

Expert testimony in adversarial legal proceedings *Some tips for demographers*

STANLEY K. SMITH

Bureau of Economic and Business Research, University of Florida, Gainesville, Florida, USA

Abstract. Many business, political, and personal disputes in the United States are settled only after passing through the nation's judicial or regulatory system. The culmination of this process is frequently a hearing or trial in which the opposing parties argue the merits of the case. Demographic factors play a critical role in many of these disputes and demographers are often called upon to testify in hearings or trials. This article discusses the role of the demographer as expert witness and offers some tips on how to prepare and present expert testimony. The objective is to provide some practical guidance to prospective witnesses which will help them maximize effectiveness and minimize emotional distress when testifying in adversarial legal proceedings.

Key words: Applied social science, Forensic social science, Legal demography, Professional standards

Introduction

The United States is a highly litigious society. Many business, political, and personal disputes are settled only after passing through the nation's judicial or regulatory system. The culmination of this process is frequently a hearing or trial in which the opposing parties – each with a battery of consultants and attorneys – argue the merits of the case.

Demographic concepts and measures play a crucial role in many of these disputes. Consider the following examples:

1. A 26 year old man has been killed in an industrial accident and his employer has been found culpable. For calculating monetary damages, what are the expected future earnings of persons similar to the deceased?
2. In a divorce settlement, a woman has been awarded custody of a four year old girl and a two year old boy. For calculating child support payments, what are the expected costs of raising these children?
3. A citizen's group has charged a county commission with creating racially discriminatory voting districts. Can a voting district be created in which the racial minority constitutes at least half the eligible voters?
4. An automobile manufacturer wants to establish a new dealership in a rapidly growing area, but its proposal to the state regulatory agency has been opposed by a nearby dealership. Is the current and expected future population of the area large enough to justify the establishment of a new dealership?

5. A hospital would like to add 10 beds to its obstetrics unit, but its proposal to the state regulatory agency has been opposed by another hospital in the same city. Is the projected number of births in the area sufficient to indicate a need for the additional beds?

Demographers are uniquely qualified to address these and similar questions. Consequently, they are frequently called upon to testify as expert witnesses in hearings or trials. In spite of their technical expertise, however, many demographers are completely unprepared for the total experience of preparing and presenting expert testimony. Adversarial legal proceedings can be pressure-packed and nerve-wracking; often, the stakes are very high and attempts are made to discredit the witness's testimony or even to destroy his/her credibility as an expert. In addition, legal concepts, terminology, and the litigation process itself may be mystifying to many demographers. On the other hand, testifying in hearings or trials provides an opportunity to develop and present demographic analyses that have a direct, immediate impact on real-world decision-making. Testifying as an expert witness can be exciting and rewarding, if a bit intimidating.

A substantial forensic social science literature has been developed over the last several decades, covering issues as diverse as the mobilization of evidence (e.g., Chesler, Sanders & Kalmuss 1988); problems with using social science evidence in court (e.g., Richardson et al. 1987; Sperlich 1980; Wolf 1976); comparisons of different models of social science applications in the legal sphere (e.g., Kalmuss 1981); problems with using statistical measures and tests (e.g., Fisher 1986; Meier 1986); the ethics of providing expert testimony (e.g., Loftus 1986; McCloskey, Egeth & McKenna 1986); and the sociology of law and the legal system (e.g., Black 1972). The following discussion draws on that literature, but focuses primarily on the courtroom experience itself. What should one expect when called upon to testify in hearings or trials? What steps can be taken to avoid potential pitfalls and enhance the effectiveness of expert testimony?

In this article I discuss the role of the expert witness in adversarial legal proceedings and offer some tips on how to prepare and present expert testimony. These tips are based on my experience testifying in hearings and trials and on my discussions with attorneys and other expert witnesses. They are not iron-clad rules, of course; other experts may disagree on specific points or emphasize issues not mentioned here (e.g., Brodsky 1991; Dorrann 1982). My objective is simply to provide some practical guidance to prospective expert witnesses and to promote further discussion of the topic. I hope this and future discussions will help expert witnesses maximize effectiveness and minimize emotional distress when testifying in adversarial legal proceedings.

Role of expert witness

The term 'expert witness' has a specific meaning in legal proceedings. An

expert witness is a person accepted by the judge or hearing officer as being qualified to make judgments and offer conclusions in the area of his/her expertise. Areas of expertise may be defined broadly (e.g., demographic data and analysis) or narrowly (e.g., population estimates and projections). It is important that they be defined broadly enough to cover all aspects of the topic under consideration, but narrowly enough to indicate specific knowledge of the topic.

An expert witness stands apart from other witnesses, who may give factual testimony but are not entitled to draw conclusions or offer opinions. Criteria for qualification as an expert include educational background, training, work experience, knowledge, and specialized skills. Judges and hearing officers do not automatically accept everyone offered as an expert witness; opposing attorneys have the opportunity to object. Potential witnesses may have to demonstrate why they are qualified to present expert testimony on a particular topic.

Two perspectives help define the role of the expert witness.¹ The first sees the expert's role as producing any type of professionally competent demographic analysis that will help advance the client's interests. This does *not* mean the expert will intentionally use inaccurate data, apply improper techniques, misinterpret results, or provide false or misleading testimony. Rather, it means he/she will focus testimony on evidence that supports the client's case and avoid evidence that weakens the case. This perspective is consistent with the structure of the US legal system, in which it is assumed that truth is most likely to emerge when each side attempts to produce the strongest possible case for its clients (e.g., MacHovec 1987; Wolfgang 1974).

The second perspective sees the expert as an impartial observer who performs a complete, objective analysis of all issues under consideration. The expert then forms various conclusions, which may or may not support the client's case. Based on the nature of the expert's findings and conclusions, the client decides whether or not to call upon the expert to testify at the hearing or trial. Under this perspective, the expert is an 'educator' rather than an 'advocate' (Loftus 1986). By uncovering weaknesses that may have to be faced in the courtroom, the expert as educator provides a valuable service to the client even when his/her conclusions do not completely support the client's case.

Practitioners differ in their views regarding the validity of these two perspectives (e.g., Kalmuss 1981; Loftus 1986; McCloskey, Egeth & McKenna 1986). Some believe the educator role is the only ethical role and that playing the role of an advocate inevitably compromises the professional standards of scientific research. Others believe the educator role is impossible to maintain in the highly charged atmosphere of adversarial legal proceedings; they favor the expert accepting the realities of the adversarial system and striving to be a responsible advocate, presenting one side of an issue clearly and professionally, without distorting or misrepresenting research findings.

Potential expert witnesses should carefully consider the implications of these two perspectives before becoming involved in the adversarial process.

Each perspective can create tension. Under the first, tension may arise from the requirement that the expert focus solely on factors that support the client's case. This requirement is inherently in conflict with the expert's scientific training, which emphasizes the importance of a complete, objective analysis covering all sides of an issue. Under the second, tension may occur if the expert's attempts to be thorough and evenhanded come into conflict with the attorney's desire to include only those parts of the analysis that support the client's case.

Some prospective witnesses may be quite uncomfortable with one or both types of tension. If so, they must operate only within the perspective with which they feel most comfortable or avoid involvement in the adversarial process altogether. Whichever perspective the expert takes, it must be communicated clearly to the client. A positive experience testifying in hearings or trials will be possible only if both the expert and the client have the same understanding of the role the expert witness intends to play.

Regardless of one's perspective on the role of the expert witness, the expert must reject any attempts to pressure him/her into supporting a clearly unwarranted conclusion. Failure to do so will diminish his/her personal integrity and professional reputation, as well as corrupt the legal system and tarnish the profession as a whole. Faced with such attempts, the expert should withdraw immediately from the case.

Preparation

The key to effective testimony is thorough preparation. This starts when the client first describes the proposed project and the expert decides whether or not to become involved. It is essential to clarify exactly what the client wants, what the time frame and financial compensation will be, and what resources will be available. The expert must determine whether the client simply expects a thorough, objective analysis or expects support for a specific conclusion. The client must be very candid about his/her expectations and the expert must be equally candid about what he/she can provide. If the expert senses that the client has a hidden agenda, he/she may have to push a bit to bring that agenda out into the open. If the expert senses that a lack of expertise is preventing the client from being fully aware of all the relevant issues, he/she may have to help the client determine exactly what needs to be done. A clear understanding of each party's needs and expectations from the very beginning helps avoid problems as the case progresses.

After determining the scope of the project, the expert must formulate a work plan, collect any necessary data, and perform the required analyses. Whenever possible, I have found it helpful to use data sources and techniques regarded as standard in the demographic profession. Data from the US Bureau of the Census and other federal agencies, state government offices, departments of vital statistics, county planning departments, and so forth are

usually accepted without challenge in legal proceedings. Data sources that can be termed 'official' are typically accepted as more authoritative than 'unofficial' sources. Similarly, analytic and statistical techniques commonly used by demographers are easier to defend than nonstandard techniques. This is not to say that unusual data sources and techniques should never be used, of course. The demographer who uses them, however, must be prepared to defend their validity and explain why they were chosen instead of more commonly used alternatives. My rule of thumb: If two data sources or techniques are equally valid, use the more standard one.

It is important to keep track of all data sources and techniques used at every stage of the analysis. Never rely strictly on memory; in a long and detailed analysis, it is easy to forget exactly what took place at a given point in time. Keeping a written record is particularly important when preparing expert testimony because hearings or trials sometimes do not take place until a year or more after the original analyses were performed. It is also helpful to make photocopies of data sources rather than simply taking notes or copying numbers by hand. Not only are photocopies useful for verifying data, but they are often required for documenting sources as well.

Sometimes the analysis focuses on a particular locality, such as a county or subcounty area. In these cases, it is helpful to establish contacts with local residents who are intimately familiar with the area (e.g., technical staff of county or city planning departments). Knowledgeable local residents can enhance the consultant's understanding of the area by providing information on trends and characteristics that are not evident in the available data. It is also important that the expert visit the area before completing his/her analysis. This provides a 'feel' for the locality and helps the expert evaluate the impact of any unusual or unique characteristics or events. Perhaps more important, spending some time in the area adds credibility to any report that may be prepared and to the testimony given in the hearing or trial. The opponent's attorneys can make the expert look pretty silly if he/she has never set foot in the area under consideration.

Once the expert completes the analysis, the next step is to prepare the exhibits that will be used at the hearing or trial. Exhibits are the diagrams, charts, tables, reports, and other documents introduced as evidence. They provide background support and a summary of the testimony presented by the expert. Exhibits should be presented sequentially and tell a consistent, coherent story. All data sources used in the preparation of each exhibit should be cited. Pictorial exhibits (e.g., diagrams, charts, graphs, maps) are often more dramatic and easily understood than written descriptions or tables of numbers. Needless to say, exhibits should be double- (or triple-) checked to ensure that they contain no factual errors. Opposing counsel will use any errors or inconsistencies to attack the expert's credibility.

In some cases the expert will be asked to prepare a written report summarizing his/her analysis. This report should discuss the mission (i.e., what the expert was retained to do), the methodology (i.e., the data and techniques

used in the analysis), and the final conclusions. It will typically include all tables, diagrams, charts, and maps that were constructed while preparing the analysis. The written report should describe all essential parts of the analysis, but should be as simple and clear as possible. The written report itself is frequently used as an exhibit at the hearing or trial.

Preparation for a hearing or trial often includes a deposition. The purpose of a deposition is to allow opposing counsel to learn about the evidence to be presented by the expert. The opposing attorneys are entitled to ask the expert questions about his/her background and qualifications, data sources that have been used, analyses that have been performed, conclusions that have been drawn, and so forth. Typically, the opponent's attorneys have access to the expert's exhibits before the deposition is held.

Depositions allow the attorneys for one side to learn more about the case the other side is preparing. Although depositions may help the opponent's attorneys prepare their case, they also help the expert by revealing any parts of his/her testimony that need additional work and by providing a preview of the cross-examination that might occur during the hearing or trial.

A deposition is sworn testimony. The expert must therefore answer all questions completely and truthfully. However, the expert should answer only the specific questions asked, without volunteering additional information. The more the opponents know about the case, the better they will be able to prepare for it. It is during the hearing or trial – not the deposition – that any additional information relevant to the expert's testimony should be revealed.

Testimony

Direct testimony is that presented by the expert under the guidance of his/her client's attorneys. It is typically presented as a series of questions and answers, with attorneys asking questions and witnesses answering them. These questions should follow a logical sequence, allowing the expert to discuss all steps of the analysis before presenting the final conclusions. Testimony should be consistent with the sequence of exhibits and use the exhibits to illustrate and summarize major points. To ensure that all relevant points are covered, the expert should assist his/her attorneys in preparing the questions. All issues regarding the nature of the expert's testimony should be resolved at this time: the expert does not want any surprise questions on the witness stand and the attorneys do not want any surprise answers!

Shortly before testifying, the expert should review all the data, analyses, and exhibits he/she has prepared, recalling exactly what was done at every stage of their preparation. This will facilitate a smooth, clear presentation and enhance the witness's credibility. In contrast, the inability to remember exactly what was done or explain it clearly can drastically weaken a witness's credibility.

The expert witness must strive for both completeness and simplicity. Testimony must be comprehensive, addressing all the issues involved, but must also be simple, presenting esoteric concepts and procedures with descriptions, illustrations, and terms comprehensible to a nondemographer. Technical jargon should be avoided whenever possible. The expert's objective is not only to produce the best demographic analysis possible, but also to convince the judge, jury, or hearing officer of its validity. Logical analyses and clear explanations are much more convincing than black-box models and arcane terminology.

Testifying at a hearing or trial typically includes not only direct examination by the client's attorneys, but also cross-examination by the opponent's attorneys. Cross-examination provides an opportunity for the opponent's attorneys to question any part of the expert's testimony. One objective of cross-examination is to discredit that testimony by uncovering errors, omissions, contradictions, inconsistencies, and dubious assumptions. Cross-examination can be aggressive, confrontational, or even down-right hostile! It is during cross-examination that the expert truly comes to appreciate the importance of thorough preparation.

It is therefore important to spend some time before the hearing or trial thinking about questions that might be asked during cross-examination. (The client's attorneys may be helpful in thinking of likely questions.) Why were these data sources and techniques used instead of alternative ones? What theory and evidence support their use? What assumptions were made at various stages of the analysis? How dependent are the results on the choice of data sources, techniques, and assumptions? Have similar analyses been done? If so, what did they show? Thinking about questions like these can help the witness anticipate cross-examination questions and formulate potential responses. It may also be helpful for the expert's attorneys to hold a mock cross-examination in order to prepare the witness for the rigors of the real thing. Emerging from cross-examination unscathed can tremendously enhance the effectiveness of the witness's testimony.

Expert witnesses must be wary of several temptations that can lead them astray when providing testimony. One is to overstate the strength of the analysis by claiming greater accuracy, less uncertainty, or broader conclusions than are warranted. I believe this temptation stems at least in part from the way adversarial legal proceedings are organized. A hearing or trial is much like a team sports competition. Two teams are typically involved: the plaintiffs and the defendants. Both teams have a number of players, each with a different role (e.g., attorneys, clerks, secretaries, and expert witnesses). Both teams develop their game plans (choice of experts, issues, and exhibits), practice their plays (testimony), and prepare for the big game (the hearing or trial). They play with a clear set of rules (the law and legal precedents), a referee (the judge or hearing officer), and an unmistakable outcome (winning or losing). Each team attempts to score 'points' while preventing the other team from scoring. There may even be spectators and reporters in

attendance! It is easy for the expert to get caught up in the spirit of the competition and overstate his/her case in order to 'win one for the Gipper'. Expert witnesses must guard against this temptation because it weakens objectivity and reduces credibility; in the long run, it may damage the expert's professional reputation as well.

Another temptation the expert witness must strive to overcome is offering opinions on topics beyond his/her expertise. This temptation is more likely to appear during cross-examination than during direct testimony. The opponent's attorneys often ask a great many questions, some of which stray into areas far afield from the witness's true expertise. Not wanting to appear ignorant or stupid, the witness experiences a strong temptation to try to answer these questions. This may prove to be disastrous! Providing poor answers to questions beyond one's expertise may cause judges, juries, or hearing officers to question the validity of other parts of the expert's testimony; it may also unwittingly contradict the statements made by other witnesses testifying on behalf of the same client. The expert should make every effort to overcome this temptation and respond to such questions with 'I don't know' or 'That's outside my area of expertise'.

Finally, it is essential that the expert maintain his/her composure on the witness stand. If they are skillful, the opponent's attorneys will zero in on any weak or questionable parts of the expert's testimony. They may also attempt to rattle the witness with a hostile manner, trick questions, obscure references, or quotations taken out of context. The expert should not take these attempts personally or react emotionally; such tactics are simply part of the 'game'. The expert should think through each question carefully before giving an answer; there is no need to rush. If the opponent's attorneys refer to certain materials, the expert should ask to see those materials. The expert should respond to all questions respectfully and honestly, but should feel free to elaborate if a short, direct answer might be inadequate or misleading; hearing officers and judges typically grant a good deal of latitude in responding to questions. Remaining cool, calm, and collected makes a witness much more effective.

Conclusion

Demographers have many opportunities to work as consultants and to testify at administrative hearings and in courts of law. I have worked on consulting projects involving hospitals, nursing homes, automobile manufacturers, banks, electric utilities, telephone companies, cable television companies, department stores, school boards, water management districts, environmental advocacy groups, and civil rights groups. Some of these projects simply called for helping a company or government agency analyze a problem or plan for future development; others required that I testify in a hearing or trial. The present discussion grew out of those experiences. I hope it will

help inexperienced witnesses avoid mistakes and improve effectiveness when providing expert testimony in adversarial legal proceedings.²

Why should demographers become involved in such proceedings? I believe there are a number of reasons (in addition to the obvious benefit of the consulting fees paid to expert witnesses!). First of all, presenting and defending an analysis in the crucible of adversarial legal proceedings can improve one's research and presentation skills. Cross-examination is analogous to having a research paper reviewed by one's peers, but is much more intense and frequently less civil. Vague or unsubstantiated statements are quickly exposed and challenged. This intense scrutiny forces the researcher to critically examine every data source, technique, and assumption. The lessons learned through this process carry over to other areas, improving one's skills for a variety of research projects.

Second, working as an expert witness can help the demographer identify topics that need further research. A number of my academic research projects grew out of questions raised during adversarial legal proceedings. The involvement of demographers in such proceedings can lead to research that makes important contributions to the field of demography, especially in the area of applied demography.

Finally, the participation of professionally qualified demographers in adversarial legal proceedings can be beneficial to society as a whole. Better demographic analyses lead to better legal decisions. By improving the quality of the data and analyses upon which decisions are based, demographers enhance the fairness and economic efficiency of the judgments handed down by our nation's judicial and regulatory systems.

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Notes

1. A third perspective could be mentioned as well: a willingness to use inaccurate data, apply improper techniques, misinterpret research findings, and do anything else necessary to support the client's case. I am assuming that no readers of this discussion would consider engaging in such unethical tactics.
2. This discussion has focused on a situation in which the expert is presenting his/her own analysis of a demographic issue. There are also situations in which the expert is asked to provide rebuttal testimony (i.e., critique someone else's analysis). Most of the present discussion is applicable in both types of situation. For rebuttal testimony, however, the scope of the analysis is relatively narrow: the expert's analysis must respond specifically to the

analysis prepared by the opponents. In addition, the time available for the preparation of rebuttal testimony is often relatively short.

References

- Black, D.J. (1972). The boundaries of legal sociology, *Yale Law Journal* 81: 1086–1101.
- Brodsky, S.L. (1991). *Testifying in Court: Guidelines and Maxims for the Expert Witness*. Washington DC: American Psychological Association.
- Chesler, M.A., J. Sanders & D.S. Kalmuss (1988). *Social Science in Court: Mobilizing Experts in the School Desegregation Cases*. Madison, WI: University of Wisconsin Press.
- Dorram, P.B. (1982). *The Expert Witness*. Planners Press, American Planning Association.
- Fisher, F.M. (1986). Statisticians, econometricians, and adversary proceedings, *Journal of the American Statistical Association* 81: 277–286.
- Kalmuss, D.S. (1981). Scholars in the courtroom: Two models of applied social science, *The American Sociologist* 16: 212–223.
- Loftus, E.S. (1986). Experimental psychologist as advocate or impartial educator, *Law and Human Behavior* 10: 63–78.
- MacHovec, F.J. (1987). *The Expert Witness Survival Manual*. Springfield, IL: Charles C. Thomas Publishers.
- McCloskey, M., H. Egeth & J. McKenna (1986). The experimental psychologist in court: The ethics of expert testimony, *Law and Human Behavior* 10: 1–13.
- Meier, P. (1986). Damned liars and expert witnesses, *Journal of the American Statistical Association* 81: 269–276.
- Richardson, J.T., K.G. Swain, J. Codega & K. Bazzell (1987). Forensic sociology: Some cautions and recommendations, *The American Sociologist* 18: 385–393.
- Sperlich, P.W. (1980). Social science evidence and the courts: Reaching beyond the adversary process, *Judicature* 63: 280–289.
- Wolf, E.P. (1976). Social science and the courts: The Detroit schools case, *Public Interest* 42: 102–120.
- Wolfgang, M.E. (1974). The social scientist in court, *Journal of Criminal Law and Criminology* 65: 239–247.

Address for correspondence: Stanley K. Smith, Bureau of Economic and Business Research, 221 Matherly Hall, Gainesville, FL 32611, USA
Phone: (904) 392 0171; Fax: (904) 392 4739