

Presented:
2010 Page Keeton Civil Litigation

October 28-29, 2010
Austin, Texas

Preparing and Cross-Examining Expert Witnesses

Robby Alden

Author contact information:
Robby Alden
Byrd Davis Furman, LLP
707 W. 34th St.
Austin, Texas 78705

ralden@byrddavis.com
512-454-3751

This will not be another *Daubert* paper.

A federal judge recently told me that in the nearly 10 years he has been on the bench, he had only granted 2 *Daubert* motions. Two! That track record is probably not unusual for most trial judges. The truth is that when it comes to preparing or cross-examining expert witnesses, good lawyering requires much more than being able to draft or defend against a *Daubert* motion. Trial lawyers need to approach expert testimony with the assumption that the expert *will* testify, and this article will, too.¹

A. TIPS FOR DEPOSITIONS

I. YOUR EXPERT

a. Style

Broadly speaking, there are two components of an expert's deposition or trial testimony: content and delivery. You need to make sure your expert is prepared on both. While content is important, especially in a *Daubert* context, delivery is important, too -- maybe more important. Experts are trained and focus much more on content, and usually know very little about delivery. In one of his "Jury Tip of the Month" eLetters entitled "What Your Witness Should Learn from Psychology," jury consultant Harry Plotkin wrote:

Jurors routinely ignore the content of what witnesses say and focus on seemingly trivial minutiae like the witness's body language, appearance, personality, communication style, demeanor, and rapport during cross-examination. Jurors regularly ignore and dismiss the testimony of the "smarter" expert witness and listen to the expert with sloppy science and wrong conclusions. Jurors routinely fail to penalize litigants who make startling admissions that should cripple their case while routinely hating litigants who stand their ground during cross. It may surprise the lawyers or even seem irrational, but there is a reason that jurors base their assessment of witnesses more on demeanor than on the content of their testimony, and it has to do with a psychological phenomenon called "fundamental attribution error."

Translating psychology into English, fundamental attribution error is the tendency for people to attribute the behavior of others (specifically strangers) to their perceived

¹ If you don't already have all the CLE material you need for any *Daubert* and *Robinson* problem, you can easily find one on the UT CLE eLibrary website (<http://www.utcle.org/eLibrary/>) or the State Bar of Texas CLE eLibrary website (<http://www.texasbarcle.com/CLE/HOME.ASP>).

personality, rather than on situational explanations. In other words, people judge strangers based on how they're acting instead of letting the situation explain how they're acting. On the other hand, people tend to judge themselves (and people they know well) based on the situations we're in.

If your spouse or best friend was in a horrible mood, you'd wonder why—what happened to them?

If you met a stranger who was in a horrible mood, you'd probably assume they were an angry, rude person. You probably wouldn't even consider if they had a bad day or just got out of 90 minutes of gridlock traffic. Unfortunately, your witnesses aren't familiar to your jurors, and they won't get any benefit of the doubt.

Jurors are the same way with unfamiliar witnesses—they assume that the witness's demeanor, behavior, and reactions are indicative of the witness' personality, honesty, and guilt.

This is why jurors decide whether to trust or disbelieve a witness (especially your client) largely on HOW that witness testifies, not on WHAT they say. This is why jurors never trust a witness who seems angry, argumentative, defensive, or nervous, even if they're telling the truth or if they have a valid reason for being upset. And this is why jurors always trust a witness who seems friendly, confident, and honest, who doesn't seem fazed by tough questions or admitting mistakes, and who seems as polite and comfortable during their cross-examination as they are during direct—even when they make admissions that should be detrimental to their case!

In a recent case of mine, the jurors described a brilliant expert as “snotty and egotistical” because his communication style—content aside—was condescending and arrogant.

The jurors interpret a witness's defensiveness and nervousness even worse than they do anger. Your witness might have good reason to be defensive and nervous, but jurors have a hard time understanding what it's like to be in a litigant's shoes. When a witness seems bothered by a question, even for good reason, the jurors always assume it's because the witness knows there's something to be worried and defensive about. When a witness dodges a question or tries to divert a question and give their own answer, the jurors always assume it's because the witness wants to hide the truth.

Explain to your witnesses that they have a second choice: being as friendly and helpful to opposing counsel as they were to you during their direct examination. When a witness survives cross-examination without getting angry or defensive, without seeming worried or troubled, and seems unfazed and confident throughout, the jury gets an unmistakable message—the witness knows he or she has a winning case, is perfectly honest, and has nothing to worry about. Time and again, I've seen witnesses calmly and

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Preparing and Cross-Examining Expert Witnesses

Also available as part of the eCourse

[Effective Advocacy: Maximizing Case Values; Effective Cross-Examination; plus Preparing and Cross-Examining Expert Witnesses](#)

First appeared as part of the conference materials for the
34th Annual Page Keeton Civil Litigation Conference session
"Preparing and Cross-Examining Expert Witnesses"