

Forensic evidence testimony — some thoughts



Introduction

In our last column we took a look at presenting the evidence report. This time we will discuss some tips that will help the new player to testify with credibility. The first thing that must be remembered is that any court appearance is an adversarial process. As an independent technical expert you must always be sure to remember that you are neither an advocate nor defender of any position. What you have found during your investigation and analysis should be presented in neutral terms as facts and, unless required, not as opinion. Opinion can more easily be disputed, requiring you to defend your assertion. A good attorney may be able to rattle or confuse witnesses and by doing so can sometimes reduce or negate their testimony.

Who is an expert?

As of the writing of this column, there is to my knowledge, no internationally accepted certification of electronic forensics professionals. This will, no doubt, come in time. There are specific organizations, usually vendors of a product that will certify completion of a successful trainee in the use of their product. This certification contributes to one's credibility but in isolation is not normally enough to constitute international or local recognition as an electronic forensics expert. Law enforcement, in various jurisdictions, has formal training programs that are well established and these offer a good degree of credibility. Credentials provide the Court with a level of confidence that your testimony is based on sound best practice techniques. Because there is no formal accreditation, and no formally recognized standard for investigative techniques and forensics experts are not currently required to be licensed, at this point just about anyone can claim to be an "expert".

Those in law enforcement have their training as an advantage when testifying as an expert witness. However, no matter where you hang your hat, you must be involved with and participate in your community of interest and be able to prove it. This adds to your credibility because it provides a conduit for new ideas, techniques and tools that might otherwise be missed. It also offers an opportunity to talk with others of a similar interest about various problems faced in the course of investigations and analysis. Often, innovative techniques, tools and short cuts emerge and are shared amongst practitioners who participate in these forums. Most forensic breakthroughs are not written about in any formal journal. In fact in some cases, techniques that are found to be successful are deliberately kept confidential to give the "good guys" an edge. So, you just cannot go out and find answers in a forensics journal (I don't think there even is one yet).

Being a professional

When testifying in a court of law, you are being judged in every way. Not only is your testimony being appraised but so too is your demeanour and appearance, the quality of your report and documentation, and the directness and confidence of your answers. All this will influence the level of confidence placed in your testimony by those who witness it. Technical people sometimes do not understand that appearance may raise or lower the value of the evidence they present. You are a professional – look and act like one. The report and documentation that you create for others to see must reflect the highest standard of quality and accuracy. That means that there should be no spelling or grammatical errors within it. It must also be put together in a logical sequence that helps the reader/audience/jury to see and easily understand your evidence.

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Fear of public speaking

It's been often said, that which is most feared by just about everyone is having to speak in front of an audience. This fear can be explained by a number of factors. First, a courtroom is a new, intimidating and normally unfamiliar audience who, to be sure, are critical of what they hear. Second, we often feel that we have nothing of interest or importance to say. Or that we will say or do something stupid and be ridiculed or discredited. Third, as technical people who almost always control their environment, we have no control of the court proceedings. Fourth, cross-examination is, by its nature, adversarial and can be stressful to say the least. Finally, every word is transcribed and becomes a part of the Court record. This in itself may be intimidating.

Why then, do we want to participate in such a forum? Because it is part of the game we're in and one of the most important duties of forensic professionals. Anyone can do the technical work. Being able to explain and defend what has been found and talk in easily understood terms about what it means is a challenge. Every court appearance should be treated as an opportunity to hone and sharpen one's speaking and reporting skills. Those in law enforcement will most likely have no choice about testifying. However, those who have a private practice get to choose their cases. That choice should be made with care and a good knowledge of the attorney(s) that you will be working with. Don't work for a jerk. There's not a deal in this world that you can't walk away from.

Having said that, it should not be considered an oratory contest. Questions asked by the attorney on your side of the case should be known and rehearsed ahead of time. The expert witness should normally not be surprised by any questions put by his/her allied attorney. Testifying means answering questions in a clear, precise and concise manner without volunteering any information that is not

necessary to answer the question before you. Every additional piece of information not asked for opens a door for further questioning. This can dilute, confuse or obfuscate the importance of the initial answer.

Often the opposition attorney may attempt to rattle you or to weaken or discredit your testimony by asking questions that are difficult or that question your competence. Be thoughtful in your response and remain steadfast in what you have said but do not ever become argumentative with the cross-examining attorney (or anyone else in the courtroom for that matter). That is a recipe for disaster.

When on the witness stand, you are in view by all who participate in the courtroom drama and in some cases the proceeding is being video taped as well. With that in mind, no matter how restless you may become or, how difficult the questions or, how obnoxious the opposing attorney, never allow yourself to betray your feelings physically. Do not sigh or grimace or fidget or in any other way give away your satisfaction, displeasure or impatience. Remain calm and look it. The reason for this physical control is two-fold. First, you may alert the opposing attorney to a potential weakness in your testimony. Second, you may appear to the jury to be tentative or unsure about your evidence and that could diminish the effectiveness of your evidence and testimony.

Exhibits

It is often necessary to use graphical exhibits to make a piece of evidence clear or more easily understandable. Target your audience. Any exhibit put forward also becomes a part of the record and should be constructed at the highest standard – simplicity and honesty is best. Do not try to make a point by an inaccurate or a misleading graphic. Remember, the impression given by it will be a reflection of your professionalism or at least how that

professionalism and expertise is perceived by the reader/audience/jury. We are NOT advocates. We find the truth and report it. Nothing more.

We often take for granted that everyone knows what we know. With that expectation we often use terms of the art (jargon and acronyms) casually in our conversation. In a courtroom, we cannot assume that anyone knows what we know. Evidence explanations and graphics must be couched in terms that anyone can understand. Do not use graphics unless their use enables the clarification of a complex point of evidence or the clarification of a vital technical issue – leading to an understanding of the evidence presented and/or how it was obtained.

Bringing it all together

Forensic investigators are only as good as their skill and ingenuity coupled with their integrity. It is not the role of the investigator to be an advocate or to “get” anyone. The role is clear. It is to find the truth and report it and testify to it as clearly, concisely and precisely as is humanly possible without the colour of bias. The

exception can be seen in law enforcement. Within that community, you’re either with us or against us. That ethos and culture has no place within private forensic investigation. Our reputation can only be tarnished if we allow bias, for any reason, to become a part of our work. Finally, the only unique thing that we have to sell is that integrity. Once that is sullied, it may not be able to be recovered. Be forewarned and govern yourself accordingly.

Further reading

An excellent reference for those who have to testify as a forensics expert and want to know more is *A Guide to Forensic Testimony – The Art and Practice of Presenting Testimony as an Expert Technical Witness* by Fred Chris Smith & Rebecca Gurley Bace (ISBN: 0-201-75279-4).

We’ll leave it here for now and continue next time with some ideas about setting up an electronic evidence forensics laboratory. Remember, if you have questions or comments (critical, complimentary or helpful) please do contact us.