The Usage and Training of a New Expert Investigator

Most Attorneys' will recognize that there is a difference between an investigative consultant and an expert witness. The paramount distinction is that what a consultant does is not discoverable, whereas everything an expert witness does is. Secondly a consultant does not have to have the courtroom attributes that would be required of a testifying expert.

Sometimes the world's most qualified scientist would make the worlds best consultant and the world's worst witness. When an attorney seeks out inexperienced persons for usage in the arena of expert witness in aviation investigation, he should be aware of some potential pit falls. This section is written for the benefit of both attorney and inexperienced investigators.

An aviation accident investigator acting solely in that capacity is first a fact gatherer. Then depending upon his experience, he is called upon to make factual evaluations of the
data so retrieved.

He is trained to assess possibilities, contributing factors and sometimes the ultimate issue of determining probable cause or causes. If the investigator is trained and employed by the N.T.S.B. the investigator is supposed to be restricted to fact gathering and making factual evaluations in his specialty areas.
Probable cause is assigned by the Board in Washington.

The military has a similar situation where the safety board makes the determination of cause, contributing factors, expresses opinions and makes recommendations for safety. After their report is complete it is routed to superiors for acceptance and correction or rebuttal.

In neither case is it the boards' intention or purpose to determine legal fault. The purpose of these boards is to find out what caused the accident and to make recommendations concerning the entire situation that would prevent a re occurrence and make all factors safer. Investigators from this background are not trained in legal words of art used to determine fault.

An investigator so trained and experienced will not know the vocabulary and words of art required by the legal community, and
if not forewarned neither will the attorney realize that a communication problem may exist.

For instance the investigator may use the words, pilot error, maintenance error, training error, and supervisory error. To the lawyer this may mean or sound like negligence. To the investigator it may mean a simple mistake.

An investigator may say that a part was defective. He may mean that the part broke a fact of no legal significance. He will not be using the word defective to mean that: it caused an unreasonable risk of harm, that it failed consumer expectations, or that it failed the risk utility test in that it is beneficial usage was outweighed by the risk of harm that its usage caused. An investigator will over use the word possible, since it was never his job description as investigator to prioritize the possibilities. This was left for others sitting on the board or at headquarters..... The investigator will have no inkling that the word he utilized often has no legal significance, or that a judge would instruct a jury to give no weight to mere possibilities.

The investigator will have the concept strongly imbedded that the word" **probable**" is the other half of the word" **cause** " just as some sailors I knew thought that " mother " was half a word . He will not be used to the word meaning in the legal sense that means slightly more likely than not. Unless told, he will be uncomfortable with prioritizing the likely hood and significance of possibilities into legally significant relative probabilities and certainties.

A man with the investigators background will be well versed in documenting and substantiating the facts that he has discovered and discussing the methods involved in their discovery. This investigator will be very able to assess the validity and reliability of the facts recovered .This was always within their job description and work background.

Other words, with precise legal meaning, he will not be familiar with, or worse,may have the wrong concepts of are: sole proximate cause , proximate cause ,and producing cause. He also will not be attuned to the idea that he is now expected to express his professional opinions as to what the facts that were gathered means. His initial reluctance to do this will come from the fact that previously he was excluded from expressing his opinions about the meaning and significance of his findings. This was true in the military and is true with the N.T.S.B.

A First time expert may take to the new arena like a duck to water, others will take longer to make the transition. An attorney need spend the time to assure that there is no confusion over the new terminologies and new expectations.

RULES and GUIDELINES to FOLLOW

A. Never extend the witness beyond his expertise.

B. Always be 100 percent truthful

C. Always be clear as to what is fact and what is opinion.

D. Practice direct questioning and cross examination questioning

E. Always have evidence the witness relies upon, directly available in usable format.

F. Since aircraft accident investigation is so complex, there is nothing wrong with the witness referring to his notes.

In every case there are two sides to the story. An attorney has a choice on direct. He may choose to only present the good and, wait for the opposition to cross examine about the bad. The attorney is taking the chance that it appear to the jury he was trying to hide something when the expert attempts to explain away the bad. The reason an attorney might take such a tack is that the opposition might not possess the downside information sufficient to cross examine about it. THIS IS UNDERESTIMATING THE OPPOSITION… I chose to never underestimate the potential harm a sea slug poses. I submit that Goliath's last thought on earth was "I wish somebody would have told me about the slingshot."

It is my philosophy to emphasize the good and expose and dispose of all issues unfavorable on direct examination. It is my belief that a jury will turn on any lawyer who is perceived to be hiding anything, be it important or trivial.

Since truth is the paramount issue underlying any courtroom drama, the problem is getting the truth to the jury in a believable and understandable fashion. This is often the job of the expert witness who must be a truthful teacher to the jury.

I always tell my expert that their audience is a classroom and the jurists are students. I suggest that the teacher must teach to the experience level of the least experienced juror without talking down to the remainder. I remind the expert that even the lawyer presenting him for questioning is far less understanding than he is of the technical subject matter. I suggest that the expert consider the courtroom in the following manner:

Assume that the attorney is your 15 year old son who has asked you to come to his science class and explain the intricacies of aircraft investigation (or his specialty field). The format for the classroom will be that your son will initially ask you direct questions. Some of these questions may even be a little imprecise. You as dad do not want to embarrass your son by saying that was a dumb question. Instead you want to get the information to the students while not making your own son look foolish.

The object of this classroom visit was to impart as much information as possible to the class in as little time as was available.

Later you will, be asked questions from a designated class member. When he is asking the questions you are not as concerned about making that questioner look good. You must always tell the truth, and when truth demands it agree with the questioner, When you disagree with this examiner do so with the same degree of explanation that leaves the class with an understanding of why you disagree. Remember you are a teacher.
Don't be like your last college Physics professor who left you clueless as to what he was talking about. The class is later going to deliberate and vote, and an uneducated

electorate is apt to err in its choices.

I also stay away from overused experts who have a history of working for all plaintiffs or all defendants. Since experts are paid for their time and expenses, any such witness appears biased if he has made a living representing only variety of client.