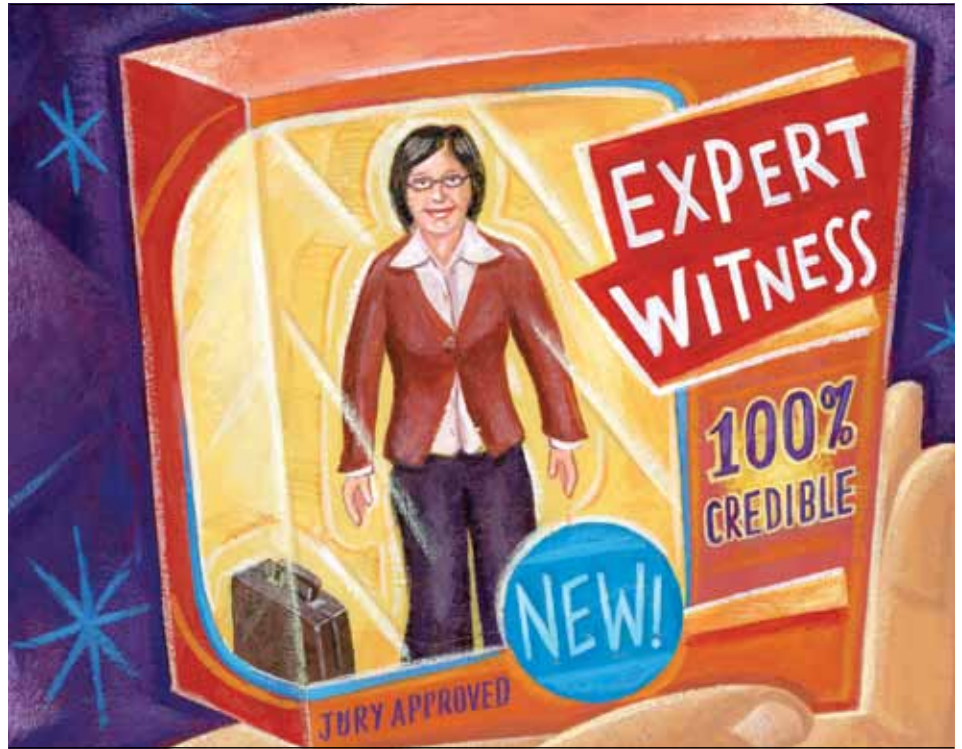


HEADNOTES



EXPERTS

Shiny and New— Like the Very First Time

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The best expert witness is often the one with no expert experience.

In a recent case my expert, an academic, had spent most of his career doing precisely the kind of analysis we needed—without ever having made a profit from doing it. My opponent, by contrast, used a “litigation consultant” who made more than 90 percent of his income by testifying, almost always for the same kind of client and almost always for the same side.

Guess whom the court in this bench trial found more credible? After our

10-day trial ended, the court issued a 50-page opinion in which it mentioned specifically that our expert had never testified before and had no ties to the industry that hired him. We won on every issue, in part because we won the battle of experts.

You’re not a virgin after the first time, of course. Our expert will never be able to proclaim his purity again. And that’s too bad because it was that lack of litigation savvy that excused or explained some of his behavior and opinions. For instance, in contrast to the seasoned expert on the other side who had no trouble making categorical statements, my witness said during cross-examination that perhaps the plaintiff was right; after all, anything is possible.

Once we recovered from the shock of hearing our witness concede that maybe the other side had it right, it became obvious how we might use his unsophisticated and unlitigious outlook to our advantage: He’s so unpracticed as a witness, Your Honor, such a true scientist, that he doesn’t think in absolutes. Sure, the other side might be correct—that’s a possibility—but it’s not a probability, and our expert doesn’t think it happened that way. Who

is more believable—the guy who tells you he could not be wrong under any circumstances or the guy who admits that it’s theoretically possible that he has made a mistake, although he’s confident he’s right?

There are some very good reasons to hire the novice expert who wants to tell your client’s story—not because he’s paid to do it but because he believes in it. There are also some added precautions that you, as the lawyer, have to take when you’re working with an inexperienced expert.

First, be really careful (even more so than usual) about his report. It’s one thing for him to say that there is always room for doubt and quite another for him to write that the opposing side might be analyzing the situation correctly. Having him craft a good opinion requires you to explain that an expert report is an advocacy piece. Remember, he has never written an expert report before and is probably used to authoring scientific papers that almost invariably conclude that “further research is needed.” Describe how the other side’s lawyers are going to comb through the report looking for waffle language. The less of that he includes,

Illustration by Sean Kane

without compromising his honesty, of course, the less there will be to question him about.

Because he's never written an expert report before, he won't know how much to say. He's going to look to you for guidance. You want to be sure he includes enough that he won't run afoul of Federal Rule of Civil Procedure 26(a)(2)(B)(i) (requiring "a complete statement of all opinions the witness will express and the basis and reasons for them"), but not so much that he has nothing original left to say.

In our case, the report stated the expert's opinion that any bacteria that started at point A would not survive the journey through a vegetated field to point B because most would die off. His report mentioned, but did not elaborate on, the specifics of why the bacteria wouldn't survive. (They would be trapped and immobilized by leaves, killed off by sunlight, digested by the biomass at the roots of plants.) At deposition, he answered every question accurately and completely. When he testified at trial, he went into much more detail about how each of the

mechanisms worked, coming across as learned and thorough. Our opponent cried foul and tried to have the testimony stricken, but he had no grounds to protest because the expert had not altered his opinion or come up with a new basis for the opinion—he'd said all along it was the plants and exposure that kept the bacteria from reaching point B.

Second, spend extra time preparing the novice expert to be deposed. Start and end with basics, real basics. Don't assume he'll know what clothes he should wear for a videotaped deposition or tell him to dress as if he were going to work—many academics wear jeans to work. They didn't show depositions on *Perry Mason*, and the ones that are depicted in popular media these days are woefully inaccurate. (Remember the film-long deposition in *The Social Network*, where there were no questions and no answers, just people—parties, actually—talking to each other?) You'll have to explain where to sit, who else will be there, what kind of room you'll be in, that he should answer even when you object, and anything else that

you might not think to tell your average, seasoned expert witness.

You also should inform your expert where things stand with your case procedurally and educate him about the law. If you plan to use his report to support a motion for summary judgment, tell him that and explain what "summary judgment" is and how the other side will try to defeat it. Also tell him to be wary of the other side's lawyer. He might think opposing counsel is really being friendly and not sneaky when she's nice to him. Spend extra time preparing the inexperienced expert for cross examination, both at the time of deposition and then again just before trial.

Although there are extra precautions that you will need to take when you hire a novice expert, it's usually worth the added effort. A virgin expert not only carries more weight with a judge and jury, he also can reinvigorate you with a fresh perspective and—to paraphrase Madonna—make you feel shiny and new, like you're litigating for the very first time. ■