

I've been a journalism expert witness in approximately 10 defamation cases in state and federal courts, but have testified only once—and that was my first case in 1986. And while I have come to expect that result, either because the case is settled out of court or because the judge won't allow expert testimony, I still believe that an expert witness can be a valuable team member.

An article in Legal Times by Steven Moss ([http://www.legalaffairs.org/issues/March-April-2003/review\\_marapr03\\_moss.html](http://www.legalaffairs.org/issues/March-April-2003/review_marapr03_moss.html)) makes all expert witnesses sound like prostitutes, saying that “experts, who are hired and paid by one side in a case, get compensated for saying what the lawyers want to hear” and get hired only if they can help a lawyer prove the case. It is true that the expert takes sides, but the journalism expert who doesn't privately point out problems isn't of much use, as I'll show later.

Without citing specific cases, I'd like to run through some of the good and bad assistance journalism experts have provided in some of the cases I've been involved in.

In the case I mentioned at the outset, a newspaper had failed to follow standard journalistic practices in gathering information for a story, editing it and checking on the reporter. The story was a classic example of what not to do when reporting on a malpractice lawsuit, from quoting erroneous and irrelevant statements by the plaintiff to not calling the doctor for his comment (even though journalists know that doctors don't typically comment when they're being sued for malpractice). My job was not just to help the lawyers prepare their case, but to do it in a way that when I testified, the jury of laymen understood what journalism was about.

I also tracked down information on the newspaper that suggested it had delayed publication of the story to a Sunday because it had a larger circulation then and would get more bang out of the sensationalistic story. And I did research on the newspaper's expert, particularly his major publications. (From what I could tell, the newspaper's legal team did not instruct its expert to do the same on me and seemed to know nothing about me. The team quickly found one of my textbooks and was better prepared for my second day of testimony.)

The malpractice story was a textbook example of how not to practice journalism, but I've also had to explain textbook examples of well reported stories. In a case involving gambling, Indians and alleged mob ties, my audience was not a jury, but a single judge who wanted to pull one sentence out of a story as an example of bad reporting when in context it was very clear that the reporters had gotten all sides of the story. That one sentence, in context, was only one of those sides. Eventually, my view prevailed and led me to say to the lawyers I was working with: You cannot give emphasis to one sentence in a news story any more than you can pull a sentence out of a judge's decision and claim to have the whole meaning.

I once found myself parsing a lawsuit in defense of a reporter who filed a story about a doctor being sued for malpractice because he had botched the removal of a wisdom tooth. As it turned out, the doctor performed two procedures on his patient that morning and it was in another area of her mouth that he made a mistake. But the lawyer who wrote the lawsuit use the singular “procedure” or “surgery,” thereby misleading the reporter who based his four-paragraph story on the lawsuit. Because I not only taught editing, but had written textbooks on editing and on language skills, I argued in my videotaped deposition that the reporter should not be penalized for the lawyer’s grammatical lapse. It was for naught. The judge, about to retire, ordered the sides to settle without watching my deposition.

A good expert will also make sure the attorney he is working for is aware of any problem areas in a story. I once worked for an out-of-state newspaper that published a column containing some damning admissions by the reporter, especially the failure to follow up on a phone call to double-check information. However, the newspaper’s attorney assured me that he could prove through other means that the reporter had good cause to believe his information and so that wouldn’t be an issue. Fine, but to be forewarned is to be forearmed. As I noted earlier, an expert witness cannot be a yes man; in fact, should play devil’s advocate.

More recently, a newspaper was sued for, among other things, reporting that the driver of a car was not under the influence when she ran a stop sign and collided with another car. The newspaper’s lawyer agreed with me that it was a common phrase and commissioned me to conduct a national search of newspaper databases using that phrase. The search yielded the results I expected—that given society’s emphasis on driving while intoxicated, it had become accepted practice for newspapers to mention the lack of alcohol or drugs in a driver’s system. In fact, such information is routinely part of the standardized police accident report form used in Pennsylvania.

I was especially looking forward to testifying in this case because I felt the newspaper was being hung out to dry in what appeared to me to be a petty local political dispute. Again, the story was sourced correctly and information in it attributed. The judge would not allow either expert to testify, but the newspaper’s lawyer did an excellent job without that information and the jury decided quickly in favor of the newspaper. Also, a great deal of money was spent on a case that, I believe, should never have been filed, let alone reached a jury

Of course, expert witnesses are paid, but I have provided advice to lawyers without turning on the meter. For example, a lawyer I had helped in a previous case consulted with me once about what newspapers do to correct their own mistakes. The newspaper in question had said it would do a follow-up story quoting the person it had made multiple mistakes about, thus giving his side of the story. But this wasn’t about “sides”; it

was about a reporter misreporting what had happened. I explained what I regarded as the minimum action a newspaper should take in that circumstance and the lawyer was able to resolve the issue to his client's satisfaction.

In the previous case, I was able to give the lawyer a suggestion on how to demonstrate that the newspaper he was suing had failed to follow its own policy on identifying people involved in criminal stories. Once it became apparent to the newspaper's lawyer that he was dealing with a breach of policy, he helped get the case settled long before a trial date was ever contemplated.

I have worked for plaintiffs and defendants and I have also turned down cases. I once turned down a newspaper because I didn't feel I could defend the story in court. (The newspaper won.) In another circumstance, I tried to talk a lawyer out of suing a newspaper that had used the word "indicted" in a civil suit, clearly a venue in which people are not indicted. Of course, I'd flunk a student for doing that, but I don't think I'd want to burden a court calendar. In fact, I would love to see more mediation and fewer defamation suits all around.

A study done by Randall P. Bezanson, Gilbert Cranberg, and John Soloski published in 1987 as Libel Law and the Press : Myth and Reality found that people who felt themselves wronged by the press really wanted a correction and were angered by the brusque way they were treated by the press. And when lawyers got involved, that merely upped the tension level on both sides. In fact, my first case involved a doctor who would have preferred a correction over the lengthy trial in which he initially won a six-figure judgment.

As I hinted earlier, I've seen some examples of an expert having the wrong background. When I was called the first time to be an expert witness, I told the attorney he had the wrong person, that he wanted the person who taught communications law. No, he replied, I want someone who can talk about journalistic practices. Nearly 20 years later in another case, the expert for the plaintiff was a professor who taught communications law and his report focused on the law, not on journalism. I can't say it mattered because the case was settled out of court, but I suspect that in court the newspaper's attorney would have made much of the expert's failure to discuss journalistic practices. Also avoid an expert who is outside his field. For example, if you're defending or suing a newspaper, your expert should come out of print journalism, not broadcast. Be sure he has the right professional background. A Ph.D. who has never been in the newsroom isn't much help. Do read the other expert's publications. And don't quarrel in front of a jury over whether or not the expert is an expert.

A newspaper's lawyer once did that with me and the judge became so vexed he cut him off and said: "The man says he's an expert; he's an expert. It's for the jury to decide whether or not he really is." The plaintiff won.

So while it's true that experts seem to be allowed to testify less and less, you should still object if your expert is not allowed. If nothing else, it leaves room for an appeal later. Overall, a journalism expert can be of great use, even if he or she doesn't testify.

R. Thomas Berner is a professor emeritus of journalism and American studies at the Pennsylvania State University. He lives in Santa Fe, New Mexico.