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ELEMENTS OF EFFECTIVE EXPERT TESTIMONY

Donald Doud

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Many expert witnesses approach their court experiences with feelings of apprehension and fear, for they do not fully understand the purpose of their testimony or the tools with which they have to work. This paper will attempt to set forth some simple rules for testimony which, it is hoped, will assist the expert witness in attaining greater proficiency in his court appearances.

In effect, expert testimony is the art of persuading others to our way of thinking, and, this can be a most difficult task when those jurors to whom it is directed possess such varying degrees of perception and reasoning, not to mention prejudices. In a sense, the expert is himself on trial every time he appears in court. Suspicion and skepticism are the almost instinctive reactions of one hearing for the first time an unfamiliar subject presented by an unfamiliar person. The expert must at once set about to remove from the minds of the jurors all doubts as to his fairness and ability. Once a favorable personal impression is established, the process of presenting the reasons for an opinion becomes easier and the words fall on more receptive ears.

MAKING TESTIMONY CONVINCING

Convincingness on the witness stand begins with the first examination of the documents and the opinion reached by the expert from the evidence thereon. Thus, a convincing witness is a self-assured witness, and one absolutely confident of the correctness of his conclusions. If he is even slightly in doubt about any opinion, he should not take the witness stand. His testimony will reflect this attitude.

To hear some advice given on the subject, an effective witness should exhibit the oratory of a William Jennings Bryan, the forcefulness of a Teddy Roosevelt, the persuasiveness of a Daniel Webster, and the trustworthiness of an Abraham Lincoln. Impossible as it obviously is to attain all of these goals of perfection, there is not a man among us who does not have the basic qualities of an excellent witness, if he but apply himself to their development.

A convincing witness is one who tells his story in a straightforward manner. He is sincere and readily admits inadvertencies in his testi-

mony as well as the limitations of his ability or of the particular field under discussion. Indeed, a candid admission of error in some minor particular may do more to impress a jury as to the expert's fairness than will many words of persuasive testimony.

When he takes the stand the effective witness sits straight in the witness chair and speaks directly to the judge or jury rather than gazing at the ceiling or floor. His intimate knowledge of all phases of the case gives him a poise that instills confidence in the listeners. It is unnecessary for him to have a great booming voice or a glib tongue. His testimony is a smooth, scientific presentation with no hint of advocacy or bias. From the moment he enters the courtroom to the time of departure, he conducts himself with quiet dignity.

On cross examination the expert witness will not allow himself to become excited or flustered by unfair or improper questions. If admonished by the cross examiner, "Now, Mr. Witness, I want you to answer these questions 'yes' or 'no'," he will quietly decline to do so and will insist on his prerogative to explain any response. He will firmly refuse to answer the "when did you last beat your wife?" type of question, but other questions of a proper type are answered with fairness and courtesy.

From this it can be seen that convincing expert testimony is more than just an act of selling a certain idea to judge or jury. It is the persuasion of a scientist who by carefully and logically presenting his facts, leads the listener irresistibly to the desired conclusions.

MAKING TESTIMONY CLEAR

One of the unfortunate happenings in the course of any trial is to see a learned scientist take the witness stand and attempt to explain in complicated, technical language the reasons for his opinion. The blank stares of the jurors bespeak their common thought, "What does he mean by that statement anyway?" The wise witness uses simple, non-technical language, and he avoids drawing fine distinctions that might tend to confuse the important issues. The order of his testimony is so carefully planned that one point logically follows another like the acts of a play. The performance reaches its finale in the strongest, most conclusive phase of the evidence.

Expert testimony will sometimes fail to measure up to expectations because of a number of small errors and omissions which add up to sizeable proportions. For example, does the witness always refer to the document by its exhibit number, or does he make the mistake of jabbing at the exhibit with a finger and referring to "this document"? Accurate designations are especially important if the case is later taken

up on appeal. Does the witness make sure that each juror has had ample time to examine the photographic demonstrations? In this regard, it is usually better to distribute one chart at a time rather than have their attention diverted by exhibits to which the witness is not referring. Does he always make certain that the judge or jury sees the specific point referred to when they are looking through a microscope or when using some other scientific instrument? Seldom will a juror admit he cannot see or understand what you are pointing out. These are but a few of the more salient points leading to clearer, more comprehensible testimony.

The effectiveness of court testimony depends to a large degree upon the ability of the expert witness to gain and sustain the interest of court and jury. This is especially true in lengthy or technical matters where it is all too easy for the jury's attention to wander. However, by the use of "attention getters," the technical witness can sustain interest in his presentation and thereby make it more convincing. For example, word pictures like "pump handle" for the curved top of the typewritten "r"; a fraudulent mending of a pen stroke being like "the imperfect join of two boards by a carpenter"; the indented tracks left by the nibs of a pen being like "the ruts in a country road." Descriptive phrases of this kind also serve to clarify the particular point at hand.

One need look no further than modern television to conclude that the average person is more interested in seeing things than hearing them. Likewise the interest of the jury is best held, and the testimony made more effective, by the use of visual as well as verbal illustrations. Photographic comparison charts of handwriting or typewriting, shown at intervals during the course of testimony are many times more effective than words alone. Good use can also be made of blackboard and drawing crayon, especially where it is desirable to demonstrate the method by which a writing was executed. Other types of demonstration will also suggest themselves. In one case, involving indented writing, John F. Tyrrell, the writer's associate, used a unique home-made instrument made out of a funnel with a pencil projecting from the small end. He filled the funnel with lead shot until it approximated the weight necessary to indent a letter to the extent noted in the disputed document. A "suicide letter" supposedly written by a frail woman was thus shown to be a "murder letter" written by a heavier person. The accumulative weight of this kind of testimony can be most compelling.

Convincingness, clarity, interest—these are the elements of effective expert testimony. If the ability to achieve them is at your command, like "the better mousetrap" the legal world will beat a path to your door.