

Understanding the Implications of Biased Experts in Litigation

By Jason Miller, RCA #526



In the realm of litigation, the role of an expert witness is paramount. Their testimony often has substantial weight in influencing the judgment of the court. Among these expert witnesses, consulting arborists, often referred to as tree experts or forensic consultants, play a crucial role in cases involving personal-injury and property damage disputes. However, the credibility of these experts can be severely compromised if they are perceived as a "hired gun" – experts who tilt their findings or testimony towards their client's opinions and desired outcomes for a case rather than providing an impartial explanation of the complex issues at hand.

This article delves into the factors that contribute to the perception of an expert as a hired gun, the implications of such biases on their credibility, and effective strategies for maintaining a respected reputation as a Tree Expert providing expert opinions for legal cases.

The Concept of a Hired Gun

The term "hired gun" essentially refers to an expert witness whose testimony is swayed by the interests of their clients, rather than being impartial, basing their opinions on objective analysis of the evidence and facts of the case. A hired gun's testimony may sound biased towards their client's case, eclipsing the neutral explanation of a complicated issue the trier of fact is trying to understand, which is the real benefit and intended purpose of expert testimony.

The testimony of a hired gun may be disregarded by a jury due to its evident bias, complexity, or lack of logical coherence. In some cases, the testimony might even be dismissed by a trial judge using the Daubert standard upon facing a challenge from opposing counsel.

Developing a reputation as a hired gun can severely undermine an expert's credibility and future prospects for doing expert witness work. Such experts, once identified, are likely to face intense scrutiny regarding their reputation, pay rates, frequency of court appearances, and the number of cases they review.

The Role of Expert Witnesses in Legal Cases

The importance of expert witnesses, such as tree experts, is instrumental in the legal landscape. Their specialized knowledge is vital in assisting their clients and the trier of fact to

comprehend and interpret complex evidence and ascertain the issues pertinent to the case. Facts about trees can be counterintuitive for laypersons, requiring clear explanations of topics many of us tree experts consider simple. We are expected to base our reports and testimony on sufficient facts or data, use reliable principles and methods, and reliably apply these principles and methods to the facts of the case. Although we may not always agree on certain matters, we all should be orbiting the same star, so to speak.

The Importance of Using Accepted Science, Protocols, and Methods

The credibility and reputation of tree experts heavily relies on their adherence to accepted scientific principles, established protocols, and reliable methods. By aligning ourselves with these foundational pillars, we can safeguard our credibility and avoid being perceived as biased or unreliable "hired guns." Failure to demonstrate a sound scientific basis for our methodologies in our reports can have various adverse consequences.

Opposing counsel is more inclined to depose experts whose reports lack comprehensibility or appear dubious in nature. Such depositions can undermine the expert's standing and credibility, potentially weakening their client's position. Moreover, cases are more likely to proceed to trial when expert reports are met with skepticism, as the disputing parties seek resolution through litigation rather than settlement.

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In court, judges are more likely to dismiss expert witnesses who rely on what is commonly referred to as "junk science" or present no scientific basis at all for the opinions they provide (net opinion).

To maintain credibility and withstand scrutiny, we must ensure that our reports draw logical and sound conclusions, and are firmly grounded in accepted scientific principles and methodologies. Adhering to established industry standards and protocols further bolsters the validity and reliability of our findings. By employing robust scientific evidence, following rigorous methodologies, and adhering to industry best practices, tree experts can enhance their standing as trusted professionals whose opinions are respected and relied upon within the legal arena.

Recognizing Bias in Subject Experts

An expert witness's bias can manifest in various ways, potentially compromising the integrity of their reports and testimony, and subsequently, their client's case. Instances of bias can arise from emotional influences, pre-existing relationships with the plaintiff, defendant, or attorney, or even a motivation driven by financial gain.

Biased expert witnesses may employ a range of tactics to advance their agenda, including but not limited to:

1. Selective omissions: Purposefully excluding certain information, that may undermine their desired conclusions or favor the opposing party's position.
2. Manipulation or manufacture of facts and evidence: Distorting or fabricating data and evidence to bolster their argument

and/or undermine opposing viewpoints.

3. Poor separation of facts from opinions: Failing to clearly distinguish between objective facts and subjective opinions, potentially misleading the trier of facts.
4. Obscure presentations: Utilizing complex and convoluted language or techniques that obscure the information presented, creating an air of exclusivity and making it difficult for others to comprehend or challenge their assertions.
5. Attempts to replace facts with opinions: Repeatedly asserting personal opinions as if they were factual, attempting to sway the perception of the evidence through repetition.
6. Padding of resumes and work history: Inflating qualifications or credentials in an effort to lend an air of authority and credibility to their opinions, often employing the fallacious reasoning of "because I said so."
7. Creation of lists of unobservable factors: Presenting a list of factors or considerations that cannot be directly observed or tested, making it challenging for others to assess or refute their claims.
8. Deliberate use of outdated publications: Citing outdated or superseded publications to support their arguments, ignoring current knowledge or advancements in the field.
9. Use of irrelevant facts:

Incorporating irrelevant information or data that serves to distract or confuse, potentially misleading the trier of fact.

10. Alteration of cited works: Manipulating or misrepresenting the content of cited sources to align with their preferred conclusions, undermining the integrity of the supporting evidence.

These tactics often converge, compounded by an overlay of conclusions that favor their client's case, drawing upon an entirely new scenario and data. This amalgamation of biased strategies and selective use of information serves to bolster their argument while potentially distorting the truth and compromising the fairness of the legal proceedings.

When an expert's reasoning becomes illogical, or their presentation of facts fails to align with the matter at hand, they risk being perceived as biased. This perception of bias can also arise if an expert exhibits a clear preference for one side through their evidence, opinions, or testimony.

Two notable and problematic forms of expert biases are adversarial bias, where an expert collaborates with a lawyer to sway the courtroom, and conscious bias, where experts provide testimony based on their own personal perceptions. Both types of bias pose significant concerns for all parties involved in litigation, as such testimonies are typically accorded less weight than those provided by experts grounded in factual information.

While it is true that some attorneys may seek out "hired guns," most reputable law firms are cognizant of the financial risks and potential

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reputational consequences associated with hiring experts who offer favorable opinions without a solid basis.

Attorneys in established firms are keenly aware of the importance of due diligence in vetting potential experts. They utilize legal resources such as Westlaw and LexisNexis to examine an expert's background and track record. Furthermore, attorneys, like us, actively engage in professional networks, social circles, and online discussion forums, where experiences and opinions regarding various experts are shared.

Once an attorney invests considerable time, effort, and resources in building a client's case around an expert who ultimately fails to provide coherent or scientifically supported testimony, they are likely to communicate their experience to colleagues and peers. These firsthand accounts serve as valuable warnings and contribute to the collective understanding of which experts should be trusted versus which should be approached with caution. By sharing their experiences and insights, attorneys strive to safeguard the integrity of the legal profession and promote the use of credible expert testimony based on sound scientific principles.

Likewise, when attorneys find themselves compelled to invest additional effort and resources in countering an adversary's hired gun through additional work by their own expert and filings, they often express their frustrations and share their experiences with colleagues.

The "Hired Gun Effect"

Should a legal matter proceed to the courtroom, an entirely distinct challenge, often bearing a similar name, comes into play. The "hired gun effect" characterizes a noteworthy phenomenon in legal proceedings, whereby jurors exhibit a propensity to

question and undermine the credibility of testimonies offered by experts. This skepticism stems from the presumption that these paid professionals may be inclined to provide data and testimonies tainted by bias, driven by the monetary incentives associated with their involvement. Although studies on the hired gun effect yield diverse findings on the precise scope and magnitude of its impact, it is unambiguous that this prevailing perception wields substantial influence over the efficacy and reception of expert testimony within the legal realm.

The implications of the hired gun effect are multifaceted, intertwining the realms of legal procedure, psychological dynamics, and the pursuit of justice. In essence, when jurors harbor suspicions regarding the potential partiality of paid experts, they become more inclined to discount or dismiss their testimonies outright, thereby impeding the intended purpose of expert insights and opinions. This phenomenon poses a considerable challenge for legal professionals, who must navigate the delicate balance between incorporating expert evidence and managing the attendant skepticism surrounding the expert's motivations.

Whether a biased expert is dismissed outright by the court or not may not play a role in the weight of their opinions on the matter. The jury already has a preconceived notion at some level, discrete or obvious, that the expert is being compensated for their opinion, not because of it.

Nonetheless, irrespective of the precise magnitude, it is evident that the hired gun effect casts a shadow of doubt over the legitimacy and trustworthiness of expert testimonies. This necessitates proactive measures to address, mitigate, and manage potential biases associated with paid experts. Legal professionals

can employ a range of strategies, such as rigorous vetting processes, disclosure of financial arrangements, and effective presentation techniques, to minimize the influence of the hired gun effect, to help safeguard the integrity of expert testimony.

Ultimately, the effective utilization of expert witnesses hinges upon the ability to confront and surmount the challenges posed by the hired gun effect. Striking a delicate balance between expertise and objectivity is paramount to ensure that juror perceptions are not unduly compromised by preconceived notions of bias. By fostering transparency, promoting ethical standards, and adopting a comprehensive understanding of the complexities surrounding paid expert testimony, the legal system strives towards a more equitable and reliable administration of justice, and so should we.

Disqualification of a Biased Expert Witness

The judicial system implements stringent measures to safeguard against the undue influence of biased expert witnesses in shaping the outcome of a case. In instances where a judge identifies indications of bias in an expert witness, various steps are taken to address the situation. The testimony, evidence, or opinions provided by the expert may be subject to disqualification in whole or in parts, helping to insure that impartiality and fairness are upheld throughout the legal proceedings. However, in practice, when a tree expert's work or testimony is excluded from a legal proceeding, it has a disastrous impact on their client's case and the expert's reputation.

Maintaining Credibility: Strategies for Tree Experts

While the threat of being labeled a hired gun looms large, there are

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several strategies that we can adopt to maintain our credibility and reputations. Being a successful expert witness can be done without becoming a hired gun, and that is our goal.

1. **Avoid Over-Promotion**

Over-promotion can quickly erode an expert's image. Advertising an expert's services haphazardly in every public directory can give the impression of desperation for business, raising doubts about your viability as an expert in more sensitive matters.

2. **Be Selective**

Tree experts are often hired for their specialized knowledge and experience. It's crucial to strike a balance between time spent in active practice, and time spent as an expert witness.

3. **Opinions Are Not For Sale**

Transparency is critical in maintaining an expert's credibility. If an expert witness is found to support case theories that they do not agree with (usually for financial gain), their reputation can suffer significant

damage.

4. **Transparency and Clarity**

An essential element that can significantly enhance an expert's credibility is proficiency in effectively communicating complex concepts using clear and accessible language. When an expert can convey their reasoning in a manner that jurors, opposing counsel, the trier of fact, and other laypersons can readily comprehend, it increases the likelihood of persuading them to see the matter for what it is. Paradoxically, based on my experience, this often decreases the need for sworn testimony.

Conclusion

The role of a Tree Expert in litigation cases holds undeniable significance. However, in order to maintain credibility and avoid being perceived as a biased "hired gun," it is crucial for us to uphold principles of impartiality and transparency while continuing our ongoing professional growth. By embracing the strategies and avoiding pitfalls highlighted throughout this article, consulting arborists can

safeguard their reputation as expert witnesses whose contributions to the legal arena are esteemed and respected. By adhering to high ethical standards, maintaining transparency in our processes, and continually advancing our knowledge and skills, we can bolster our professional standing and continue to provide valuable insights within the legal context. 🌿

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ASCA Consulting 2024 Academy

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