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The Search For An Effective Expert: Sailing the Seven C's

I love expert witnesses. As a plaintiff's personal injury trial lawyer, I deal with expert witnesses on a daily basis. I also give speeches to different expert witness organizations and I am constantly asked, "What are you looking for in an expert witness?" Here are a few of my thoughts, for potential experts and the lawyers that hire them.

My search for the "effective" expert witness can be difficult at times. While Christopher Columbus sailed the seven seas, I sail the following "C's," in my quest for the effective expert witness. My seven "C's" are sometimes more difficult to navigate than those Christopher Columbus encountered. And while some of these "C's," appear simplistic, it is surprisingly difficult to find an expert witness that embodies all of these traits.

Credible

I am looking for an expert witness who is credible. Experts need to be constantly vigilant in protecting their credibility. Like it or not, your credibility is always at issue. Ironically, it often takes years to build credibility as an expert witness and only one case to destroy it. How do you destroy your credibility? It starts with getting involved in the wrong cases. Do not get involved in any type of case that is a "dog." Lawyers respect experts more if they are willing to turn down an engagement as opposed to accepting everything that comes in the door. Why put your credibility and reputation on the line for a case that is highly questionable? The system fails when that happens, and, in the long run, nobody wins. Additionally, experts do a disservice to their own career and to the parties involved when they accept a questionable case they cannot stand behind. Experts: Be selective. Do not be afraid to say "no."

Part of this process requires you to be thorough, and not to be shy. Do you won due diligence on counsel who wish to retain you. Make sure you are fully informed of the expectations of counsel, the nature of the assignment and the time commitments. In other words, do not be too quick to accept assignments. Do your homework. Verify that you have received everything from the lawyer. Do not hesitate to ask questions or request additional material or information. Many times, it is not what you review but what you have not reviewed that destroys your credibility.

Another way of gauging your credibility as an expert is examining your believability. Are you believable? Make sure that you have not published anything that

is inconsistent with the opinions you are offering in the current case. If the article you published last year takes an inconsistent position, it will be impossible to convince a jury that you really believe what you are saying now. If you did not believe it then, they will not believe it now. As a lawyer, I want the jury thinking my expert is believable; and if the expert is believable, we are on the way to a favorable result.

Competent

I want an expert that is competent. I love utilizing a teach as an expert. I think individuals that teach are effective with a jury. The problem with many experts is that they get in trouble when they venture outside of their “sandbox.” Stay within your area of expertise. This is where you are most competent and therefore most effective. For example, in a medical malpractice case, if I am trying to question a nursing expert on nursing issues, it may be difficult to cross-examine the expert on the topic. However, when the nurse starts espousing opinions outside his area of expertise, I know I will win that battle. It is that simple. Honestly define for yourself your true area of expertise and feel confident in that zone. Know your role in this case and stay within it. Do not let any lawyer (the one that retained you or opposing counsel) push you into an area you are not comfortable with. When you start to opine outside of your area of expertise, you lose.

As a lawyer, you need to help your experts stay within their area of expertise and never ask them to go outside of it. You also need to thoroughly investigate whether or not this expert’s opinions, the methodology, and the basis of the opinions will hold up in court. It is your job to make sure this expert’s opinion meets the legal requirements for admissibility of expert testimony. To do this job, there is a plethora of potential questions you need to ask the expert. For example, is the methodology the expert used contrary to published studies? Has the theory or technique been subject to peer review and publication? Is a conclusion inconsistent with material testimony or evidence? Are the expert’s theories based on generalized information and calculations? Are there flaws in the expert’s investigative process? Does the expert have a particularly strong (or weak) curriculum vitae? Has the expert ever been barred or excluded in a case under Daubert? Has the expert been allowed to testify in other similar cases under Daubert? Does the expert have personal experience? Did the experts test the theory? Is the technique so new that there has not been time for applicable standards to be implemented?

Failure on the part of the attorney to ask these questions is a recipe for disaster. Trust me, I would rather spend a “couple of dollars” up front in finding out these answers – and dealing with any weak spots while I still can – as opposed to finding myself “holding the bag” at the end of the case after my expert’s testimony has been barred and I have nothing else to offer in its place.

Convincing

I want my expert witness to be convincing. In other words, be persuasive. Step down and use a chalk board. While there are many ways to be convincing, there are just

as many ways to discredit your testimony in front of a jury. You need to be honest with the lawyer and yourself in recognizing your nervous habits and figure out how to avoid them during your testimony. Consider videotaping yourself. Any quirks? Any fidgeting? Any annoying habits? Like it or not, we all have negative characteristics, nervous laughs, etc. If you are honest in identifying these problems up front, you can devise a strategy to avoid negative characteristics while in front of a jury. Also, make sure you know whether or not your deposition testimony will be videotaped and used at trial. This could influence your attire. And be careful. In the back of your mind, remember that jurors may be watching this deposition videotape some day. Similarly, typically the lawyer will want you to testify live at trial, because you can be more effective at convincing a jury when you are in front of them. As such, dress appropriately for the venue and inquire about any “quirks” with the judge.

Confident

I want my expert to be confident. There is a fine line between confidence and cockiness. Look at the jury. Make eye contact. Talk to them, not over them. Arrogance does not play well to a jury. The biggest problem I have with expert witnesses is that they are very confident on direct and often do a terrible job on cross examination. Cross-examination does not equate with “adversarial examination,” from a demeanor standpoint. An expert should try to maintain the same confident and open disposition on direct and cross-examination.

Caring

I want my expert to be caring. It is very important that the expert witness appears to be involved in the case because they are trying to “right a wrong.” When the expert is there to truly make a difference and improve the jury’s understanding of the true facts, the system works. When an expert educates the jury on how it should be, this is much more believable than an expert who appears to be testifying solely for money. Believe me, a jury will see through the expert that is involved in a case when the only issue is financial gain.

Along those same lines, I want my expert to avoid being an advocate. An expert is there to give opinions. I do not need an expert to advocate a position. Advocacy is my job. There is a fine line between persuasion and advocacy. Both the expert and the lawyer need to understand the difference.

I also need my expert to testify honestly and make concessions when appropriate. If you do not know the answer, say so. Again, avoid acting like you are testifying in a partisan fashion. You are there because you care that the jury understands the facts.

Creative

I want my expert witness to be creative. Keep the interest of the fact finder. Paint a clear, coherent and understandable story. The expert can be very helpful to me, as the

lawyer, helping to develop a theme for the case. Help me choose the exhibits that we should use to effectively get our message across to a jury. Help me with the use of analogies so a jury understands any complex issue. I do not want an expert to be a puppet. Experts are an integral part of the trial team and should be used to maximize their own effectiveness.

Communicate

Finally, I need you to effectively communicate with the jury. You need to carry yourself well. Jurors are charged with the difficult task of mastering complex issues at trial. They are searching for the guide. They are searching for the teacher. Their understanding of these issues is dependent on your ability to communicate your opinions effectively. If you see that the jury is getting board, change the mode of communication. I need an expert to do whatever is possible to persuasively communicate our message to the jury. No expert has been held in contempt for creativity in the way they communicate, and it is imperative to keep the jury awake.

The qualities that make someone a good dinner companion (personable, open, entertaining, engaging, fascinating) also make a good expert witness on the stand. I want the jury to like my expert witness. Your true personality must be able to shine through at a trial. Be honest, polite, self-deprecating and likeable. Make every effort to avoid being condescending or arrogant.

Today, the role of the expert witness is expanding exponentially in litigation. Experts are being called upon by the judicial system to play a vital role in assisting the trier of fact to understand complex issues. The expert's role is becoming increasingly more important.

Both the lawyer and the expert must give careful thought to how they will present the expert's testimony. The expert's role in the trial is crucial. As a lawyer, I know if a jury has followed my experts in the battle of the experts, it is because I won the battle of the "C's."