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By Justin Lawrence

Jurors' Perception of Expert Bias

I recently lost a trial in which I purposely pitted the testimony of a highly experienced accident reconstructionist expert against the unanimous testimony of several lay witnesses. My theory was that I could discredit the expert simply by showing that he was both paid to testify and in opposition to all the lay testimony. Although not bringing an expert to trial is always risky, I wanted to pursue this approach for two reasons. First, I was polarizing the case, and I thought the presentation of the defendant corporation as an unsympathetic, willful actor would dovetail nicely with the revelation that it hired testimony when it couldn't find a lay witness with a story it wanted to hear. Second, I held unspoken faith in the idea that jurors would judge the testimony of an unpaid lay witness more credible than any paid expert when set in opposition.

The strategy backfired spectacularly. The jury discounted all four lay witnesses in favor of the defendant's expert, including one lay witness who testified about an admission made by the defendant's driver at the time of the accident. This made the defense verdict especially surprising to me. Because this verdict shook my aforementioned, unspoken faith in jurors' suspicion of paid expert testimony—and because I'm appealing and want to make the second trial better than the first—I researched studies on the effect experts' paid status has on jurors. The findings of those studies could help you in your next trial.

Do Jurors Disfavor Paid Expert Testimony?

Various juror surveys have been conducted to determine jurors' opinions regarding expert testimony, but as far as I can tell, none has asked jurors to assess the credibility of paid expert testimony vs. unpaid lay testimony under controlled settings. Thus, that answer must be derived indirectly from other studies that focused on factors affecting jurors' perception of expert witnesses' credibility. At the outset, interesting statistics emerge that may affect jury selection for cases in which one side relies heavily upon expert testimony.

First, multiple studies have found that fewer than half of jurors believe that an experts' paid status results in untrustworthy testimony. In one study, 50 percent of jurors surveyed said, "expert witnesses say only what they are paid to say."¹ In another, 35 percent of jurors surveyed stated "payment of the expert by the lawyers meant that the expert could not be trusted to be unbiased."² After analysis, these numbers are worse than they look. One must consider that the "jurors surveyed" in these studies had already sat through trials in which experts testified, and in which the experts' compensation was brought into evidence via testimony. For some reason, 50 to 65 percent of all jurors found evidence of the experts' payment insufficient to show bias. Thus, it is likely that the majority of jurors in your jury pool *will not* be convinced that payment for testimony can bias an experts' opinion. Further, it is likely that a much higher percentage of potential jurors enter the trial without a clear predilection to believe unpaid lay testimony over paid expert testimony, since it is unlikely that jurors become more convinced of an expert's neutrality upon the introduction of evidence that the expert has been paid.

Second, there is an interesting gender variance on the issue of expert bias. A separate study found that "82 percent of male jurors compared to 64 percent of female jurors agreed that lawyers could always find a compliant expert."³ This study did not focus upon a jurors' perception of expert bias specifically, but rather, attempted to determine what expert characteristics best resonated with jurors.⁴ The finding that men are more likely than women to believe attorneys simply bring a compliant expert to trial is interesting, especially for lawyers who tend to prefer more women than men on their juries.

Third, multiple studies found that personal characteristics of the expert—such as an expert's payments from counsel, credentials, mannerisms, etc.—only become important when the jury does not understand the expert's testimony.⁵ This makes an accident reconstructionist perhaps

the worst kind of expert to discredit with evidence of bias due to financial gain. An accident reconstructionist's testimony discusses the operation of a car—something the jurors do every day and can easily visualize.

Finally, studies show that jurors tend to disfavor highly paid experts.⁶ However, jurors have no conceptual framework to determine whether an expert is “highly paid” or not. Consider the blue-collar worker who hears testimony from a medical expert: the blue-collar worker will *expect* the doctor to make a vast sum of money. Arguably, contrasting the defendant's expert with a comparatively lower paid expert of your own is the best way to give the jury a conceptual framework to determine that the defense expert is “highly paid.” Again, this suggests against offsetting expert testimony with exclusive lay testimony; rather, it suggests following the wisdom of using experts to cancel one another out.

What is the Best Way to Show Experts Bias?

Knowing the answer to this question will probably make you a very successful attorney. The answer will obviously change based on the expert, jury and case, but one series of studies shows a sort of hierarchy by which jurors measure expert bias.⁷

As stated above, if jurors consider experts' fees at all, they will measure experts' fees for testifying against one another. The lowest fee will become the anchor by which the other expert fees are measured. However, the effect of higher credentials may offset the effect of higher fees. For example, if an economist who teaches at a community college is stacked up against an economist who teaches at Harvard, jurors may anticipate—and forgive—that

the Harvard economist commands a higher fee.

To answer this question, researchers conducted mock trials in which different juries were given the same case but with varying information regarding the expert's fees and credentials.⁸ Unsurprisingly, they found that the lower-paid/higher-credentialed expert was most convincing. The lower-paid/lower-credentialed expert was considered just as convincing as the higher-paid/lower-credentialed expert. The mock jurors found the higher-paid/higher-credentialed expert least convincing. The results led the researchers to two conclusions: first, that the expert's financial gain had no effect upon a juror's perception of credibility without some indicia that it was excessive, and; second, that the information regarding

expert's credentials and financial gain were not considered separately from one another.

The researchers speculated that their mock jurors used the information about fees and credentials in combination to infer greater frequency of court testimony in other cases, with the highly paid, highly credentialed expert marked as the “hired gun.” To test this, the researchers conducted additional mock trials where the financial gain and frequency of prior testimony were varied. Credentials of the mock expert and case facts were held constant. In this study, mock jurors found the higher paid expert who had testified in only one prior case most reliable, followed by the lower-paid/novice plaintiff expert, the lower-paid/frequently testifying plaintiff expert, and the higher-



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paid/frequently testifying expert. In short, jurors believed the number of times an expert testified previously was more likely to show bias than the experts' fees. Further, the mock jurors were willing to overlook a high fee if they knew the expert did not testify frequently.

Focusing on experts' fees is therefore not the best way to discredit an expert. While high fees can turn off a jury, frequency of testifying is a far more potent way to infer bias.

These findings suggest the following:

1. Don't set an expert up against lay witnesses and expect to show bias. The expert's paid testimony is not per se evidence of bias to the average juror, and experts that testify on matters that most lay witnesses will have knowledge of—such as the operation of a car—are the least likely experts to be judged based on their credentials or payment history.
2. When dealing with defense experts that closely guard their financial records from discovery, it may be advantageous to instead ferret out information regarding the frequency with which they testify. For example, if presented with such

a defense expert in a state court case, try to obtain a copy of his or her federal case list. This is not to say you should not insist upon the experts' financial records; however, tips for doing so are best left to a future article.

3. If your case depends heavily upon discrediting a defense expert, make sure you are paying your expert less than the defendant is paying theirs. If you are paying substantially more, it could be a problem. Further, take a good look at the expert's history of testimony to offset potentially higher fees.

When the defendant tries to win your next trial with a trumped up opinion, you'll be ready for them. Good luck out there.



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- 1 Peter Aronson, et al., Jurors: *A Biased, Independent Lot*, Nat'l L.J., Nov. 2, 1998 at A1.
- 2 ABA Special Committee on Jury Comprehension, "Jury Comprehension in Complex Cases" 40, 42 (1989).
- 3 Sanja Kutnjak Ivkovic & Valerie P. Hans, "Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message," 28 *Law & Soc. Inquiry* 457-58 (2003).
- 4 For this reason, the higher percentage of jurors in the Ivkovic and Hans study does not conflict with the study in the Aronson study mentioned previously. The two studies asked different questions, with the Ivkovic and Hans study's questions covering a broader array of topics.
- 5 See e.g. Joel Cooper, Elizabeth Bennett, and Holly Sukel, "Complex Scientific Testimony: How Do Jurors Make Decisions?," *Law and Human Behavior* 20: 379-94 (1996).
- 6 Lora M. Levitt & Margaret Bull Kovera, *Psychological Mediators of the Effects of Opposing Expert Testimony on Juror Decisions* 15 *PSYCHOL. PUB. POL'Y & L.* 124, 127 (2009).
- 7 Cooper J, Neuhaus I. "The 'hired gun' effect: Assessing the effect of pay, frequency of testifying, and credentials on the perception of expert testimony." *Law and Human Behavior* Vol. 24, pp. 149-171 (2000).
- 8 *Id.*

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