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TRANSFORM

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Understanding the Role of Cybersecurity Expert Witnesses

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Welcome to your first deposition. Counsel, proceed...

- I'm going to be asking you a series of questions today. If at any point you do not understand the question, please let me know and I'll try to rephrase it. Otherwise, we will all understand that you understood the question as I meant it. Please speak clearly and answer questions audibly, as the court reporter can't record things like head nods.
- Is that OK with you?
- Ok, let's proceed.



*Photo: Science Education Resource Center (SERC)
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Welcome to the World of Cybersecurity Expert Witnesses

Here's What We Will Cover in this Session:



Session Outline

- What an Expert Witness Is – And Isn't
- Are You an Expert? On What – EXACTLY?
- How Expert Witnesses Can Help a Case
- What's Admissible and Not Admissible (And Meet the Dauberts)
- The "Golden Rules" for Cyber Expert Testimony
- Reports, Deposition and Trial Testimony
- Next Steps on Your Expert Witness Journey
- Conclusions

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What is an Expert Witness?

Are You an Expert?

What is Your Area of Expertise?



What is an Expert Witness

- Traditional fact witnesses can testify about what they saw, heard, smelled, tasted or touched. They cannot offer opinions.
 - Question: What is your favorite color? How does green influence shoppers?
- An expert witness can offer opinion within the scope of their expertise, if it is supported by accepted methodology/background.
- The expert opinion must assist the court/jury – possesses specialized knowledge
- The expert is an advocate for the opinion and NOT for the party that engaged them
- Stays within their lane

Are YOU an Expert?

- Experts must document their (“relevant”) expertise, which can consist of one or more of the following categories:
 - Training (University, Courses)
 - Experience
 - Certifications
 - Publications
 - Presentations
 - Teaching Experience
- Expert CV (but be prepared to back up everything in it!)
 - “One of the top experts in the U.S.”
 - “Globally recognized as...”



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Counsel and Expert Witnesses: When Expert Testimony is Necessary and Helpful

Keys to a Successful Engagement



When Do You Need an Expert?

- Educate a layperson (i.e., judge and jury) with varying levels experience with technology and misconceptions of cyber.
- Address key questions
 - Did the company act “reasonably” prior to, during and after the incident consistent with industry standards?
 - What data was accessed or exfiltrated?
 - Did the incident harm specific individuals (cause and effect)?
 - Was remediation sufficient and what are future risks of harm?
 - Can a class be identified (ascertained)?
- Rebut opinions made by other side.
- Non-testifying expert consultants can also assist attorneys in formulating defenses, case themes, and class certification arguments.

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The Question of Admissibility... and Meet the Dauberts

Judges Serve as the Gatekeepers



Will Your Work be Admitted by the Court?

- Are you testifying within your actual field of expertise?
 - The case of “Forensics=Cybersecurity”
- Relevance and Reliability: Scientific Knowledge/Methodology
 - Generally accepted? Subject to peer review? Tested? Known error rate?
 - Daubert challenges
- What is the “standard” for “Commercially Reasonable Security”
- Have you slipped into advocacy? Are you offering legal opinions?
 - The “Gross Negligence” case



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The **Golden Rules** for Expert Witnesses



Focus on the Golden Rules for Expert Witnesses

- Your duty is to tell the truth. Period.
- If your opinions have differed in the past, or have previously been excluded, tell counsel and be prepared to explain your evolution of opinion. Expect a challenge.
- You can focus on the questions during depositions. Answer them and stop talking! Don't fear silence.
- Limit your reporting, testimony and opinions to your expertise.
- Understand and defend your "assumptions".
- Prepare, prepare, prepare. Ensure that you know all aspects of your report, the materials (facts) considered, and the materials cited. This is particularly important in the case of jointly authored reports.

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Reports, Depositions and Trial Testimony

Do's, Don't Do's and NEVER EVER Do's



Reports and Testimony: What Could Possibly Go Wrong?

- Be prepared to defend any assumptions made in coming to your conclusions.
- Write your own report. Don't let counsel write it for you, which is itself a basis for exclusion!
- You can't hide sources. If you were told something that you used as a basis of opinion (even if from counsel), disclose it.
- Provide the shortest, truthful answer when being deposed or on cross.
- You can finish your answer, even if counsel doesn't want you to.
- Don't render legal conclusions.
- Don't stray beyond the subject matter of your report or retention.
- Insist on pre-deposition/pre-trial preparation (and enough of it!).

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Next Steps:
Applying What We've Covered Today



Do You Want to be an Expert Witness?

- Prepare a CV that contains your:
 - Education & Training
 - Certifications
 - Awards
 - Work History
 - Testimony History
 - Publications
 - Presentations
- This must cover at least 10 years for cases in federal court, *but any publication you ever wrote might show up at a deposition or trial*
- Speak and write in your field of expertise



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Conclusions



Conclusions...

- Expert testimony is vital in many cases involving cyber technology.
- But experts have to be qualified and able to prove it.
- Experts can overstate their expertise.
- Experts must not cross the line into drawing legal conclusions.
- Being an expert witness is not easy, but it is very important.



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Q&A



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