



E19 Presenting Expert Testimony: The Expert's Perspective

Susan E. Morton, BA, San Francisco Police Criminalistics Laboratory, 850 Bryant Street, San Francisco, CA 94103*

Attendees will learn the expert's perspective on presenting courtroom testimony. This presentation will promote better understanding and communication between experts and attorneys. Attorneys will then be able to facilitate more effective testimony by expert witnesses.

Encounters between experts and attorneys sometimes produce astonishment on both sides. Scientists and jurists have very different world views and purposes. In general, scientists believe that the very latest word on a subject that has been replicated and verified is the controlling principle. Attorneys, conversely, will look to the oldest precedent. The author was once cross examined by an attorney about the possibility of developing fingerprints on paper. The text the lawyer was using to formulate his questions was Wigmore's 1895 treatise. The attorney exhibited befuddlement when told that time had marched on in the intervening century and that new techniques were now available as considerable effort had been spent in finding the oldest reference possible on the subject.

Attorneys, being advocates, sometimes forget that experts are not. An honest expert may be called to the stand by one side in a case, but does not, or at least should not, be perceived as "on that side". Obvious bias in an expert will render that witness ineffective more quickly than incompetence. Juries may have some sympathy for an honest fool, even as they dismiss evidence he has proffered. However, a "hired hack" will produce not only a rejection of the evidence, but suspicion of the side that offered it. A jury may conclude that they are being conned because there is no real evidence for that side to present.

Another area that causes misunderstandings is language. Both Attorneys and scientists use language in very precise ways. Unfortunately, they may be using the same words, but attributing different definitions to them. An example is an encounter between a prosecutor and a Forensic Alcohol Supervisor in a DUI case. The alcohol level test was performed on and Intoxilyzer® breath alcohol instrument; the expert was to testify to these results. During a pretrial conference the prosecutor posed the question to the expert whether it was possible for the expert to infer and testify to the defendant's state of impairment based on field sobriety tests and other observations made by the arresting officers, even in the absence of the chemical test. Forensic Alcohol Supervisors are trained and qualified to testify to such conclusions and regularly do so. Once familiar with the pertinent information, the expert in this case agreed that testimony could be offered that the individual was impaired, even in the absence of the chemical test. However, the question that the prosecutor asked in court was somewhat different from the agreed upon question. The prosecutor asked the expert if, based on the field sobriety test and other observations by the arresting officers and even in the absence of the chemical breath test, the expert could conclude that the defendant was under the influence of alcohol. The terms "impaired" and "under the influence of alcohol" may have sounded interchangeable to the attorney, but they certainly are not to a scientist. The expert answered in the negative to the great surprise and distress of the prosecutor. To a scientist, impairment can be inferred from behavior. It is not possible to know without chemical tests or other information whether that impairment is due to fatigue, illness, talking on a cell phone, illicit drugs, prescription medications or alcohol.

These different perspectives can lead to misunderstandings and miscommunications. The author has been an expert witness for many years. She will describe some of the more instructive encounters she and her colleagues have with attorneys in hopes that both sides can learn how to communicate better. Her insight into what attorneys have done wrong, as well as what they have done right, in attempting to present her scientific findings to courts will help practicing attorneys hone their skills. Poorly worded questions can handicap an expert witness and fail to elicit compelling evidence. Properly couched questions can make scientific findings tell powerful stories. Experts and attorneys need to learn to listen carefully to each other and pay attention to the other's language. Society needs for justice and science to work together.

Expert Witness, Communication, Effective Testimony