TRIAL DYNAMICS AND YOU, THE EXPERT:

THE GOOD, THE BAD AND THE UGLY

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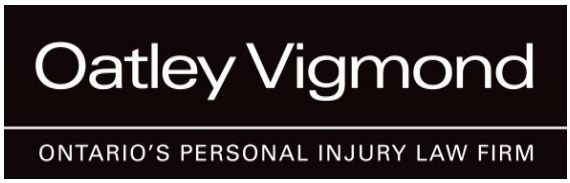

INTRODUCTION

I am going to focus on the manner in which you present your evidence. Since your fundamental objective is to be believed, we need to examine and appreciate what it is that makes some witnesses credible while others are not.

Does it surprise you that I start with the proposition that your fundamental objective is to be believed? Are you thinking that your only objective is to tell the truth and to give your evidence in an impartial fashion, and be damned whether you are believed or not? You may be confused about your obligation as an expert witness, so let me be clear: you are not destined for a career as an expert if you are not pre-occupied with the need to be believed. That is what a trial is all about. That is why you have been asked to testify and to give your opinion on fundamental issues in the case as an expert.

It is common for experts to think that they will be believed if they are right and if they are unbiased. But unfortunately in the real world of trial dynamics that is not so. The expert whose evidence is believed is the expert who is perceived to be the more credible. My objective in this paper is to help you enhance the likelihood of your being credible.

It is good to be believed. It is bad to not be believed because it impacts your future as an expert and it diminishes your client's case. It is beyond bad – it is downright ugly if your presentation is so harmful that it destroys your client's case and harms your career.

Trials are fluid things. They are dynamic. They are a contest between themes. They are a contest between the likeability of one side and the other. There is an ebb and flow that you as an expert must understand. Make sure you have a good feel for the ebb and flow of the trial and the mood of the courtroom before you testify. In other words, know what you are walking into! I'll have more about this to say later.

HOW PEOPLE, INCLUDING JUDGES AND JURORS MAKE DECISIONS

I have written elsewhere[1] on the work done by sociologists to understand and explain the manner in which human beings make decisions. Most of us are handicapped by the naïve notion that if our version of events is forthright and logical that judges and juries will believe it. Unfortunately if you want to be an effective expert witness you must understand that everyone uses decision-making heuristics, or short cuts, to make decisions, and that decisions may have very little to do with logic or the truth.

Your challenge as an expert witness is to understand these biases and use them to your advantage. I mention only a few of the more significant biases now.

Belief Bias

Very simply put, people prefer subconsciously to maintain existing beliefs. For example, if they believe that there has be a high speed collision before serious injury can occur, it will be an invisible force against evidence to the contrary. Similarly, if people believe that you only slip and fall when you aren't paying attention, that belief will make a judge or juror resistant to evidence about the standard of care in maintaining public sidewalks. The effective strategy is to acknowledge the belief and then to explain why it applies or doesn't apply to the case at hand.

Defensive Attribution

Again, at the risk of over-simplifying, people prefer to believe that good things happen to good people and bad things happen to bad people. It is believed this occurs because we all like to believe that if we are good people and live our lives in a prudent way that bad things will not happen to us. We unconsciously assign fault to people who are injured as a way of maintaining that important, subconscious view of the world.

This is particularly important to any expert who is testifying concerning fault in a case where liability is an issue. Interestingly, this bias is said to become more powerful the more significant the injury.

Identification

This powerful bias is very simple to understand but not so simple to deal with. Identification means liking. We tend to believe and want to help people we like. I often think this is what trials are all about – at least in personal injury cases with a jury.

If you as an expert want to be believed, what this means is that you have to present yourself in a way that inspires the trier of fact to like you!!! If you have been retained by me, one of the tests you have already passed is the likeability test. It

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[1] Roger G. Oatley, "Understanding Juror Bias in Decision-Making" in *Addressing the Jury: Achieving Fair Verdicts in Personal Injury Cases*, 2d ed. (Aurora: Canada Law Book, 2006), 13-28.

doesn't matter how much expertise you have, if the trier of fact doesn't like you he or she will probably not accept what you say over a contrary witness who is liked.

And this is what I mean by "the music is more important than the words". I will have more to say about likeability later.

Scarcity

We can think of numerous examples of how we tend to attach special importance or value to something that is scarce, or not available to others. A stock tip, that no one else is said to have, for example, has enhanced value just because it's a secret tip. "Please keep this between us" will make the information conveyed seem all the more important, whether it really is or not. So an expert may obtain leverage for his or her opinion by informing the trier of fact that he or she has information that no one else has considered.

The Authority Bias

Credibility is in direct proportion to the perceived authoritativeness of the source. So someone who has been a professor of engineering at Harvard who has consulted to NASA is more likely to be believed than someone with a diploma in engineering from George Brown College, even though the engineer from George Brown is the expert who is correct.

I cannot over-emphasize the importance of an expert giving his or her evidence of credentials in a confident manner. No one likes a braggart, but it will enhance your credibility if you accept your credentials in a matter of fact manner. You might suggest to counsel that he or she lead you through your credentials so that you avoid any embarrassment or any appearance of smugness.

THE SPECIAL POWER OF INOCULATION

I have also written about inoculation before[2], but I mention it here because it is such a powerful weapon for an expert to use. It is appropriate for experts, especially physicians, to use this tool.

In brief, we inoculate against another point of view when we state it, acknowledge its legitimacy, speak to its virtues and then explain why it is wrong. It is a very useful form of argument because it takes the sting out of an opponent's contrary view.

The medical diagnostic rubric known as differential diagnostic is a form of inoculation. The physician is obliged to consider all the reasonable possible explanations for the patient's condition and then to rule out one after the other, in the

[2] Oatley, "Inoculating Against Weaknesses", 51-68.

order of threat to health. A medical expert will inoculate and therefore appear to be fair by taking the trier of fact through the differential diagnosis in a meaningful way.

All experts can and should use inoculation, because it is a very effective way of creating an appearance of fairness.

HOW IS THE TRIAL GOING?

As I mentioned earlier, trials ebb and flow. One day the trial can feel like it's going well and the next day it can feel like it's a disaster. It's important during preparation for trial to find out what sort of atmosphere you are going into.

If the trial has been going on for weeks and the lawyer calling you has just had a bad day he or she may be exhausted and appear defeated. You need to know this. Evidence goes in well when both the expert and the lawyer calling the expert appear energized and enthusiastic. If you sense the lawyer needs to perk up feel free to make your feelings known. But whatever you do, don't let the lawyer's low mood drag you down so that you don't make a good impression when you testify.

LIKEABILITY

What follows is a list of suggestions and comments on likeability:

- We don't like people we can't understand. So try to use the clearest, simplest, most understandable language that you can. Do not use jargon. Speak slowly enough that the listener can process your information.

- Speak actively to the judge and/or the jury. In other words don't regurgitate a script. Be in the moment and engage the listener.

- Be dynamic. Allow some emotion in your message. Demonstrate that you care about your evidence. And whatever you do, do not read your report.

- When you aren't sure about something, admit it. Demonstrate your willingness to be corrected.

- Avoid being argumentative when you are being cross-examined. Never answer a question with another question or with sarcasm. Always be courteous and respectful, even if counsel is behaving badly.

- Don't go on and on. Get to the point. Demonstrate that you care about everyone else's time.

- Don't be defensive under cross-examination.

DEMAND PREPARATION FROM TRIAL COUNSEL

If you are being called by a lawyer to testify in chief, the lawyer owes you proper preparation. Even if you are an experienced expert who has testified for the lawyer before, demand that he or she prepare you properly. Don't allow the lawyer to make the mistake of assuming that because you've testified many times you don't need to be properly prepared.

Be sure that the lawyer tells you what the issues are in the case and how your evidence fits within the lawyer's theory of the case. Explore with the lawyer the landmines of the case and the way opposing counsel will try to exploit them. With the lawyer, develop responses to anticipated cross-examination in these difficult areas.

Request and receive an assurance from the lawyer who is calling you that you have all the relevant documentation, all the transcripts and statements and all the relevant experts' reports. Review all the material and know it cold.

Develop a rapport with the lawyer by rehearsing key questions and answers. Having a rapport that transfers into the court room will make you feel at ease. Your appearing at ease will make it easier for the jury to trust you.

UNDERSTAND THE RELATIONSHIP OF YOUR REPORT TO YOUR TESTIMONY

It will help you to understand what if any role your report is taking in the trial. Most experts, quite naturally, assume when they testify that their report is before the judge or the jury and that everyone has read it. Some rather ugly results can flow from this mistaken assumption.

The ugly results include the following. The expert leaves out important information because he or she perceives the court already knows what is in the report. The expert repeatedly makes statements such as "as I explained at the bottom of page 3" or "you'll see on page 3 that I considered that possibility". It can leave a bad impression, especially with a jury, if you are repeatedly referring to a report that the jury does not have and will never see.

It may surprise you to know that your report will never be evidence if you are testifying. The judge and the jury never see it. Our rules are clear that a lawyer who calls an expert to testify cannot also file the expert's report. So, keep in mind that if you are to be effective you must provide whatever information is necessary in response to questions to give a complete answer. The information in your report will not fill in any gaps because it does not become evidence in a trial.

In judge alone trials counsel often agree to give the judge a copy of all experts' reports as an "Aide Memoir". But you are best to assume the judge does not have the report unless the judge tells you that he or she has the report and asks you where you are in your report. However, avoid the trap of thinking that the "Aide Memoir" becomes part of the evidence. The judge can only rely on the evidence presented in court during the trial.

One other note about reports. Make them as short as possible. Some experts seem to feel that the longer the better. However, the longer a report the more likely there will be fodder for cross-examination. And if you are going to quote from literature make sure that everything in the literature supports your opinion or ugly things will happen for sure.

YOUR REPUTATION, YOUR FUTURE

Some pretty ugly things can happen if you aren't properly prepared to testify. Remember that how you perform in court is going to affect your reputation and your future. The following suggestions may help you enhance your reputation and your future.

Good things will happen if you find out in advance how your evidence fits in to the theory of the case. Why are you being called? What evidence does counsel need from you? In other words make sure you have a good feel for the big picture.

Good things will also happen if you develop a rapport with your own counsel as I said earlier, but you also will benefit from having a feel for the personality and style of opposing counsel. I often recommend to my experts that they come to court to see at least part of the cross-examination of the expert who will testify before you.

Beware of any question that begins with "isn't it possible that…" To an expert many things are possible but not at all likely or probable. Very bad things can happen to a case in a hurry if you as an expert agree that propositions put to you are possible. The simple key to handling this type of cross-examination, which is very common, is to calmly respond that while the proposition is possible it's not at all likely.

Keep your cool. It is ugly when an expert loses his or her cool under cross examination. On the other hand judges and jurors will give you points as an expert for keeping your cool and unflustered under an aggressive cross examination. Also, you will be far more credible if you keep your cool.

One of the worst places to lose your cool is under cross-examination concerning your credentials. Most experts are used to respect. Unless you are used to the challenges to credentials that often go on in a courtroom you might feel very offended by a challenge to your expertise. The best way to handle such a cross-examination is calmly and with confidence.

Good things happen when you find out from counsel during preparation what stage the case is at, what evidence the court has heard, and who will be following you. It's impressive if you are able to tie your evidence together with other witnesses with phrases such as "as Dr. Smith said last week" or "as the plaintiff's therapist described in her testimony yesterday". These references demonstrate that you are extremely well informed.

Good things also happen if you look and sound as though you are interested and care about the outcome. You have to appear, too, to believe in what you are advancing when you give an opinion. Remember that if you are giving an opinion that your body language says you don't believe in, it's your body language that will speak the truth to the listener.

Finally, get a good feel during preparation for the judge and the jurors you will face. Is the judge attentive? Or does the judge avoid eye contact in favour of making notes on a laptop? Does the judge like to be spoken to or should you direct all of your communication to the jury? What kind of jury will you face? Should you take it personally if they don't make eye contact? What will you have to do to get through to the jurors?

CONCLUSION

Whether you are a first time expert at trial or a seasoned veteran you can always improve your presentation. If you agree to provide an opinion in a case you are also agreeing, whether you like it or not, to testify if you are needed. If you find yourself headed to trial give yourself lots of time to get ready and be prepared. You owe it to your client and you owe it to yourself.