



How to Make Sure Your Expert Witness Isn't a Lemon



LORMAN[®]

Published on www.lorman.com - October 2018

How to Make Sure Your Expert Witness Isn't a Lemon, ©2018 Lorman Education Services. All Rights Reserved.

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ✓ **Unlimited Live Webinars** - 120 live webinars added every month
- ✓ **Unlimited OnDemand and MP3 Downloads** - Over 1,500 courses available
- ✓ **Videos** - More than 1300 available
- ✓ **Slide Decks** - More than 2300 available
- ✓ **White Papers**
- ✓ **Reports**
- ✓ **Articles**
- ✓ **... and much more!**

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

HOW TO MAKE SURE YOUR EXPERT WITNESS ISN'T A LEMON

Written by Merrie Jo Pitera, Ph.D. – CEO

We once had a client come to us with an expert witness who needed some serious prep work. He was a great guy, very approachable, and extremely knowledgeable about his industry. As it turned out, however, he had *major* problems with short-term memory and would buckle under cross because he couldn't remember basic details related to the case at hand. Even keeping track of the case's timeline bordered on impossible. And while, with no small effort, we were able to employ memory strategies to hammer the key information into him, he was simply never going to be anything more than a barely passable witness.

Not too long after, another client sent us a video of *their* expert witness with a desperate plea that they needed our help. He had shined during the interview and knew his field inside and out, they explained, but put him up "on the stand" in a mock deposition prep and he'd implode. Thinking fondly back on our previous nightmare, this guy sure sounded familiar. And indeed, we booted up the video, got about 30 seconds in... and realized he *looked* pretty familiar, too: So it was. Mr. Memory Problem had snagged another client.

How Bad Expert Witnesses Slip Through the Cracks

If the gentleman made for such an atrocious witness, how did he keep showing up on clients' rosters? There are two answers to this question:

1. Bad Witnesses Can Pass Interviews

The problem with bad expert witnesses is that they might very well be great *experts*. In an interview, when answering questions within their wheelhouse, they'll pass with flying colors because they have years upon years of knowledge and experience.

They're being tested as an expert, but not as a witness. What basic interviews won't often tell you is whether the expert can adapt to *your* case information and themes, whether they can communicate their knowledge effectively to layman jurors, and whether they have personality flaws – hostility, arrogance, rudeness, sarcasm, etc. – that will turn jurors off.

2. There's No "Yelp" for Experts

When a witness *is* bad, there's not a good system in place for clients to share their negative experiences with others, or to make a public record of an expert's shortcomings. There's no "Yelp"-style system of review (and, indeed, such a system would conjure up a whole host of other problems). To that extent, you're flying blind. Thus, Mr. Memory Problem can pop up again and cause trouble for client after client.

Why You Can't Afford a Bad Expert Witness

In many cases the expert is the linchpin, the cleanup hitter. And jurors really do want to trust and rely on them to guide their decisions.

So if opposing experts are giving conflicting information, your case may hinge on whoever jurors feel came out ahead on credibility and performance. When it's their expert vs. your expert, not just any expert will do; yours needs to be approachable, clear, and persuasive.

Your mediocre expert can lose to their convincing one. Or, as we've seen frequently with jurors, two experts of equal appeal just cancel each other out; and unfortunately, the defense case is usually at a disadvantage in that situation.

Finally, of course, a *bad* expert can actively damage your case. We've worked with witnesses who are proud of being hostile during cross. We've worked with a revered orthopedic surgeon who was so condescending and sarcastic he made even basic prep a nightmare. Let's just say that jurors don't like these qualities.

How to Weed Out Bad Witnesses

If you've already hired a less-than-ideal expert, don't worry; problem witnesses can still be salvaged (and even great experts can improve) through witness prep. As always, though, the best way to ensure a good product is to start with the right raw materials. Moving forward, you'll want to weed out bad experts first thing.

That means expanding your interview process:

Your Expert Interview Guideline

1. Initial Interview. This includes the standard questions. Gauge how well your experts know their field and how much relevant experience they have, and try to pick up on initial body language and demeanor cues.
2. Check References – Thoroughly. Beyond backing up what your experts told you in their initial interview, you'll need to get a sense of how they'll be as actual witnesses and as people you'll be working with closely. We recommend contacting the trial teams

from their last few cases. Be sure to ask references the following kinds of questions:

- How easy were they to work with?
- Did they do the preparation work themselves, or tend to hand it off to associates?
- Were they responsive to feedback?
- Could they learn quickly and *remember the details and talking points*?
- What was their demeanor like on the stand? Did they come across as arrogant, condescending, rude, nervous, slick? Approachable, knowledgeable?
- Were they a *teacher* to the jury? Were they able to explain complex ideas in ways a jury could understand, or did they fall back on technical jargon? Did they incorporate case themes and advice into their testimony? Were they successful in creating, or directing a graphics designer to develop, pedagogical demonstratives that helped the jury understand these complex concepts?
- *Important:* Are there any deposition videos (or at least transcripts) available so we can see their performance and/or how they answer questions?

3. Practical Interview. If steps #1 and #2 go well, you're on the right track. But with something this significant, we highly recommend inviting your experts back to test them in action: *How will they handle being your actual witness?* Not enough teams incorporate real Q&A practice into their interviews because they don't want to offend the expert. Believe me, it is a lot more difficult to explain to your client why you have to fire an expert when a lot

of money has been spent on him than it is to regain the expert's trust, if he was indeed offended.

Here are a few ideas for eliciting sample testimony:

- Give your experts a document and have them try to come up with some rough testimony.
- Explain to them a major case theme or two and see if they can smoothly and convincingly work it into their response.
- Present them with a complex idea or process and see how well they translate it into layman's terms.

Now, some witnesses balk at this idea. And guess what? That tells you something. If your expert turns her nose up at the thought of a test run, then her pride has announced itself to be more important than your case. This attitude could signal other problematic behaviors down the line. Throughout the process, be on the lookout for warning signs in experts' tone, language, and demeanor.

Conclusion

Expert testimony is not a special favor to the trial team; your witnesses are being paid handsomely for their time. So don't you deserve the best fit for your case?

If there's one thing we've learned about working with experts, it's never to be lulled into confidence simply in the face of a long, illustrious career. Your case is best served not only by their expansive knowledge but by their ability to be *jury-friendly teachers* of your key scientific points and themes. Before you hire, make sure your great expert is also a great witness.

Please feel free to [contact us](#) for additional tips on selecting the right expert witness!

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.