



Standing at the Crossroads of Truth and Advocacy:

How to win jurors and influence outcomes through expert testimony

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Introduction

It's an old saw that to deliver an effective speech, you must first understand your audience. We all know that warming up your audience with a good dirty joke is probably not a good idea when speaking to a convention of Sunday school teachers. However, most people don't bother to think about the broader frame of their speaking activity, namely the structure and meaning of the event itself and how that shapes your role and your communicative possibilities.

In this paper, I intend to help you—whether you are an experienced expert or someone just starting out—understand your audience—jurors—by sharing with you data that my colleagues and I have gathered as part of our ongoing jury research activities. However, I want to begin by stepping back and looking at the broader frame of the trial. Understanding the complex role that you play as an expert in a trial is critical if you want to become a persuasive and effective expert witness. After taking a look at both this broader frame and jurors' reactions to experts inside that frame, I will share with you some practical tips on how you can use this knowledge to win jurors and influence outcomes.

What is a trial?

What is a trial? According to Merriam-Webster's online dictionary, a trial is, among other things:

- 1a: the action or process of trying or putting to the proof : TEST*
- 1b: a preliminary contest (as in a sport) or the formal examination before a competent tribunal of the matter in issue in a civil or criminal cause in order to determine such issue*
- 2. a test of faith, patience, or stamina through subjection to suffering or temptation; broadly : a source of vexation or annoyance*
- 3a: a tryout or experiment to test quality, value, or usefulness*
- 3b: one of a number of repetitions of an experiment*

From my perspective as an anthropologist, a court trial is something else only alluded to in the dictionary definition: It is a ritual. That is, it is a highly structured, formal and sacred occasion and social space which people enter in the hopes of transforming themselves or their situations. It is in fact one of the most hallowed civil sacred spaces of U.S. society.

In a ritual setting like a trial, people's attention is heightened and special rules of conduct, both explicit and implicit, come into play. The official participants—in the case of a trial, the judge, attorneys, witnesses, jurors and parties—have special, formal roles that are unique to that ritual. Part of your job as an expert is to understand what your role is in the larger ritual and to behave appropriate to your role.

Medieval roots of our trial ritual

The dictionary definition states that a trial is “a preliminary contest (as in a sport)...or the formal examination before... a tribunal... in a civil or criminal cause.” The blending of those two seemingly different types of trial, of a sports contest and a legal inquiry, is not a mistake or an accident. It reflects the fact that our jury trial system emerged during the medieval and early modern periods of English history, a time when agonistic—that is, competitive, combative and adversarial—methods were the norm of public interaction. It's instructive to remember that a duel—a physical trial—was still a common way of resolving conflicts in this country well into the 1800s. Alexander Hamilton, one of our most important founding fathers, was killed in a duel with Aaron Burr.

Medieval society was based on oral communication and learning

Back in the medieval and early modern periods, education and learning happened largely through the ear and the mouth, not the eye. Books were expensive and rare. Education was therefore based on verbal interaction, not reading books. Debate and rhetoric were the central subjects in the curriculum, much like reading and writing now are in our schools.

Verbal contests were a basic method for uncovering the truth

In this oral world, fighting in a verbal contest was the most commonly accepted method for arriving at truth. This was true not just in the realm of law but in every realm, including religion (which is why sermons were such a vital literary form), medicine and politics. Does it seem strange to you that people believed you could arrive at truth through argument and oral contest? Today, most Americans believe that competition in the marketplace ensures that the best companies and products rise to the top and “win.” This is not dissimilar to the medieval belief that verbal competition ensured that weak ideas were vanquished and the best ideas and interpretations rose to the top.

Our jury trial is a modern development out of these medieval practices of oral combat designed to arrive at the truth, and it retains many features of earlier oral contests. A trial is essentially a truth contest, where each side is allowed to present testimony and

related physical evidence on its behalf. Each side is then allowed to argue the meaning of the evidence, in an effort to persuade the jury that its version of the truth is the most believable.

We have shifted from an oral to a literate society

While the modern jury trial retains many characteristics of our oral past, we live in a very different world today. Today, literacy and the habits of thought shaped by reading and writing dominate education and educated exchanges. In today's United States, few people are well trained in oral combat. High school speech classes and debate clubs are vestigial reminders of a different educational past. The academic subject of rhetoric, which involved learning a wide range of persuasive speaking techniques, used to be central to the university curriculum. Rhetoric still exists as a subject in universities, but rhetoric scholars typically focus on texts and films rather than speech and debate. Even today, as we move away from book-based communication and become an image-dominated, post-literate society, most people—and certainly most professionals, including lawyers and accountants—still negotiate oral situations using literate habits of thought and speech.¹

Science is today's preferred method for arriving at the truth

One significant change from our oral past is that science, not oral debate, has come to be the paradigmatic educated way of arriving at the truth. (For our purposes here today, I am going to define "science" as the following: A process of searching for the truth through persistent applications of group-developed methods to investigations of the material world.) As science emerged as the dominant way of knowing, rhetoric—the art of oral combat—was belittled and dismissed. "That's just rhetoric" is what we have said for many years to dismiss an effort to dazzle through language rather than cut through to the solid facts of thing. However, our form of trial remains rooted in the practice of rhetoric, that is, the practice of persuasion through oral performance. That's why the heart of the trial is the witness box, with evidence delivered through the mouths of witnesses, instead of through written reports or written transcripts.

All expertise today is measured against science

With science our dominant paradigm for how to arrive at the truth, all other forms of professional expertise—including accounting—are measured against the methods and results of science as understood in the general culture. Most people in the U.S. believe that science produces clear, objective, unbiased and unambiguous answers about how the world works. Most do not realize, and perhaps do not want to hear, that science involves interpretation and is full of uncertainties, or that scientists' results can be biased. Most jurors therefore bring to trial an expectation that what scientific and

¹ For example, many judges interrupt an attorney if they consider the attorney's argument repetitive. Only in literate societies is repetition considered a deficiency in oral presentation. Repetition is an important tool for structuring oral presentations and helping listeners remember what they have heard when written records are not available.

other expert witnesses should do is to present testimony that is objective, unbiased, and gives clear answers about what the truth is.

The Expert Paradox

"Okay," you're thinking by now, "this is all terribly interesting, I love a good history lesson, but what does it have to do with helping me to be a better witness at trial?"

Experts stand at the crossroads of advocacy and truth

This history reveals to us that the role of the expert in our modern U.S. adversarial system is one that is both critical and paradoxical: The expert is an advocate hired by one party in an adversarial dispute, one side of an oral combat for the truth. Yet, you will only be persuasive if jurors believe that you are neutral and objective expert, like a scientist is supposed to be, with an opinion that has been uninfluenced by the adversarial structure of the proceedings. This is the heart of the challenge you face to develop yourself into an effective expert at trial. This is the heart of what I call "the expert paradox."

The cartoon below illustrates this paradox very well.



"I've hired this musician to play a sad melody while I give you a sob story why I didn't do my homework. It's actually quite effective."

This cartoon plays on the contradictions of someone who is claiming to testify to the truth but who has an obvious motive to persuade. It is funny because in U.S. culture,

we believe that telling the truth and trying to persuade are mutually exclusive, incompatible goals.²

In the cartoon, part of the humor is that the boy himself is bragging about the fact that he is preparing to tell a lie whose persuasive impact is supposed to be enhanced by his hired expert. He's giving away the game, because if we as communicators make it too obvious that we are not just "telling the truth," but are actually trying to persuade, our audience is more skeptical and sometimes may even feel angry that we are trying to manipulate them. Where here the boy's own declaration reveals his situation, oftentimes the situation declares for us that we are caught in this paradox of communication.

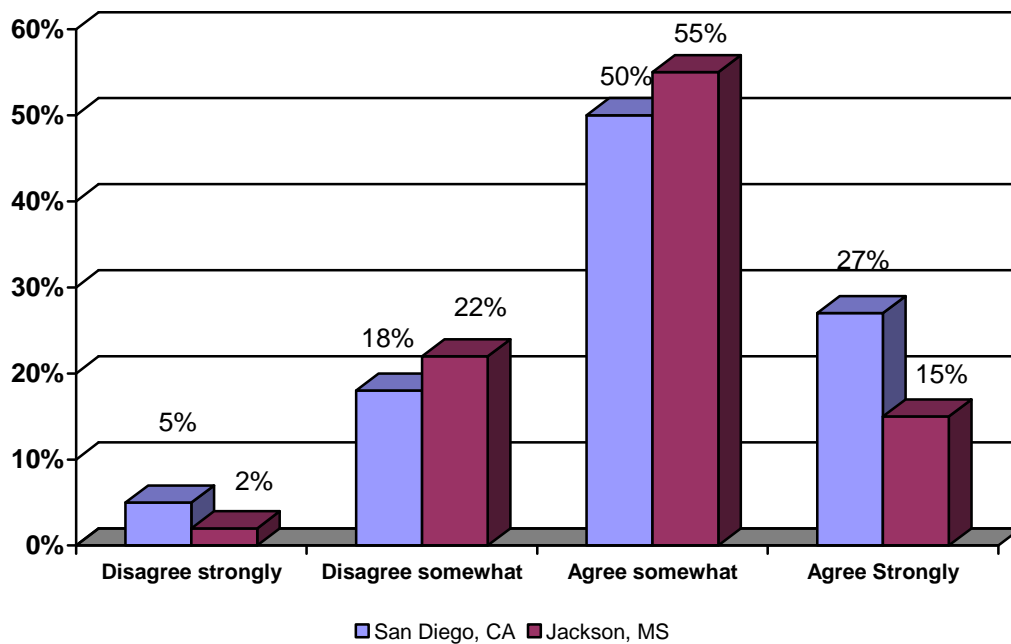
Jurors start out suspicious of experts' objectivity

Trial is one of those situations. Jurors are already well aware that you are like the violinist in that cartoon, hired to play a sad song to support the paying party's story. Furthermore, they recognize implicitly that your *role* as an expert is to be an objective and unbiased witness to the truth. However, the *situation* you are in demands that you be an advocate for your side. Most jurors therefore start out somewhat suspicious of expert witnesses.

We often ask mock jurors to what extent they agree with the statement, "Most expert witnesses in a lawsuit will say whatever their lawyer wants them to say." Take a look at the following graph, which shows responses to this question from two very disparate locales: Jackson, Mississippi and San Diego, California. Jackson is a venue with one of the lowest levels of educational achievement in the country, while San Diego has one of the highest. Jackson is a very liberal area known for high plaintiff jury verdicts in civil cases, while San Diego is a more conservative venue that only occasionally returns very high civil damage awards.

² In cultures that are still strongly rooted in oral tradition and face-to-face interaction, where modern science has not permeated common culture, persuasion is typically not seen as being incompatible with telling the truth—although "truth" may also be understood very differently than in the U.S.

Figure 1: “Most expert witnesses in a lawsuit will say whatever their lawyer wants them to say.”



As you can see, these two very different groups of jurors share the same majority opinion, that most expert witnesses will choose to be advocates over telling the truth. These data can be replicated in most other venues in this country.

In America, our default belief is the cynical and defensive one, that money always trumps the truth.

In your weakness lies your strength

Whether you are a potential expert witness or a seasoned veteran, you might be feeling a bit depressed now and be thinking, “Gosh, how can I ever get out of this tangle? I never fully realized what a terrible position the expert witness is in! How can anyone ever overcome jurors’ cynicism and skepticism about expert witnesses?!?”

Just as in martial arts you succeed by using your opponent’s strength against him, the best way to defeat a paradox is to use the power of the paradox. Look for the opportunities the paradox presents.

Most jurors are overwhelmed when faced with multiple interpretations of the truth and find it very challenging to sort through the testimony of experts to reach a decision. I see and hear this jury confusion and anxiety all the time in mock trials and post-trial interviews. For example, when we conduct mock trials, we give jurors questionnaires throughout the process. One question we always ask is, “What do you find confusing or have doubts about?” A common answer is, “Which side is right!” or “How can top experts have totally opposite opinions about what is going on?” These questions show the anxiety jurors feel when the naïve belief I discussed earlier—that experts sort

through confusion to arrive at objective, unbiased, and clear answers about what the truth is—is challenged in the situation of the courtroom.

Jurors don't like feeling anxious. When people feel anxious, we look for ways to relieve that anxiety. Anxiety, therefore, presents an opportunity for influence.

If not given clear principles for evaluating competing claims, jurors are likely to fall back on the cynical common sense of our culture and write off all the expert testimony as advocacy-oriented “spin.” That is a simple way to relieve their anxiety about making the right decision about who to believe, and we see it happen quite often in trials that involve dueling experts. The opposing experts will cancel each other out, and jurors will decide the case based on other factors.

However, there is another way juror anxiety can be relieved. Jurors are looking for an expert who gives them a clear answer to the question: “How can we know whose version of the truth is the best?” The way you can win jurors and influence outcomes is to be an effective teacher. Do not just deliver your opinions. Explain your thought process and the methods you used to reach your opinions. Give jurors some basic tools for sifting through the evidence themselves. Review your counterpart's opinions and explain why his or her methods and/or conclusions are simply not as sound as yours.

If you are a successful teacher, jurors will not need to fall back on their default position of cynicism. They will be able to make a reasoned and informed decision. Jurors will feel grateful to you for truly helping them with their task and relieving their anxiety—and for showing them that cynicism is not always the best explanation of how the world works. Furthermore, jurors will judge you to be a witness who has risen above the advocacy situation to be a witness for the truth.

What Turns Jurors Off?

The first step towards becoming a successful expert witness is to understand what turns jurors off and inclines them to ignore or dismiss your testimony. My colleagues and I have been preparing witness for testimony and collecting data on juror reactions to expert witnesses for twenty years. We have seen that there is a great deal of consistency in what turns jurors off in expert witnesses. And all of the behaviors that turn jurors off reinforce a sense that the expert is choosing to be an advocate rather than a witness for the truth.

Over-rehearsed testimony

Despite what you may think, the most experienced and polished expert witness does not necessarily make the best witness. Jurors respond better to experts who come across as unrehearsed. They also like experts who spend more time practicing their profession than testifying in court, or who have become full-time experts after a long career in their field.

Unenthusiastic testimony

Jurors can tell when you are not engaged by your subject. Part of your job as an expert is to get jurors to listen to and remember what you say. If you are not interested in your own testimony, why should the jury be interested?

Failure to examine relevant evidence directly

We worked on a legal malpractice case in which accountants' and lawyers' analysis of bills and expenses was key testimony. Here's what one juror had to say about the plaintiff's billing expert:

My initial reaction differed from what came down in the end. Initially, I thought he was quite competent. When [defense counsel] took over, and by the time he was finished, [the plaintiff expert] was not nearly as credible a witness as had been presented initially.

Why this lack of credibility? Another juror explains:

"The fact that ... he had not reviewed the documents... really took away from his impact for the plaintiffs.

Another said,

I believed everything he said, but it was not really applicable to this case. He spoke more from a theoretical perspective and not more specifically about this case.

You are hired to help jurors evaluate the evidence in the case. Your opinions are helpful only if jurors perceive them to relate to the evidence they have to evaluate and the decisions they have to make in the jury room. If you have not directly examined key evidence they will have that is clearly relevant to your area of expertise, you will lose credibility with jurors and reveal yourself to be a biased advocate, not a witness for the truth.

Oftentimes, counsel deliberately withhold evidence that they fear may be bad for their client and spoon feed you only that evidence which they believe will help you arrive at the conclusion they want. If you allow yourself to be spoon fed, you leave yourself in a vulnerable position. Jurors will readily conclude that rather than being true to the standards and methods of your profession, you have chosen to shape your opinions to the needs of your side—you have been bought. It is part of your job to expressly ask counsel for the records and other documents that will help you support the opinion you are being asked to render. Explain to the attorney why you need them.

Ask counsel if he or she is worried about anything in the records, or if there are bad facts that your testimony may need to address. Discuss any bad facts frankly with counsel before examining the evidence you will rely on to render your opinion, to explore if you might effectively address them through your testimony. If your counterpart for the other side will have access to those records, insist on seeing them. If counsel chooses not to give you access to relevant evidence, you must be prepared

to explain why you did not see this evidence and why it does not matter to your opinion.

Rambling and irrelevant testimony

Here's the comment of a juror in a recent patent trial about the plaintiff's key expert witness:

The witness did not stay on the subject and offered too much information. It was glaringly obvious that he was doing cartwheels to bring his scientific opinion to the point where he could sit on a witness stand and say [these two inventions] were different.... He also seemed to be totally out of control of his counsel. [His lawyer] was just mentally wringing his hands in anguish as [the Professor] keeping going on.

Your job is to support your attorney's case. Be clear about what topics she or he wants you to cover. Cover only those topics and keep your answers concise. Rambling and irrelevant testimony suggests the worst—that you are an advocate for yourself and your own importance rather than meeting the needs of either advocacy or the truth.

Overly technical testimony

In this same trial, another juror said this about a key expert for the defense: "He really blew it. You know what they say, 'The more education you have, the dumber they are.' He did not have the common sense that God gave him. No common sense at all."

Your job as an expert, in most cases, is not to baffle them with your brilliance (although occasionally, counsel may want to follow this strategy). Sprinkling in a few big words that jurors will not understand is okay, as that establishes you as an expert with access to specialized knowledge. However, your primary job is usually to walk jurors through relevant evidence to help them understand why they should accept your opinion on behalf of your client. You need to be a translator of your technical subject to your lay audience of jurors. Explain things clearly in everyday English, using metaphors, analogies, visual examples, and demonstrative graphics that help them to understand your testimony in their own terms.

My colleague Mike Tiktinsky advises, "Try explaining your testimony to a 13-year old. If the 13-year old doesn't understand it, neither will your jury."

Later in this paper, I give some specific ideas about how to talk about numbers in a dynamic and persuasive way.

Clearly biased testimony

It should be obvious by now to be an effective expert, you must persuade jurors that your opinions are based on the evidence and commonly accepted methods of analysis, not on the needs of your attorney. Jurors feel upset and often dismiss testimony when they are being manipulated or told what to do:

“I would just as soon not have heard [the Professor’s] testimony. Sure, he thought he was doing the best job he could, but I felt like I was back in school with the teacher with his pointer telling his students, ‘This is what you are going to believe.’”

Evasive or combative answers

In a patent case that we worked on, here’s what a juror said about one of the plaintiff experts: “Basically, [the plaintiff expert] agreed with [the opposing expert], I think, but he wouldn’t say it. He wouldn’t disagree [with the opposing expert] and therefore I think he really agreed with him.” The plaintiff expert’s avoidance of key issues gave extra credibility to the defense expert, who jurors felt had answered questions clearly and directly.

Evasiveness and combativeness—which are two sides of the same coin—are sure signs to jurors that you are unsure of your opinions, have reached conclusions that are bad for your side, and/or you are insecure in your own expertise.

Mistaken and contradictory testimony

Here’s what a juror said about an expert in a tax fraud case:

The witness used inappropriate numbers, didn’t do deductions properly, presented things in a roundabout way, and gave a lot of incorrect information.”

As you can imagine, jurors did not find him persuasive.

Arrogant self-presentation

“That witness was confrontational while being cross-examined and was arrogant, and that did not help,” said a juror about a defense expert who jurors agreed was the single worst witness in the case. The defense lost—which our research shows is the most common outcome when jurors perceive the defense experts to be bad. (Bad experts on the plaintiff side, however, do not necessarily lead to plaintiff losses.)

Arrogance is a sign to jurors that you do not listen to others, and someone who does not listen to others cannot be objective because s/he is cut off from external sources of insight and information.

Other turn-offs

Some other common behaviors that undermine your credibility in jurors' eyes are:

- ▶ Appearing ill at ease or nervous
- ▶ Using indirect eye contact
- ▶ Crossing your arms defensively across chest
- ▶ Quibbling over common terms
- ▶ Drinking a lot of water
- ▶ Looking to your attorney for assistance in cross
- ▶ Using a defensive tone of voice
- ▶ Using a lots of “ahs” or “uhs”

Qualities of a Successful Expert Witness

So what do jurors have to say about effective expert witnesses? Here's one juror's comment, from the legal malpractice case, on the expert testimony of an attorney for the defense:

It was fabulous, one of the highs. He was clear. For a lawyer, he gave brief, short answers. He had a wide-ranging view of the evidence. He informed us. He gave us his reasoning for his opinion. He seemed very sincere. I felt that he was defending his profession.

The qualities of a successful witness can be summed up in three words:

- ▶ Dynamism
- ▶ Trustworthiness
- ▶ Expertise

If you look back at the list of witness “turn offs” for jurors, you will see that all are inversely related to one of these three qualities. As I noted earlier, the juror “turn offs” are also all related to proving your objectivity in a situation of advocacy. You persuade by showing that you plan to win by being a witness for the truth.

Notice that what you might naturally put in the forefront—your expertise—is only one of the three factors that jurors use to evaluate you. You might initially find this to be a sad reflection on jurors and juries. However, if you think about it in light of your own experience in evaluating people, it will make a lot of sense. Each of us has only a very narrow slice of expertise relative to the immense amount of knowledge in our world. In most situations in everyday life—evaluating the skill of a financial advisor, say, choosing the best plumber to hire, or selecting a professional and qualified caterer for your wedding—most of us cannot usually rely on an in-depth knowledge of these

fields to guide us. We have to rely on other, common sense cues that help us to determine if the person's purported expertise makes sense in light of the person's way of being in the world.

Here are some tips on how to convey dynamism, trustworthiness and expertise at trial.

Communicating dynamism

If you are bored by your own testimony, it's only natural that the jurors would be as well. There are simple, concrete ways you can convey your enthusiasm for your subject and your testimony:

- ▶ Be active in your presentation. Write on a flip chart, get up and interact with a hardboard exhibit, use hand gestures, have a Power Point presentation to present some key points. If you use Power Point, spend some time on the stand without using the Power Point so that jurors can focus on you for some of the time rather than on a screen.

For most of us, it is helpful if we rehearse and practice these techniques so that we can integrate them smoothly in to the flow of our talk and presentation.

- ▶ Don't speak in a monotone or speak too softly. Many older jurors have hearing problems and will miss your testimony. Speak with tonal variety and loudly enough so that all jurors can hear. If you are by nature soft-voiced, a good technique to help increase your speaking volume in testimony is to practice doing it at a pitch you feel is a shout or a yell for at least 4 or 5 minutes. Then, go back to using a more normal voice. You will find it easier and more natural to increase the volume of your speaking voice. If you aren't sure how your voice comes across, tape yourself on video or audio and listen to yourself.
- ▶ Don't forget who your audience is. Make eye contact with the jurors. Get them involved with your testimony by using your eyes to draw them in. In the U.S., it is hard for us to resist someone who looks at us directly. However, don't stare—that may make jurors feel intimidated by you. Also be aware that jurors reared in other cultural traditions may not feel comfortable looking you directly in the eye. Move your eyes back and forth between the questioning attorney and the jurors as appropriate.

Communicating trustworthiness

Trust is a complex social feeling generated by a variety of verbal and non-verbal behaviors. In your role as expert at trial, some aspects of building trust relate specifically to dealing effectively with the expert paradox, that is, the fulfilling your role as a witness to the truth in a situation of advocacy. Others are more generic:

- ▶ Consistency is one of the most important common sense cues that indicate trustworthiness. People look to see if what you say matches how you say it and how you behave when you are saying nothing at all.

- ▶ Realize that you occupy your ritual role as an expert for the entire time you are in the Courthouse, not just when you are on the stand. Behave with decorum from the moment that you exit your car or taxi at the Courthouse until you leave the Courthouse after your testimony is over. Jurors are everywhere and they watch, and they talk with each other about what they see and overhear.
- ▶ People who are trustworthy show respect to others. Jurors will not trust you if they feel that you are not respectful of them or of the court process. You need to show that you are not above the ritual process of the trial. Be polite and respectful to the Judge, the attorneys and the jurors at all times. If you are sitting in the audience, listen respectfully to other witnesses on the stand. Don't make smarmy or sarcastic comments that jurors might overhear.
- ▶ If you have a condition that requires you to stretch or to take frequent breaks, be sure to have your attorney bring that out immediately in your direct exam. Otherwise, some jurors will interpret those behaviors erroneously as a sign that you are disengaged or nervous and you will lose credibility.
- ▶ In America, equality is a strong value. We trust those who treat us as their equal. That's why you should not talk down to jurors in your testimony. Teach them what they need to know. Treat them like intelligent adults who can understand, if given the right tools and explanations. Someone who recognizes that we don't know something and teaches us in a non-threatening and supportive way is someone we will trust.
- ▶ Don't be arrogant. Arrogance suggests that you do not listen to or value others ideas and opinions and put yourself above others. Don't dismiss the expert who is your counterpart. Treat his or her opinions respectfully, even if the expert's work does not deserve your respect. Reserve your criticism for the expert's work and conclusions, rather than criticizing the expert as a professional or a person. If you can, show some humility for your own achievements and expertise.

To use the expert paradox to your advantage, your testimony needs to come across as unbiased to jurors. If you come across as unbiased, rising above the pressures put on you in an advocacy situation, jurors will perceive your opinions to be trustworthy. Here are some basics for conveying that you are unbiased:

- ▶ If you testify for both sides, make sure that comes out during your direct testimony.
- ▶ Demonstrate to jurors that you considered a variety of scenarios or conclusions as you went about forming your opinion. An opinion that results from a complex process is more trustworthy than is a firmly held opinion that seems to have been pre-ordained.
- ▶ On cross, it is essential that you not appear to duck any questions from opposing counsel. Answer all his questions clearly and forthrightly, even those

that may seem to damage your side's case. (However, there are techniques you can learn for answering a question and yet not giving opposing counsel the answer she or he wants.) People who are trustworthy and objective don't try to worm out of tough questions. If you directly respond to the hard questions and do not make a big deal out of your answers, neither will the jurors.

Communicating expertise

Being a doctor and playing a doctor on TV are not the same, yet people often walk up to actors who play doctors and ask them for medical advice. Why? Because *conveying expertise* is not the same as actually *being an expert*. To be a successful expert witness, it is not enough that you actually are an expert in your field. You must start to understand how to behave in ways that convey your expertise to others.

- ▶ You convey expertise first through your credentials, experience, and publication and presentation history. Don't overdo it, however. Discourage counsel from having you testify about credentials or experience that is not relevant to the issues at hand. Jurors will realize that you are just padding your resume, so to speak, and you will lose credibility.
- ▶ Be prepared. Examine the relevant evidence, prepare your reports and any demonstrative graphics, and know what role your testimony will play in the trial. Prepare your own materials for presentation, or closely supervise their preparation. Do not let counsel take charge of this. (If counsel has a professional graphics company involved, work directly with the graphics consultants yourself.) Talk with counsel to understand what decisions—that is, what verdict questions—jurors will have to answer relying on your testimony. Experts are people who know how to figure out what is important in a situation. The more tight, focused and relevant your testimony, the more you show jurors the substance of your expertise. Your expertise at trial is about giving jurors what they need, not showing off everything that you know.
- ▶ Teach effectively. Communicating in clear, everyday language is part of conveying your expertise. This demonstrates that your understanding is deep and that you can relate it to everyday experience.
- ▶ On cross, don't let opposing counsel get away with misstating facts, your opinions or important principles of your field. Practice ways of responding respectfully but firmly with the correct information.

Is Money the Root of All Expert Testimony?

Earlier in this paper, I discussed data that shows most jurors start out believing that experts will say whatever their attorney tells them to. This belief is rooted in the structure of the trial, in which you are paid by the attorney to testify on behalf of his client in an adversarial situation. I have talked extensively about how your successful performance as an expert depends on conveying to jurors that you have risen above

the adversarial situation to be a witness for the truth. However, we have not yet talked about *money*.

How do you deal with the fact that you are paid to participate in this proceeding? Most attorneys believe that an effective way to attack an expert on cross is to elicit how much you have been paid for your work. Is there any way to answer such questions honestly and yet overcome juror cynicism about your ambiguous status as paid expert?

The short answer is yes, there is.

Jurors, just like you and me, have contradictory and crosscutting attitudes. The kind of cynicism expressed by jurors about the integrity of expert witnesses is a common cultural attitude in America, reinforced daily by media and events in the political and business worlds. However, many people adopt that kind of cynicism defensively. They believe it is a core truth of our society that must be acknowledged, but they are not happy about it. Most of us do not really want to live in a world where money is the only value and the truth can be bought and sold. We are grateful when someone comes along who proves us wrong.

In addition, jurors live in the same world of money that you do. Jurors are also paid for what they do. Although jurors may believe that others' opinions can be bought and sold, they rarely believe it about themselves. Most jurors, like most of us, believe that whatever they might be paid, they have earned honestly through their own effort and skill. If anything, U.S. jurors are likely to believe that they are not paid enough, not that they are paid too much. Jurors also understand that, in our society, people with special expertise are rewarded with higher salaries.

Jurors frequently tell us that that they assume experts are well paid and dislike it when attorneys dwell on how much experts are paid. Just as with negative political ads, which voters say they hate but clearly have an impact on voting behavior, jurors may say that they hate this kind of testimony but still be influenced by it. The way in which you and counsel handle such questions is the key determinant of how influential facts about your fees will be in jurors' minds.

- ▶ Start by just acknowledging the fact that you are paid matter-of-factly and then move on. Do not make a big deal out of it. Make clear that you are paid for your *time* and not your *opinion*.
- ▶ If your fees are higher than the norm, be prepared to justify them based on your experience and expertise. If you have been paid high fees, your performance in court also better justify your pay. If you have fallen into the traps of poor communication outlined earlier in this paper and opposing counsel draws out that you are also highly paid, you will lose credibility with the jury. Because your performance is inconsistent with your high pay, many jurors will conclude that you have been paid a large sum to buy your support for your party's position.

- ▶ If you can get counsel to agree, it is best to bring out the details of your fees in your direct exam, rather than leaving it for cross. Speaking about your fees on direct steals opposing counsel's thunder and makes his or her attack on your credibility seem petty and weak. It also establishes you as someone who has no fears about this information coming out.
- ▶ If you frequently testify only on behalf of one side, you need to be prepared to explain how this is a principled position and not a form of biased advocacy. As discussed earlier, people look for consistency in communicative behavior. You can turn what opposing counsel wants to make into a bad fact into a glowing sign of consistency, if you are staunch and clear in your position. For example, you might say, "If I ever encounter a situation where the facts support a defendant's position in this type of case, I would be delighted to testify on behalf of the defense. I understand that it looks suspicious to jurors that I have testified only on behalf of plaintiffs. The problem is that the truth doesn't change. That's why I testify only on behalf of plaintiffs."

Telling Tales with Numbers

As an expert witness on accounting and damages issues, you face some special challenges. For most people, numbers are a numbing form of evidence. Based on our research, we know that at least 50% of your jurors are likely to have hated math in school and feel at sea with numbers. About 20% of jurors will have had some kind of experience with accounting or bookkeeping—a fact that can cut both ways for you, because, as Mark Twain once said, "A little bit of soap and a little bit of education are dangerous things." Jurors who believe they have relevant expertise often get things wrong but may be looked to as an expert in the jury room. You therefore should not presume that the jury has any relevant knowledge.

Here are some tips on giving effective testimony about numbers and accounting issues:

- ▶ Smile and look like you are enjoying it!
- ▶ Most accountants like to talk about processes rather than behaviors or people. Most jurors like to hear stories told about people. When you describe what you did to reach your opinions, use the first person and active voice: "I reviewed these records, and I found..." "To determine the value, I first looked at these records and talked with these people..."
- ▶ A vivid example is more persuasive and memorable than a general summary statement.
- ▶ If you are using visual metaphors and analogies to explain things, consider working with a graphics consultant to design demonstratives that will show while you tell.

- ▶ Numbers do not speak for themselves to most jurors. Explain what a number you are giving means in the context of your trial. \$1 million can be a small number and 2 can be a big number, depending on the context. If you are dealing with very large numbers, this is especially important. You need to either normalize this large number for the jurors (if your client is seeking significant damages) or make it apparent how outrageous the number is (if your client is contesting a high damage demand).
- ▶ Explain what is explainable to the jury and do not explain what will be over their heads. Figure out what is most explainable in the evidence—like how a tax return was filled out and how this helps you to determine an appropriate value for an asset, and step jurors through it. A tax return is a good choice because most jurors will have some familiarity with tax returns.
- ▶ Explain to jurors how numbers get put together, not just what they mean or the evidence you have examined. Giving them some background in understanding where the numbers come from will make them feel more confident about evaluating the evidence.
- ▶ Take on your counterpart's numbers and explain clearly to jurors why your numbers are better.

Conclusion

The key to being a successful expert witness is recognizing the expert paradox and proving through your performance that fulfilling your role as an objective expert is more important than conforming to the demands of the advocacy situation. I hope that the insights I have shared here help you achieve that performance.