



E4 It Don't Rain in Indianapolis in the Summertime; the Defense Expert is Never Interested in Reliable Scientific Methods; the Government's Expert Will Always Use the Best Methods and Testify From an Unbiased Perspective; and, It Don't Snow in Minneapolis When the Winter Comes

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After attending this presentation, attendees will become aware of the importance of an expert witness to maintain impartiality in testifying.

This presentation will impact the forensic science community by reinforcing the belief that the expert witness must avoid the "desire to win" mentality, which is a product of the adversarial process.

This presentation will examine the experiences of an "expert witness" whose perception of reality is based on decades testifying for the government and whose recognition of reality in the courtroom has faced many "what is happening here" moments.

For someone whose career spanned more than 32 years in forensic science laboratories affiliated with law enforcement agencies, there is an inherent desire to believe in truth, justice, and the American way when entering the courtroom. In the greatest majority of cases, this has and will usually be true. Most forensic science laboratories which are a part of a government organization and which are accredited conform to the requirements for reliability and relevance in following analytical protocols. Many who have spent the entirety of their careers in similar professional settings have come to believe that only the defense will "go after the expert" in the adversarial arena of the courtroom, and then only to keep the client (translation, "bad guy") out of jail. Now, think *Porgy and Bess* – George Gershwin had it right when he wrote "*Ain't Necessarily So*." The defense does have the legal obligation to cross-examine a prosecution witness in any way deemed appropriate; and the prosecution does have a legal obligation to cross-examine a defense expert to demonstrate the invalidity of contrary opinions. Winning at any cost is not supposed to be a part of the equation; however, sometimes this appears to be exactly what is happening.

The reality is that on both sides, there are always elements in any expert witness testimony which can and should be determining factors in distinguishing between what "one claims to see" (sometimes with one eye shut) from "what is." The courtroom is not always a search for the truth; and the adversarial system does influence priorities in ensuring that the process gets it right. Both sides at times start with a conclusion and then work backwards in considering only those data interpretations that supports these pre-determined conclusions. This is the scientific method in reverse. Testing the hypothesis is supposed to precede the formulation of a conclusion. There are still expert witnesses who refuse to acknowledge the fact that standardized methodology and requirements for documentation do exist, and everyone who testifies as an expert witness, especially witnesses called by the government, must conform to these standards. There are still too many government witnesses who use a cafeteria style approach to testifying as an expert. All of this and more happens on both sides in the courtroom, both pre-trial and then again during the trial. There are factors both the defense and especially the prosecution can and should consider in determining the reliability, relevance, validity and veracity of expert witness testimony:

1. The government seeks expert witness testimony outside of a government entity when the expertise exists within that entity.
2. The expert witness admits that the government retained their services to state a specific opinion.
3. The analytical approach to evidence analysis is "holistic" rather than method specific.
4. There are no documented protocols or evidence of conformance to standards.
5. The expert witness bases conclusions on "training and experience" rather than on empirical data or demonstrative evidence.
6. A laboratory which loses accreditation or which does not meet the requirements for extending accreditation has serious problems.
7. Referencing the internet as the only authoritative source is questionable at best.

These situations not only "can happen," they have all been experienced in a very narrow timeframe of two years. In the courtroom, the judge, as "gatekeeper," makes every attempt to ensure that expert witness testimony meets the standards of the jurisdictional rules of admissibility. However, that gatekeeper's responsibility and the responsibilities of all participants in the process require more than a belief that the "good guy always wears a white hat." Everyone who testifies in a courtroom has a responsibility to play by the rules, irrespective of where the subpoena to appear originates, especially when the expert is testifying "for the prosecution" in a criminal trial. This does not always happen.

The desire to win is a product of the adversary system, and this adversarial process can usually be very effective at arriving at a just verdict. However, arguments based on challenges to methodology, documentation, data, and the validity of conclusions can be more persuasive than the occasional personal attacks from both sides during the "adversarial processes" in the courtroom.

Expert Witness, Standards, Adversarial Process