Shakespeare on Expert Witnesses
What The Bard Teaches Us About Experts

Shakespeare on Expert Witnesses

By Charles G. Ehrlich

Shakespeare's works are often probed for hidden meaning.

My diligent research reveals that he had much to say about effective use of expert witnesses. His advice still rings true today. In this article I've updated some of his observations in light of modern experience.

"I wasted time, and now doth time waste me." Richard II, Act V, Scene IV

Quite often lawyers leave getting an expert to the last minute – prompted only by the imminence of the deadline for designation.

Reasons for procrastinating range from cost ("why spend the money; the case may settle") to skepticism ("we really don't need an expert - but maybe just to be extra careful . . . . ") to simple inadvertence ("OMG, I totally forgot").

So, why is procrastination a bad idea?

In my insurance company general counsel days, one of our cases turned on a policy exclusion that referred to a complex federal statute. Well before the designation deadline, we started to think about experts. How about the man who wrote the law – and was acknowledged as the World's Number One Authority? Brilliant! We engaged him and smugly awaited the disclosure date. It was a bit of a shock when disclosure was immediately followed by a motion to disqualify our counsel for interfering with the other side's expert.

What happened? The policyholder had hired World's Number One Authority at the beginning of the case. Unfortunately, because the policyholder had several business names, the World's Number One Authority missed the conflict when we hired him. Putting aside the appalling embarrassment, angina, and expense of the motion to disqualify, we missed out on the World's Number One Authority because we didn't think about an expert right at the start of the case – and the other side did.

"But," you say, "there are lots of experts who could suit our case, that's not a worry, there's no rush." Well, maybe so. But let's look at another of Will's rules.

"A fool thinks himself to be wise, but a wise man knows himself to be a fool." As You Like It, Act V, Scene I

Our minds unconsciously trick us into foolishness. Confirmation bias is one of these tricks – we give more weight to information that fits our preconceived notions and less to whatever conflicts with those notions: "Our guy's deposition was great; their guy is a patent fraud." "Our troublesome email has a perfectly reasonable explanation; their emails are disastrous."

We also suffer from overconfidence in our own judgment. "We see this case realistically; the other side must be smoking something." Thus, fifty-six percent of judges in one study rated themselves in the top quartile of least reversed jurists. (Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420 , 436 -37 (2007).) Ninety-four percent of college professors see themselves as in the top half of their profession. https://www.cbsnews.com/news/everyone-thinks-they-are-above-average/ [1]

What does this have to do with experts?

Good lawyers need an antidote to unconsciously overrating their case and discounting the opponent's. A good expert retained early enough can be that antidote. The expert, having some detachment, can sound the alarm on positions that flourish in the feedback loop of lawyer and client but wilt in the real world.

I've had occasion to say things such as, "gosh, that's a great argument but given my experience in these cases, I question whether the jury will actually believe you denied the claim only to protect the policyholder from higher premiums." It is not uncommon for a wonderful story to founder on the shoals of actual industry practice or mere common sense.

"How far that little candle throws his beams!" The Merchant of Venice, Act V, Scene I

The expert's perspective, coming from outside the feedback loop, can be more than a corrective to thought biases -- it can make your case work better. I encountered a litigation some years ago in which both sides and the court were convinced that the plaintiff would have to prove that a letter was not received. This posed quite a challenge -- the intended recipient was dead. An expert, looking at the case from a different perspective, realized that the point could be won without that heavy burden of proof, by instead demonstrating flaws in the letter's preparation and mailing process.

"The Empty Vessel Makes The Greatest Sound." Henry V, Act IV, Scene V.

This rule is something of a corollary of the last one. Will means: Avoid the expert who loves your case too much. Why? Because that expert won't acknowledge potentially difficult issues

[1] For more on unconscious influencers that distort legal thinking, see, *The Brain or The Tummy: Some Thoughts on Unconscious Factors in Deciding Arbitrations*, Dispute Resolution Journal, 72:4 https://arbitrationlaw.com/library/brain-or-tummy-some-thoughts-unconscious-factors-deciding-arbitrations-dispute-resolution

that you actually should surface and deal with early on. In his wonderful memoir, *My Early Life, A Roving Commission*, Winston Churchill cautioned those thinking about embarking on war: "Always remember, however sure you are that you can easily win, that there would not be a war if the other man did not think he also had a chance."[2]

In other words, don't simply put together a chorus of cheerleaders. Pay heed to the expert who may bring a dose of salt to your efforts; she may be the expert who really helps.

Another problem with the overly enthusiastic expert is losing credibility with the trier of fact. A couple of years ago, I was the neutral umpire in an arbitration. One side put on an expert whom I knew and respected. His effectiveness was considerably blunted, however, when he went overboard on the wonderfulness of a key memo that I thought was actually rather dumb.

"It is a tale. Told by an idiot, full of sound and fury. Signifying Nothing." Macbeth, Act V, Scene V.

Putting on your case at trial is a challenge. Witnesses can be inarticulate, intemperate, boring, arrogant, irritating to the judge or jury. They can even forget what they so passionately believed during preparation. Written agreements can be dense, convoluted, and difficult to understand. Emails often suffer from lack of context or the use of industry shorthand. The jury, or even a judge, faced with all of this, might not grasp your issues with the same crystal clarity with which you see them.

So, what does this have to do with an expert?

A good expert can be the tour guide for the jury, and even the judge, through the messy quagmire of witnesses and evidence. She can clarify why a seemingly obscure requirement of the deal was critical. She can explain how the other side ignored industry custom and practice. She can go through the transaction from start to finish in an easy to follow straight line.

"The lady[or man] doth protest too much." Hamlet, Act III, Scene II.

Be careful, very careful, of the expert who is a crusader. Some years ago, I observed a trial in which one our companies was part of a group of London Market insurers seeking to rescind a pharmaceutical recall insurance policy. A critical issue was what the Food & Drug Administration would have done had certain facts been disclosed by the policyholder. Our side had a great expert, with many years of experience directly on point. Unfortunately, he also had an axe to grind with the FDA. No amount of preparation by our excellent lawyers was enough to keep him from veering off into vendetta land when on the stand. Credibility – much reduced!

"I must be cruel only to be kind." Hamlet, Act III, Scene IV

[2] https://foreignpolicy.com/2009/02/25/churchills-advice/

Here, Will's talking about preparation for deposition or trial. There's a tendency to think that your expert knows what she's talking about, has written a great report, and will do just fine in deposition or on the stand by preparing with a couple of hours of page flipping through her report. This is not the case.

Do the New England Patriots, who've won uncounted crucial games, prepare with merely [why delete "a?"] chalk talk in the classroom? Hardly. The most successful team in football puts on pads and starts hitting.

Expert preparation should be the same. Take the time to prepare your expert for examination as if you were the other side's toughest lawyer. No matter how well founded the expert's opinions nor how often she's been through the grinder, if your case is important (and surely it is) you want to be ready for what's coming. The way to do that is to be tough. After all, the other side isn't cross-examining because they want to understand how wonderful your expert's views are; they want to make her look as credible as Josef Stalin selling kindness and compassion.

"This above all: to thine own self be true. And it must follow, as night the day . . . Thou canst not then be false to any man." Hamlet, Act I, Scene III.

Let's conclude with this observation of Will's. Ultimately, your expert has to believe in what she's saying. That means not pushing her into untenable positions. That means be willing to reconsider arguments she finds problematic. Because, ultimately, you don't want an expert who's a mouthpiece; you want an expert who credibly and with good reasons assists the trier of fact.

Author Attribution: A former private practice litigator, General Counsel, and senior insurance claims executive, Charles Ehrlich serves as an expert consultant and arbitrator.