The Better Teacher: 
Be an Expert at Testifying and 
Not Just a Testifying Expert

By Ken Broda-Bahm, Ph.D.
It is a truism when dealing with competing experts: *The better teacher wins*. Of course, a credible expert still needs qualifications, a sound methodology, and reasonable conclusions. But when it comes down to that moment in deliberations when a jury decides who they trust, it will come down to the question of which expert made them feel that they understood the issue well enough to reach and support their own conclusions.

Some experts might feel, “My only job is to provide the conclusions and a good foundation for them...it’s the attorney’s job to sell it.” And it’s true that the attorney should be seen as the advocate, not the expert. At the same time, there is a world of difference between the expert who merely provides opinions, and the expert who really makes a serious and informed attempt to communicate those opinions in a clear and understandable fashion, and also defends those opinions in order to guard against opposing experts and counsel. Communicating effectively doesn’t turn the expert into a lawyer, it turns the expert into an effective expert: someone who can truly help the jurors do their job.

But the simple choice an expert makes to try to teach as well as possible isn’t the end of the story. Instead, there are a number of steps that even very experienced experts should be taking in order to continue to improve. This article will select three of those steps and consider some of the psychological and communications research underlying the needs, as well as the practical components of putting them into practice. Specifically, an effective expert needs to:

- **Convey** the need for the expert opinion;
- **Show** why your analysis is better than the analysis of a competing expert; and
- **Fight back** when your conclusions or methods are challenged.

### Convey the need for the expert opinion.

It is common experience that jurors will often set aside expert testimony. Part of it, of course, is a “hired gun” effect (Cooper & Neuhaus, 2000) that in some cases leads jurors to distrust experts based on the knowledge that they’ve been paid for their opinions by one side or the other. But over time I’ve come to believe that is not the dominant reason jurors have for avoiding reliance on experts. Instead, there is a more basic reason at work: Jurors don’t use experts because they’re not convinced they need experts. They think they know the general idea well enough already. Why listen to a product safety expert if I think product dangers are obviously based on common sense? Why listen to a construction expert if I have a brother-in-law who works in construction?
This overconfidence and preference for personal knowledge has a social science name: **the illusion of explanatory depth**. It’s a cognitive bias that occurs when people believe they understand a concept more fully and more specifically than they actually do. The way it works is this: Once we’re able to appreciate or articulate something at a very general or abstract level, we come to believe that we understand the specifics and the mechanics of it at a concrete level as well. But, we don’t. As one of the most comprehensive recent studies of the phenomenon (Alter, Oppenheimer & Zemla, 2010) has noted, this perceived general understanding isn’t something we can trust. “Although folk wisdom suggests that people often fail to see the forest for the trees,” the authors note, “sometimes the greater concern is that people fail to see the trees for the forest.” That has an immediate relevance to jurors’ and other fact finders’ understanding of expert testimony. Jurors can fall victim to overconfidence in understanding, and the experts themselves can unwittingly promote that illusion. The main goal is to avoid abstract explanations and be concrete instead. In order to practice what I preach, I mean to concretely explain in this section what I mean by “be concrete.”

**Missing the trees for the forest: the illusion of explanatory depth.**

Cognitive science seeks to understand how our patterns of thinking explain our actions and decisions. The research I’m looking at in this section (Alter, Oppenheimer & Zemla, 2010) addresses the question of why people believe that they understand far more about natural processes, their abilities, other people, and future events than they actually do. The illusion of explanatory depth is a common way we overestimate personal knowledge. The authors use the following example:

> Many people know vaguely that an earthquake occurs because two geologic plates collide and move relative to one another....but they know little about the mechanism that initially produces these collisions. Nonetheless, people believe they understand these concepts quite deeply and are surprised by the shallowness of their own explanations when prompted to describe the concepts thoroughly.

In other words, possessing only the most general outline of something, we think that we can translate that outline to the specifics, and we can’t. That can cause problems in applying expert opinion testimony. If we think we understand the phenomenon better than we actually do, we’re more likely to rely on our own knowledge instead of expert opinions.

But what determines whether we fall into this illusion or not? What the researchers found was that it boils down to whether we are using an abstract or a concrete route to understanding. Referring to this as a “construal level,” they explain that “people construe or represent the environment along a continuum from abstractly to concretely.” In looking at how a simple pen works, for example, you might have a global understanding (*I move it across a paper and ink appears*), or a concrete understanding (*there is a ball in a socket between the paper and the ink, and that ball serves to separate the ink from the air and to transfer that ink in small amounts to the paper as it rolls*).
By measuring and inducing this broad or detailed understanding of situations like the earthquake or the pen, the researchers looked at whether they could cause and prevent this illusion. Through a series of six studies, they found that individuals do commonly experience an illusion of explanatory depth, and when they approach information abstractly (either naturally or after being induced to do so by the researchers), they are more likely to experience this feeling of having greater understanding than they actually have. Across the six studies, they found what minimized this illusion was concrete construals - the action of thinking about phenomena in tangible and physical terms, rather than broad and global abstractions. “Our findings suggest that whenever people instinctively adopt an abstract construal style, they might erroneously conclude that they understand fine-grained, concrete concepts more deeply than they actually do.”

That observation provides a useful addition to a good expert’s toolbox. By now, it is common advice to pare back on the jargon and to adopt a teaching mindset. But taking it even further, experts should try first to convey a concrete understanding by letting the example lead and the explanation follow. Instead of doing that, however, experts too often will explain broadly, dipping down to a concrete level only to provide some illustrations. It is a trick of language: As we move up the ladder of abstraction, focusing on forests rather than trees, we feel that we are explaining more, but in practical terms, we are explaining less.

Concretely, here are a few things that experts and those who hire them can do to stay on the concrete side:

1. Focus on how and not simply on why.

Formally, the law puts the focus in expert testimony on the expert’s conclusions and the reasons for those conclusions. That makes sense given the expert’s role, but from a communication perspective, it lodges the expert firmly in the “abstract” department when it comes to the level of construal, or understanding, that jurors and other fact finders are being asked to use. In the Alter, Oppenheimer and Zemla (2010) study, the researchers provided a simple trigger that experts and other legal persuaders can use. When they wanted to induce an abstract style of thinking, they would ask “why,” but when they wanted to induce a concrete approach, they would ask “how.” Experts can follow the same pattern. Instead of focusing primarily on reasons and conclusions, immediately engage the fact finders by focusing on how.

For example, in one of our more complex cases, we had a damages expert on the stand for several days who had to provide a detailed account of economic losses. Feeling the rather substantial risk of losing the jurors in the first 25 minutes, we focused the early parts of that testimony on the expert’s process. Like a mathematics story problem, the expert walked the jury in a step-by-step fashion through the challenges he faced and the solutions he applied so that jurors had the chance to see the concrete how before getting into the greater abstractions of what and why.

2. Start with what you can show, then work back to what you can tell.

In December, 2012, Anderson Cooper featured restaurant industry expert witness, Howard Cannon, on his show to talk about the sources of food poisoning we face when dining out. If you look at the clip (available at this link: http://goo.gl/bAEu3), you’ll see that the same techniques they chose to make for interesting television also make for effective testimony. Instead of talking abstractly about things that we can’t see (bacteria, kitchen conditions, etc.), Cannon led with a number of concrete illustrations of the specific and visual scenarios that can cause illness or even death from food poisoning.

That approach can be replicated in court. In one of our cases, for example, our witness needed to explain to jurors the concept of “microbial imbalance” which occurs when the act of wiping out some good microbes causes other harmful microbes to flourish. Of course, it was all explainable in the abstract, using data and tables, but what jurors remembered is the animations, the analogies (if you kill the wolves, then there are too many deer), and a demonstration in which the expert was allowed to step up to the jurors and show them various petri dishes containing microbial communities glowing under a black light. Instead of focusing first on the “main testimony” and then, almost as an afterthought, thinking of ways that you might use graphics to illustrate it, start with the graphics that engage the jurors immediately on a concrete level.
3. Emphasize your teaching ability as much as you emphasize your expertise.

Of course, getting fact finders to the concrete level requires some skill on the expert’s part, and lawyers definitely look into that skill when hiring their own experts and assessing the experts on the other side. There are companies that will provide comprehensive profiles for your expert (e.g., “ExpertWitnessProfiler.com”), and while those reports will generally include the most salient indications of experience and credibility that the law sees (e.g., teaching, publications, past testimony, etc.), they often leave out the quality that I’d consider most important: Can this expert effectively communicate their conclusions to an audience of laypeople? Beyond qualification, can they truly teach the unfamiliar and the abstract? Or, viewed in the light of this research, can they encourage jurors to set aside their illusion of explanatory depth long enough that they actually rely on the expert’s opinions instead of their own folk wisdom on the subject? To assess these questions, there is no substitute for a lawyer’s own experience with a witness or as well as conversations with those who’ve had experience with the witness. So your word-of-mouth reputation matters a great deal.

Show why your analysis is better than the analysis of a competing expert.

When the case comes down to ‘expert versus expert,’ one important question is, what makes jurors believe one expert witness over another? Applying the rational model of law, we would like to think that jurors would evaluate the credentials, the methodology, and the strength of the conclusions offered, and compare the competing experts based upon the appropriate standards of the field. That would be rational, but alas, not really typical in the courtroom. One reason for that is that we know that jurors often have a difficult time identifying methodological flaws in an expert’s analysis (McAuliff & Duckworth, 2010). While they may or may not be able to grasp obvious points (like a missing control group, or a lack of peer-review, it is almost inevitable that the more advanced methodological short-comings will not be evident.
The Better Teacher:  
Be an Expert at Testifying and Not Just a Testifying Expert

Instead of applying a primarily rational evaluation of methods, jurors bring a wide variety of tools to the assessment of experts, including their own visceral reactions to the individual witnesses, as well as their own possibly naive views on the subject matter. We have, however, discovered one important shortcut when it comes to cutting down the credibility of your opposing expert, and it squares with recent research on how people judge the sources of new information. That shortcut is to point out the “Large Internal Error” (L.I.E. for short) in the other side’s conclusions. This is a more specific point than just “show how they are wrong” and goes beyond just “say that you are better.” Instead, what works best is to focus on a mistake that is part and parcel of your adversary’s analysis. The important criteria are:

1. It is Large. A minor or inconsequential mistake could easily be seen as a distraction. A large error is one that goes to the question of whether jurors can trust the source or not.
2. It is Internal to that expert’s own methods and approach. It isn’t enough that you would have done it differently. Instead, the best point is, “even on your own terms (methods, assumptions, design, etc.), you messed up.”
3. It is an Error. It isn’t just a comparative advantage to your expert’s approach, it is a mistake, miscalculation, exaggeration, omission, or a bungle.

Now granted, a good opposing expert won’t always give you a Large Internal Error to work with, but the more you look for one, the better your chances of finding a very simple tool to allow jurors to side with your analysis. Instead of contenting yourself with the feeling that your analysis is better (an approach that academics reward), it is worthwhile to focus on the simpler reasons why your adversary is wrong (an approach that jurors understand).

Everyone who has tried an expert-based case knows that the testimony can get complicated very quickly. If it just comes down to two or more experts of apparently equal competence who have simply reached different conclusions in the courtroom, then jurors can end up dismissing the issue as a ‘judgment call,’ or rely on their own beliefs. If an expert can be shown to have made an important mistake, on the other hand, the loss of credibility for that expert can extend to their entire testimony. Why do jurors find it so much easier to accept the superiority of one expert when, arguably, the other expert made a mistake? The answer has to do with the way humans process new information. There is a very influential model of persuasion with the ungainly name of “Elaboration Likelihood Model” (Petty & Cacioppo, 1986). Briefly, the idea is that there are two routes that people tend to take when accepting new information or making a decision. The “peripheral route” is the easier route that relies on readily available, though not necessarily reliable, cues (Think about how you impulse buy a candy bar in the checkout line: you don’t give it a lot of thought, and as a result, the packaging could make a difference). On the other hand, the “central route” is the more thoughtful route, where you consider the implications, advantages, and disadvantages of your decision (Think about how you make a big purchase, like a new car). We know that some jurors approach the expert testimony peripherally, like the impulse candy bar, and some approach it centrally, like the new car, and it can be hard to tell which approach they are taking.
But the beauty of framing the opposing expert’s testimony in terms of the Large Internal Error is that it bridges both poles. Relying on expert credentials tends to appeal to those on the peripheral route, and relying on the superiority of methodology tends to require the attention of those on the central route. A “mistake,” on the other hand, is both easy to grasp (for those on the peripheral route) as well as substantive in its implications (for those on the central route).

A recent study (Kumkale, Albarracin & Seignourel, 2010) combined data from a number of other investigations and concluded that the credentials of a source do tend to matter when your audience has no current attitudes on the topic, and when they lack the motivation or the ability to analyze the content more fully. Even under those conditions, however, the effects of source credibility tended to diminish quickly, which is an important implication in a longer trial. The existence of a clear error, on the other hand, can provide a more memorable moment for jurors to hang on to.

I will share one example from a recent trial. An attorney at our firm, Doug Abbott, was cross-examining an expert tasked with calculating the lost yields and economic damages experienced by a sugar beet farmer who was Mr. Abbott’s client. Throughout the examination, it became clear that the expert had made a number of mistakes in the analysis. Initially, the questions focused on a number of smaller problems in the expert’s analysis: an incorrect label here, a reference to the wrong county there. But soon, Mr. Abbott was able to take aim at the math at the heart of the expert’s analysis. Approaching the witness with a calculator, the attorney asked the expert to recreate the calculations underlying a chart the expert had used in direct the day before. In a courtroom moment that was about as dramatic as it gets during damages testimony, the math turned out not to just be wrong, but to be way off, in favor of the expert’s client. To make this exchange even more memorable, Mr. Abbott had been using a marking pen and the Elmo to make edits directly on the expert’s own exhibit. The final corrected version (shown below) was then marked as a demonstrative, photographed, and used in closing argument.
The Better Teacher:  
Be an Expert at Testifying and Not Just a Testifying Expert

persuasionstrategies.com    February, 2013

After the verdict, I had the chance to talk to the jurors. Though the mistakes related to just a few out of literally hundreds of calculations, what stuck with jurors was the Large Internal Errors: the fact that the expert had made mistakes, significant mistakes, and mistakes based within the expert’s own method. At the mention of the expert’s name, one juror said, “Oh him, he was the one who was wrong, wasn’t he?” That is definitely the way you want your jurors to remember your opposing expert.

**Fight back when your conclusions or methods are challenged.**

In fencing, a “riposte” is the act of turning away an attack (a parry) and converting it into a strike back at your opponent. In common conversation, a riposte means answering an attack or an insult with a witty reply. In either case, it is a good comeback that converts defense to offense, and that is what expert witnesses need to be looking for when their credentials, methods, or conclusions are being criticized as part of litigation. It may sound obvious to “have a good response,” but recent research shows that the quality and style of answers can play a critical role in supporting the expert’s credibility. Our own experience tells us that experts who are prepared with a specific sequence or model for response do much better.

One thing we do know is that jurors are paying attention. One recent review, (Foster, 2010) looked at the roles that experts play in combating the less rational tendency of jurors to “anchor” their opinions, and found that the bulk of research on the question suggests that jurors don’t simply accept expert testimony at face value, but instead look closely at the clarity and credibility of that testimony. Another very important study (Kutnjak-Ivkovich & Hans, 2003), for example, drew from the experiences of 269 jurors who had completed their service on civil trials involving expert testimony. Based on hour-long interviews with each of these former jurors, the authors concluded that jurors tend to look at the clarity and the completeness of expert testimony in deciding whether to believe it or not. One recurring factor is how well the witness holds up in cross-examination. In describing his reactions to a particular expert who stood up well to cross-examination, one juror said:

> “Most people would tend to back down if they’re attacked, but he didn’t. He knew his stuff and he knew the rules. I just liked that. I thought, he’s not lying, and he’s not hemming and hawing. He knows his stuff.”

Another juror mentioned – incidentally on the same witness:

> “This man was able to tell the lawyers, ‘no offense, mind you, this is my line, so I’ll tell you.’”

One of the best expert witnesses I’ve ever seen is a relatively young damages expert. What sets him apart is two things: one, he does his homework to the point that he is miles ahead of opposing counsel; and two, he has a friendly way of not giving an inch. Obviously, two depends on one, but when it works, cross becomes the highlight of testimony. Jurors may not understand all of the financial nuances, but they understand that opposing counsel is getting nothing in cross, and they will smile and nod when they see our expert giving one effective response after another. It is only after cross that they fully appreciate the strength of his testimony.
So how do you get there as an expert, to the point where cross becomes the time to shine? There are a variety of tools, but let me suggest one effective sequence for making sure that you are giving riposte and not just responding. The method applies to any situation where you, as an expert, are responding to criticism: a rebuttal report, deposition, cross-examination, or rebuttal examination. While opposing counsel might try to restrict you to “yes” and “no” responses, you will have at least a few opportunities for a complete answer at some point or other. Using the example of a medical expert, the response would move quickly through four phases:

1. **Identification** (or I can see how you would think that...)
   This step builds credibility. By seeing the critique as “an understandable mistake” rather than “just plain wrong,” you have a better chance of converting those who may, at least initially, be swayed by the criticism.
   
   **Looking at the charts now, knowing what we know now, I can see how it might seem obvious that the patient should have gotten a CT scan...**

2. **Re-frame** (...but it isn’t like that)
   Refuting a point can be thought of as moving your listeners from one frame to a better frame. Often it is the case that your adversary isn’t making a factual error, but just isn’t thinking about it in the right terms. Your re-framing should lay out those terms.
   
   **...but the better way to look at it is to consider the information that Doctor Stevens had at the time: the patient’s own reports and vital signs.**

3. **Support** (...and the reason we know that is true is...)
   Jurors know that you are paid, and at least some of them believe that it is not just for your time. They listen for the proof, and the proof should be like a neutral third party.
   
   **...and what she reported was trouble breathing. And what her vital signs indicated is a mildly elevated heart rate. Nothing at all that would suggest the need for a CT scan.**

4. **Return** (to your main point...and so that brings us back to the correct answer...)
   The measure of the response is how you end it. Never end in the position of being back on your heels, trying to explain away a problem. Instead, always try to end an answer by bridging back to one of the main conclusions that you want jurors to take away.
   
   **...and what that means is that Doctor Stevens violated no standard of care, but instead made the only medically appropriate decision.**
It isn’t hard to remember, and it sounds natural and powerful when you put the four steps together. A response can just leave you on the defensive, but a riposte can bring you back to your ground and leave jurors with a better understanding and a more favorable impression.

Conclusion

Of course, this brief discussion does not say all there is to say about teaching and communicating effectively from the witness box as an expert. Doing that would require a book, or perhaps a library. However, I have aimed at providing three important messages that speak to needs that experts may be prone to forget:

One, it isn’t enough to presume that jurors need and are interested in your information. They may be perfectly fine figuring it out on their own. An effective expert will demonstrate the need for their testimony in concrete fashion.

Two, it isn’t enough for you and your opposing expert to simply put forth your alternate methods and conclusions and allow the jurors to choose for themselves. An effective expert will provide jurors with the most easily understandable basis of comparison as the key, and that isn’t always the academic’s basis of comparison.

Three, it isn’t enough to keep your head down and weather the cross-examination. Jurors are particularly attuned to this phase of testimony, and an effective expert will, assertively but not aggressively, find every opportunity to score points against the other side.

Ultimately, it is worth remembering that the expert witness is participating within an adversary system. Instead of a pure realm, where truth will win regardless of the packaging, we have a system that assumes that each side will be doing their best, bringing not only the best evidence, but the best presentation as well. Effective experts need to be attuned to their role in the process.

Versions of this material have previously been published in the author’s blog, PersuasiveLitigator.com
References:


Cover illustration: Pam Miller, 2013.

To have a more detailed conversation about how these findings may affect your litigation strategy, please contact Ken Broda-Bahm at KBrodabahm@persuasionstrategies.com or 303-295-8294.

Dr. Ken Broda-Bahm has provided research and strategic advice on several hundred cases across the country for the past 16 years, applying a doctorate in communication emphasizing the areas of legal persuasion and rhetoric. As a tenured Associate Professor of Communication Studies, Dr. Broda-Bahm has taught courses including legal communication, argumentation, persuasion, and research methods. He has trained and consulted in 19 countries around the world and is a past President of the American Society of Trial Consultants. Ken is a lover of new ideas, exotic places, innovative gadgets, and good arguments. He is married to the other Dr. Broda-Bahm (wife, Chris), and is the proud dad of 5-year-old Sadie. Learn more about Dr. Broda-Bahm at www.persuasionstrategies.com.