SYMPOSIUM

The Political Scientist as Expert Witness

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Political scientists serve in courtrooms as expert witnesses on many topics related to their professional training: elections, same-sex marriages, employer sanctions for hiring undocumented aliens, school desegregation, political asylum requests, property rights, and racial profiling, among many others. It is not by chance that we—the authors—have chosen to testify as experts in cases concerning elections (see also Cain 1999). Election-related cases compose a large percentage of all cases involving political scientists brought to court: a study of references to expert testimony by political scientists in published federal district court decisions from 1950 through 1989 reports that 61% involved election law issues (Leigh 1991). Our replication of this study for the period of 2000 through December 18, 2010, reveals that 74% of such cases (28 of 38) involved election law issues.[1] These cases involved issues of minority vote dilution, redistricting, alternative election systems (cumulative and limited voting), campaign financing, voting equipment and invalid ballots, voter registration, nominating petition requirements, and a number of other issues.[2]

Our political science expertise is particularly relevant to issues of how political competition is or should be structured and how election structures interact with the behavior of voters to affect election outcomes and other facets of the electoral process that are often litigated. Yet despite political science's relevance for this area, relatively few political scientists serve as courtroom expert witnesses, perhaps because these jobs are not easy to find. This kind of employment is not listed in the APSA Personnel Service Newsletter, the *Chronicle of Higher Education*, or any other standard job listing. Expert witnesses may be recruited through informal networks or by over-the-transom requests. They may be referred by a friend, schoolmate, or mentor (as happened to McDonald), or they may have had a chance meeting with an attorney at a party (as happened to Engstrom). A nonacademic practitioner may need an expert in a particular field and be sufficiently familiar with the scholarly literature to identify a likely candidate. Organizations such as the Southern Coalition for Social Justice have even begun recruiting and training scholars for the rigors of expert witness testimony in their policy advocacy areas.

The historical lack of formal recruitment mechanisms may be diminishing as time goes by, but this absence is not the only impediment to political scientists using their skills as expert witnesses. This type of work does not follow some scholarly norms. Witnessing often occurs on a fast track and takes precedence over other responsibilities. The legal process is confrontational, not collegial. An attorney's goal is to win a case, not advance social science theory. Lawyers prefer experts who state their findings in simple, nonequivocating terms.

We hope to help political scientists understand these challenges so that they may become expert witnesses when an opportunity arises. This article introduces the role and responsibilities of expert witnesses, the standards that their work must meet to qualify as "expert," and the adversarial context in which they testify. Understanding the latter point is extremely important, because this environment differs greatly from the scholarly forum with which we are all familiar. This difference in context can make academics uncomfortable. Despite understanding in the abstract how the adversarial context works, scholars are quite often shocked the first time they are subjected to a deposition or cross-examination at trial and may not respond as planned. Experienced lawyers have noted that "the world's leading expert may be a terrible witness" (Horowitz 2005, 18). Successful expert witnesses must be able to handle themselves in this pressure-cooker. They must have a thick skin; good concentration; and the ability to explain concepts, measurements, and analytic techniques to persons who have no formal training in them. They must be able to deliver their work product under severe time constraints. For some political scientists, their first experience working on a case is their last; they simply do not want to go through the ordeal again, or worse, they perform so poorly that no one wants to hire them in the future.

If the previous paragraph has not scared you off, this article offers a place to start for scholars who want to learn more about being an expert witness. There are plenty of benefits to working as an expert witness, such as the great satisfaction that can come from this work; the ways in which witnessing can enrich your teaching, research, and writing; and, of course, the sometimes impressive financial remuneration. First, however, we describe this job in more detail. The following section outlines this work's challenges and rewards, as well as its ability to contribute important service to society while rounding out and enriching a scholar's career—a defining characteristic of all pracademic work.

WHAT IS AN EXPERT WITNESS?

The major distinction between an expert witness and a lay witness in a court of law is that an expert is allowed to express opinions in court (Posner 1999, 92). Lay witnesses are "fact witnesses" who testify based on their direct, personal knowledge of people and events. Expert witnesses are allowed to inform the court about their conclusions based on their examination of information. The federal rules regarding the use of

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expert witnesses in litigation are described in the Federal Rules of Evidence.[3] Rule 702 identifies a person as a qualified expert based on his or her relevant "knowledge, skill, experience, training, or education" and the formation of his or her opinions through the application of established principles and methods to the facts of the case (Engstrom 2005; Mitchell 1978). Witnesses who present themselves as experts can have their credentials challenged by the opposing counsel. This challenge is usually a pro forma exercise, since an attorney is unlikely to present an unqualified expert to a court. Still, an expert witness who does not have an established reputation in the area central to his or her testimony can be disallowed from testifying.

THE ROLE OF THE EXPERT WITNESS

As a potential expert, you will typically be contacted by attorneys, not the parties to a case. Attorneys will inform you about the case and provide you with their version of both the legal and evidentiary issues. If litigation is already underway—which it may be in fast-moving election law cases—a copy of the plaintiff's complaint, the defendant's response, and any other filed court documents may provide you with important context to the factual disputes. If he or she is not already familiar with your reputation, an attorney will question your credentials, quiz you about facets of the case, and observe your demeanor to determine if you will make a credible expert witness (Horowitz 2005). In deciding to take your first case, be honestly self-critical in assessing your level of expertise and time available to provide the requested testimony. This initial contact also provides an opportunity to assess the type of lawyer who is recruiting you. Steer clear of an attorney who may pressure you to provide testimony that is in conflict with the facts as you see them (Eaton and Kalman 1994). Your most valued commodity is your credibility. If this is damaged by straying outside your area of expertise or allowing your judgment to be subverted, it cannot be easily rehabilitated (Prager and Marshall 2005).

Ultimately, attorneys decide what an expert will address in his or her testimony (Ruse 1986, 69–71). This power to determine a line of inquiry is the critical distinction between research prepared for litigation and academic research: the expert's role is to answer only those questions that the attorneys decide to ask. Your attorney may consider questions that a political scientist might want to examine to be legally irrelevant. However, this dynamic does not mean that you and your legal team cannot discuss which questions to ask and how to ask them. In our experience, this input is typically welcomed. Ultimately, however, the attorneys will decide what questions will be investigated. You may want to file away theoretically interesting questions related to the case to pursue later, on your own time—which does not begin until the litigation is concluded, depending on the terms of the confidentiality agreement you may be required to sign. Scholars may even be asked to sign such an agreement before an attorney will speak with them about the case.

You must be careful while working on a case because everything that you do that is related to the case while it is pending is potentially discoverable to the opposing side—that is, everything must be shared with the opposing legal team. This information can include anything you used to inform your opinion, including e-mail communications. Opposing attorneys will attempt to discredit your testimony or use it to their favor, and they will tenaciously pursue any indication that you have doubts about your conclusions.

Once the attorneys agree to enter into a contract, the real work commences. The legal team may first commission preliminary analysis from you to determine whether their factual assumptions are supported by the evidence. Such work is usually done in the role of a *consulting expert*, an expert who does not present testimony before the court and whose work is not shared with the other side. If the attorneys are pleased with your preliminary analysis, they may change your role from consulting to *testifying expert*, an expert who testifies. If this shift occurs, all of the work performed, including that done previously as a consultant, becomes discoverable by the opposing side. If your analysis does not support their expectations, the legal team may decide to change its line of argument, engage another consulting expert for a second opinion, or engage another testifying expert to replicate only the portion of your work that is consistent with its argument. This stage of the process demands the highest quality work. Unlike peer review, your data are discoverable and must be shared with the opposing attorneys. The opposing counsel will engage its own experts to replicate and pick apart your analysis. You will have no chance to correct your expert report in response to reviewer comments.

Discovery is the next phase of the process, in which both sides must share all of the evidence that they will present. For an expert witness, this evidence may include anything done in relation to the case. It is for this reason that lawyers often prefer to communicate by phone—and why you need to develop meticulous and consistent archiving habits. You will be required to share all your work in a timely manner. The judge or judges will set a discovery schedule, which can be distressingly short in election law cases, since the subject of the case—such as redistricting or a ballot format—requires a court ruling in advance of an impending election. Judges frown upon expert witnesses who hold up court proceedings by failing to disclose all information, such as data files or any programming code used in your analysis.

As a testifying expert, you are responsible for preparing a report. This document will identify the opinions you intend to express and the analyses you performed to support your conclusions. You will give this report to your attorneys, who in turn will provide it to the opposing attorneys by a court-specified date. When each side employs an expert, which is the usual practice, these reports may be exchanged simultaneously or the plaintiff's expert's report may be provided first with the defendant's expert's report following. These initial reports may be followed by supplemental and rebuttal reports.

Reports are followed by depositions, during which the opposing attorneys will ask you questions in the presence of your lawyers, but without a judge present. These sessions are conducted under oath and are typically in-person, although they may also be held by video or telephone. During the deposition, all your reports may be the subject of questioning by

the opposing legal team. The primary purpose of a deposition is to find out what witnesses will and will not say in court to preclude one party from ambushing another at trial with new evidence or testimony. The deposition also streamlines court proceedings, since it allows opposing attorneys to avoid asking dead-end lines of inquiry and get straight to the points they wish to make in the courtroom. Depositions are almost always what they are widely reputed to be—unpleasant for the individuals being questioned. These situations can be "an enormous shock to the unprepared" (Mayer 2010, 3). The style of questioning can range from friendly to nasty and aggressive, and the focus of questions can range from disagreements between the parties' experts to attempts to catch you impeaching your testimony. Because no judge will be present to act as an impartial referee, your attorney may instruct you to not answer particular questions, although such direction is very rare. Objections can be raised and noted for the record, but they are generally left for a judge to rule on later, if necessary, since it would be inefficient to go back and forth between depositions and rulings. A court reporter transcribes deposition testimony, and you are allowed to correct the record for spelling, grammar, and missing words. You are not allowed to correct or elaborate further on the substance of your testimony.

If the case is not settled in advance, your court day will eventually arrive. Plaintiffs present evidence first, so the plaintiff's expert will normally be the first expert to testify. Each expert will be sworn in and testimony will begin with direct examination, during which the attorney with whom each has worked will ask questions. The judge or judges will now be present and may interject questions at any time. You should be well-prepared for this part. Because good attorneys usually appreciate experts' input about potential lines of questions, you will usually know which questions will be asked and how they will be phrased. However, surprise questions and unexpected phrasing that changes the meaning of questions can arise even during direct examination, so you must stay on your toes.

The next stage is cross-examination, which is perhaps the most difficult aspect of expert witnessing for most scholars. In cross-examination, one side's attorney asks questions of the opposing witnesses. You do not know what will be asked, although potential lines of questioning can be anticipated from the questions posed previously in deposition. Although a cross-examination is supposed to stay within the confines of what a witness was asked during direct examination, our experience is that judges are not strict about enforcing this constraint. In particular, judges tend to be more flexible about what they allow into the record in a bench trial as opposed to a jury trial. Furthermore, lawyers are given more leeway in cross-examining expert witnesses than fact witnesses. Judges give attorneys wide latitude in their style of cross-examination, as long as attorneys are not abusive. After cross-examination, your attorneys will have the opportunity to ask additional questions during follow-up redirect questioning, which may result in re-cross-examination, *ad infinitum*, although our experience is that any questioning beyond one round of re-cross is rare. Experts may still testify a second time in a case, offering rebuttal testimony in response to the other side's expert.

Your obligations as an expert witness do not necessarily end when the courtroom phase of the case concludes. When a case is appealed, higher courts do not ask witnesses to testify before them. However, higher courts may remand cases back to lower courts. Another trial may be held in which the lower court will address specific legal questions posed by the higher court. Expert witnesses may be required to produce more reports and testify again or can even be ordered by the judge or judges to perform tasks such as drawing a redistricting plan. Any further work you do related to the case, including your own scholarly pursuits, can be requested by the opposing legal team through a new round of discovery. Until all court action is exhausted, you should consult with your attorneys before doing anything that may affect the case. Afterwards, you may be contractually barred from discussing the case or using proprietary information in your research.

THE ADVERSARIAL CONTEXT

The adversarial process in the Anglo-American judicial system differs greatly from other fora in which political scientists share their work. The legal search for the truth in a case is not a consensus-building enterprise. When experts are used in a trial, two sides present contrasting versions of the facts, and often the law from which the judge or a jury is expected to determine the "truth." Thus, presenting expert research in court is far different from presenting basic research at a professional conference. A discussant on a panel at a professional meeting might provide a harsh critique or complimentary feedback. The latter is very unlikely to be heard in court from opposing lawyers or their expert witnesses.

The job of the opposing legal team is to ask you questions that are intended to impeach your analysis and sometimes your credibility as an expert who can render opinions on the subject at hand (Mitchell 1978, 212). As an expert witness, you should never dismiss the opposing attorneys because you think you are a better substantive expert. Especially when you are serving as an expert for the first time, the opposing lawyers will likely be better versed than you on the evidentiary issues at hand. Many lawyers have extensive experience reading expert reports, questioning expert witnesses, and studying their research methodologies (Van Matre and Clark 1976). Opposing experts may also be present in deposition and the courtroom to provide advice to their attorneys, although they cannot ask questions directly. If you are confident in your skills, consider this: depositions of respected scholars have sometimes gone so poorly that their attorneys removed them from the testifying calendar.

In attempting to discredit your expertise and testimony, all of your professional activities are fair game for the opposing legal team, including your publications, media work, and what you have said in previous depositions and trials. One veteran expert witness was even asked questions about a surreptitiously recorded conversation between himself and a planted audience-member during a public forum. "Nitpicking," "blowing smoke," and "obfuscating" are all words experts have used to describe attorneys' cross-examinations of them. Sometimes, opposing experts may be the source of this nitpicking and obfuscation, and they may even employ these

approaches in their testimony (Engstrom 1985; Engstrom 2005; Wuffle 1985). While these criticisms are often principled, they can sometimes become personal—hence the need for a "thick skin," as mentioned earlier. The nature and character of criticism in the legal context can be a big surprise to a first-time witness. While an expert in court might make positive comments about the other side's expert, we have never heard one say nice things about his or her overall work for the case. Indeed, it is our experience that when cross-examination gets personal, it usually means that the attorney has not been able to discredit the analysis. The old adage applies: if you cannot attack the message, attack the messenger.

BENEFITS OF THE WORK

As noted previously, there are many additional benefits to expert witness work than the satisfaction of doing a good job. Political scientists are often passive observers of politics. Policymakers may incorporate your ideas into the political discourse, but their influence is often heavily diluted within the melting pot of pressure politics. Not so in the legal realm. In their written opinions, judges directly cite the evidence used to arrive at their conclusions, including expert testimonies. The theories that you study can be immediately implemented in practice when a court rules to change government institutions, whether it mandates a change to the electoral system or the overturning of a government policy.

The experience of expert witnessing can also enrich your teaching by providing examples that will engage students, particularly those who wish to proceed to law school. In the area of election law, for example, our work provides us with concrete examples of representation and election issues related to the use of single-member districts and alternative electoral systems, as well as how these issues relate to seminal U.S. Supreme Court decisions—topics that are often dryly presented in textbooks. Analyses for court can easily be presented to classes. Anecdotes from trials can reveal the normative dimensions of the adversarial legal process.

Expert witness activities can also inform a scholar's writing and influence his or her research agenda both substantively and methodologically. Consider the literature on the effects of the Voting Rights Act, which was developed with the intent to inform courts and policymakers on how best to achieve racial representation goals (e.g., Engstrom and Widgen 1977; Cameron, Epstein, and O'Halloran 1996; Lublin 1997). Refinements in ecological inference were stimulated by the need for reliable estimates of levels of racially polarized voting in litigation under the Voting Rights Act (e.g., King 1997). A parallel line of scholarship on redistricting that examined electoral systems' bias and responsiveness helped stimulate efforts to detect legally impermissible partisan gerrymanders (Gelman and King 1994; Grofman and King 2007). Several other innovative methods have been developed across disciplines, from computer science to political science, to detect gerrymandering (for a review, see Altman and McDonald 2010).

From an academic political scientist's perspective, the remuneration for service as an expert witness can be very rewarding. During your initial contact with an attorney, you will be asked about your hourly rate and to estimate how many hours of work a project will take. When asked, do not be shy. Set an hourly rate that will reasonably cover all your costs, including your home office and your taxes. Estimating the number of hours a case will require is always difficult. We cannot offer any hard and fast numbers, since everyone accomplishes activities at his or her own pace, and experts have little, if any, control over the need for additional analyses and reports. Report writing often takes longer than you anticipate. Furthermore, remember that anything that you do for the case that you would not otherwise do is billable, including replying to e-mails, speaking on the phone to your attorneys, traveling, and sitting in a courtroom waiting area. (Some people charge half-time for activities in which they can do other work, such as travel.) You must meticulously note the date, time, and activity for anything you do that is related to the case. Most attorneys request invoices on a monthly basis.

In attempting to discredit your expertise and testimony, all of your professional activities are fair game for the opposing legal team, including your publications, media work, and what you have said in previous depositions and trials. One veteran expert witness was even asked questions about a surreptitiously recorded conversation between himself and a planted audience-member during a public forum. "Nitpicking," "blowing smoke," and "obfuscating" are all words experts have used to describe attorneys' cross-examinations of them.

CONCLUSION

We conclude with some thoughts about the role of expert witnesses in the profession. A selection bias does exist in the choice of expert witnesses (Lee 1988). This is the nature of the adversarial process. Attorneys will only call on an expert to testify if the expert's findings support their side of the case. This bias coupled with what most academics consider extraordinary pay are likely reasons why others often view expert witnesses in the same light as lawyers: "hired guns" or even "whores" who will do or say anything for money (Kousser 1985). The professional stigma that can result when one appears to be subverting one's professional integrity for filthy lucre may steer some scholars away from this type of work

(Ruse 1986). But not all lawyers deserve such epithets, and neither do all expert witnesses. Many well-respected scholars participate in this type of pracademic work.

An expert does not have the responsibility to win a case. His or her responsibility is to provide good, defensible evidence for the issues on which they testify. This distinct aim is why experts' fees should not be contingent on the outcome of a case. Selection bias does not preclude an analysis from being high quality. Analyses by political scientists in election law cases are typically transparent and inter-subjective. Data are scrutinized, statistics replicated, and decision rules attacked and defended. Experts can maintain their integrity in this process. Over the years, expert testimony by political scientists has been found to be disingenuous on at least one occasion, but those individuals who provide such testimony rarely testify for long. Those who provide solid evidence without embellishment are usually asked to testify in many cases, sometimes over many years.

Expert witness testimony is hard, stressful, and can interfere with other obligations. For these reasons, you should carefully weigh the opportunity costs of engaging in this type of work, especially if you are a younger scholar who needs to mind your career advancement. However, hardworking junior scholars have juggled academic and legal work successfully and used their experiences to launch fruitful research agendas. We believe that this work has made us better teachers and scholars and allowed us to contribute to the profession as a whole. We thus encourage those scholars who are given the opportunity to engage in expert witness work to consider such a responsibility in a favorable light. Serving as an expert witness can be immensely satisfying pracademic work, because it employs an academic's knowledge and skills to directly address the legality of government policies that affect countless peoples' lives. ■

NOTES

1. The Leigh study and our study entailed a LEXIS search of federal district court cases. We requested cases in which the word "expert" appeared along with "political scientist," "political science," "professor of government," or "department of government." Whereas Leigh found 53 cases during the 1980s (Leigh 1991, 521), our search found only 38 cases over the 11 years covered, including those cases with unpublished opinions. We do not claim that this list is exhaustive. Some cases in which political scientists served as experts might not appear in the LEXIS database, and some cases that are in it do not identify expert witnesses by name or academic discipline. Not all of the cases in which we have testified have recorded this information. We are not aware, however, of any reason to suspect that such identifications would vary by the issues involved and therefore skew our distribution of the types of cases. As noted previously, our search included federal and not state court cases. We have both testified in state court cases involving redistricting issues. The findings might be quite different, however, if the issues addressed by political scientists in state courts systematically differ from those addressed in federal courts. For a report on the experience of political scientists participating as expert witnesses in a state court case concerning the butterfly ballot in Palm Beach, Florida, in 2000, see Brady et al. (2001).
2. For a report on the experience of two of the 12 political scientists testifying in the campaign finance case, *McConnell* v. *Federal Election Commission*, see La Raja and Milkis (2004).
3. State rules vary but may be modeled on the federal rules. See http://www.law.cornell.edu/rules/fre/.

REFERENCES

Altman, Micah, and Michael P. McDonald. 2010. "The Promise and Perils of Computers in Redistricting." *Duke Journal of Constitutional Law and Public Policy* 5: 69–112.

Brady, Henry E., Michael C. Herron, Walter R. Mebane, Jr., Jasjeet Singh Sekhon, Kenneth W. Shotts, and Jonathan Wand. 2001. "Law and Data: The Butterfly Ballot Episode." *PS: Political Science and Politics* 34 (1): 59–69.

Cain, Bruce E. 1999. "Election Law as a Field: A Political Scientist's Perspective." *Loyola of Los Angeles Law Review* 34 (2): 1,105–19.

Cameron, Charles, David Epstein, and Sharyn O'Halloran. 1996. "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?" *American Political Science Review* 90 (4): 794–812.

Eaton, David L., and David Kalman. 1994. "Scientists in the Courtroom: Basic Pointers for the Expert Witness." *Environmental Health Perspectives* 102 (8): 668–72.

Engstrom, Richard L. 1985. "The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases." *Howard Law Review* 28: 495–514.

———. 2005. "Expert Witness Testimony." In *Encyclopedia of Social Measurement*, vol. 1, 919–25. ed. Kimberly Kempf-Leonard. London: Elsevier.

Engstrom, Richard L., and John R. Widgen. 1977. "Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering." *Legislative Studies Quarterly* 2 (4): 465–79.

Gelman, Andrew, and Gary King. 1994. "A Unified Method of Evaluating Electoral Systems and Redistricting Plans." *American Journal of Political Science* 38 (2): 514–54.

Grofman, Bernard, and Gary King. 2007. "The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after *LULAC* v. *Perry*." *Election Law Journal* 6 (2): 2–35.

Horowitz, David Paul. 2005. "The Expert Witness Primer." *New York State Bar Association Journal* 77 (2): 18–23.

King, Gary. 1997. *A Solution to the Ecological Inference Problem: Reconstructing Individual Behavior from Aggregate Data*. Princeton, NJ: Princeton University Press.

Kousser, Morgan J. 1985. "Are Expert Witnesses Whores?" *Public Historian* 6: 5–19.

La Raja, Ray, and Sidney M. Milkis. 2004. "For the Plaintiffs: The Honor and Humility of Defending Political Parties in Court." *PS: Political Science and Politics* 37 (4): 771–76.

Lee, Tahirih V. 1988. "Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence." *Yale Law and Policy Review* 6: 480–503.

Leigh, Lawrence J. 1991. "Political Scientists as Expert Witnesses." *PS: Political Science and Politics* 24 (3): 521–24.

Lublin, David. 1997. *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress*. Princeton, NJ: Princeton University Press.

Mayer, Kenneth R. 2010. "Is Political Science Relevant? Ask and Expert Witness." *Forum* 8 (3): 1–9.

Mitchell, James K. 1978. "The Expert Witness: A Geographer's Perspective on Environmental Litigation." *Geographical Review* 68 (2): 209–14.

Posner, Richard A. 1999. "The Law and Economics of the Economic Expert Witness." *Journal of Economic Perspectives* 13 (2): 91–99.

Prager, Irving, and Kevin S. Marshall. 2005. "Examination of Prior Expert Qualification and/or Disqualification—(Questionable Questions under the Rules of Evidence)." *Review of Litigation* 24 (3): 559–80.

Ruse, Michael. 1986. "Commentary: The Academic as Expert Witness." *Science, Technology, & Human Values* 11 (2): 68–73.

Van Matre, Joseph G., and William N. Clark. 1976. "The Statistician as Expert Witness." *American Statistician* 30 (1): 2–5.

Wuffle, A. 1985. "Expert vs. Expert: Lessons from *Badham* v. *Eu*." *PS: Political Science and Politics* 18 (3): 576–81.