

REMAINING BALANCED IN A DERANGED FORENSIC ARENA

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Introduction

Testimony is like being on a high wire; we are inundated with distractions that can cause us to lose our balance and sometimes fall or fail. Fears of Daubert, perjury, aggressive and obnoxious attorneys, changes in medical technologies, conflicting methodological approaches, etc. can be problematic. This presentation will inspire, motivate, entertain, and educate the audience. Through the use of humor, metaphor and examples, there will be applicable methodologies that can be used in our practice.

Objectives:

1. To provide an inspirational and different approach to our practice.
2. To motivate members to improve their practice in every aspect of forensic work.
3. To demonstrate difference between balanced and unbalanced methodologies for case preparation.
4. To provide examples of poor and good case presentations and effects on our career.
5. To provide techniques for avoiding needless anxiety and burn out.

At the end of this presentation, I feel confident that you will have obtained some basic ideas that can be applied in your day to day practice. By expanding your competencies, you will reduce the fears, doubt and anxiety that may occur in testimony.

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NOTES

1. Attorney attacks:

The primary goal of an opposing counsel is to try and show many flaws in your opinions. These flaws that they will attempt to find include but are not limited to: Inconsistencies, inaccuracies in your opinions/report, you are using junk science, typos, you are dishonest, you lack credentials, you have made stupid statements in the past, you have too little experience; you are an expert in everything

Suggestion: be prepared for any question about any aspect of your past including testimony, work, problems, statements, vocational and/or personal problems.

2. Distractions.

One of the most disconcerting distractions is at the beginning of cross examination when counsel presents a topic that is not relevant to the expert opinions. You need to be prepared to discuss just about everything except the opinions contained in the report

Suggestion: have a good CV

Suggestion: just answer the questions and don't argue; it is the responsibility of the counsel who hired you to object

Suggestion: talk slowly and remain calm

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3. Prior testimony

The goal here is to try and find opinions in a similar case where the opinions you made were opposite of the ones you're giving this case

Suggestion: be consistent in testimony and opinions;

Suggestion: internet search; profile

Suggestion: have accurate CV, try not to change your CV

4. Biased opinions:

It is the opinion of many attorneys that an expert is completely biased and will only say what the attorney or attorneys have hired the expert what said relative to opinions in the case Attached docs show can work.

Suggestions: list documents you have reviewed and taken into consideration in forming your opinions;

Suggestion: block total discovery;

Suggestion: have trial testimony history document with plaintiff & defense identified & know plaintiff/defense ratio of cases

5. Expert Disclosure

There are several issues related to disclosure that include: contact and content of conversations/meetings with contracting attorney, disclosing e-mails, notes on Facebook, and all prior reports; completeness of opinions relative to possible exclusion under, Daubert or rule 26. There is usually an attempt to make you look like a greedy person charging hundreds of dollars an hour.

Suggestion: no attorney contact after eval prior to report; transparent; get paid prior; don't get stupid reveal past skeletons

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Suggestion: have billings available.

Suggestion: prepay trial testimony.

Suggestion: no attorney contact after assessment prior to report.

Suggestion: bill off retainer:

Suggestion: no stupid comments on FB, LinkedIn, etc.

Suggestion: block total discovery

6. Exclusion of Testimony:

A tactic that is being used by attorneys is to exclude testimony of an expert. This is a serious problem because if you are excluded; this will adversely affect your future ability to obtain cases and reduce your credibility. Issues that could affect your admission or exclusion such as a deficient report, Daubert issues, “magic words”, exceeding your discipline, missing discovery deadline, and lack of being informed of exclusion by retaining counsel.

Suggestion: review Daubert/rule 26

Suggestion: engagement/retainer contract require notification of Daubert/in lime motions

Suggestion: verify your methodologies are accepted

Suggestion: insure all medicals are provided

Suggestion: check CV again

Suggestion: transparent re: any career problems

Suggestion: don't stray out of your area of expertise

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7. Report drafts:

You may be asked to produce earlier drafts. . Do not change opinions. Attorneys may try to change or influence your opinions. Not only do you insist on obtaining all relevant records, you have the right and obligation to interpret the materials using our accepted methodologies and not suggested methodologies by the referring attorney.

Suggestion: never submit a first draft to attorney and change. You can correct typo's or address issues that you may have omitted.

You can elaborate or clarify your opinions if requested.

Suggestion: An addendum report is acceptable.

Suggestion: discuss case prior to accepting referral. Discuss and define all factors whether they are supportive or not to the attorneys case. You must be truthful in this analysis.

Suggestion: turn down cases that are not appropriate.

Suggestion: do not allow attorneys to write your report!

8. Work product:

There is protection against some discovery of documents depending on jurisdiction. Documents prepared by attorneys are protected.

Just about anything you put into writing is discoverable. Raw test data has limited protection from discovery. Report drafts are discoverable.

Suggestion: assume everything you write will be discoverable

Suggestion: be transparent with your documents and don't refuse any reasonable requests for documents such as notes, worksheets, etc.

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9. Good News:

Opposing counsel can not get into everything you have done in the past. They may need a court order to get some info. The opposing counsel can only go so far in investigating your personal life such as financial status, social issues, hobbies as well as social networking.

Suggestion: you can complain and take action if opposing counsel engages in egregious behavior such as surveillance, investigation into your personal finances, etc.

10. Talking:

We sometimes feel compelled to explain answers in testimony. As experts we love to talk; most of the time we talk too much

Suggestion: Only answer the question asked.

11. Death by 1,000 cuts:

Minor issues and problems may seem small at the time, but can become big problems that can damage your testimony. Just keep in mind opposing counsel wants to discredit you and cause the jury to believe that you are either incompetent, lazy, careless, inattentive, unqualified, and should not give any consideration to your opinions. It may seem silly for opposing counsel to nitpick over seemingly minor issues such as a typo, misspelled physician's name, math that is in accurate but not significant to the overall conclusions. Just keep in mind opposing counsel wants to discredit you and cause the jury to believe that you are either incompetent, lazy, careless, inattentive, unqualified, and should not give any consideration to your opinions. While one mistake may not be a "fatal error" a continuous listing of minor errors becomes a major problem with regard credibility and acceptability to your opinions.

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Suggestion: Carefully proofread your reports and reduce your problems to a minimal even if they seem minor.

Suggestion: know your case

Suggestion: simplify reports

Suggestion: have references available

Suggestion: multiple proof readings

Suggestion: use consultant

Suggestion: upgrade report format

Suggestion: attend seminars