

Preparing Your Expert To Win A Jury Trial

10 Questions to Ask Your Expert Witness

A PUBLICATION BY JERRY GLAS

Introduction

Dancing With Antaeus

You don't win a trial with their expert. You win a trial with yours. So forget all the movies you've seen, and all the stories you've heard. Stop daydreaming about your next cross examination, and start obsessing about your next direct examination.

Make no mistake. Like Antaeus of Greek mythology, experts often think of themselves as half-god, are usually better suited to fighting than dancing with lawyers, and only remain invincible while their feet remain on the ground. So if direct examination must be compared to a dance, let it be compared to a tango. Not a tango with a graceful, experienced dancer, but a tango with an awkward, homicidal giant.

You can win trials with your experts, and your favorite trial stories can become stories about direct-examination, but you have to prepare your expert and yourself to win the trial.

What you need are trial-proven strategies for preparing your expert to win the trial during direct examination. Here are ten rather unusual questions you should ask your expert.



Chapter One

HOW CAN WE
MAKE THIS MORE
COMPLICATED?

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Every attorney is taught to “Keep It Simple Stupid” (KISS), but lawyers often forget the reason behind the rule and only present the simplest explanation or the simplest exhibit.

Why Shouldn't I Keep Things Simple?

If you only keep it simple:

- You deprive the jury of the full body of evidence supporting your expert's testimony.
- The jury may give the testimony less weight.
- You may fill jurors with a false sense of confidence regarding the material.

Ok, How Do We Complicate Things?

Every direct examination should start by presenting the most accurate and most complicate analysis before offering the more simple and accessible explanation. By doing so, you serve notice to the jury:

- Your expert knows infinitely more about the issue than anyone in the courtroom.
- They should trust your expert's conclusions.

You should ask your expert to explain the exhibit in three ways:

1. The “He's Smart” Exhibit
 - This demonstrates how they would explain the concept or opinion at the most prestigious conference in their field.
2. The “That Makes Sense” Exhibit
 - This identifies the best way to explain the same concept to college students or interns.
3. The “He Really Is An Expert” Exhibit
 - This identifies the best way to explain and demonstrate the same concept to a high school freshman.



Perhaps it is time to transition from the “KISS” trial philosophy to a more modern “DJ KISS” philosophy of “Don’t Just Keep It Simple Stupid.”

By intentionally “dumbing down” the material, you can unintentionally “dumb down” your expert and your argument.



Chapter Two

WHY ARE YOU JUST SITTING THERE?

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Jurors have shorter attention spans and have become visual learners. So don't ASK your expert to describe the location of the L5-S1 on the lumbar spine. Tell your expert to stand-up and POINT to it on a model or on your back.

Let Jurors See and Hear The Experience

There is a difference between telling a jury your witness is a good doctor and showing them. If your expert analyzed a histology slide, let the jury see your witness "expertly" place the slide under the microscope and hear your expert describe the steps involved in the analysis.



Watching your witness do what they do every day reminds the jury that your witness is an expert.

Whenever possible, let the jury see your experts doing their job.



Be sure to practice your demonstrations with your expert!



Chapter Three

WHO TOLD YOU YOU'RE FUNNY?

WHO TOLD YOU YOU'RE FUNNY?

You need to figure out what type of witness your expert thinks he is, and whether he is right or wrong. This can be the hardest part of preparing your expert for trial and the most important. Don't try to change your expert witness, because you can't! Instead, use your preparation meetings to discover their real personality. Help them become who they are and figure out how to sell that to the jury.

Jurors like "real" people and do not trust salesmen or experts trying to sell themselves as something they are not.

"Math teachers don't have to 'sell' the idea that $2 + 2 = 4$, and old math teachers have every right to get surly if lawyers waster hours asking them to explain why $2 + 2 \neq 147$."



Chapter Four

WHAT'S A GOOD MISTAKE I CAN MAKE?

WHAT'S A GOOD MISTAKE I CAN MAKE?

Today, jurors are suspicious of lawyers and their hand-picked experts. They will distrust any direct examination that appears too well choreographed. Lawyers should stop soliciting an expert answer of “yes, that’s absolutely correct.”

The real challenge is to stop asking what we want to ask our expert, and start figuring out what jurors want to ask our experts. The best way for this to happen is for attorneys to make a mistake and allow for the jury to listen as the expert explains everything to you.

Biases, Prejudices, and Misconceptions

Every jury has a bias, prejudice, or misconception about some aspect of a trial (i.e. about a product, injury, test, etc). Most misconceptions are based on one of more true premises, facts, or metaphors. To help correct these, attorneys should:

- Let the jury hear the expert agree with the truth of those premises, facts, or metaphors.
- Ask why, if that premises/fact/metaphor is true, the common misconception isn’t also true.
- Let your expert correct you and explain it to you.

Picture a juror who holds the same misconception thinking “hey, I was thinking the same thing” or “oh I see why that isn’t true” as your expert explains why they agree or disagree. Shine the light on your expert and give your expert the chance to teach the jury and win the trial.



Chapter Five

WHAT ARE THEY RIGHT ABOUT?

WHAT ARE THEY RIGHT ABOUT?

Experts often charge exorbitant fees for an attorney meeting, and experts sometimes can't spare a lot of time. The need to "cut to the chase" can pressure an attorney into only asking what the other side is wrong about.

What should I bring to my meeting?

The most important documents to bring to your expert meeting are THEIR expert's reports and deposition testimony. Show your expert everything their expert said and find out what premises, assumptions, calculations, and opinions are 100% accurate.

This is your true starting point because that is what jurors want to hear first. They want to be told specifically where the two roads diverge before you ask them to choose a road to travel by.





Chapter Six

HOW CAN WE MAKE THEIR CASE BETTER?

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In most cases, jurors lack the experience needed to recognize “on a scale of 1 to 10” where a claim, defense, argument, or injury ranks. The best way to teach them is to show them what a better claim would be and what a more severe injury would have been. Your strategy should involve teaching the jury what a much better claim/defense would have been, and the jury will learn why the current claim/defense is inadequate or invalid.

How Do I Develop This Strategy?

This trial strategy starts during the initial meeting with your expert. When you meet, find out:

- What facts or circumstances would have made the plaintiff's (or defendant's) case much better.
- Ask whether your case is a “textbook” example of whatever your expert is describing.
- If possible, have them show you the textbook.

The reverse of this can also be true. Always ask your expert to show you what a “textbook” example looks like. Prove that the present case is not a “textbook” case, and you are halfway home.



Picture your expert showing “textbook” cervical MRI images of acute trauma and pointing to edema. Now picture your expert showing the plaintiff’s cervical MRI image and pointing out where there is no edema.



Chapter Seven

WHAT'S HE/SHE GOT THAT YOU AIN'T GOT?

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Your witness may be an expert, but they are not experts in preparing a curriculum vitae (CV). Before your meeting, be sure to dissect your witnesses' CV and prepare questions to solidify them as an expert. Remember to also ask your witness if any additional positions, awards, honors, organizations, articles, lectures, or specific cases would "help" jurors understand what weight to give their testimony.

Filling out a chart comparing your expert's qualifications with theirs is an effective tool during a jury trial. Days later, jurors might not recall what each row addressed, but they will remember seeing a column of "yes" for your expert and a column of "no" for theirs.

During closing arguments, show the chart again and suggest that your expert's opinion be objectively entitled to greater weight.

KNOWLEDGE & EXPERIENCE: CONDUCTED ELECTRICAL WEAPONS		
When Hired:	Kerwin	Swerdlow
Served on Scientific & Medical Advisory Board for TASER International, Inc.?	No	Yes
Served on Board for any CEW Manufacturer?	No	Yes
Published (first author) a peer-reviewed CEW scientific paper?	No	Yes
Published (senior author) a peer-reviewed CEW scientific paper ?	No	Yes
Published <i>any</i> peer-reviewed CEW scientific paper?	No	Yes
Written <i>any</i> CEW scientific papers?	No	Yes
Retained as an expert in a CEW lawsuit?	No	Yes
Researched effect of CEWs?	"Yes"	Yes
Touched a CEW?	No	Yes
Seen "in real life" a TASER M26 CEW?	"Yes"	Yes
In the broadest possible sense, did you have any exposure or experience with TASER CEWs?	No	Yes

Example of a comparison chart created in a 2015 wrongful death jury trial.



Chapter Eight

WHAT DO YOU DO ALL DAY?

WHAT DO YOU DO ALL DAY?

Jurors often define who a person is by what they do. Make sure your jury sees the big picture. Remember to ask your expert to tell you what a “typical day” or “typical week” is like in their practice.

During a murder trial, one witness of mine was portrayed as a expert “in the field of emergency medicine” and “on the physiological effects of electronic control devices on the human body.” Below is a part of his testimony describing his typical work week:

Q. If you would, please tell the jurors about your actual practice, what you do in the course of a week?

A. Several things. I wear many hats. Uh, in the course of a week I spend approximately twenty-four to twenty-five hours actually taking care of patients in the emergency department. I probably spend twenty to twenty-five hours doing what's called EMS, medical direction. So, I provide administrative and medical director services to some of the law enforcement and fire department paramedic programs around our area, and I spend an additional twenty to twenty-five hours on research activities. So, my typical work week is about seventy hours or so.

When asked afterward, members of the jury said they realized that expert was a hard-working doctor who helped people every day, and they gave his testimony great weight.



Chapter Nine

WHAT ARE YOU REALLY GOOD AT?

WHAT ARE YOU REALLY GOOD AT?

When painting the picture for your expert, make sure your expert agrees with the exact working of every field. You do not want to limit your witness by characterizing them in a field that is too broad or too narrow.

Be sure to avoid tendering an expert as an expert in doing something. There is a difference between your witness being an expert “in the field of cardiology” and “in open heart surgery”. Broader is also not better. By tendering a witness too broadly, lawyers can solidify a testimony meaningless if broad questions cannot be answered.

It is also good to know whether courts in your jurisdiction have allowed experts in your witness' field to offer the type of opinions you will ultimately seek.



Chapter Ten

WHAT DO YOU HAVE TO SAY FOR YOURSELF?

WHAT DO YOU HAVE TO SAY FOR YOURSELF?

Do not meet with your experts until you've researched them like you were going to cross-examine them at trial.

The Skeletons Out There

Your experts may not know they have skeletons out there and the negative affects they could have on the way jurors listen to their testimony.

- SHOW your expert what you found
- Find out WHAT your expert would want you to ask about the issue
- Find out HOW your expert wants you to ask about the issues

"Prepare;" don't "Scare"

Always approach the issue as if you are simply trying to make sure your expert's "side of the story" comes out at trial. Never play Devil's Advocate so aggressively that you anger or alienate your expert during a meeting.

Make sure your expert knows when, what, and why you are going to be asking direct examination questions about skeletons to steal opposing counsel's thunder. Never surprise your expert with "stealing thunder" questions.



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Jerry was born and raised in New Orleans, and taught religion at Jesuit High School before attending law school. Jerry joined the firm in 1999 after serving as a Senior Assistant District Attorney for the Parish of Orleans, and enjoys teaching trial practice as an Adjunct Professor at Loyola University College of Law. Jerry is married and has two wonderful daughters.



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