Intellectual Pugilism: The Art and Science of Expert Witnessing

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April 12, 2016
Expert Witnessing

Art
1. Questions you do not have to answer
2. How to answer questions
3. Controlling your testimony

Science
1. Better knowledge of the facts and issues than opposing counsel
2. 3 Keys to strong expert witnessing – Prep, Prep, and More Prep
3. Writing reports that tell a coherent, convincing story

Mastery comes with years of diligence and practice in cases.
Skills Essential for a Good Expert Witness

• Couple facts & evidence with your knowledge & experience;

• Analytical writing style;

• Control the dialogue;

• Know facts & evidence better than opposing counsel;

• Answer questions clearly, concisely, credibly and confidently;

• Focus on most relevant facts & evidence; and

• Utilize 8 Cs of expert testimony.
Facts and Evidence Weighed Based on Your Knowledge and Experience

• Show facts and evidence supporting your opinions;

• Footnote all materials upon which you rely;

• Deep knowledge and experience re your opinions;

• Report and testimony reference your background and experiences re your opinions.
Case – i4i v. Microsoft
“Opportunities When Opposing Counsel Is Unprepared”

• Represented i4i re Single Patent-Generate XML Documents;

• My testimony on willful infringement and inequitable conduct;

• My report concluded Microsoft fact witnesses had lied;

• Asked question about Microsoft employees.
Excellent Analytic Writing Ability

• Coherent story how facts and evidence support your opinions;

• Clear statement re issues on which you opine;

• Then, state your background/experiences supporting opinions;

• Next, clearly state your summary conclusions;

• Provide time line of key facts relevant to your opinions (graph).
Bases for Your Opinions

• Your opinions must be based on:
  - customs, standards, and practices in the expert field;
  - your background/experience in the field;
  - evidence of record and materials cited in your report.
  - **NOT ON THE LAW (SOLELY COURT’S DOMAIN)**!

• **EACH OPINION TIGHTLY COUPLED TO FACTS, EVIDENCE, OTHER MATERIALS UPON WHICH YOU RELY.**
Controlling the Testimony Dialogue with Opposing Counsel

- Show your greater knowledge of facts and evidence;
- Use Live Notes;
- Carefully listen to questions; give your counsel time to object;
- Ask for clarification of unclear or ambiguous questions;
- Do not answer hypothetical questions;
- Entitled to answer the question completely without interruption;
- Never guess at answers;
- Control the testimony, shorten the questioning.
More In-Depth Knowledge of Opinion Subject Matter than Opposing Counsel

• You are the expert

• Cite materials supporting your opinions:
  - Articles on the subject matter
  - Cases
  - Specific examples from your work/other expert engagements
  - Legal or industry definitions
  - Practices by others in the industry supporting your opinions
  - Address potential weak points before the other side
Case – Wi-Lan v. Acer et al, RIM et al, and Westell Tech. et al
“Hitting it out of the Park”

• 2 Wi-Fi S.E. patents;

• 20 Defs. – chips, laptops, cell phones & routers;

• My depo taken re willful infringement 6 weeks before trials;

• Question why end-product mfgrs. being sued
Answer Questions in a Clear, Concise, Credible and Confident Manner

• Understand question before answering;

• Never guess;

• Generally, keep answers short;

• Clear, concise answers: no indecisiveness/waffling;

• Deposition testimony is not a memory contest;

• Quote from your report.
Your Credibility and Self Confidence Are Paramount

• Cannot say anything client wants;
• Present facts/render opinions making best credible case;
• Expert’s credibility critical;
• Practicing expert more credible;
• Integrity of credibility is true client value proposition;
• Confident but not narrow-minded;
• Expertise, experience, proven reputation trump “label.”
Convincing the Judge and the Jury

• Show sound grasp of the facts, evidence, & basis for your opinions;

• If Judge asks a question, look at Judge, answer clearly and concisely;

• Your testimony is opportunity to educate the Judge and Jury;

• Face the Jury directly when answering questions;

• Credible testimony wins over Judge and Jury;

• Jury heads nodding in agreement, not nodding off from sleeping.
Case – Cornell University v. HP
“Taking Advantage of Cross Examination”

• Single microprocessor patent issued 1990;

• 1995-05 HP increased server/workstation share from 40% to 55%

• On cross exam asked about HP in-license royalty 8% net sales
Employing 8 Cs of Expert Testimony

- **CLEAR** – crisp and to the point
- **COGENT** – pertinent, relevant, compelling
- **COHERENT** – logical, organized, easily understandable
- **CONCISE** – short answers
- **CONFIDENT** – certainty re your abilities, correctness
- **CONSISTENT** – harmonious, regular, steady continuity
- **CONVINCING** – satisfying; assuring by argument or proof
- **CREDIBLE** – reasonable grounds for belief
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