

## ***Political Scientists as Expert Witnesses***

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It is not by chance that we testify as experts in cases concerning ‘election law’ (see Cain 1999). Our political science expertise is particularly relevant to issues of how political competition is structured, or should be structured, or how election structures interact with the behavior of voters to affect election outcomes. Yet, few political scientists serve as a courtroom expert witness, perhaps because these jobs are not easy to discover. Those wishing to be an expert witness will not find an APSA Personnel Service Newsletter listing. Instead, political scientists are most often recruited through informal networks. They may be referred by a friend, schoolmate, or mentor (as happened to McDonald). Or, they may even have a chance meeting with an attorney at a party (as happened to Engstrom).

This essay introduces readers to the role and responsibilities of expert witnesses, the standards their work must meet to qualify as an ‘expert,’ and the adversarial context in which they testify. The latter is extremely important, because it differs greatly from scholarly forums. This difference in context may make academics uncomfortable. Despite knowing in the abstract how the adversarial context works, academics can be quite shocked the first time they are subject to a deposition or cross-examination at trial. Experienced lawyers believe that “The world’s leading expert may be a terrible witness” (Horowitz 2005: 18). A successful expert witness must be able to handle themselves in this pressure-cooker: they must have a ‘thick skin,’ good concentration, and an ability to explain concepts and measurements to people with little

familiarity with them. They must further have the analytical skills to deliver work product under severe time constraints. Sometimes their first experience working a case is their last; they simply do not want to go through it again, or worse, they perform so poorly no one wants to hire them.

If the previous paragraph hasn't scared you off, and you want to learn more about being an expert witness, the following will hopefully be helpful to you. And we do get to the good stuff later, such as the great satisfaction that can come from this work, how it can enrich your teaching, research, and writing, and of course how the financial remuneration for it is much better than that provided by many paid activities engaged in by political scientists.

## **What is an Expert Witness?**

The major distinction between an expert witness and a lay witness is that an expert is allowed to express *opinions* in court (see Posner 1999, 92). Lay witnesses are 'fact witnesses' who testify based on their direct personal knowledge of people and events. Expert witnesses are allowed to inform the court about their conclusions based on their examination of information. The rules regarding the use of expert witnesses in litigation are described in the Federal Rules of Evidence. Rule 702 stipulates that a person is qualified as an expert based on their relevant "knowledge, skill, experience, training, or education" and that their opinions are informed by established principles and methods that have been applied to the facts of the case (Engstrom 2005; Mitchell 1978).

## **The Role of the Expert Witness**

Potential experts are typically contacted by attorneys, not the parties to a case. Attorneys will inform a prospective expert about the case and provide them with their version of the issues, both legal but primarily evidentiary. If litigation is already underway – which may be true in fast-moving election law cases – a copy of the plaintiff's complaint, defendant's response, and any other filed court documents may provide important context to the factual disputes. If not

already familiar with you, an attorney will question your credentials, quiz you about facets of the case, and observe your demeanor to determine if you will make a credible expert witness (Horowitz 2005). Be honestly self-critical in assessing if you have the expertise to provide the requested testimony. This initial contact is also an opportunity for you to find out what type of lawyer you are dealing with. Steer clear of an attorney who may exert pressure on you to provide testimony that is in conflict with the facts as you see them (Eaton and Kalman 1994). An expert witness' most valued commodity is their credibility. Once it is damaged because you stray outside your area of expertise or allow your judgment to be subverted, it cannot be easily rehabilitated (Prager and Marshall 2005).

Ultimately, attorneys decide what an expert will address in their testimony (Ruse 1986, 69-71). This is an important distinction between research prepared for litigation and academic research: *the expert's role is to answer questions that the attorneys decide to ask*. Attorneys may view what a political scientist might desire to examine as legally irrelevant or even damaging to their case, and therefore is not an inquiry they are willing to pay for. This does not preclude an expert and attorneys discussing which questions to ask, and how to ask them. In our experience, this input is typically welcomed. However, file away theoretically interesting diversions to pursue later on your own time. Remember that everything you do that is related to the case is potentially discoverable to the opposing side. Your own time does not begin until the litigation is concluded, depending on the terms of the confidentiality agreement you will sign. You may even be asked to sign an agreement before an attorney will even speak with you about the case.

Once past the initial meeting, work commences. Attorneys may first commission preliminary analysis to determine if their factual assumptions are supported by the evidence. This work is done usually in the role of a consulting expert, whose work is not shared with the other

side. If the attorneys are pleased with your preliminary analysis they may change your role from consulting to testifying expert. If this shift occurs, all of the work performed – including that as a consultant – is discoverable by the opposing side. If your analysis does not support their expectations, they may decide not to proceed with a line of argument, engage another expert for a second opinion, or engage another testifying expert to replicate only the portion of your work that is consistent with their argument. Consulting experts may pick apart the analysis of the opposing side's testifying experts, so the highest quality work is demanded.

Discovery is the next phase, where each side must share with the other what they will present as evidence. This may include anything related to the case, from e-mail communications to notes jotted on a napkin. It is for this reason that lawyers often prefer to communicate by phone and why you need to develop meticulous and consistent archiving habits. The judge or judges set a discovery schedule. Judges prefer elections to be held on time, so discovery schedules in election law cases can be distressingly short.

A testifying expert is responsible for preparing their report. This document identifies the opinions you intend to express and the analyses performed to support your conclusions. The report is provided to the attorney the expert works with, who in turn provides it to the opposing attorneys by the specified date. When each side employs an expert, which is the usual practice, these reports may be exchanged simultaneously or in sequence, with the plaintiff's expert's report provided first and the one prepared by the defendant's expert later. An initial report may be followed by supplemental reports and rebuttal reports.

Reports are followed by depositions, at which all reports produced by that time are the subject of questioning. The primary purpose of a deposition is to find out what you will and will not say in court. This is to preclude the other party from being ambushed at trial with new

evidence or testimony. Depositions are conducted under oath and are typically in-person, but may be by video or telephone. They are almost always what they are widely reputed to be – *unpleasant* for the deponent. The style of questioning ranges from friendly to aggressive, with the later on occasion being even nasty. (We comment further on the adversarial context of the legal process in the next section.) They range in substance from a focus on disagreements between the parties’ experts to classic fishing expeditions. There is no judge present at a deposition to act as an impartial referee. Your attorney may instruct you not to answer particular questions, but this is very rare. Almost all objections are noted for the record and left for a judge to rule on, if necessary. It would otherwise be inefficient to go back-and-forth between depositions and rulings. A court reporter transcribes deposition testimony and you are allowed to correct their spelling, grammar, and missing words. You are not allowed to correct or elaborate further on the substance of your testimony.

Finally, your court day arrives. The judge or judges are now present and they may ask you questions at any time. The plaintiffs present evidence first, so the plaintiff’s expert is normally the first expert to testify. Each expert’s testimony begins with direct examination, during which the attorney they work with asks questions. The expert is usually well-prepared for this part. As we noted earlier, attorneys often appreciate the input of experts on what to ask, and how to ask questions. Thus, the expert usually knows which questions will be asked, and how they will be phrased. However, surprise questions and unexpected phrasing that changes the meaning of questions may occur during direct examination, so you must stay on your toes.

Cross-examination is next. This entails the other side’s attorney asking questions. The expert does not know what is going to be asked, although much of the cross can usually be anticipated from questions asked in deposition. While a cross-examination is supposed to stay

within the confines of what was asked on direct, our experience is that judges are not strict about this. This may be another difference between bench trials and jury trials: judges seem more flexible about what they allow into the record when they are the decision maker rather than a jury, and especially when a witness is an expert rather than a fact witness. The style of cross-examination varies much like that in deposition, as it can range from respectful to demeaning. Judges give attorneys wide latitude, as long as they are not abusive. Your attorneys may ask additional questions during follow-up redirect questioning, which may result in recross-examination, *ad infinitum*, though our experience of any questioning beyond recross is rare. Experts may still testify a second time in a case, offering rebuttal testimony in response to the other side's expert.

## **The Adversarial Context**

The adversarial process differs greatly from other forums in which political scientists share their work. The search for the truth in the legal process is not a consensus building enterprise. Instead, two sides present contrasting versions of the facts and often the law, from which the judge is expected to determine the 'truth.' Presenting expert research in court is far different than presenting basic research at a professional conference. A discussant on a panel at a professional meeting might provide a harsh critique, or he or she might have complimentary things to say. The latter is very unlikely to be heard in court.

As a first-time expert witness, it would be a mistake for you to dismiss the opposing attorneys because you are the 'expert' in the room. As a first-time expert, the opposing lawyers will be likely better-versed than you on the legal issues you are testifying on, and they will ask you questions intended to impeach your credibility as an expert who can render opinions on the subject at hand (Mitchell 1978, 212). Many lawyers have extensive experience reading expert reports, questioning expert witnesses, and studying the methodologies you use – perhaps even

more than you (Van Matre and Clark 1976). Opposing experts may also be present in deposition and the courtroom to provide advice to their attorneys, although they cannot ask questions directly. If you think you are secure, consider this: we have seen a deposition go so poorly that an expert was removed by their attorneys from the testifying calendar.

As an experienced expert witness has said, “lawyers play by rules that go beyond those of academic fair play” (quoted in Feinberg 1997, 323). Depositions and cross-examination are means for identifying weak spots in an expert’s work and credentials. It is not the job or interest of opposing attorneys to help make your points. “A. Wuffle,” (a pseudonym) has much pithy advice in his must-read for a budding expert witness, including, “The two most beautiful words your attorney can hear on response to cross-examination are ‘yes’ and ‘no.’ Almost as good is ‘I do not know.’” (1984: 61). In other words, you must truthfully answer the questions posed to you. Your responsibility is to be responsive without elaborating, unless requested to do so by an attorney. Avoid the temptation of being drawn into an argument with an opposing attorney. Your best opportunity to respond to what you perceive to be an unfair attack is under friendly questioning from your attorneys during redirect. When experiencing cross for the first time, this can be difficult advice to follow.

All of your professional activities are fair game, including your publications (as we expect this article to be) and what you have said in previous depositions and trials. One veteran expert witness was even asked questions about a surreptitiously recorded conversation between himself and a planted audience-member during a public forum. ‘Nit picking,’ ‘blowing smoke,’ and ‘obfuscating’ are all words experts have used to describe cross-examinations. Sometimes opposing experts are the source of the nit-picks and obfuscations and they may even employ them in their testimony (e.g., Engstrom 1985 and 2005; Wuffle 1985). While these criticisms are

often principled, they can sometimes get personal. Hence the need for a ‘thick skin,’ as we mentioned earlier. The nature and character of the criticism can be a big surprise to a first-time witness. While an expert in court might say nice things about the other side’s expert, we have never heard one say nice things about their work overall for the case. Indeed, it is our experience that when cross-examination gets personal, it usually means the attorney has not been able to discredit the analysis. The old adage applies: if you can’t attack the message, attack the messenger.

## **Benefits of the Work**

As noted above, there are additional benefits to expert witness work than the satisfaction of doing a good job, having a court reference your work positively, and even seeing changes in election systems that result at least partly from your testimony. The experience can enrich your teaching by providing examples that will engage students, particularly those who wish to proceed to law school. In the area of election law, for example, our work provides us with concrete examples of representation and election issues related to the use of single-member districts and alternative electoral systems, and how these issues relate to seminal Supreme Court decisions often dryly presented in textbooks. Analyses for court can be presented to classes. Anecdotes from trials can reveal the normative dimensions of the adversarial legal process.

The experience can inform a person’s writing, and influence their research agenda, both substantively and in terms of methods. As just a few examples, consider that an entire subfield of representation examines the impact of the Voting Rights Act, with an intent to inform the courts and policymakers on how best to achieve racial representation goals (e.g., Cameron, Epstein, and O’Halloran 1996; Lublin 1997). Refinements in ecological inference were stimulated by the need to reliably estimate levels of racially polarized voting in litigation under the Voting Rights Act (e.g., King 1997). A subfield examining electoral systems’ bias and responsiveness was partially

motivated to detect legally impermissible partisan gerrymanders (Gelman and King 1994; Grofman and King 2007). Several further innovative methods have been developed across disciplines from computer science to political science to detect gerrymandering (for a review, see Altman and McDonald 2010).

The remuneration can be, from a political scientist's perspective, very good. When asked, usually during your initial contact with an attorney, about your hourly rate and to estimate how many hours you will work on a project, do not be shy. Set an hourly rate that will reasonably cover all your costs, including your home office and your taxes. Estimating the number of hours is always difficult. There are no hard and fast numbers we can provide since everyone accomplishes activities at their own pace and experts have little, if any, control over the need for additional analyses and reports. Report writing often takes longer than you imagine. Anything that you do for the case that you would not otherwise do is billable, including replying to an e-mail, speaking on the phone to your attorneys, traveling, or sitting in a courtroom waiting area. (Some people charge half-time for activities where they can do other work, such as travel.) Meticulously note the date, time, and activity for anything you do that is related to the case. Most attorneys request invoices on a monthly basis.

## **Conclusion**

We conclude with some thoughts about the role of expert witnesses in the profession. There is selection bias in the choice of expert witnesses (Lee 1988). This is the nature of the adversarial process. Attorneys will only call an expert to testify if the expert's findings support their side of the case. This selection bias is no doubt the reason why others often view expert witnesses similarly to lawyers, as 'hired guns' or 'whores' who will do or say anything for money (e.g. Kousser 1985). The possible stigma that may arise from the appearance of

subverting one's professional detachment for monetary gain may steer some away from the work (Ruse 1986). But not all lawyers deserve such epithets, and neither do all expert witnesses.

It is not an expert's responsibility to win a case. This is why their fees should not be contingent on the outcome of a case. It is their responsibility to provide good, defensible evidence on the issues to which they testify. Selection bias does not preclude an analysis being of high quality. Analyses by political scientists in election law cases are typically transparent and inter-subjective. Data are scrutinized, statistics replicated, and decision rules attacked and defended. Experts can maintain their integrity in this process. Experts who provide good defensible evidence without embellishing it are asked to testify in many cases, sometimes over many years.

Expert witness testimony is hard work, stressful, and can interfere with other obligations. But we also believe it to be immensely satisfying and important work because it directly affects peoples' lives. We believe that it has made us better teachers and scholars, and has more broadly contributed to the profession as a whole. We thus encourage those who are given the opportunity to consider favorably taking on the responsibility.

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