



Feder's

Succeeding as an Expert Witness

Fourth Edition

Harold A. Feder
Max M. Houck



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Succeeding
as an
Expert
Witness

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Harold A. Feder
with Revisions and Additional Text by
Max M. Houck



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Witness

Fourth Edition

This book is dedicated to Lucy, who is my anchor, my tiller, my compass. Without you, I'd be adrift at sea.

My father, Max W. Houck, for being so supportive of my education. I owe what I have attained to you.

This book is also dedicated to the narrow-minded, short-sighted, ignorant nitwits who irritate me, much as sand does oysters, to the point of productivity. I hope this is a pearl.

M. M. H.

Foreword

Peter Neufeld

What does it mean to succeed as an expert witness? Is success measured by whether the side that summoned you to the witness stand prevails at trial? By recommendations that you make a convincing presentation to judge and jury? By the size of the fee you command in the marketplace or the promotions and awards bestowed upon you in the public sector? My own belief is that none of these are benchmarks of success.

Forensic science and, by extension, expert witnesses are at a crossroads. The extraordinary power of DNA to identify the guilty and exonerate the falsely accused is one factor driving the wave of new graduate programs and expansion of undergraduate departments in forensic science. But while DNA typing may be a “truth machine,” all too frequently, the truth revealed in postconviction DNA testing is that years earlier, less powerful (by today’s methods) or misapplied forensic science had been presented at trial by the “successful” expert witness to secure what turned out to be a false conviction.

Television’s fictionalization of crime scene investigation is so successful that the public seems to prefer crimes that are investigated by technicians in white lab coats rather than by old-fashioned gumshoes in rumpled, coffee-stained sport jackets. But is the forensic community’s reliance on TV misplaced when the consortium of national forensic organizations parades the TV actors before Congress to lobby for crime lab funding?

Finally, the national mobilization to combat terrorism and defend the homeland lends urgency and patriotism to the justice system; the “righteousness” of the cause, however, may inadvertently compromise the integrity of the result. In the identification sciences, “matching” the suspect to the crime sample can help win the war on terror much the same as it played an important role in the war on crime. But since experts utilize subjective human judgment, expectation and suggestion can influence outcome. Indeed, one lesson from the DNA postconviction exonerations is that examiner and confirmation bias are involved in too many erroneous hair, toolmark, and bite mark inclusions, as well as mistaken findings of homicide and arson when the cause was ultimately proven to be accidental.

In the aftermath of the 2004 terrorist attack on a commuter train in Spain, the FBI erroneously claimed that the fingerprint of an Oregon attorney with ties to the Islamic community but no criminal record “matched” a fingerprint found on a plastic bag containing detonators found near the Madrid crime scene. In the affidavit used to justify the arrest of the lawyer, the two FBI examiners swore they were 100 percent certain of the match. The Spanish police insisted that the FBI was wrong: an Algerian terrorist was ultimately linked to the fingerprint. Without the persistence of the Spanish police, the FBI would not have reconsidered its findings. One irony of any mismatch is that whenever an innocent man is falsely charged or convicted, the real criminal or terrorist remains at liberty to commit further acts of violence. Faulty forensics may wrongly exclude the factually guilty.

For years, the dominant argument for not regulating experts and forensic sciences was that every time an expert steps inside the courtroom, his work is vigorously peer reviewed and scrutinized by opposing counsel. A forensic scientist might occasionally make an error at the lab bench, but the “crucible” of courtroom cross-examination would expose it at trial. The crucible, however, turned out to be utterly ineffective. In not one of the forensic science scandals of the last 20 years were the transgressions of experts revealed by counsel at trial.

Although forensic science is used most commonly in crimes of violence, and state courts receive almost two hundred times more criminal prosecutions than federal courts, the overwhelming majority of challenges to the admissibility of expert testimony occur in civil cases in the federal system. When the courts in the 1990s moved from the *Frye* standard of admissibility to *Daubert*, they obligated judges to assume the role of “gatekeepers” and to exclude proffered scientific evidence unless it rested on scientifically valid reasoning and methodology. But since most criminal defense lawyers lack the training, skill, time, and money to mount credible challenges to speculative expert testimony, there is nothing for a gatekeeper to tend to. If the crucible is a fiction and the judicial system fails to provide meaningful controls to ensure the integrity of the process, other remedies must be found further upstream.

Because an expert’s conclusions should be predicated on first principles of science, one lesson of the DNA revolution is to require a basic research model that will test the core assumptions in each expert’s discipline. Whereas DNA typing rests on a stable foundation extensively rooted in research well documented in the literature, many of the forensic sciences have not been put through the same paces. Basic research takes money and independence, more than agencies such as the National Institute of Justice can provide. Given the urgency of international developments and the success story of DNA, I think it likely that the federal government will rise to the occasion.

Another lesson of DNA typing is the necessity that other disciplines develop methods to provide meaningful frequencies of attributes and characteristics. New protocols need to be established to minimize unintentional bias. Essential principles of statistics, long overlooked by experts, need to be incorporated to substitute random match probabilities (the kind used routinely in DNA) for the uninformative and often misleading terms *match*, *similar*, and *inclusion*. The published probabilities coupled with known error rates, based on external blind proficiency tests, could then be presented in court. The final downstream fix is to establish reasonable parameters for the content of expert reports and live testimony so as not to distort the probative value of the evidence. An expert’s job is not simply to answer *all* the questions propounded by the attorneys on both sides. If a question is inherently misleading or scientifically irrelevant, the expert has an affirmative duty to alert the court and put the testimony back on track.

At the beginning of the twentieth century, a critical awareness and creative energy ignited a movement to modernize clinical laboratory medicine. One hundred years later, the time is right for a comparable transformation in forensic science. It is an exciting time for everyone who is part of this community. Succeed by being thoughtful and rigorous scientists. Succeed by being honest, objective, and ethical expert witnesses.

Preface

One of the classes I teach at West Virginia University is the expert witness class. For many reasons, it is one of the most difficult classes the students take. They are used to reading, memorizing, synthesizing, and being tested (which, in my darker moments, I refer to “read, remember, regurgitate”). They are not used to developing a deep-seated, broad understanding of their scientific discipline, being challenged on nuances and things they did or did not do, and thinking on their feet (or seat, as they are in the witness chair). What you face as an expert in the courtroom is completely at odds with what you have learned as a scientist. I tell them at the beginning of the course that if I could take the semester to teach them boxing and poker, instead of expert witnessing, the effect on their readiness for testimony would be much the same. They never listen, unless they box or play poker, and they are inevitably bloodied and emotionally broke by the end.

In his fascinating and insightful book *Strong Representations*, Alexander Welsh explains the development of courtroom presentations into narratives through the use of circumstantial evidence. The shift from person-based testimony to thing-based testimony is instructive for our purposes, as it creates and opens the doorway for the modern expert witness. People may lie or have their eyes fooled, but facts, going back to Aristotle, were considered inviolate. Having someone represent those facts for the plaintiff and defendant was the first great step toward the court system employed today. Welsh notes,

People need not go about telling their stories and hoping for the best; instead, the stories should be managed with a careful view to the consequences. This management obviously takes ability and experience and, above all, hard work and therefore can best be left to professionals.¹

Any evidence that is not a firsthand account is considered circumstantial, that is, it relates to the circumstances surrounding the past activity in question. Past activity had to be inferred from the stuff left behind that was indicative of the actions. Physical and real evidence grew in importance but never dethroned the eyewitness testimony. Ultimately, Welsh continues, managing the evidence became nearly as important as the evidence itself—the relaying of the evidence and its significance *was* the narrative in chief. This was most meaningful for prosecutors, of course, as they carried the burden of proof. To this day, evidence is largely the domain of the prosecutors and their partners in jurisdiction, the police.

A diaspora appeared from the start. The governmental law enforcement agencies had their pro-state mandate. The scientists, although often employed by that same state, had been schooled in the neutrality and objectivity of science: taking sides, other than the side of science, is inherently bad. As my colleague Jim Fraser at the University of Strathclyde has noted, “The relationship between forensic science and the police is a failed marriage.” Neither party gets exactly what it wants. And this is

¹ Welsh, A. *Strong Representations: Narrative and Circumstantial Evidence in England* (Baltimore: Johns Hopkins University Press, 1992, 133)

true every time scientists step into a courtroom—they are the consummate stranger in a strange land. The renowned forensic entomologist Lee Goff of Chaminade University in Hawaii puts it succinctly:

Academics and the legal system do not usually coexist in comfort. The laws of science and the rules of evidence have little in common. In theory, Academia functions on the principle of collegiality. In theory and reality, the American legal system is adversarial. The average academic entering the legal system is in for a tremendous shock.²

Another of my admonitions to my expert witness students is imagine you are dressed in white shorts, a polo shirt, light tennis shoes, and are carrying a tennis racket. You step through a door onto a large field where multiple large men wearing armor pound you into the earth. You were dressed and ready for tennis but you were on a football field: not your game, not your rules, not your equipment. Welcome to the courtroom.

Having said that, the courtroom need not be a harrowing experience. An expert has been invited—by a subpoena—to the courtroom because of his knowledge, education, and experience. All actions seemingly to the contrary, they *want* you, they *need* you in that courtroom. The prepared expert, outfitted with the sword of humility and the shield of patience, need fear nothing from even a highly skilled attorney. In his wonderful book *Testifying in Court*, Stanley Brodsky describes the courtroom-familiar witness:

The courtroom-familiar witness has a relevant educational background, understands how expert testimony fits into judicial decisions, is unusually detailed in records, and seeks out early meeting with the attorneys...speaks clearly and persuasively to judge or jury in terms they understand...is sensitive to traps in cross-examination and is not fearful about being cross-examined. These witnesses have no problem in admitting what they do not know and being strong and assertive about what they do know. The courtroom-prepared witness has known what to expect and typically departs with at least neutral feelings, sometimes quite positive feelings.³

This idea of the prepared witness can not be stressed enough. If you are not prepared, you should not be in the courtroom—you will, at best, be ineffective and, at worst, dangerous.

The need for this book became self-evident a few years ago when I had trouble finding a suitable text for my court testimony class. I had to settle—and I do not do well with settling. In late 2005 I was asked to review and possibly update and revise *Succeeding as an Expert Witness* by Harold A. Feder (1932–1995), a Colorado attorney and longtime national “expert on experts.” This landmark handbook provided an excellent overview of the expert witness process, primarily from a civil law perspective for private experts. I recognized an opportunity to produce the kind of comprehensive, useful text for my forensic science students that was otherwise unavailable. It meant a strong rearrangement of the existing contents and scope, and some signifi-

² Goff, M. L. *A Fly for the Prosecution*. (Cambridge, MA: Harvard University Press 2000), 174.

³ Brodsky, S. *Testifying in Court: Guidelines and Maxims for the Expert Witness* (Washington, DC: American Psychological Association, 1991), 9.

cant additions, to encompass both forensic science students (mostly headed to public labs and criminal cases) and private experts (private labs that handle civil cases). This book is the result of that labor.

As a trial lawyer for 35 years, Harold used experts in most of his cases. Feder wrote and lectured extensively on legal matters, including expert testimony, throughout the United States and Canada for over 20 years. He represented experts. He was engaged as an expert. And he went after experts as opposing counsel in deposition and cross-examination with legendary zeal and effect. His unique experience, perspective, and insights combine to the great benefit of any expert: student, novice, or veteran. I did not know Harold Feder, but I understand that he was a man of great compassion, optimism and good humor, personally and professionally. He made all he did look easy, because he did it with such grace, style, and wit that most never saw the countless hours of hard work that went on behind the scenes to cover all the bases. His great hope was that the material contained in this book would enhance ethical and professional competence for expert witnesses—and attorneys—working within all aspects of the dispute resolution process. He stressed that “advocacy is for the attorney and objectivity is for the forensic expert.”

Harold Feder wrote this text’s underlying work, *Succeeding as an Expert Witness*, in three editions, the first in 1991, the last appearing posthumously in 2000. That is why his name appears in the current title and as primary author. I would have preferred the privilege of working with Harold as living coauthors of this text. Fate and destiny had it otherwise. His son Harlan, the book’s previous editor and publishing director, says Harold and I “would have gotten on famously.” I will take his word for that. I have done my best to remain true to the substance, essence, style, and integrity of Harold’s work and voice, and of my own. Not an easy task in these circumstances, but a most rewarding one.

Acknowledgments

Acknowledgments are a funny thing: the author wants to take space to publicly thank the people who helped with the book in some way, but often the author is the only one who knows these people. Not so, in this case.

First, I want to thank Becky McEldowney-Masterman for having an enlightening conversation with me in Hong Kong. Had I not dumped on her about my frustration at not being able to find an expert witness textbook for traditional forensic scientists, this book would not have happened.

My students in FIDP 406, Expert Testimony, also deserve recognition for helping me with this text; I always say that students are the best teachers.

The ultimate thank you, however, goes to Harlan Feder for trusting me enough to work with his father's book and update it. Faith like that is rare these days. I cherish the fact that a *mensh* like Harlan would entrust his father's original *Succeeding as an Expert Witness* to my care. Thanks, Harlan, I hope I have not let you down.

Authors

Harold A. Feder (1932–1995) was a trial lawyer with 35 years of trial experience. Most of his cases involved the use of experts. Feder was a fellow of the College of Law Practice Management and the American Academy of Forensic Sciences, a member of the Association of Trial Lawyers of America, past president of the Colorado Trial Lawyers Association, and an active member of the American and Colorado Bar Associations. Feder wrote and lectured extensively on legal matters, including expert testimony, throughout the United States and Canada for over 20 years. He wrote *Succeeding as an Expert Witness* in 1991; the text was revised in 1993 and updated with additional text in 2000.

Max M. Houck is the director of the Forensic Science Initiative, a program that develops resources and training for the forensic industry. Houck is a trace evidence expert and forensic anthropologist who has worked for the FBI Laboratory, the Tarrant County Medical Examiner's Office in Fort Worth, Texas, and private industry. Houck is a graduate of Michigan State University and a fellow of the American Academy of Forensic Sciences, among other professional organizations. Houck is also director of Forensic Business Research and Development in the WVU College of Business and Economics. He is a senior teaching/research fellow in the Department of Applied and Forensic Chemistry at Curtin University of Technology in Perth, Australia.

He has coauthored and edited *Mute Witnesses*, *Trace Evidence Analysis: More Cases from Mute Witnesses*, and *Fundamentals of Forensic Science* (with Jay Siegel). Houck is the chairman of the Forensic Science Educational Program Accreditation Commission and serves on the editorial boards of the *Journal of Forensic Sciences*, *Journal of Forensic Identification*, and *Science and Justice*. Houck is also coeditor of *Forensic Science Policy and Management*.

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