EFFECTIVE PRESENTATION OF EXPERT WITNESS EVIDENCE

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HONORABLE LAMAR MCCORKLE
Judge, 133rd District Court, Houston

Judge Lamar McCorkle was elected in 1986 as the judge of the 133rd Judicial District of Texas. Judge McCorkle has been active in numerous continuing legal education programs as an author, presenter or course director, including those for the State Bar of Texas, National Judicial College, Texas Center for the Judiciary, National Institute for Trial Advocacy, Houston Bar and for law schools in Texas. He teaches litigation courses annually as an adjunct faculty member at both South Texas College of Law and at the University of Houston. Prior to his election, he was a trial attorney concentrating in the area of business litigation. Actively involved in judicial activities, he has been recognized for court management programs and results by the Texas Research League, and he is the recipient of the Justice Charles W. Barrow Award, 1996, recognition for court administration. Judge McCorkle currently serves as Chair of the Judicial section, State Bar of Texas; on the Judicial Committee on Information Technology for the Supreme Court of Texas; as past Chair of the Texas Center for the Judiciary Peer Committee; as Chair of the State Bar Professionalism Committee; on the Board of Trustees of the Texas Center for Legal Ethics and Professionalism; and as Managing Editor of the Harris County Bench Book and the Assigned Judges Bench Book.

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INTRODUCTION

Fact: The illiteracy rate in America is about 25%.

Fact: 28% of adult Texans fall into the lowest level of literacy.

Fact: The Gore-Bush debates were targeted to a 4th grade vocabulary level.

Fact: The attention span of the average American is about 1/5 of the time it will take to scan this brief paper.

Fact: About ¼ of high-school diploma holders in Texas fall into the lowest level of literacy.

Fact: 40-46 % of African Americans in Texas perform at the lowest level of literacy. 50-51 % of Latinos in Texas perform at the lowest level of literacy.

Fact: Texas is among the top three states in the number of immigrants taking residence.

This article is written to assist Texas lawyers in applying principles from learning and memory social science research and jury debriefing research to achieve the effective presentation of the expert witness. Having debriefed hundreds of jurors after actual trials, mock trials, and reviewed jury research, it is painfully clear that in the majority of cases, jurors miss completely or misunderstand the key points or pivotal issues of a case. This problem commonly results from limited human capacity interacting with a tremendous amount of bewildering, unfamiliar, and non-essential information. This experience, of course, fits with comments from lawyers that jury verdicts are "undependable", "undeterminable", or "unforeseeable".

Winning is the ultimate goal. But, how can you win the trial if you cannot communicate clearly the case position? Effective case strategy takes you to a win. Persuasive presentation of the expert is a core element of case strategy.

STRATEGY

Before any hearing or trial, the lawyer should map out the 3 to 5 key questions (less is better) that the jury or trier of fact must answer in the case. Even lengthy and complex jury charges of thirty or more questions can be broken down to a few basic categories. These issues come together to form your broad case theme – your central focus. Although case strategy is not the topic of this brief paper, the central focus must be mapped out in order to present your expert powerfully.

Moving from the general to the specific you should next review your witness list. Under each key jury charge category, the witness who most strongly impacts that particular question should be listed. This is where the goal of the expert testimony will emerge clearly.

Finally, beside each witness, 3-5 key points of testimony should be outlined. In this more detailed examination, it will become clear to you where there are overlaps and gaps in testimony and evidence. Noting the evidentiary overlaps and gaps will help you narrow down the key issues that need to be highlighted by the expert.

This strategic planning must occur prior to your preparation of the expert for trial or a hearing. The folly of most trial lawyers is to present an expert's opinions and work fully. This "shot gun" approach usually results in weak and unfocused testimony. An expert's opinion is one of the most powerful weapons in your adversarial arsenal – use it with focus and planning. Expert testimony will be stronger and have a greater impact when it is narrowly directed on the target.

Although this preliminary work seems elementary, relatively few lawyers are able to articulate these points prior to trial. The key here is to limit the information going to the jury to that which is essential to answering those few jury charge categories. Peripheral and non-essential information is noisy. It distracts the jury or trier of fact from the pivotal, meaningful evidence. You have to keep it simple.

Trial strategy continuing legal education courses are heavily attended because the real world of courtroom drama is complex and challenging. So much so, that lawyers are mired into presenting their cases in a manner which mirrors the detailed and complex legal process itself.

Winning lawyers bring their own reality to the courtroom. They use a strategic trial plan similar to the following:

Simplicity is the key.

Develop a Central Premise.

Determine the general question(s) the jury must answer.

Decide which witness, including experts, answers which questions most powerfully.

Focus your witness testimony to the jury questions and the central premise.

This simple trial plan, developed by the author, logically connects the different phases of your trial powerfully by employing principles of learning and persuasion research. Focusing the expert's testimony is akin to using a spotlight to help jurors see your single central focus. The more complex the trial issues, the more the lawyer needs to simplify the evidence presentation.

The challenge of direct testimony of the expert is that you, the lawyer, are coming from behind. Looking at your role from the jury's point of view, you are being paid to advocate a particular position and your profession has less than a glowing reputation. You don't have the credibility, at least in the beginning, that your expert will probably have. Your goal throughout the trial is to steer through the evidence. You cannot and should not testify through your questions. Rather, you use your expert to advocate your case position. This means you steer – not lead - the expert through the testimony. The evidence and the facts that jurors are more likely to find credible come through the expert, not through a lawyer's testimonially styled questions. Think like a juror, this will help you steer. Ask questions you think a juror would pose. Play the devil's advocate; don't be afraid to challenge your own witness. These questions of challenge will come to the minds of the jurors anyway and your statement of them and your expert's thoughtful answers will be powerful. You must do all of this, i.e. guide (not lead) and pose comprehensible questions while at the same time adhering to the rules of evidence.

SHINE THE EXPERT

Once the central premise of the case is developed, you are ready to decide how to use the expert 's opinions and work to spotlight this theme. Although the conceptual goal for the lawyer is to understand the expert's work thoroughly and in great detail, the ultimate goal in the direct testimony is to reduce the opinion to as few points as possible. The more complex the topic, the fewer the points. For example, in a case involving mental health testimony regarding a personal injury, you probably can cover 3-5 main points because lay persons are familiar concepts of depression, traumatic events, or therapy. But in a patent infringement case regarding highly technical data, the points probably need to be reduced to 3 or less.

Only with a thorough understanding of the expert's work and opinions can you accurately reduce the information to a few key points. This detailed knowledge is essential to other aspects of your trial strategy. It arms to frame appropriate questions back to the expert in re-direct as well as be more agile in the cross examination of the opposition's experts.

Here are the basic rules that make your job in direct examination easier:

1. Stay with simple questions.

2. Use down to earth language.

3. Join up with the jury & judge

"Could you help us understand?"

"Could you explain that to us?"

4. Ask the logical question you think the jury is asking silently

5. If it can be seen, show it.

Use a written outline to keep the testimony flow logical and focused, particularly amid objections. Also, do what you can to enhance the expert's credibility. If the expert becomes confused or

makes an error, buy some time for him or her to reorganize their thoughts. Take responsibility for a poor question, backtrack in the testimony, or return to a previous answer through a leading question.

The written outline is essential to an effective direct examination. The following techniques which combine principles of learning and persuasion will help you construct an effective outline.

REPETITION

Short-term memory is extraordinarily limited, though our long-term memory capacity is impressive. For example, when given a list of random letters or numbers, the average adult can recall about 7 items (the range is 5 to 9). The phenomenon is so consistent that it has been dubbed the "magic number" in social science research. One way to envision this phenomenon is to think of many boxes of information sitting on a dock to be stored in a warehouse when there are only a few minutes to store them by one worker until the warehouse door closes. When the door closes, the remaining boxes on the dock are lost forever. When several of the boxes are similar (repetition) there is more likelihood that this information will be picked up and stored.

The more complicated the topic the more repetition will assist the jury in understanding and remembering the information. Therefore, you will want to repeat concepts, not exact questions, through the examination. Looping is a technique which incorporates an answer into the next question. It is not, though, a leading question. Looping takes the information or phrase right back to the jury again to increase the likelihood they "get it".

In ordering the outline, remember that we are working with only 3 to 5 key issues for the entire examination, so you will want to pull in facts or findings which support these categories. An easy way to do this is to present the key issues first so the jury knows the general direction of the testimony then go back through each key issue with the necessary supporting facts or background as needed.

The expert needs to simply state the key points in everyday language and should be particularly attuned to the jury's capacity. When possible, core points need to be repeated, particularly with unfamiliar information. In presentation of the expert 's evidence, repetition increases the likelihood that 1) the evidence gets enough attention to be attended to 2) that it gets stored in a meaningful way and 3) that it gets recalled accurately.

You can use hypotheticals as a vehicle for repetition – particularly with complex or technical testimony. You can also employ hypotheticals to summarize several facts or pieces of information. Again, the hypothetical would serve to repeat the jury's exposure to the information.

ATTENTION

The likelihood of retaining information is greater when it is familiar. Going back to our worker on the dock – the boxes which are familiar will get the worker's attention first. They are more likely to get stored. Attention is the key concept here. Nothing will be stored or retrieved from memory unless it first is attended too. Attention is the core problem in inconsistency of eyewitness testimony. People remember different aspects of the same events as dictated by what demands their attention at the time. For example, if a woman making a deposit slip is present at a robbery at a teller's window, it is unlikely she could reliably report the event – her attention was on the deposit slip, not the teller's window and no amount of memory enhancing techniques will cue up more knowledge than she first gives. One cannot retrieve information from memory if it is not first purposefully and meaningfully stored. Meaningful storage requires that attention be given to the event or data.

What Can You Do to Gain a Jury's Attention?

Think about the descriptors "bright " and "clear". Avoid routine for your key points. There are a variety of techniques you can employ to keep the testimony of the witness bright, interesting, and clear.

1. Vary Exhibit Types.

Use power point, video, hard boards, graphs, charts, write on a large tablet. Avoid one exhibit type. Move around the courtroom – pick up a board, point to an overhead, stand up, approach the witness on a key word or point. Movement provides a break in the monotony of the trial pace. When your expert makes the key points, write then down on the large tablet or flash them on a video screen . This commands the jury's attention.

Overuse of exhibit types becomes mundane. Use your demonstratives when you need punch – it

they become routine, then they will have only a routine effect.

2. Exhibits Should Capitalize on Parallel Modalities of Learning.

It is a given that jurors will hear testimony. Using parallel modalities of communication will enhance the message. When possible, use visuals, models, photographs, documents and tactile exhibits. Parallel modalities not only command more attention from jurors, they hasten the learning process as well by repetition of the information.

Different people learn in different ways – some are more auditory, some more visual, some tactile - paralleling the ways in which data is presented will more likely impact a greater number of jurors.

3. ABC… XYZ.

A four year old's early recitation of the alphabet usually starts and ends well – it is the middle that often contains idiosyncratic and bizarre utterances. This phenomenon is known as the primacy and recency effect of learning. That which is presented first and last is more likely to be attended to, learned, and successfully retrieved. When you start and finish with your expert, spotlight your case focus. Keep the important parts at the very beginning and at the very end.

4. Use Silence.

Nothing is more commanding than silence in the courtroom. Use it before a pivotal question or let an answer to a key question hang in silence before moving to the next question.

5. Vary Your Intonation and Rate of Speech.

Similar to silence, variation in intonation and rate of speech will demand attention – it breaks the routine. Used sparing, slowing or speeding your speech signals the jury something important is coming up.

Returning to the construction of the direct examination outline, it should be clear form the previous section that the jury needs to know where you are going before you start this journey. Put out those key points first – punch them up. Then return one by one to go through more detailed information as needed . All of the expert's testimony should fall into these few key categories. When you finish with one category use transition questions to a new category to alert the jury to a turn in the road. Try to put yourself in the jury box, if you were hearing this for the first time, what would you want to know, what would be the next logical question. Testing the outline on people who have not had exposure to the case is very helpful in learning where your logical leaps are too great.

You want a lean outline – no irrelevant noise. Most of your expert's detailed work is not meaningful to the jury; it is like those boxes sitting on the dock that are never stored. As you are working with limited jury capacity, not to be misconstrued as mental limitations, you don't want to waste your storage space with meaningless information. Stick to the key points.

WHAT CAN A LAWYER DO TO PERSUASIVELY PRESENT EXPERT TESTIMONY?

Don't follow the footsteps of your brethren and sisters - jury feedback and research literature regarding persuasiveness will surprise you. Avoid testifying through leading questions or telling the jury what to think. Remember that lawyers start out with limited credibility in the courtroom. Evidence is more credible coming from other sources. When you are ready to make an important point to the jury, employ a technique that will demand their attention.

WHEN DO YOU CALL THE EXPERT?

Research about perception and the strength of perception (anchoring research) indicates that a jury develops an "operating" story about the case very early on – probably as early as voir dire. Once a story is anchored, evidence is interpreted as either supporting or not supporting the initial story. Anchoring research accounts for why there is an advantage for going first in trial. Things beyond your control, your expert's schedule, the trial schedule, sudden illness of a witness, often impact when you call your expert. First or last usually carries more punch. If you call the expert last, let the jury know it is the last witness, give them a heads up. If the expert testifies first thing in the morning, jurors are more alert. If the expert is the last witness of the day, keeping their attention will be more challenging but if the challenge is meet, then jurors go home with the information in their minds. In learning research, once new information is learned, then if there is a respite rather than another barrage of new information, it is more likely to be retained. If your

expert is the one to tell the story of the case, then the sooner your version is put forth, the better.

EXPERT ATTRACTIVENESS

There is no doubt that the physical attractiveness of your expert greatly impacts her or his credibility with the jury. A large body of social science research clearly indicates that attractive individuals are viewed as more successful, smarter, and more honest that their less attractive counterparts. Generally, jurors expect experts to be well dressed though not flashy. There are some pitfalls for female experts that should be kept in mind. Long hair is viewed as less professional than short hair; therefore females should wear their hair up or back. Short skirts, tight dresses, or heavy make-up sometimes communicates a provocative manner rather than attractiveness and diminishes credibility. Physical impressions in the courtroom are powerful when there is such limited exposure to the jury.

EXPERT EYE CONTACT

Jury research indicates that experts who do not make eye contact with jurors are likely dishonest or deceptive. Though it may be awkward to the expert, looking to the jury when giving explanations or when discussing a pivotal case issue is essential for credibility.

EXPERT OPINION: STRONGER IS BETTER

Strongly stated expert opinions are the most persuasive. This finding is consistent through jury research. The expert must not waffle on key points – it there is waffling, then that particular issue should be addressed more strongly through another witness or should be thrown into the middle of the direct examination where it is not so noticeable – certainly, don't leave the waffling issue last. If it must be said, put it in the middle of the examination.

THE CUE BOOK

Your expert will be a better witness if he or she uses a "cue book" on the witness stand, especially in this age of Daubert-type challenges and cross-examinations. The "cue book" usually contains a summary of the expert's work and relevant articles or papers to which the expert might refer or be crossed.

THE EXPERT'S BACKGROUND

Jurors really do pay attention to the expert's background. Background data enhances expert credibility – usually. Again, employing the primacy principle, the most important, not necessarily the most recent, aspects of the expert's background should be presented first. Highlight and summarize the background, rather than going through specific events. For example, if an expert has taught and conducted research in 6 different colleges from 1980 to 2001 present the data as 21 years of experience as a teacher and researcher in colleges such as … rather than going through each college employment and the specific dates. A jury will be not able to summarize the years of experience unless you do it for them. Give them snapshots, the important ones and the ones which directly relate to your case premise.

INOCULATION

Research regarding persuasive techniques indicates that inoculation is a valuable countermeasure to your opponent's attack of the weaknesses of your case position. Inoculation should be started in opening statement and in some cases, voir dire. Inoculation generally means giving the jury a "taste" of a particular case weakness or anticipated criticism and then providing the counter argument (your position). For example, on a personal injury case if you anticipate your opponent will claim minor damage because your client is functioning with limited impairment, go ahead and present this information through your own expert in form of a devil's advocate type question. The question posed might by, "Dr. X, how can you say the injury was severe when Mr. Y goes to work everyday?" This takes the wind out of the sail of your opponent. The jury has already heard the claim, they heard it first form you, and your expert has addressed it. The jury was going to think about this question anyway, so your presentation serves to "inoculate" – protect your case from susceptibility to your opponent's position.

SHOW IT, SHOW IT, AND SHOW IT

Physical evidence is the strongest. Show whatever you can, when you can, whether it is documents, photos of a warehouse, a video of an accident scene, or a medication under scrutiny. If it can be seen, it is more real to the jury. Juries

actually study tangible evidence and they return to it during their deliberations.

CONCLUSION

Effective presentation of the expert witness is the core of winning trial strategy. The concepts in this paper were assimilated from actual social science research and debriefing research with real and mock juries. What is most familiar in the courtroom is not necessarily the most effective. We want our new wave of experts to be more scientific and accurate in their work and testimony. The old style of giving opinions based on experience is passe' because we have learned personal experience alone is highly idiosyncratic and not that reliable. So too, attorneys need to leave behind old practices in favor of trial science findings. The challenge for most attorneys is to be open to new methods of trial strategy and to make a commitment to simplicity if indeed a trial is inevitable.