

Piercings, Tattoos, & Expert Witnesses

You've found the leading expert in the field. He is an accomplished academic and the author of leading treatises. But he dyes his hair green, has an oversized gold loop dangling from one ear, and dresses more like Austin Powers than Perry Mason.

Do you hire him?

Stated more broadly: Should an expert's personal quirks or lifestyle choices ever be a factor in deciding whether to retain the expert?

The politically correct answer, of course, is no. However, that may not be the strategically correct answer for a lawyer who is preparing for trial.

As Boston trial lawyer David White responded when asked whether he takes into account an expert's quirks, "Like every legal question, the answer is, of course, it depends."

Could Quirks Influence Outcome?

What it depends on, lawyers generally agree, is whether an expert's quirks or lifestyle could somehow influence the outcome of the trial. That could happen in any of three ways:

- If an expert's personal politics or quirks bear on the expert's credibility, they could be fair game to be brought out on cross-examination.
- If the expert's appearance or demeanor is overtly quirky, it could distract jurors from the expert's testimony.
- If the expert's odd or quirky behavior makes the expert recalcitrant or uncooperative, it could interfere with the attorney's ability to work with the expert.

"I am hiring an expert for one job and one job only – to be effective and persuasive to a jury – and anything that detracts from that singular job is *not* helpful to my client's case," asserts Jim Reed, a trial lawyer in Elmira, N.Y., and a director of the New York Academy of Trial Lawyers. Reed says he will reject an expert for anything about the expert that might undermine the expert's effectiveness on behalf of his client.

A more measured approach is suggested by Kelly Lynch, a long-time in-house trial attorney for a major insurer in California. "The most important question you should ask about an expert is, 'Is the expert an engaging teacher?'" Lynch advises. But if the ability to teach jurors is important in an expert, then quirks can detract from that ability, she says. "If the jury is put off by the expert's demeanor or bored to death by the presentation, then your case was stronger without that expert."

No Nose Rings, Please!

If demeanor and presentation are important, then physical appearance is a contributing factor, it would seem.

"When you choose an expert, you hope to find not just a great technical expert, but an excellent witness who will be persuasive with the jury," White explains. "Likeability is a key factor, and certainly physical appearance (no nose rings please!) is important to a jury."

White's "no nose rings" rule rings true with other lawyers. In 25 years as a commercial litigator in Los Angeles, Victoria Pynchon says she never once heard or posed a question to an expert about the expert's personal life and she considered an expert's political leanings to be "totally out of bounds." But even Pynchon, who now focuses on mediation, adds, "I'd probably draw the line at multiple piercings or facial tattoos that could not be covered up."

Piercings and nose rings may be an easy call, but what about physical characteristics unrelated to lifestyle choices? Should lawyers ever consider the possible prejudices of jurors when selecting an expert?

One lawyer, Andrew Simpson, who litigates cases as an insurance defense lawyer in St. Croix, U.S.V.I., offers this hypothetical: You are trying a case in a predominantly Caucasian county known for racial tensions and your potential expert is an African American who is tops in his field and has impeccable credentials. Do you retain him?

"I submit that the answer should be yes," Simpson says. Rather than let race or any other physical characteristic be a deciding factor in selecting an expert, the lawyer should go forward with the expert and screen for any juror biases in *voir dire*. "But I'll bet in actual practice," Simpson adds, "the answer would be no 99 out of 100 times, even if no one would admit that that was the reason."

Politics as Proof of Bias

An expert's personal lifestyle, political leanings or other personal characteristics unrelated to expertise are unlikely to be admissible at trial or to be the subjects of inquiry at a deposition.

This makes sense. Generally, an expert's personal politics and lifestyle have nothing to do with his or her qualifications and ability to serve as a knowledgeable and informative witness. But if something about the expert's politics could bear on the expert's credibility, there is nothing to stop opposing counsel from going after the issue on cross-examination.

As an example of how an expert's politics might come into play, Joseph C. Gioconda, an intellectual property litigator in New York City, suggests the scenario of an expert testifying about damages in commercial litigation in federal court. Assume the expert had openly and publicly endorsed the use of medical marijuana in violation of federal

narcotics laws. Opposing counsel could try to make an issue out of the expert's support for what technically is criminal conduct, Gioconda argues.

"The fact the issue is unrelated to his expertise may not be dispositive in limiting that line of questioning," Gioconda contends. "The adversary would point out that his personal position on the medical marijuana issue could arguably shed light on his beliefs about the interplay between legal and moral obligations. So in that hypothetical, I could see a federal judge giving the adversary some latitude and permitting that line of questioning."

So, It Depends

So should you retain that green-haired, earring bedecked, loudly dressed expert? In the final analysis, it would appear that the answer to that question is, "It depends," as David White suggests. What it depends on is whether these quirks – or any quirks – could have an impact on the case.

"You can say these factors are 'unrelated to expertise,' but courts allow broad rights of cross-examination when it comes to experts," notes Bruce E.H. Johnson, a partner with Davis Wright Tremaine in Seattle. "There is no guaranty that these factors will not come out."

Ultimately, the answer depends upon whether the quirk could negatively influence how a fact-finder might view the expert's testimony, Andrew Simpson argues. "If so, I think the duty to your client compels you to choose a different expert."

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Meta Desc: Should an expert's personal quirks or lifestyle choices ever be factors in deciding whether to retain the expert?

Meta Kwds: expert personal quirks, expert lifestyle choices, politically correct, expert credibility, personal politics, legal obligations, moral obligations, expert testimony dependent on physical characteristics, expert witness physical characteristics