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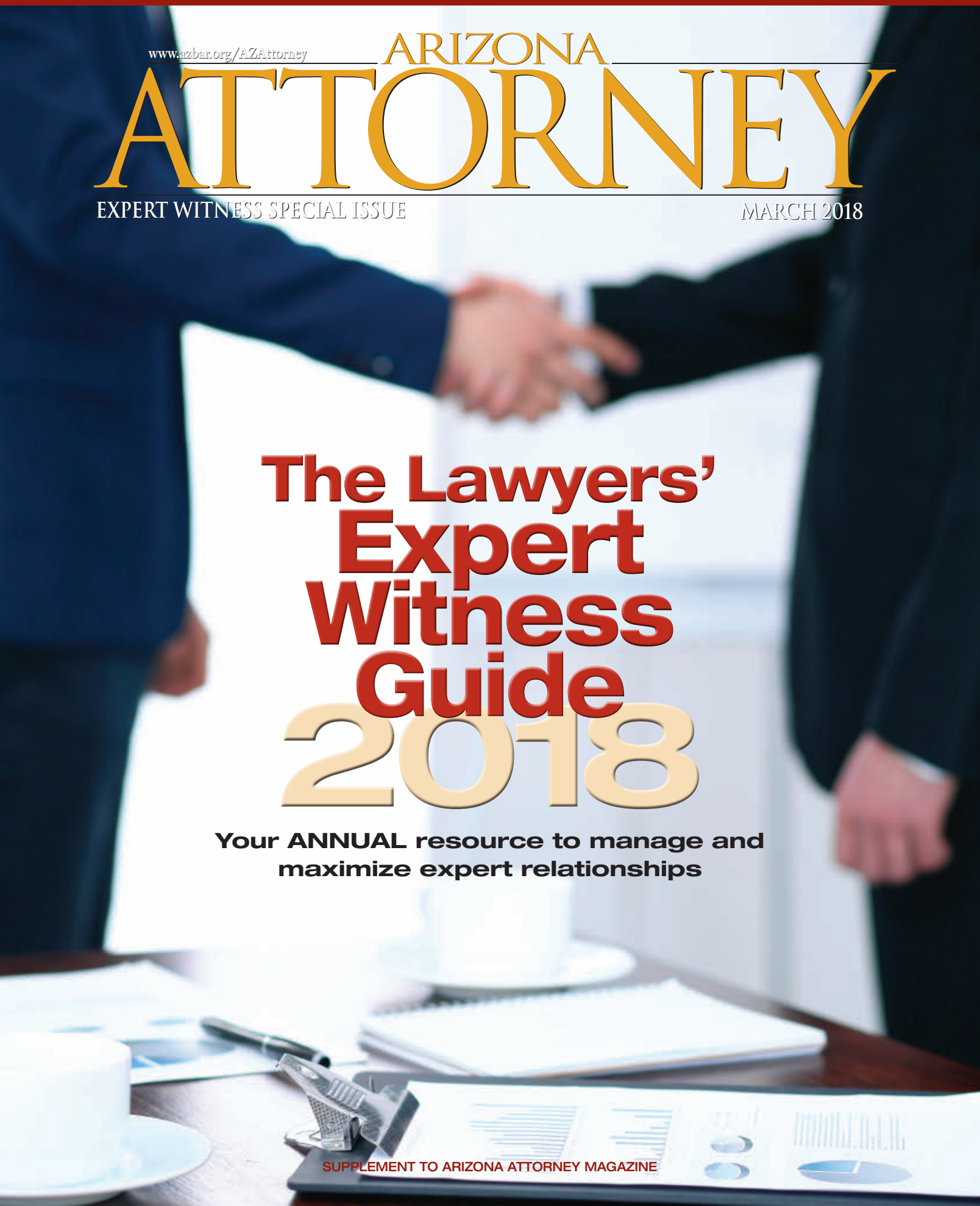

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EXPERT WITNESS SPECIAL ISSUE

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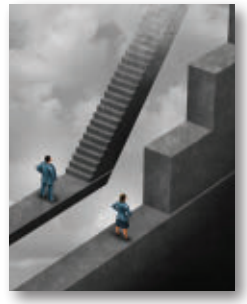

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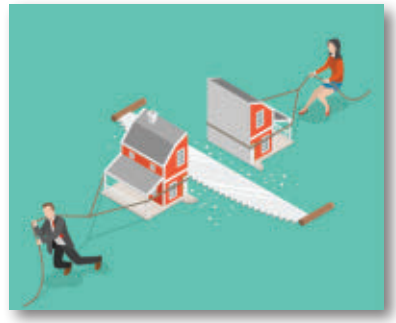

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ON THE COVER

As discovery and trial grow more complex, so do the skills that attorneys and their experts must develop. This issue provides a wealth of resources and insights from experienced professionals who have faced your challenges.

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FROM THE EDITOR

Experts offer positraction

Confession time: My **favorite fictional expert witness** has to be … wait for it … **Mona Lisa Vito**.

Mona Lisa Vito: Experts must be "dead on… accurate."

Doesn't ring a bell? Think of her this way: the tire-track expert in ***My Cousin Vinny***.

I defy anyone to disagree.

What makes **Marisa Tomei**—I mean Mona Lisa—such an effective deliverer of trial testimony? Besides that awesome accent, it's the fact that her character's expertise derives from **real-life experience**. It's a cinematic pleasure to see her knowledge about actual cars upend the book-learnin' of FBI analyst George Wilbur, who testifies about tire marks left at a crime scene. Plus, I learned about ***positraction*** and 1964 Buick Skylarks. **What's not to love?**

Before all the experts reading this lash out in annoyance, I'll admit: That scene in an Alabama courtroom was **nothing but hooey**. And Vito may have demonstrated one aspect of an expert's skill set—calm under pressure—but none of the countless others that are required to turn an amateur into a pro.

Like research and communication and writing and presentation and ethics and practice and –

You get the picture. All those skills are what this **special annual issue** is all about. Not flash, but substance. Not fireworks, but deep knowledge and hard work.

In the following pages you will hear from those who have walked the walk, in trial prep and in trial. They explain the **characteristics of effective experts**, presentation methods, private investigations, mediation, real estate masters—even gender differences in the profession.

Once again, I am impressed by the expertise we are privileged to publish.

But I continue to wonder about **the disconnect between fiction and reality** that experts and attorneys must face. Some call it The CSI Effect, but popular culture has created expectations in jurors, me, and other uneducated folks that may be unrealistic and harmful to actual cases.

For instance, I heard from a few readers about the **CBS show *Bull***, about a jury consultant—not exactly an expert witness, but in the same courthouse. Based on a real person, the character is brash and consistently right. And if it's like every other legal show or movie, it's likely to be over the top and unrealistic.

Translated: It's highly entertaining.

So who'd like to read an article that dissects what media get right and wrong about expert witnesses?

No need to wait 'til next year. If you're also intrigued about writing (for instance) "5 Things *Bull* [or *Law & Order*, or …] Gets Right [Wrong] About Expert Witnesses," drop me a note at **arizona.attorney@azbar.org**

Just **don't bad-mouth Mona Lisa Vito**. As Vinny Gambini said, she was "a lovely, lovely witness." And I wish the same for you. AZAT

Tim Eigo

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When Your Expert's Expertise Isn't Enough

BY DEBORAH JOHNSON

DEBORAH JOHNSON, MC, is the President of High-Stakes Communication. She is an industry expert in effective communication and a six-time Emmy Award-winning writer/producer. She has consulted on a wide variety of high-stakes civil, criminal, and family law cases, including a $5.3 million civil rights case and multimillion-dollar divorce cases.

The wrongful termination case should have been a slam-dunk. The plaintiff, a top-producing *female* executive in the financial industry, was fired by her *male* superior for a ridiculous list of petty problems—the same problems her male counterparts were guilty of, but with no consequences to them. It was clear that they were jealous of her success and wanted to scavenge her lucrative accounts. The plaintiff's seasoned industry expert had sterling credentials, decades of experience inside the industry, and deep knowledge of hiring and firing practices. He provided an airtight analysis and report. A multimillion-dollar award was a given.

And then the expert imploded during fierce examination by defense counsel. He stumbled over simple answers. He looked confused. His shoulders slumped, his voice got quieter and quieter. He stopped looking at counsel when asked questions. Every piece of his report was rock-solid, every word of his testimony was true. But suddenly, the expert's behavior made his once-credible testimony suspect in the minds of the jurors. The cost: millions of dollars.

Preempting Catastrophe

This is an extreme example. But, on a lesser scale, it happens often. How can you ensure this doesn't happen to you? This article gives you an insider's look at how to preempt this kind of damage to your case. First, it's about redefining the qualifications you demand from a testifying expert. Second, it's about research on how our brains work to help you understand how your jurors operate and what they're looking for. Third, this article offers proven practices on how to better assess your expert, and tips on a how to prepare your expert to ensure they make an authentic and influential connection with your jurors.

Hard Skills vs. Soft Skills

Your expert may have stunning credentials, specialized knowledge and experience, be able to prepare pristine analyses, and speak astutely about that analysis. But that alone will not get you the results you need.

An expert's hard skills—what they know—is only the first step. It's their soft skills—how they relate to people—that prove to be exponentially more important to the jurors.

Soft skills are the ability to engage each one of the jurors, to relate to them, to communicate complex ideas in a respectful and easy-to-absorb manner, to handle the most challenging questions with aplomb, to defend a position without being defensive. Mastery of these soft skills determines whether your expert is merely a conduit to deliver information or can actually influence the jurors with that information.

Jurors are going to buy—or not buy—your case based on emotion and then justify with facts.

Finicky Jurors

The scenario above, in which jurors do not believe an expert, plays out all too often. Time and again, in juror debriefs, I hear them talk about who they liked, who they trusted, who they believed. If they talk about data or facts at all, it's most likely through the filter of how they felt about the expert who presented it. I've heard jurors say things about experts like, "I didn't believe a thing that expert said, he was too pompous," or "That engineer was so sincere, I'm sure she was right and the other guy was wrong," or "I didn't trust that accountant, I don't believe his numbers."

Despite appearances, your jurors aren't being finicky. They are naively admitting what science can prove: Emotions or feelings about people are power ful determinants in decision-making. In the consumer world, experts know that we buy on emotion and then justify with facts. In the courtroom the same is true. Jurors are going to buy—or not buy—your case based on emotion and then justify with facts.

While this behavior may seem capricious or shallow, our brains are wired this way. Our DNA dictates that we are on alert for clues of who to like. We constantly scan for the subtle signs of who to trust. We unconsciously gather, filter, and analyze clues of who to believe.

The key take-away: Your jurors register everything. Every nuance of your expert's behavior matters. It builds a case for your jurors to like or dislike, trust or distrust, and believe or disbelieve your expert. How your expert shows up has a direct and powerful bearing on the credibility of their testimony—and therefore the outcome of your case.

Assessing Your Expert

These insights about what jurors are looking for give you criteria by which to assess your expert. Is your expert likeable? Do they have the soft skills to engage your jurors? On the

stand can they have a conversation with jurors rather than lecture them? Can they lead them gracefully through complex concepts without speaking over their heads or insulting them? Can they hold up under the toughest onslaught from opposing counsel? Your expert must have these soft skills to instill trust in your jurors.

There are four specific criteria I use when assessing a witness. To be most gffective, get out of "attorney" mode and into "observation" mode. Watch and listen carefully, not for content, but for what a neutral juror will observe.

1. Body Language

Research shows that more than 90 percent of communication is nonverbal. That means everything from the top of the expert's head to the tip of their toes is communicating. Is your expert's posture open and welcoming? Do they make eye contact easily? What do they do with their hands? Do they have nervous gestures like blinking, twiddling their fingers, wiggling, or clearing their throat? Observe them when they are comfortable and then challenge them to see if anything shifts. Under stress, do they drop their head, lower their eyes, droop their shoulders, or squeeze in their arms? Even if the jurors don't consciously recognize it, the subtlest shift in body language signals that something is wrong.

2. Language

Again, listen like a juror—unattached. Does your expert actively engage you, or are they lecturing you? Is their tone conversational or austere? Do their words invite you into the conversation or push you back at arms-length? Do they use comfortable, colloquial terms or insider language? Are their sentences short and clear or long and convoluted? Is their tone warm and friendly or dry and flat?

3. Attitude

This may seem a little obtuse. But remember, jurors will pick up any signals if your expert feels superior to them. So, is the expert comfortable? Are they there to help the jury understand a complex issue—or to parade their expertise? Will they treat opposing counsel with the same respect as they treat you?

4. Disconnect

We know from research that when people have an expectation of who a person is and they show up differently, that creates a gap in trust and believability. For example, an expert you've spoken with has a gracious British accent. You would expect him to show up being "British." Instead, he shows up wearing cowboy boots and a string tie. Or, you might expect an oil-rig construction expert to look like he'd worked in the oil fields. Instead, a petite, Asian woman shows up wearing pearls and designer dress. There's a disconnect between what you expected and what showed up. It isn't always this extreme. It can be age or sex or race or height or weight or dress or even whether your expert has a high-pitched or very deep voice.

Let me be clear: There is absolutely

When your expert is confident, the words and how they say them telegraph trust to the jurors.

nothing wrong with experts who don't fit expectations.

But there's also nothing wrong with expectations. That's because our brains are wired to create expectations. They are designed for efficiency, i.e., creating shortcuts for storing all the data we are exposed to every day. Over time we build up a single, compact idea for things. Our brains categorize, group, and then store things like the files on your computer. We expect potato chips to be salty, the sunshine to be warm, big dogs to have a big bark, and basketball players to be tall.

So, when you put your petite, female, Asian oil-rig construction expert on the stand, in all likelihood there will be a disconnect for your jurors. You can't afford to ignore it. Your job is to make sure that you quickly close that gap with your jury and pay extra attention to your expert's soft skills and their ability to connect to the jurors and build trust.

A Polished Preparation

The most crucial aspect of expert testimony is confidence. It's clear that from the juror's perspective it's not only *what* your expert says, but *how* they say it. Jurors are turned off by boasting, annoying, frivolous puffery. What they respond to is calm, comfortable, clear, concise answers delivered with conviction. When your expert is confident, the words and how they say them telegraph trust to the jurors.

I've found the two key ways to help your expert exude confidence and connect to the jurors are: practice and video feedback.

1. Practice

This is crucial in helping your expert fine-tune the kind of soft skills they need to help you win the case. The military knows the value of practice in handling high-stress situations, illustrated by how Special Forces are trained. On the first go-around in a high-risk situation, their blood pressure and heart rate shoot sky-high. However, on each subsequent practice, those indicators lower a little until they reach optimal performance range.

In the wrongful termination case, the attorney knew how aggressive opposing counsel would be, but he had not practiced with his expert on how to handle it. When the assault started, the expert lost his confidence. Had he had the opportunity to practice responding to the verbal barrage, he would have sailed right through cross-examination rather than turning into a deer in the headlights.

In your case, what will be the most

The single most powerful tool you have is video feedback. One minute of video is more instructive than one hour of talking.

treacherous questions from opposing counsel? Practice them with your expert until they are calm and confident, no matter what is thrown at them. For example, hypotheticals can be quicksand. If your expert pauses too long, breaks eye contact, or ducks their head, the jurors might think the expert is being evasive. But a firm, clear "I don't speculate" or "That's outside of the scope of the work I was hired for" tells the jury there's nothing to hide.

An insurance expert I worked with knew opposing counsel would hammer him on his use of the term "industry standard" in his report. Where was it written down? What authority set it up? How can you claim this? His initial wishy-washy answers of "I just know" or "That's how it's always been" would only invite a further assault. So, to give him ammunition and confidence, we counted how many files he had handled in his years in the industry. There were over 15,700. Now he confidently faced the challenges with, "I've handled more than 15,700 files and this IS the industry standard." The jurors had no doubt that he was an expert on the matter.

2. Video feedback

When you're polishing your expert's presentation skills, the single most powerful tool you have is video feedback. Researchers are clear that at least 50 percent of people have no idea how they come across. I've had many witnesses look at their video with shock, saying they had no idea they leaned away when they were nervous or did that funny thing with their mouth or said *um* or *ah* so many times or nervously twisted their hands. One minute of video is more instructive than one hour of talking. You don't need fancy or expensive equipment. Your cell phone can capture and play back what the jurors will experience.

Conclusion

Soft skills do not show up on a C.V. Evidence of them cannot be found in the pages of a well-prepared report.

Much as you might want to think that the facts speak for themselves, it's really *how* your expert speaks about those facts that influences jurors. Take the time to assess your expert for their soft skills, and then diligently prepare them to exude confidence and make that all-important connection to the jurors.

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A Picture Is Worth More Than 1,000 Words

5 Best Practices for Effective Demonstrative Exhibits

BY MICHAEL J. HAUGEN, CPA/CFF, CFE
& WILLIAM M. FISCHBACH, ESQ.

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"You need to be trial lawyers. A litigator drinks wine and takes depositions. A trial lawyer drinks whiskey and tries cases."

This was the admonishment delivered recently by the Honorable Cheryle Gering, Chief Judge of South Dakota's First Judicial Circuit, to the dueling factions of lawyers in the multibillion-dollar "Pink Slime" trade libel lawsuit brought by beef product manufacturers against ABC News. While not all of the best trial lawyers are necessarily proficient imbibers of whiskey, the best trial lawyers are all, without exception, proficient persuaders. Persuasion in the courtroom is a matter of showing your narrative as the most convincing interpretation of the facts and evidence at hand.

When expert witnesses are involved, demonstrative exhibits play a key role in effective persuasion. Good demonstrative exhibits provide a clear and concise illustration of witness testimony. They enhance the comprehensibility of expert opinion, and thus enhance the credibility of expert opinion. For counsel, effective demonstratives are essential to illustrating the important aspects of the narrative supporting your position.

The combination of visual and verbal mediums is most effective for recovering and retaining information. For example, one study found that after three days participants retained 65 percent of information delivered both visually and audibly, whereas participants retained only 10 percent of information delivered audibly[1]. By engaging multiple senses, demonstrative exhibits can focus a jury's attention and convey a lasting message that might otherwise be lost after several days or weeks of trial.

The following are five best practices for creating and deploying effective demonstrative exhibits in the courtroom. After all, it doesn't matter how well informed or foundationally sound an expert's opinion is if the jury doesn't understand it.

Best Practice Tip #1

"KISS"— Keep it Simple, Stupid

It seems obvious, right? But lawyers and experts do a marvelous job of needlessly overcomplicating things, particularly when attempting to translate complex ideas into easy-to-understand demonstratives. Here are three ways to keep demonstratives simple and comprehensible:

1. Break-it-down-and-build-it-up

Avoid information overload. If the visual is too complicated it will distract from, not enhance, the intended message. If it is necessary to show a lot of information in a single demonstrative to make a point, break it down into several steps. Show the conclusion briefly, then back up and use a sequence of demonstratives to build back to the conclusive illustration. This can be done very effectively with PowerPoint by using successive slides to add incremental layers of information.

2. Exclude extraneous detail

Cut the fat and avoid the noise. Those things might prove to be a distraction to the jury.

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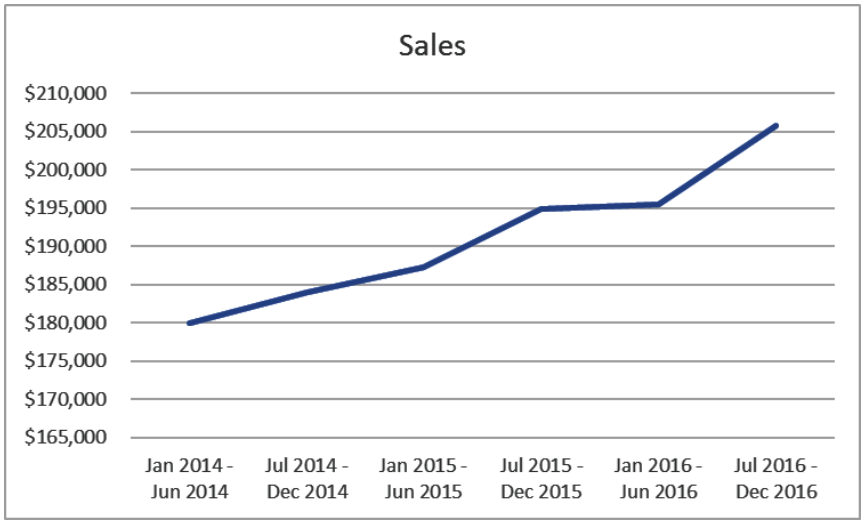
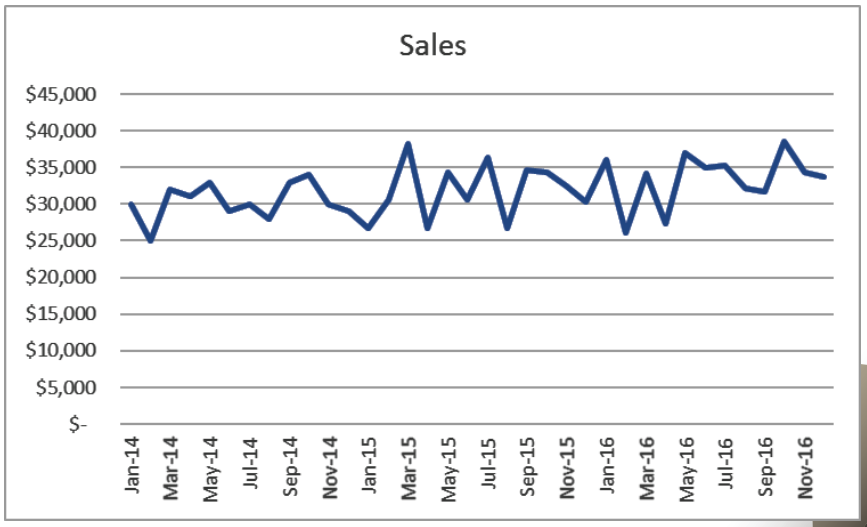


Not This:



For example, suppose a demonstrative is prepared to show the jury that the plaintiff's historical revenue growth would have continued in a steep upward trajectory for three years but for the tortious meddling of the defendant in the plaintiff's business affairs. If monthly revenue patterns are volatile and irrelevant to the broader three-year forecast, the demonstrative should show the broader historical revenue growth pattern, not monthly revenue volatility. (See examples on p. 13.)

3. Employ repetition and consistency

Be consistent in wording, definitions, background, font, text size, and colors. Doing so will prevent confusion and keep the jury's attention focused on the intended message rather than an irrelevant formatting change. And when a new piece of information warrants added attention, a change in formatting such as font, text size, and color can highlight its importance.

Best Practice Tip #2
Motion in the Ocean

Movement implies action, and an active exhibit is more effective than a static exhibit. Take the chart above showing escalating sales over a three-year period. An expert could present that as a stationary and motionless chart. But it would be more effective if presented as an animated slide showing the sales figures climbing higher and higher. Animation and movement will leave a greater impression on the jury, particularly when presenting dry material such as monthly sales revenues.

But don't overdo it. Be mindful of "KISS" above, as well as how the various parties are likely to be perceived by the jury. If your client is a large corporate defendant being sued by a small mom 'n pop business, using an expensive, state-of-the-art presentation is not likely to ingratiate your client with the jury.

Best Practice Tip #3
Make the Unfamiliar Familiar

When explaining a concept that might be unfamiliar to the jury, use demonstratives to analogize that concept to something almost anyone can understand.

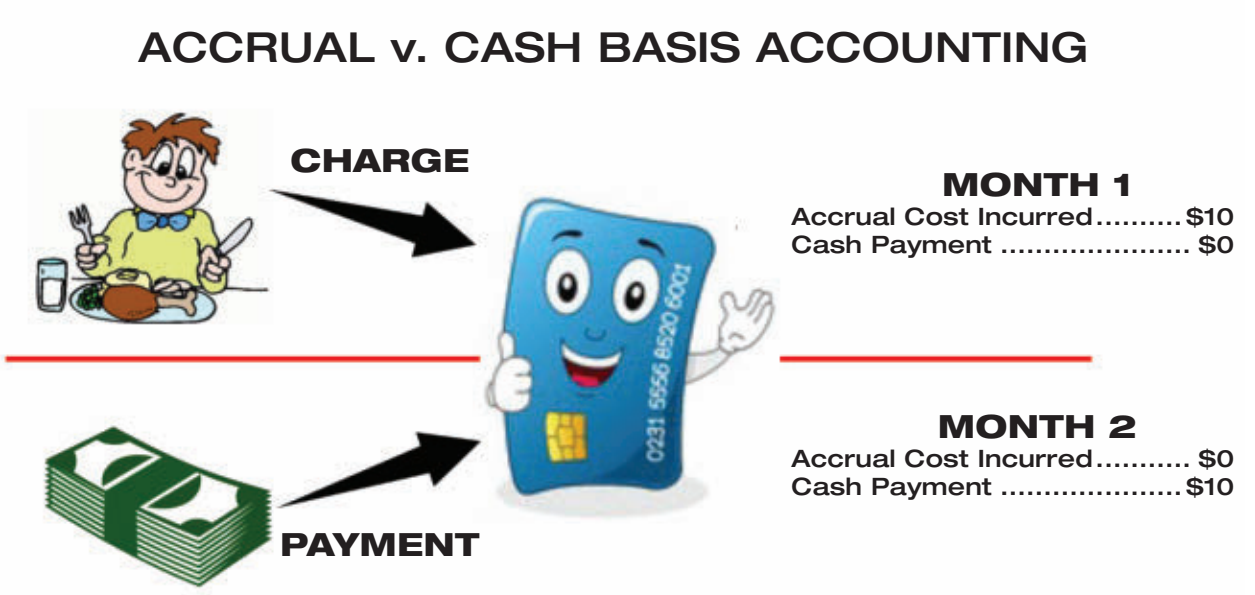
For example, suppose a demonstrative is prepared to illustrate the difference between accrual and cash basis accounting. Most jurors will be familiar with buying dinner using a credit card. The demonstrative can illustrate a credit card charge for dinner as a cost incurred under accrual basis accounting. Payment to the credit card the next month is not a cost incurred, but the cash basis transaction relating to the prior month's cost incurred—as shown in the image below.

Best Practice Tip #4
Size Matters

Congratulations. You have a beautiful, easy-to-understand demonstrative exhibit that really knocks it out of the park. But can the retired schoolteacher seated in the far back corner of the jury box see that exhibit and comprehend what it says? Demonstrative exhibits must be seen to be understood. Bigger is better.

Best Practice Tip #5
You're Gonna Need a Bigger Boat (or a Different Dongle)

Our state and federal courts have done an excellent job of updating Arizona's courtrooms with the latest audiovisual technology. But not all courtrooms are equipped the



same. The cable you have in your briefcase might have been compatible with the courtroom equipment used in your last trial. But it might not be compatible with the equipment in the courtroom for your next trial. Or the courtroom equipment might just be plain broken, requiring you to bring your own equipment.

At least one week before trial, contact the judicial assistant and request a time for both the attorney and expert to perform a dry run in the courtroom. Part of effective persuasion for both attorneys and experts is appearing at ease and displaying a sense of confidence in the courtroom. If the jury sees your trial team smoothly activating and operating the audiovisual equipment during direct examination—while the other side struggles to synch their laptop with that equipment during the transition from direct to cross-examination—it will likely enhance your team's credibility with the jury.

Animation and movement will leave a greater impression on the jury, particularly when presenting dry material, such as sales revenues.

An expert's decision of when and how to use demonstrative exhibits should not be made in isolation from trial counsel's case strategy. Attorneys and experts should coordinate carefully to ensure key aspects of the expert opinion are consistent with the narrative crafted by the attorney. By applying these best practices together, experts and trial counsel will maximize the efficacy of their demonstrative exhibits at their next trial. AZ AT

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endnote

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Jack or Jackie?

The Relationship of Gender and Expert Witness Testimony

BY ROSALIND R. GREENE, J.D.
& JAN MILLS SPAETH, Ph.D.

"Gender bias in the legal profession isn't new. … But nowhere is it more pronounced than among the ranks of female expert witnesses who must surmount multiple layers of ingrained stereotypes every day to do their jobs," reports Bloomberg BNA as recently as August 2017.[1] According to data compiled by The Expert Institute in 2014 (but which remains accurate today), 83 percent of expert witnesses retained by attorneys are

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JAN MILLS SPAETH, Ph.D. Since 1980, Dr. Spaeth has worked in all aspects of trial consulting, has written extensively on legal issues, and published two sets of DVDs on witness preparation with the American Bar Association. She has been a seminar presenter for legal organizations, including ATLA, and an educator. She possesses a Master's Degree in Communication, and a Doctorate in Psychology.

male and, on average, they are paid 60 percent more than their female counterparts for litigation-related services.[2] In the medical field, the income disparity climbs to 93 percent.[3]

Why is this? Are men intrinsically better at being experts? Doubtful. But that isn't really the issue. It is all about perception. Verdicts aren't based on absolute truths. They are derived from what jurors *perceive* to be true. Jurors view evidence through their individual filters, molded by life experiences. As long as gender biases are part of our culture, they will permeate jurors' life experiences, sometimes resulting in conscious or even unconscious bias.

Undoubtedly there are practitioners who will argue that in their experience, they have not seen a difference based on gender. However, this anecdotal evaluation may not be very reliable. Experimental studies enable researchers to control variables and conditions. Outside of an experimental model, there are simply too many variables to either rule in or out any causal relationships.

Over the past two decades, there have been many studies regarding gender and expert witnesses, often with conflicting results. As with most aspects of trial, there are no bright lines or clear-cut answers. Nevertheless, the research provides some interesting results to consider and evaluate within the specific case context.

How Jurors Process Expert Witness Testimony

Social psychological research identifies two models by which jurors perceive experts and their messages. Central route processing occurs when the content of the expert's argument persuades the juror. The light bulb goes on, and the juror "gets it." However, when jurors have trouble understanding the evidence or the argument, they rely on extrinsic factors to evaluate the expert's testimony. Through this peripheral route, characteristics of the expert such as gender, likability and knowledge provide decisional shortcuts enabling confused or lower-cognitive jurors to form an opinion.[4]

Case Complexity

Studies show that gender as a heuristic or peripheral cue plays a role in juror perceptions of expert testimony, particularly in more complicated cases.[5] In a 2005 study, researchers asked participants to award damages in an antitrust price-fixing case. Under high-complexity conditions where the jurors could not systematically process the testimony, mock jurors awarded higher damages when the expert was male. The jurors also rated the impact of the price-fixing arrangement significantly greater when the expert was male (Schuller, Terry, & McKimmie, 2005).[6] However, under low-complexity conditions, they rated the impact of the price-fixing arrangement as greater when a female expert presented the evidence. In addition, although falling short of statistical significance, under the low-complexity model jurors tended to award higher damages when the female expert testified.[7]

Using an empirically developed Witness Credibility Model, recent studies evaluated the impact of additional peripheral cues on the persuasiveness of expert witness testimony. When testing the likability of the expert, the results indicated, not surprisingly, that jurors were more persuaded by experts whom they liked. Interestingly, this effect was magnified when the expert witness was a woman.[8]

They also examined the impact of knowledge on expert witness credibility. Jurors found both male and female experts more persuasive when they perceived them as highly knowledgeable. However, only male experts could still persuade even if jurors perceived them as mildly knowledgeable. Women experts needed to exhibit high knowledge in order to persuade (Neal et al., 2012).[9] This suggests that the impact of expert gender may be more prominent in highly complex cases.

Social Role Theory

These results also relate to juror expectations about appropriate gender roles. Tess Neal, an Assistant Professor of Psychology at Arizona State University, has published more than a dozen peer-reviewed articles on expert witnesses and jurors. She explains that to persuade jurors, "Women experts must come across as both competent and knowledgeable (i.e., upholding their occupational role as an expert witness), but also warm and likeable (i.e., upholding their gender role)." Male experts must also:

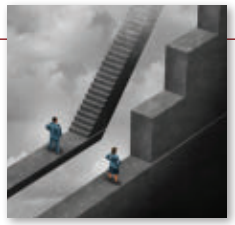
> come across as competent and knowledgeable …, but there is no social role requirement in our culture that expects men to be particularly warm or likeable, and thus men expert witnesses who are competent but unlikeable can be just as persuasive as men who are more likable. The same is not true for women expert witnesses.[10]

Generally, jurors expect males in the courtroom to be more aggressive, direct, loud and dominant, and females to be more patient, polite, controlled, and compromising. However, it becomes more complicated when a woman takes on the traditionally male role of expert witness. Women experts face a dilemma that "stems from a conflict between the stereotypes associated with women—warmth, caring, sensitivity—and the more aggressive, competitive, agentic stereotypes associated with the masculine role they occupy when they adopt the expert witness role (Eagly, 1987, Eagly & Koenig, 2008)".[11] Essentially, there are two simultaneous sets of juror expectations that female experts must consider relating to their communication style. Because of this unique duality, generalized research regarding gender, communication and conflict may not always translate well into the expert witness arena.

Little research has been done specifically on expert witness gender and cross-examination. However, one study focused on intrusive questioning, such as, "Have you ever been raped?" or "Are you sexually attracted to the defendant?" It found that jurors reacted favorably to both male and female experts who responded assertively, even pointing out the inappropriateness of such questioning. Thus, regardless of gender, when facing intrusive questions, experts should not be defensive or passive, but appropriately assertive in their response (Larson, 2008)[12]

Gender Congruency and Gender-Role Stereotyping

The subject matter of the case also can be relevant when analyzing the impact expert witness gender might have on the jury. Unfortunately, gender-role stereotypes are still prevalent in our culture.[13] When men or women enter roles that are stereotypically mismatched to their gender, prejudice may result even if the person is viewed favorably (Neal, 2014).[14]



According to research, female experts may outperform their male counterparts when the subject matter aligns with female-oriented societal stereotypes, such as battered woman syndrome (Schuller & Cripps, 1998), child abuse (Swenson, Nash, & Roos, 1984), and cosmetic sales (McKimmie, Newton, Terry, & Schuller, 2004; Schuller et al., 1998). On the flip side, male experts frequently test as more persuasive than women in cases involving "masculine" fields, such as construction (Schuller, Terry, & McKimmie, 2001).[15] These studies are relatively old in light of advances women are making in male-dominated fields, and the crossover of men into more traditionally female roles. A fresh look at gender congruency and juror expectation might reflect more progressive attitudes.

Because these results are based on cultural stereotypes, as our ideas about male, female and gender-neutral professions evolve, there should be a corresponding shift in juror expectations such that one day, gender congruency may be irrelevant.

Gender of Juror

Few studies assess how juror gender in combination with expert gender affects decision making. Moreover, it is unlikely that anecdotal evidence, via post-trial interviews, would provide true causal effect. Biases that may be developed culturally from childhood can influence jurors' actions, beliefs and opinions subconsciously. Jurors might attribute such opinions to a "gut feeling," never even recognizing a hidden bias.

Research regarding the relationship between juror gender and attorney gender and presentation style might translate into the expert witness arena. In a 1996 study, researchers determined that male jurors were influenced by attorney presentation style, favoring an aggressive attorney to a passive one. Female jurors did not change their opinions based on presentation styles, suggesting that they were persuaded more by trial evidence (Hahn & Clayton, 1996).[16]

Minimizing Gender Influence/Bias

Although research shows that the gender of an expert witnesses can affect juror perceptions of expert testimony, Professor Neal maintains that in general, the weight of the evidence still matters the most to jurors. In close cases, however, expert gender can make the difference.[17] So, how can we use the data to create productive pretrial and trial techniques?

Witness Preparation

Techniques for expert witness preparation in general is a topic in and of itself. But here are suggestions designed to specifically combat gender inequality issues.

- Make sure your expert can effectively teach jurors. Help them connect their research and evidence to the case facts. This will help jurors focus on the actual evidence and argument rather than peripheral cues. Because jurors appreciate experts who educate, this will also make the expert more likable, a particularly important characteristic for female experts. Finally, by assuming a role of teacher, which is traditionally associated with women, it can help counterbalance gender incongruency issues.
- Female experts in particular should use a more conversational tone and avoid overly technical terms. Researchers also recommend using the name of the defendant or plaintiff rather than referring to them generically and using inclusive statements, i.e., "we" or "us" when discussing members of the scientific community.[18]
- To increase likability, female experts should appear pleasant, warm, relaxed yet professional, and smile when appropriate. They should demonstrate some feminine traits rather than adopting masculine characteristics.[19]
- Portray competence and knowledge. Again, particularly for women, don't underestimate the importance of sharing details regarding background information that establishes the expert's professional experiences and expertise.
- Prepare female and male experts to respond assertively to intrusive questions on cross-examination.[20]

Jury Selection

There are no inherent differences between male and female expert testimony. It all falls back to how jurors perceive the testimony. Attorneys with a female expert testifying in a traditionally male field should look for jurors who would be more receptive based on their own life experiences. Identify people who have had favorable exposure to women in male-oriented roles. More important, identify those who may have strict gender-stereotyping attitudes or who have had negative experiences with women in male fields. Take full advantage of attorney-conducted voir dire to explore these issues and ask follow-up "how" and "why" questions of individual jurors. Use supplemental jury questionnaires if possible. And most important, recognize that despite what they say, it is very unlikely that jurors will be able to set aside their biases.

Helping Jurors Combat Implicit Biases

Rarely are there enough peremptory strikes to excuse all jurors who might be biased but are not excused for cause because they assure the judge that they can be fair. So, how do we make the best of it? Some judges and scholars suggest that explicit instructions can help to reduce implicit bias.[21] Mark Bennett, Senior U.S. District Judge for the Northern District of Iowa, asks the venire to pledge the following: "I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations." Once the jury is empaneled, he instructs:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, as-sumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense.[22]

The empirical data on the effects of such instruction are mixed.[23] Some see it as coun-

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WORK RELATED INJURY

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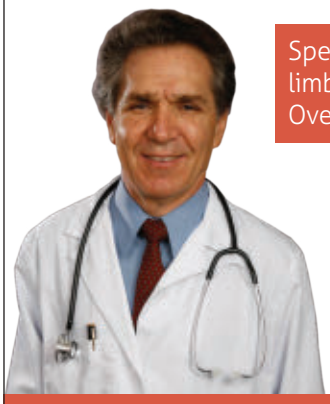
- Expert Witness
- Disability Evaluation
- Medical Chart Review



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terproductive, since people don't like to be told they are prejudiced."[24] There are also concerns that in attempting to adjust for a bias, jurors may actually overcompensate (Wegener, Kerr, Fleming, & Petty, 2000).[25] Hopefully further research will clarify the effects.

Hollywood has grabbed on to the shocking impact felt when jurors recognize their own biases. Mathew McConaughey stunned everyone in *A Time to Kill* when he asked the jury to close their eyes and visualize the brutal rape and beating of a young black girl. Voice quivering, he asked, "Can you see her? I want you to picture that little girl. [dramatic pause] Now imagine she is white."

In an episode of the TV show *Bull*, the defense took a similar approach in a case involving a female pilot and gender bias. He showed the jury pictures of a boy and two girls being bullied, adding that one of the kids stood up to the bully and defended the others. He then asked the jury what color shirt the brave child was wearing. The jury erroneously assumed it was the boy, prompting a dramatic moment of self-reflection.

Would such an approach be as effective in real life? Perhaps. But maybe the bigger takeaway from such portrayals is that beyond the TV juries, millions of viewers at home, forced to check their own biases, may ever so slightly adjust their own filters when it's their turn in the jury box.

Beware of Oversimplifying

Supreme Court Judge Sonia Sotomayor has said, "Whether born from experience or inherent physiological or cultural differences … our gender and national origins may and will make a difference in our judging." Jurors instinctively and unwittingly use their personal experiences in life to make judgments and assess credibility. In fact, our jury instructions require them to "consider all of the evidence in light of reason, common sense, and experience."[26] Heuristic factors such as gender, ethnicity, age, race, and appearance can shape jurors' preconceived notions and expectations resulting in biases. Combining these elements with more substantive considerations such as knowledge and experience makes selecting an expert witness very complex.

It can be particularly challenging as research on these issues is ever evolving. For example, a 2017 study suggests that in some cases the "right look" may be more impactful on jurors than gender, age or ethnicity.[27] Jurors reacted most favorably to expert witnesses, regardless of gender, who looked like the stereotypical image of a friendly but slightly nerdy "good scientist," similar to a favorite high school physics teacher, or cast member of *The Big Bang Theory*.[28]

Even focusing on the one aspect of gender, there are so many factors to consider. The type of case, complexity of the testimony, the jurors' experiences, the expert's experience, and personal characteristics of the expert all play a part. Determining the right expert for your case cannot occur in a vacuum. It is a dynamic element that functions interactively within the context of the litigation.

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Private Investigators and the Criminal Justice Act

BY STEVEN MASON

Private Investigator **STEVEN MASON**, Mason Investigative Solutions, is a former federal criminal investigator and has a wealth of investigative experience. Mr. Mason's curriculum vitae has been vetted and accepted by the U.S. District Court for the District of Arizona, approving him to conduct federal criminal defense investigations. He can be reached at Steven.Mason@masoninvestigations.com and 800-653-1128.

A little-known fact is that private investigators are available at no cost to indigent defendants charged with federal crimes. Private investigators can be a very important part of the defense. An estimated 85 percent of what occurs at a criminal trial directly results from work done outside of the courtroom. A defendant's chance of being acquitted or having charges reduced is significantly increased when a private investigator is involved.

Right to Representation

The Sixth Amendment to the United States Constitution guarantees the rights of criminal defendants. Specifically, the accused has a right to representation by counsel in criminal proceedings. The Criminal Justice Act (CJA), enacted in 1964, established a system for appointing and compensating legal representation in federal criminal proceedings for persons financially unable to retain counsel on their own. The federal courts, recognizing the importance of private investigators to a criminal defense, established guidelines specifically addressing their availability and appointment for all defendants. Chapter 3 of the CJA Guidelines, along with 18 U.S. Code Section 3006A, authorizes an indigent defendant to petition the court and obtain a private investigator of the defendant's choosing at no cost.

Vetting Private Investigations

Once the decision is made to engage a private investigator, counsel for the defense petitions the U.S. District Court to have their chosen private investigator appointed to their case. The U.S. District Court judge assigned to the case reviews the curriculum vitae of the private investigator and makes a finding as to the investigator's ability to conduct criminal defense investigations. Vetting of the private investigator is critical—that ensures the defendant receives a licensed, trained and experienced professional.

Retaining a Private Investigator

Unless an attorney routinely utilizes the services of a private investigator, chances are one isn't available on speed dial. Counsel should start by asking their trusted network for a referral. More likely than not, a colleague has made acquaintances with a skilled private investigator. Once a short list of names is created, a face-to-face meeting should be scheduled to evaluate the investigator's qualifications and relationship potential. Always understand that a private investigator acts as an agent for the attorney, so the investigator's approach, ethics and professionalism should equal that of the attorney.

The investigator's approach, ethics and professionalism should equal that of the attorney.

Role of the Private Investigator

A private investigator assigned to assist the defense functions in the same capacity as the prosecution's case agent(s). The investigator may conduct an independent review of all discovery material; conduct crime scene investigations; identify, collect and present evidence; locate and interview witnesses; assist with preparation for cross-examination; and testify regarding investigative efforts undertaken by the defense.

Confidentiality

A common misconception is that the relationship between an attorney and a private investigator is protected under the attorney–client privilege. Traditionally, this privilege is not afforded to third-party consultants, unless the communication is for the sole purpose of obtaining advice or discussing case strategy. Fortunately, most work performed by a private investigator falls under the protection of attorney work-product, as the investigator's work is prepared in anticipation of litigation or trial, and is for the party or party's representative. To avoid potential loopholes, a private investigator should always be retained and directed by the attorney, and not by the client. When in doubt, verbal reports from the investigator to the attorney are a safe bet, as an attorney's case notes are not discoverable.

Conclusion

Well-documented evidence obtained by a private investigator can elevate a defendant's position during negotiations and trial. Such evidence may very well make a crucial contribution to a favorable outcome for the defendant. AZAT

Using Court-Appointed Commissioners and Receivers To Resolve Real Estate Disputes

BY BETH JO ZEITZER

BETH JO ZEITZER is the Owner and Designated Broker of R.O.I. Properties, a full-service real estate brokerage firm that works with business owners, investors and property owners regarding the marketing and sale of commercial and residential properties, including retail, office, industrial, multi-family, hospitality, land and single family residential properties. She also serves as Special Real Estate Commissioner, Court-Appointed Receiver, Bankruptcy Trustee and Expert Witness in numerous Real Estate matters. Beth Jo is an attorney by training, and former Corporate Counsel for Del Webb Corporation. She can be reached at (602) 319-1326 or bjz@roiproperties.com

Any legal matter involving disputed assets can get complicated quickly—particularly when it involves the ownership, use, occupancy, or financial benefit associated with a jointly owned property. In such circumstances, a court-appointed party such as a Special Real Estate Commissioner or Special Master, Receiver, or neutral broker with specific real estate expertise can deliver a faster, less contentious, and cost-effective resolution for attorneys as well as their clients.

While receivership, divorce and family law, bankruptcy, and probate are vastly different from a legal perspective, the common thread with regard to real estate dispute resolution is the use of court-supervised sales. In most instances, each of these legal proceedings involves a court order or other court-supervised proceeding that allows the receiver, Special Real Estate Commissioner, bankruptcy trustee, or fiduciary to sell real estate assets.

The court-appointed expert is responsible for understanding the court's expectations; determining what the parties want to achieve and/or what the court order requires; identifying potential buyers and procuring their interest; and valuing, managing and selling the property or properties. For many transactions, the court-authorized expert also must be prepared for the inquiry of the judge—which means presenting all relevant information and history regarding the valuation, marketing, management and contract-negotiation process.

The following is a brief summary of the types of neutral real estate experts who can be appointed and the most common cases in which they're applicable.

Receivership

When there has been a monetary or other default in loan documents and/or a dispute among parties, a receiver is a court-appointed officer charged with taking possession of and protecting assets as set forth in A.R.S. § 12-1242 and Rule 66, Arizona Rules of Civil Procedure. As a result, receivership can be used by anyone who needs to level the playing field, whether business litigators, divorce attorneys or probate litigators.

In brief, the receiver is responsible for performing financial and physical forensics/due diligence to understand the assets and liabilities of the receivership estate; assessing the risks and the rewards; and developing a stabilization, turnaround and/or disposition strategy.

Where there are real estate assets within a receivership estate, ideally the real estate assets should be sold while a receivership action is pending. This allows the receiver to stabilize the asset, create buzz (since it's off-market or premarket), negotiate more favorable contracts and leases, and create a solid due-diligence package. It also can enable a lender to avoid liability issues arising from potential environmental, occupancy, and operating business issues, and facilitate an expedited sale with court oversight and approval.

It's important to note that while Arizona has a receivership statute, we do not yet have a wide body of case law. Nevertheless, Arizona courts will look to other jurisdictions for case law as precedent-setting in this area.

Special Real Estate Commissioner/ Special Master

In divorce and family law cases, Special Real Estate Commissioners are commonly used to value and sell property where the parties cannot otherwise agree on how to proceed with real estate assets that are a part of the community assets. A Special Real Estate Commissioner is a licensed real estate broker responsible for initiating and completing the sale of real property. Governed by Rule 95G of the Arizona Rules of Family Law Procedure implemented Jan. 1, 2006, a Special Real Estate Commissioner assists the parties with disposition of community real property when the parties are otherwise unable to agree on such issues.

A Special Real Estate Commissioner also can be used in contested estates in which beneficiaries cannot agree on the disposition/distribution of assets, or in the case of a property that cannot be partitioned without prejudice to the owners and that cannot conveniently be allotted to any one party. (The method of sale is governed by the authority of A.R.S. § 14-3911, Partition for the Purpose of Distribution.)

Finally, a Special Real Estate Commissioner can be used to resolve partition disputes (governing authority A.R.S. § 12-1218), when a property held by co-tenants (e.g., joint tenants, tenants-in-common or community property) is incapable of fair division, sale, or distribution of proceeds. In some cases, dividing and selling the property might depreciate the value (or be physically impossible, such as an income-producing property or single-family home), or the parties disagree on whether it should be sold or managed. In such cases, the Special Commissioner will be directed to sell the property and return the proceeds into court to be divided between the parties according to their respective interests—and after payment of any mortgages, liens, commissions and escrow fees.

As far as process, a standard order will require the party in possession to contact the Special Commissioner within 10 days, at which point the marketing/valuation/listing process begins. Special orders may include provisions about access, showing times, reporting intervals, short sales/

> While real property is not the only aspect of legal disputes, it is often one of the most contentious from a financial and even emotional perspective.

foreclosures, and other details.

Note that in cases where there is an operating business involved (e.g., hotels, mini-storage businesses, apartments, shopping centers, gas stations), the appropriate route is to appoint a Special Master with Receiver authority who assumes control over the bank accounts and financials, and helps manage the properties as well as addressing any health and safety concerns. The goal, as above, is to create a baseline understanding and equitable understanding between all parties about operations and financials.

Court-Appointed Broker

In bankruptcy matters, brokers may be court appointed to sell property. Typically, the bankruptcy trustee or a debtor-in-possession will hire a real estate broker, subject to Bankruptcy Court approval, to market and sell the asset in order to pay the secured creditors in full and make a distribution to unsecured creditors. In some instances, a trustee or debtor can sell real estate assets free and clear of liens, even though a lender is not being paid in full. The trustee also can sell co-owned property, where a co-owner is not in bankruptcy—which can be a very powerful tool.

Common Goal: Maximizing Value of Real Estate Assets

Although each type of court-supervised sale has its own specific steps, the common element is a focus on limiting liability for the various parties while maximizing the value of the real estate assets at issue: i.e., achieving highest/best pricing within the established timeline.

Court appointments don't necessarily require liquidation of the disputed property. For instance, a skilled Receiver may rehabilitate an asset and its systems to the point that business partners, spouses or beneficiaries can engage in equitable settlement negotiations, which is tantamount to an informal mediation. When a sale does occur, it should be as-is, where-is, without representation and warranties, and subject to court approval/oversight (which may include higher/better bidders at court approval, such as in bankruptcy and fiduciary proceedings).

While real property is not the only aspect of legal disputes, it is often one of the most contentious from a financial and even emotional perspective. Court-ordered sales are not as simple as listing and negotiating a property on the open market, given the numerous rules, regulations and checkpoints in place to protect all parties. For that reason, enlisting an expert with real estate acumen as well as experience in adversarial/litigious environments can be a significant benefit.

Compared to extended litigation, the use of a Special Real Estate Commissioner or Special Master, Receiver or neutral broker can often be less costly and complicated—as well as more expedient—for attorneys (and theirclients) seeking equitable resolution in disputes that involve real estate.

The Expert Witness May Improve Your Mediation Success

BY MARK ZUKOWSKI

MARK ZUKOWSKI has been a partner with Jones Skelton & Hochuli since 1988 and has been serving as an arbitrator and mediator for over 20 years. He has received extensive arbitration and mediation training through the American Arbitration Association (AAA) and the Strauss School of Dispute Resolution at Pepperdine University. Mark regularly serves as an arbitrator and mediator in a wide variety of cases. He is also a construction and commercial arbitrator and mediator for AAA and has been accepted into the prestigious National Academy of Distinguished Neutrals (NADN). Mark also serves as a settlement conference Judge Pro Tem for the Maricopa County Superior Court and previously served as a Judge Pro Tem for the Arizona Court of Appeals.

In my experience, it is the rare mediation where a party invites its expert witness to participate in mediation. Is it something I would recommend in every case? Clearly, no. Can it be a game changer in the right case? From this mediator's perspective, definitely yes. This article addresses the important considerations in determining whether to involve your expert witness in mediation.

Before Bringing an Expert Witness to Your Mediation

Even before deciding whether to bring your expert witness to mediation, it is always a good idea to involve him or her in the pre-mediation process. To effectively advocate your position in mediation, you need to have an excellent grasp of all the technical and scientific issues that will be discussed during the process. Involving your expert witness in your pre-mediation preparation ensures you will be fully prepared.

An experienced expert witness also can bring value by helping you select the right mediator for your case. To assure the best possible mediation outcome, selecting the right mediator with appropriate knowledge and experience of the technical or scientific issues that will be discussed is critical. Often, your expert witness will have had prior experience with potential mediators and can provide you with valuable insight in selecting the right one for your case.

Another very important consideration before bringing your expert witness to mediation is the potential for waiver of confidentiality or work product by prematurely disclosing the expert witness's or your work product to the opposition if the case does not settle at mediation. You need to be mindful of this potential pitfall. Make certain you evaluate what information to provide your expert witness to review if you intend to bring him or her to mediation. It is strongly recommended that you label all information provided to your expert witness prior to mediation "for settlement purposes only" or similar limiting language. An expert witness who has been provided access to the parties' mediation statements also should understand that information contained in these memoranda may not later be used by the expert witness in future reports or testimony.

While most states have statutes protecting communications occurring during mediation, it is still a good idea to discuss these issues with opposing counsel and the mediator prior to mediation. This ensures there is clear understanding and agreement on how communications will be protected going forward. This is particularly important when involving third parties, such as expert witnesses, in mediation.

Apprehension about bringing your expert witness to mediation usually centers around the concern that if the case does not settle, you will have prematurely disclosed your case to the opposition. However, with today's mandatory disclosure rules, this concern is largely a non-factor. Also, consider this: If you brought your expert witness to mediation and the case did not settle, it may be because your expert witness was not as effective as you thought he or she might be. Better to learn this in mediation than in trial.

> If you have confidence in your expert witness, you should relish the opportunity to demonstrate the strength of your case.

Apprehension about exposing your expert witness to the opposition in mediation also ignores the reality that the vast majority of your cases will settle before ever getting to trial. Furthermore, if you have confidence in your expert witness, you should not fear exposing him or her in mediation; rather, you should relish the opportunity to demonstrate the strength of your case—not only to the opposition but also to the mediator. Having your expert witness participate in mediation can enhance your credibility and send a strong message to the opposition and mediator that you have confidence in your case. It

also demonstrates that you are clearly invested and prepared for the mediation.

So, when should you consider bringing your expert witness to mediation? There is no hard and fast rule for making this decision. Rather, each case should be evaluated on its individual facts. Certainly, if your case involves technical or scientific issues, there can be substantial benefit to bringing your expert witness to mediation. While you may feel you have a good understanding of those issues that will be discussed, the same may not be true of your opposition or your mediator. Bringing your expert witness to mediation can ensure both parties and the mediator have a better understanding of your case. This is also likely to lead to a better resolution.

Involving your expert witness in mediation is particularly beneficial when cases are mediated pre-suit, or very early in the litigation process. A well-prepared expert witness can save you time and expense by clearly identifying the key facts and issues in dispute. They may separate advocacy and emotion that lawyers and clients typically focus on in mediation, and provide a more objective analysis of the case. A well-prepared expert witness also can provide valuable assistance in educating the opposition of the weaknesses in their case or by providing damage models, repair protocols, or other recommendations to facilitate case resolution. Finally, your expert witness can assist counsel and the mediator in diffusing unreasonable client or opposition expectations, and focus the parties on a realistic resolution of the case.

Still on the fence about involving your expert witness in mediation? Consider this: How many times have you had a mediation break down because a technical or scientific issue was raised that you could not adequately explain, did not anticipate, or did not have an answer to? How many times have you felt frustration that your mediator, or the opposition, did not fully understand the strength of your case or the weakness in the opposition's case? Having your expert witness participate in mediation can eliminate these pitfalls from derailing the mediation or maximizing your settlement.

Prepare your expert for mediation just as you would your client. Never assume your expert witness will be familiar with the mediation process.

So how do you know when to consider bringing your expert witness to mediation? There are a number of practical considerations to evaluate before answering this question. Will it be cost-effective? Are the issues your expert witness has opined on so technical or scientific that your mediator and the opposition would benefit from further explanation and analysis? Are you completely confident in how your expert witness will present and in his or her opinions to expose your expert witness to the opposition's scrutiny during mediation?

You're Bringing an Expert Witness—Now What?

It is recommended that you broach the subject of bringing an expert witness in advance of the mediation, first with opposing counsel, then with the mediator. It is important that both parties and the mediator agree on whether expert witnesses will participate in mediation and, if so, what role they will play. This allows the mediator to better control the mediation by limiting the expert witness and counsel to the expert witness's intended role. It also may prevent your mediation from ending prematurely, because the other side did not know or anticipate that you would bring your expert witness to mediation, resulting in the opposition feeling unprepared, blind-sided, or unfairly attacked.

Assuming you cross the hurdle about bringing your expert witness to mediation and the mediator and opposing counsel agree to allow your expert witness to participate, the question then becomes how to effectively use your expert witness in mediation. The most common way is to have your expert witness make a presentation in an opening joint session with the mediator and the opposition. If done right, this can have a powerful impact. It allows you to set the tone for the mediation and it demonstrates your preparation and your belief in the strength of your case. In cases involving highly technical or scientific issues, it can ensure the mediator and opposition have a clearer understanding of your case from the outset, saving valuable time to focus on resolution of the case.

It is also important to prepare your expert for mediation just as you would your client. Never assume your expert witness will be familiar with the mediation process. Your expert witness can sabotage your best intentions if he or she does not understand the role you want him or her to play during mediation.

It is critical that you educate your expert witness on your expectations for their participation in mediation. Will they simply observe and listen, and be available to educate you and answer your questions during private caucus sessions? Is it your intention

Educate your expert witness about opposing counsel and client. Preparation is the key to success.

to have your expert witness make a presentation in a joint session? If so, have you carefully prepared your expert witness for the presentation? Are you confident enough in your expert witness to allow him or her to engage in face-to-face discussion with opposing counsel, any opposing expert, if one is present, or with the mediator?

You also should educate your expert witness about your mediator's experience, mediation style and subject matter knowledge. Similarly, it is important to educate your expert witness about opposing counsel and client. Preparation is the key to success.

What if the Case Does Not Settle?

Was the decision to involve your expert witness at mediation a poor one? Not necessarily. There are still benefits to be derived from bringing your expert witness to mediation. In all likelihood, with the assistance of a well-prepared expert witness, the issues that remain in dispute after mediation will likely be substantially narrowed, resulting in more focused discovery and considerable savings in time and expense before the case is finally resolved.

Another benefit to having your expert witness participate in mediation is that you have the opportunity to test your expert witness's opinions before they are finalized for trial. Particularly if the technical or scientific issues are novel or unsettled, bringing your expert witness to mediation can provide you with valuable feedback on the merits of your case. It also can be an effective strategy for learning the strengths and weaknesses of your opponent's case and allow you time to modify your case strategy for trial.

Final Thoughts

In the proper case and with the appropriate preparation, bringing your expert witness to mediation can be a powerful weapon in your mediation arsenal. The next time you sit down to prepare for mediation, consider inviting your expert witness to the party. It may just make the difference in whether your mediation is a success.

How To Find and Prepare Your Medical Expert Witness

BY MATTHEW E. KARLOVSKY, M.D. FACS
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An expert witness's testimony is critical in litigating civil cases and is often the determining factor in winning or losing a case. Yet the expert must limit his or her expertise to a narrow scope or otherwise run the immediate risk of being disqualified. Rule 702 of the Federal Rules of Evidence requires the expert to employ "scientific, technical or other specialized knowledge" that will assist the trier of fact. Furthermore, the expert's opinion must be (1) sufficiently based on reliable facts or data, (2) the product of reliable principles and methods, and (3) derived from and apply principles and methods reliable to the facts of the case.

When considering the expert, the attorney needs to narrow the specific area of inquiry, i.e., type of product, area of medicine, etc. The exercise is a financial investment for your client and fundamental to the case, focusing on the end goal of establishing solid evidence to present to the triers of fact. Many attorneys use firms to screen experts, but is the criteria used by these firms trustworthy and rigorous? Do academic degrees and titles confer upon an expert more *gravitas*, or are experience and speaking style preferred traits to win over juries?

Offered here are guided steps to finding the right medical expert.

1. Credibility & Bias

Ensure the expert has no past history of contradictions or impeachments of his/her opinions, nor should they have a significant amount of work history with you or the attorney's firm and/or client, or, the worst scenario, be related to you or someone that works with your relative. Such relationships, past or present, with the same client create the appearance of a "hired gun." Confirm the expert is without a personal history of repeated negligence or malpractice, multiple board suspensions or probations, or open investigations. If the expert has published, be sure the publications are not inapposite to the issue or theory of your case, or that their published opinion(s) have not been disproven by subsequent or more accurate data.

2. Qualifications

The expert's qualifications must be in the like field of the subject matter of your case. Stretching the qualifications of the expert, false statements on their C.V., or falsifications of degrees will sink the expert's credibility and, potentially, the case. If the expert is willing to stretch the truth on their C.V., they may very well stretch the facts of a case beyond what may be reasonable, logical or realistic. More important, the expert may be disqualified or discredited.

Any minor cost spared on having experts not review documents may be costlier at deposition or trial.

3. Preparedness and Diligence

Give the expert all the records, regardless of relevance. Dig deep and far back into medical records or other documentation. Keep the expert updated on all relevant discovery or status. Do not supply the expert at the last minute with depositions or reports just prior to their own testimony. Any minor cost spared on having them not review documents may be costlier at deposition or trial. Allow for ample time for a pre-testimony conference with the expert to review the case, strength of their opinions, and potential lines of questions from opposing counsel. The expert should be allowed to review records in a timely fashion and write an Affidavit or Report that is cogent, references the medical record and relevant supportive literature, and is consistent with the rules of the state and federal courts. Rushed reports will reflect an incomplete review of the facts and be easily picked apart by opposing counsel and/or his or her expert. Ask for prior reports or opinions from the expert to judge their quality of work before hiring them. Continue to update the expert on legal timelines so they can adjust their schedule accordingly and complete their review and preliminary report with time for review by the attorney well before hard deadlines. The attorney should not write the expert's report. Ask the expert to research the opposing expert's background, reputation within the community, as well as the basis, source, and final opinion(s) of the opposing expert. The expert

can educate the attorney—and the attorney should ask the expert to do so. Provide subject areas for the depositions and trial with facts and lines of questions for opposing expert(s). Do not think you know everything you need to know as an attorney. Any learned detail will help your case

4. Charisma and Personality

The opposing counsel will judge the witness's worthiness, poise, use of speech, eye contact and charm and evaluate whether the expert will win or lose the jury. Speak with the expert by phone or in person for a prolonged period of time to gauge use of language, insight, wisdom and confidence. The expert must avoid arrogance at all costs. Confidence means mastery of the facts and the background of their knowledge. Arrogance turns off the jury, undermining what could be a valid opinion. Opposing counsel will find it easy to provoke the arrogant expert into belligerent answers. The expert should adopt the role of a teacher of facts and explainer of opinions, making strong eye contact and displaying positive body language toward the jury. The expert should simply defend their opinions and avoid "scoring points" against opposing counsel, but can and should object to testifying if opposing counsel is derogatory or belligerent.

5. Availability

The expert must avail themselves to the court or counsel per a reasonable timetable. Ask the expert for all their vacation schedules and apprise them of legal timelines early, and ask them if they can complete the tasks required. Common court deadlines for you may require the expert to juggle your deadlines, other attorney deadlines and his/or her own practice and/or business obligations. Provide the expert with due dates per the Scheduling Order and per your preference well in advance of those dates to allow for your review, requests for clarification, expansion or omission if something appears contrary to your understanding, theme or another expert.

6. Testifying Skills

Review demeanor under pressure and techniques to avoid common pitfalls. Obtain a list of prior sworn testimonies so that you may review prior video or written testimony. Judge the expert's mannerisms, eye contact with the jury, use of critical terminology, ability to explain complex matters in a manner easily understandable to the jury, and their ability to withstand cross-examination and questions from the bench and/or jury.

7. Properly Forming an Opinion

The expert should be familiar with the foundation and methodology to form a proper opinion and review it with the attorney. Do not ask your expert to write or state something he or she does not believe to be accurate, or craft large portions of their report. If the opinion by the expert is not expressed at least at 51 percent certainty, the judge may exclude the testimony. The preponderance

Attorneys must not influence the expert's opinion by feeding facts, cherry-picking records, or overediting reports.

of evidence must not be expressed as "possible," "perhaps," "may," or "sometimes," but rather "probable," or "more likely than not." Speculation is a recipe for inadmissibility, but absolute certainty and first-hand knowledge is not necessary for the expert's opinion to stand or to render an opinion. The attorney must be certain of the expert's confidence level with their facts and final opinions, or otherwise they will be subject to damaging cross-examination, which will reveal weaknesses in the foundation of the expert's opinion. Attorneys must not influence the expert's opinion by feeding facts, cherry-picking records, or overediting reports. The expert should be made aware that their role at deposition and/or trial is to defend their opinions/report, not to render new opinions or determine or define law.

8. Legal Standards

An expert should have a familiarity with *Frye*, *Daubert,* how to avoid *Daubert* challenges, and Rules of Evidence. The attorney must be sure the expert will avoid the use of junk science, and avoid assumptions, biases, and obvious alternative explanations for events. The expert should be aware of *Daubert* criteria and be instructed by the attorney how to *Daubert*-proof their report to withstand challenges. The expert's opinion must be able to withstand challenges to their methodology. Quoting research is not good enough. Anecdotal evidence, novel theories or extrapolating opinion from narrow research can be easily excluded. Proper methodology to prove causation such as the *differential diagnosis method* or *scientific method* can easily guide the expert down the proper path to reasonably exclude unlikely reasons for causation and ultimately form a strong, well-founded opinion. The attorney should inform the expert if they expect their opinion may be met with a *Daubert* challenge and to prepare the report accordingly from the outset to save time and cost.

9. Fees and Costs

An expert must not charge outrageous fees and costs. The expert's fees must be reasonable and within the "going rate" of like experts with like qualifications. Clarity of hourly rates for intended work, and fees regarding deposition and/or trial, should be discussed up front and signed off in writing. Ballpark estimations of how much the expert will bill may not always be possible if several waves of records continue to be discovered. However, if the expert perceives the time required to review records or perform research is taking longer than anticipated, the expert should inform the retaining attorney of the extra time.

How the Prepared Expert Responds—Even When The Going Gets Tough

BY LELA C. LAWLESS

LELA C. LAWLESS, CPA, is a Senior Manager in the Phoenix office of Eide Bailly LLP, where she specializes in forensic accounting, business valuation, claims analysis, and calculation of economic damages related to lost profits, contract disputes, fraud schemes and other business disputes. Ms. Lawless can be reached at (602) 264-8641 or llawless@eidebailly.com.

Engagement as a testifying expert and being called to the stand to testify is the object of desire for many forensic accountants. Courtroom testimony reflects an expert's education, training and experience along with professional judgment and presentation skills—all rolled into one. However, a poorly prepared expert may be ineffective or fall apart on the stand, producing weak testimony that can destroy your case.

An expert should bring the facts of the case together in a meaningful way, using their expertise, to provide a competent, accurate and unbiased analysis. Teaching the facts to the jury, laying the proper foundation and helping the jury understand how the problem has been addressed in a thorough, logical and objective manner is the expert's job on direct examination. An expert should concede the obvious, admit weaknesses and refrain from acting in a defensive manner on cross-examination. At all times, the expert should be honest and credible.

If that sounds like it's asking a lot, that's because it is. So, how can you better prepare your expert to testify effectively at trial?

The following points do not cover the entire landscape of possible witness pitfalls. But these are some of the key ones, based on my experience.

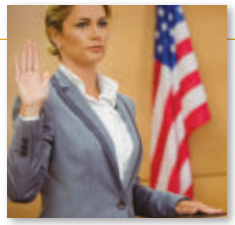
1. Expect **your expert's qualifications** to be attacked before the jury in an effort to diminish the expert's credibility and the weight of their testimony. Expert testimony is admissible if the expert is qualified, if the testimony will help the jury decide issues in the case or understand evidence, if the expert testimony is based on sufficient facts or data, is the product of reliable methods and principles and if the expert has reliably applied the methods and principles to the facts of the case. An expert should stand by their qualifications and commit to an opinion in their area of expertise. Credibility is the key. An expert should use their education, experience and background even if they have never testified before. Emphasize your expert's length of experience, prior cases that may be similar and the expert's specialized knowledge, education and training. However, education and experience are no substitute for the necessary investigation and research of the facts and data in the case by your expert.

2. Make sure **your expert's resume** is up to date and accurate. An expert should be able to explain any gaps in their resume or unknown periods—without hesitation. I often am asked why I was out of the workforce for several years, and I explain that I have three children and took time off to be with them and reentered the work force when my youngest child started kindergarten. I let the court know I have nothing to hide. Juries appreciate my frank and honest answer and relate to me as a mother as well as an expert.

3. An expert should never wander outside their area of knowledge or expertise. An expert should admit what they do not know when a question is truly outside their domain. However, an expert should never sound evasive or ill-informed. An expert should let the jury know the question is outside their scope and not relevant to their direct testimony. For example, a CPA is not an investment expert, a vocational expert or a real estate appraiser. When an expert admits what they don't know, the jury will believe the expert about what they do know. **An expert should stay in their sandbox** and not be tempted to venture into unknown territory.

An expert should stay in their sandbox and not be tempted to venture into unknown territory.

4. An expert should **never back down from their opinions or report**. Cross-examination will attack the weaknesses in the report, and it is the expert's job to neutralize that attack and present the weaknesses



in proper perspective supported by the relevant evidence. An expert should know the vulnerabilities in their report and be prepared to respond without backpedaling or second-guessing. The expert report has been carefully prepared to summarize conclusions and opinions, and an expert should stick to that report and hold their ground. However, an expert who is willing to make concessions when necessary maintains credibility and impartiality compared to the witness who continues to dodge and resist every question. An expert also should under-stand that redirect examination is an opportunity to clarify or repair damage sustained on cross examination.

5. An expert should **never, ever reverse positions on the stand**. When an expert changes their mind it creates uncertainty and conflict for the jury and leaves them guessing on assumptions and the basis of calculations. The opinions presented in an expert's report and testimony should be consistent. If an expert needs to modify an aspect of their report or testimony, the expert should explain to the court a change is needed and why. For example, new information may have become available since the expert report was prepared. When an error in a report is known, an expert should admit and address the error on direct, own up to any mistakes and explain how they have been corrected. An expert should concede the obvious and deal with an error offensively, not defensively. Considering the voluminous documents reviewed and multiple schedules and damage models prepared, unfortunately mistakes will happen. An expert should own it, deal with it and move on.

6. An expert should own their opinion and **avoid appearing as an advocate for the client's position**. An expert should testify on both direct and cross-examination in a consistent manner and be careful about perceptions of being "part of the team." An expert should never appear to be a mouthpiece for an attorney or influenced or swayed by an attorney. An expert should let the court know they have their own independent opinion based on their objective expertise and the evidence presented. An expert should not rely heavily on data and information provided by the parties that engaged them without providing their own independent analysis.

7. An expert's demeanor is important. An expert should not be a Jekyll and Hyde and change from helpful and responsive on direct to combative and defensive on cross-

> An expert should never appear to be a mouthpiece for an attorney or influenced or swayed by an attorney.

examination. Nothing undermines credibility and reveals bias like an expert's sudden refusal to give straightforward answers. Sure, an expert is being paid by one side, but maintaining objectivity is key. An expert should **be polite and respectful and never show anger or arrogance** in the courtroom even when their integrity is attacked. When an expert is evasive or argumentative, credibility and trust are lost. An expert should be authentic, likeable, calm and consistent. Credibility comes through believability. To be believed, an expert should look the part, speak the part and act the part.

8. An expert should be able to communicate his or her opinion clearly and concisely and explain complex financial analysis in terms a judge or jury can understand. Confusing testimony may cause the jury to find the expert lacks credibility. Do not let your expert's methodology get lost in a plethora of detailed spreadsheets, financial models and accounting language that no one understands. If the jury cannot understand the methodology applied, they cannot determine if the expert opinion is relative or reliable. An expert should **focus on relating to jurors in juror-friendly terms to gain credibility and acceptance**. The goal of an expert is to deliver memorable, understandable and persuasive testimony.

9. An expert should **be prepared to react to hypothetical or "what if" questions** that attempt to undermine the expert's opinion based on a set of assumed facts. If a hypothetical question is premised on far-fetched assumptions and circumstances, an expert should quickly point this out. If the assumptions are plausible, an expert should not be afraid to concede different outcomes may be possible. However, an expert should clearly state they disagree with the factual premise of the question and their opinions have not changed.

These and other traits lead an expert to be prepared, confident and effective. All of these characteristics—and more—underlie that simple statement that "A successful expert is prepared."

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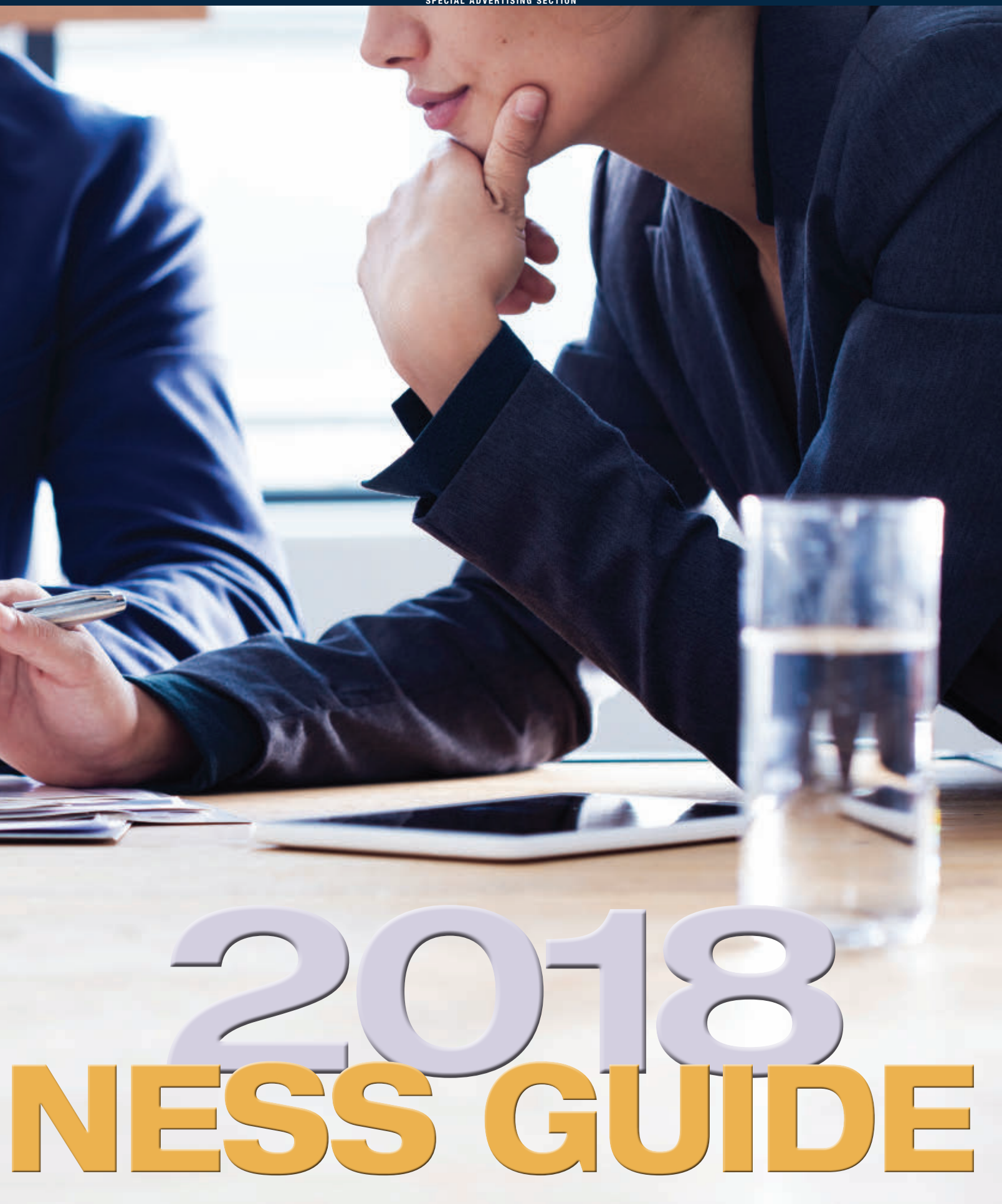

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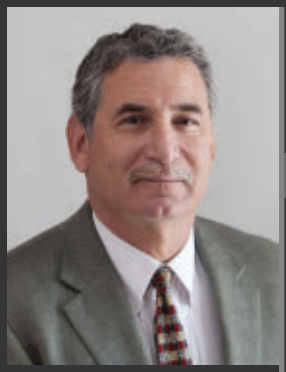

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Dr. Haq is a board-certified geriatric psychiatrist who specializes in managing mental disorders of late life, such as dementia and depression. He has a particular expertise in legal issues relating to financial capacity, such as testamentary capacity and vulnerability to undue influence. He currently works as an inpatient geriatric psychiatrist and is an affiliated clinical assistant professor at a major university. Defense and plaintiff.

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I am a Psychiatrist specializing in complex diagnostics and psychopharmacology. I have considerable trial experience as an expert witness – both civil and criminal. I also have extensive experience in Independent Medical Examinations for personal injury, workman's compensation cases and occupational illness. I am licensed in Arizona and Washington State. Legal references available on request depending on type of case.

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Quadruple boarded in Psychiatry, Addiction medicine, Sleep medicine and psychosomatic medicine (2006-2016) (Psychiatric presentations in medical disorders/general medical aspects in Psychiatric disorders). Experienced IME in evaluating Psychiatric injuries, disabilities and related impairments for 5 years. Boarded Independent medical examiner (2009-2013). Evaluated and testified as mental health expert for Maricopa county Superior court (1998-2007). Experienced medical consultant for the Arizona Medical Board. Worked for Arizona State Hospital forensic department (1998-2004). Full time current private practice.

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Mr. Epcar, a Certified Property Manager (CPM) is a consultant and expert in Real Estate and Property Management issues including Residential/Condominium, Retail, Commercial and Mixed-use properties. He is experienced in organizational assessments, asset repositioning, investment feasibility and valuation, due diligence and marketing practices. Litigation support engagements include standard of care, partnerships, brokerage issues, landlord/tenant disputes, commercial leases, personal injury and life/safety matter. Extensive experience, including trial and arbitration on behalf of both Plaintiff/Defendant.

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