



# Intellectual Pugilism: The Art and Science of Expert Witnessing



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# Expert Witnessing

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## 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.

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# 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

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- 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”

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- 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

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- 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

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- 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 you 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

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- 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”

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- 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 mfgs. being sued

## Answer Questions in a Clear, Concise, Credible and Confident Manner

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- 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

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- 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

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- 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”

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- 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

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- **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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