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Enhancing Credibility in the Courtroom

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Introduction

In developing life care plans for individuals who are catastrophically injured, it is inevitable that the life care planner will eventually be presenting and defending a plan in front of a jury in a court of law. With the Daubert decision, the Supreme Court provided a framework for the presentation of expert witness testimony in the courtroom (Daubert, 1993). But, what are the dynamics of being perceived as a credible witness by the jury when presenting expert testimony and how can an expert witness "connect" with that jury? In the context of this article, connecting is defined as the ability to persuade a jury with one's testimony. Understanding these dynamics and avoiding the "hired gun" effect are the subjects of this article.

Courtroom Scenario

Consider this, in the fall of 2002, an expert was in the midst of being qualified as a witness, the first phase of the expert witness's testimony, when the judge stopped the proceedings. The judge had the jury removed from the courtroom and the attorneys began asking the expert a series of questions related to medical records. A *motion in limine* had been made by the defense attorney, which is "a motion made at the start of a trial requesting that the judge rule that certain evidence may not be introduced in trial," (www.law.com Dictionary, 2002). The purpose of the motion in this case was to exclude certain medical records.

For the next two hours, the attorneys posed a variety of questions to the expert related to the use of certain medical records. The jury had to wait outside the courtroom and spent their afternoon in the jury room, not knowing what proceedings were occurring in the courtroom. Because it was afternoon, there was no time left in the day to provide testimony regarding the expert witness's opinion and report in this case. Then the judge retired to his chambers to make a decision, and he did not complete his deliberation and rule on the motion until the following morning.

As a result of the judge's decision, the expert was allowed to resume his testimony and was on the witness stand by 1:00 p.m. the next day. The jury had no idea why they were dismissed and why the expert then returned the next day to testify. For an expert witness, unexpected interruptions in the courtroom proceedings can be rather disconcerting. This also is most certainly the case for the jury, and one can only speculate what might have been going on in each juror's mind about the testimony and another seemingly inexplicable delay.

Juror's Role and Perception

The above-described scenario is the situation in which many jurors find themselves when involved in a trial. In the May/June 2002 issue of The Case Manager, Victoria Hekkers describes her experience as a jury foreperson and having to go through a very long and tedious jury selection process. She notes that one particular gentleman was very agitated because the jurors had to return the next day and he was missing an opportunity as a truck driver to make a delivery in California. All of the jurors had to rearrange their schedules to appear the next day.

Hekkers (2002) then describes meeting the bailiff, receiving jury instructions, and encountering the judge. By the time the actual proceedings began, Hekkers was frustrated and concerned that the jury would not have anyone to turn to if they did not understand what was occurring in the trial process.

Consider the role of the juror. Each is expected to listen carefully and absorb technical information from expert witnesses. They are ushered in and out of the courtroom at varying intervals to sit quietly and wait. They are unable to ask questions and are unable to talk about any of the proceedings until the point of decision making. As Ms. Hekkers (2002) states in her article, "It was difficult to stay engaged, interested, and focused" (pp. 80).

Based on this discussion, it is easy to realize that by the time the jury is ready to be seated to hear a case in the courtroom, they may already be both tired and bored. The *voir dire* process (i.e., qualifying the jury) can be rather lengthy, and the jurors' biggest complaint about trials is that "they waste time." (Rose, 2000) Individually, jurors may be concerned about missing time from their jobs, families, lost finances, etc. and sensing that their time is being wasted can be very frustrating and even generate anger (Rose, 2000).

According to Rose (2000), there is a "tricky relationship between jurors' common sense and experts' specialized knowledge (pp. 54). The role, of course, of the expert witness is to break down that specialized knowledge that connects with jurors' ideas of common sense. Given the probability that some or most of the jurors are tired, bored, frustrated, irritated, and exasperated, it is incumbent upon the expert to offer credible testimony that is understandable to the jury.

Supporting Research

The effectiveness of an expert witness is related to the uncertain feelings that many jurors have about experts in general (Rose, 2000). Because jurors sometimes feel, especially in complex cases, that they are being asked to make decisions they are not qualified to make, they are grateful to experts who help them understand the complexities of the case (Rose, 2000). However, jurors also may be disturbed by the idea that attorneys can hire someone to say almost anything and this uncertainty is more compelling when juries hear two highly qualified experts who oppose each other on every point. This gives rise to the idea that an expert witness can be a "hired gun."

Research studies using mock juries have shown that when jurors have difficulty understanding the expert witness testimony, they often resort to shortcuts in their processing of the information to help them assess the persuasiveness of the expert (Cooper & Neuhaus, 2000). According to Cooper and Neuhaus (2000), all witnesses who come before a jury have their persuasiveness measured by such shortcuts as appearance, dress, and manner of speech. In addition, some of the kinds of shortcuts a juror may use in complex cases are the expert wit-

ness's credentials, rate of pay, and frequency of testifying. However, expert witnesses differ from other witnesses in that they require specialized knowledge that the jury needs, and the expert is paid. Obviously, when an expert witness is considered a hired gun, it reduces the expert's persuasiveness.

Cooper and Neuhaus (2000) conducted a total of three experiments using mock juries. In the first two experiments, they manipulated two variables used as shortcuts involving the level of pay and credentials of the expert. The mock jurors were presented with moderately complex testimony from the plaintiff's expert, and the authors reported that "they (jurors) were persuaded to believe in the plaintiff's position in all conditions except when an expert with high credentials appears for a very large amount of money (pp. 168). Further analysis shows that the expert in this scenario was not liked, not found believable, not persuasive, and annoying to the jurors. The researchers therefore concluded that the expert's high credentials and high pay made him or her seem like a hired gun.

In the second study, the researchers varied the information the jury had about the number of times the expert had testified in court as well as the expert's pay in order to assess the impact of frequency of the expert witness's appearance in court. According to the researchers, the results indicate that jurors made the same negative attribution to the highly paid, frequent testifier as they had to the highly credentialed, highly paid expert in the first study. The plaintiff's expert in this scenario was unable to persuade the jurors regarding his/her testimony.

A third study was completed by Cooper and Neuhaus (2000) to assess the effects of pay and frequency of testifying by having two sets of testimony, one easy and the other difficult to understand. When the testimony was complex, mock jurors used the combination of high pay and highly frequent court appearances to decide "not to believe the expert's testimony" (pp.169). Further, they did not like the expert nor did they find him believable. On the other hand, when the testimony was easy to understand, the jurors did not use any shortcuts in their assessment of the expert's persuasiveness. The researchers note that the pattern is consistent with simple, straightforward testimony and the use of processing skills by the jurors. However, when the testimony became more complex, the jurors used shortcuts.

Given the context of a trial procedure that is sometimes viewed as frustrating, irritating, boring, and tiring to the jurors, it is imperative that the expert witness understands these dynamics and knows how to respond. Being able to "connect" with the jurors individually, in spite of the fact that there are negative feelings, will help the expert witness persuade the jury of his or her opinion. If the expert witness is able to convey the information in simple, understandable terms, even though it may be complex, research shows that jurors tend to process the information and not focus on other variables which might include credentials, pay, and frequency of testimony (Cooper & Neuhaus, 2000) .

Recommendations from a Trial Consultant

In advising attorneys on how jurors perceive expert witnesses, Jeremy Rose, trial consultant from the National Jury Project in Minneapolis states that "two things hamper experts' effectiveness: explaining concepts poorly and making jurors' decisions for them" (Rose, 2000, pp. 51). Rose also suggests three areas that attorneys should consider when deciding which expert witness they would like to use in the actual trials proceedings: the expert's credentials, teaching skills, and personality.

Credentials: Rose suggests that the length of the expert's resume may not impress a jury. Instead, he states that the key in assessing one's credentials is how much actual experience the expert has in the subject matter at hand. Hands-on experience generally means much more to jurors than the frequency of testifying in a court of law as an expert witness. He notes that experts with not as much experience in the courtroom could actually have more credibility with the jury.

Teaching Skills: Rose (2000) notes that an expert who is able to simplify concepts and explain clearly to the jury will certainly be an asset to the case. Accordingly, jurors tend to be more comfortable when they sense that the expert desires to help them understand what they need to know to arrive at a just decision. Rose further notes that an expert who is a good teacher will have a limited number of main points and be able to identify those main points very clearly. The idea, according to Rose, is to have jurors be able to recall and repeat the expert's main points during the deliberation process. Based on this assertion, jurors want an expert who will explain the information clearly and not act as an advocate.

Personality: Openness, a relaxed manner, sense of humor, and enthusiasm are personality traits that jurors tend to most favorably respond (Rose, 2000). They also tend to judge how relaxed the expert is and whether the expert makes eye contact with the jury. Expert witnesses should keep in mind that jurors are also evaluating the expert's honesty and character, and they are concerned with an expert answering questions in a straightforward manner. According to Rose (2000), jurors tend to favor experts who are not overly aggressive, arrogant, or defensive on the stand and who demonstrate a neutral position. Experts who become defensive and tend to display an advocacy role during cross-examination can certainly lose their persuasiveness in front of a jury.

Conclusions: Connecting with The Jury

The research identified in this article indicates the need for the expert witness to be able to break down complex information into terms the jury can understand. If the complex can be simplified, it is more likely that the jurors will focus on attempting to process the information and not on other issues. This is especially true when jurors are confronted with opposing opinions from expert witnesses. If the specialized knowledge the witness is trying to convey remains complex, jurors tend to resort to shortcuts such as credentials, pay, and frequency of testimony to help them assess the persuasiveness of the expert (Cooper & Neuhaus, 2000).

It is important that the expert witness remembers that by the time the jury is ready to hear their testimony, jurors are probably experiencing frustration and exasperation with the trial process and feeling tired and bored with testimony. The jury may then not be receptive to processing complex information and the expert must simplify that process for them.

Hekkers' experience as a jury foreperson seems to be consistent with research results discussed in this article and with Rose's conclusions (Hekkers, 2002; Rose, 2000). Hekkers states in her article that by the fourth day, "they were exhausted from endless delays and the repetitive nature of the subject (pp. 80)." She comments that the court system isolates individuals with strangers, postpones discussion of the testimony until the deliberation period, and sometimes lacks clarity in the information provided by all parties, including even the court officials. By bringing clarity when presenting testimony, the expert witness is very beneficial to the jurors and it is less likely that the expert will be perceived as a "hired gun."

Connecting with the jury requires the expert witness to concentrate on "explaining novel concepts in a way that matches juror's ideas of common sense" (Rose, 2000, pp. 54).

Sidebar - The Evolution in The Role of The Jury

The American judicial system has come along way over the last 200 years. Indeed, in the eighteenth-century American colonies, juries, not judges, gave the last word on law enforcement. When juries sat in court during those times, they usually possessed the power to find both law and fact. In 1793, John Jay, a Chief Justice of the United States, told a civil jury that it had "a right to take upon themselves to judge of both, and to determine the law as well as the fact in controversy. Both objects are lawfully within your power to decide" (Nelson, 2002, pp. 243). The Connecticut court believed that jurors were expected to have opinions regarding what the law is since they sat as "judges of law as well as fact" (Nelson, 2002, pp. 243). Juries were so unified by their opinions regarding what the law should be that they often heard and decided several cases a day. However, in courts today, the judge gives the jury instructions on the law and if they fail to follow these instructions, verdicts can be set aside (Nelson, 2002).

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