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Content, Form, and Ethical Issues Concerning Expert Psychological Testimony on Eyewitness Identification

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Two concurrent forces have led to the increase in the admissibility of eyewitness expert testimony over the past two decades. First, to date nationwide, at least 299 men and one woman have been exonerated through DNA evidence. At least two dozen of these people were imprisoned as teenagers, and about 35% spent more than 15 years in jail before being exonerated. The majority were initially convicted based on eyewitness evidence, and more than a quarter of them had falsely confessed or made incriminating statements. The Innocence Project in New York maintains an up-to-date website that catalogues DNA exonerations in this country (www.innocenceproject.org), and there are innocence projects worldwide (http://forjustice.org/wc/wrongful_conviction_websites.htm). Well-publicized stories of these exonerations (Samos, 2007; Scheck, Neufeld, & Dwyer, 2000) have aroused public compassion and motivated legal reforms regarding how best to secure accurate eyewitness identifications. The most sweeping of these reforms is included in the U.S. Department of Justice’s national guidelines for how to collect eyewitness evidence in criminal cases (Technical Working Group for Eyewitness Evidence, 1999). The DNA exonerations have also helped to highlight the ineffectiveness of traditional safeguards designed to protect defendants from erroneous convictions resulting from mistaken identification (e.g., jury instructions from the judge, known as Telfaire instructions), thus promoting the admissibility of eyewitness expert testimony.

The second force that has led to the increase in the admissibility of eyewitness expert testimony is the significant increase in scientific research on factors that affect the accuracy of eyewitness identifications. This is true as
well in many other areas of psychology in which psychologists testify in court (see Costanzo, Krauss, & Perzek, 2007). Although research on eyewitness memory dates back at least 100 years (Munsterberg, 1908), the number of published scientific studies on eyewitness memory has increased exponentially over the past two decades. We now have a scientifically grounded understanding of not only the situational factors that affect the accuracy of eyewitness memory (estimator variables), but also the identification procedures that are more likely to be associated with accurate versus inaccurate identifications (system variables). This impressive body of scientific research has increased the credibility of the eyewitness expert testimony per se and increased the "general acceptance" of eyewitness memory research among psychologists (Kassin, Tubb, Hosch, & Memon, 2001). As discussed in Chapter 7 of this volume, the "general acceptance" of the explanatory theory presented by an expert has been one of the criteria for admitting expert testimony since the classic case of Frye v. United States (1923), commonly called the Frye Test. Together, these factors have fostered the increased rate of admissibility of eyewitness expert testimony in the courts.

The purpose of this chapter is to provide a realistic sense of the nature of eyewitness expert testimony—its content, form, and related ethical issues. As a caveat, I need to say up front that no one really knows how many individuals testify as eyewitness expert witnesses, what the range in their qualifications is, or what each does when he or she testifies. Individuals are not "credentialed" or "licensed" as eyewitness expert witnesses; rather, throughout this country, each trial judge decides on a case-by-case basis whether to admit a particular individual as an eyewitness expert witness or not. I frequently testify as an eyewitness expert witness. I know about 12 other psychologists who regularly testify as eyewitness expert witnesses, most of whom are academics with a Ph.D. in cognitive or social psychology and an impressive track record of published research on eyewitness memory and identification. Two are forensic psychologists who left academic positions to work full time as forensic consultants. I am generally familiar with the thrust of the testimony of these 12 individuals and will rely on this knowledge, as well as my own experiences, in discussing typical eyewitness expert testimony. A second caveat is that this chapter is most relevant to eyewitness expert testimony in the United States, simply because I am most familiar with the relevant legal restrictions and practices in this country.

The Content of Eyewitness Expert Testimony

When an eyewitness expert testifies, the bulk of his or her testimony is focused on psychological factors that affect the accuracy of eyewitness memory and the research that supports each of these factors. The eyewitness factors are generally divided into two classes of variables: estimator variables and system variables. Estimator variables are those that are not under control of the criminal justice system and include characteristics of the witness and characteristics of the observed event. System variables are those that are under the control of the criminal justice system and relate to how a witness was interviewed and the conditions under which an identification was made. There are excellent reviews of the research on the psychological factors that affect the accuracy of eyewitness memory. These include a meta-analysis of facial identification studies by Shapiro and Perrod (1986) and more recent articles by Wells, Memon, and Penrod (2006) and Wells and Olson (2003). In this chapter, I summarize these findings and focus on how eyewitness experts present this research to jurors.

Estimator Variables: Characteristics of the Witness

Witness Confidence

A case is more likely to go to trial if the eyewitnesses are confident in their identifications, because attorneys know that confident witnesses are perceived to be more compelling to jurors. However, is it true that more confident eyewitnesses are likely to be more accurate eyewitnesses? In a meta-analysis of the research on the confidence-accuracy relationship, Sporer, Penrod, Read, and Cutler (1995) found that across 30 studies on this topic (total sample size = 4036), the accuracy-confidence relationship was $r = .29$. Although this correlation is statistically significant, it accounts for only 8% of the variance. One way of thinking of this is to picture a pie chart representing all of the factors that affect eyewitness accuracy. Eyewitness confidence alone accounts for only 8% of this pie chart.

However, Sporer and colleagues (1995) reported a stronger accuracy-confidence relationship when they limited their analysis only to individuals who chose to make an identification. The accuracy-confidence rate for these individuals is more formally related because the individuals who are more likely to testify in court are those who chose someone from a prior lineup, show-up, or some other type of identification test. Among the choosers, the accuracy-confidence relationship was $r = .41$. How can an eyewitness expert help a jury understand what a .41 correlation means? Wells, Olson, and Chun (2002) suggested that one way to think about this correlation is to draw the comparison to a similar relationship for which the correlation is in this same range. Using U.S. Department of Health and Human Services data, they reported that the correlation between a person's height and gender is $r = .43$. Thus, if we assume that eyewitnesses make accurate identifications about 50% of the time, encountering a highly confident mistaken identification would be about as common as encountering a tall female or a short male. Presenting the accuracy-confidence relationship to a jury in these terms would help diminish the sanctity of a highly confident eyewitness.

It is also important to recognize that witness confidence is malleable. Typically, witness memory declines with the passage of time; correspondingly, witness confidence decreases as well. However, occasionally witness confidence increases over time, for example, from an identification at a field
showup ("He looks like the perpetrator") to the live lineup ("I think that’s him; yes, that’s him") to testimony at the trial ("I’m sure that’s the man who robbed me at the ATM"). When this occurs, it is usually a red flag that something in addition to eyewitness memory is at play. For example, it has been reported that repeatedly questioning eyewitnesses inflates their confidence without affecting the accuracy of memory (Shaw, 1996). Also, if after making an identification (correct or incorrect), eyewitnesses are provided feedback that they are good witnesses, their subsequent confidence increases (Wells & Bradfield, 1999). By the time most witnesses testify in court, they have been questioned multiple times, and it would not be surprising to learn that, along the way, they have either inadvertently or directly received feedback that they “picked the right guy.” This alone can explain why many eyewitnesses are so confident in their identification in front of the jury at the trial.

Cross-Race Identification

One of the strongest witness characteristics associated with identification accuracy is whether the race or ethnicity of the eyewitness and the perpetrator are the same or different. Metzner and Brigham (2001) recently reviewed research studies on cross-race identification (also known as the own-race bias). In terms of correct identifications, across these 39 studies, eyewitnesses were 1.4 times more likely to correctly identify a previously viewed own-race face than a previously viewed other-race face. In terms of misidentifications, selection of the wrong suspect was 1.56 times more likely with other-race individuals than with same-race individuals. The cross-race effect has also been observed to be consistent across age. Pendek, Blandon-Gilid, and Moore (2003) compared kindergarten children, third graders, and young adults in their ability to identify a Black and a White individual from a six-person lineup after a one-day delay. Similarly sized cross-race effects were reported at each age level.

Although the cross-race effect is somewhat reduced by exposure to other-race individuals, the effect of other-race contact on reducing the false alarm rate to other-race faces is modest. However, Metzner and Brigham (2001) reported that increased viewing time reduced the own-race bias; that is, when a witness has a shorter time to view a perpetrator, the false alarm rate to other-race faces increased. This finding is interesting because it suggests an interaction among eyewitness factors such that eyewitness identification accuracy would be expected to be especially unreliable when multiple deleterious eyewitness factors co-occur.

Eyewitness Stress

In presenting an eyewitness to a jury, the government’s attorney frequently claims that certainly the eyewitness would be reliable, given the high rate of stress that focused her attention during the incident. Ironically, however, the research evidence clearly suggests that under high levels of stress, eyewitness memory is less—not more—reliable. This conclusion follows from a meta-analysis recently conducted by Defenbacher, Bornstein, Penrod, and McGorry (2004). Included in the meta-analysis were 36 tests of the effects of stress on recall of crime-related details and 27 tests of stress on person identification. High levels of stress significantly impaired both types of memory, and the effect of stress was greater on (a) reducing correct identification rates than (b) increasing false alarm rates.

During cross-examination of an eyewitness expert, the government’s attorney also frequently argues that findings of impaired memory under high levels of stress is restricted to laboratory tests of face recognition memory and have little bearing on high-stress during real crimes. However, in the meta-analysis by Defenbacher and colleagues (2004), the effects of stress were actually significantly higher in eyewitness identification studies that involved staged crimes than in those that involved laboratory face recognition tasks. One of the most impressive real-world studies of the effects of high stress on face recognition accuracy was recently reported by Morgan and associates (2004), in this study, more than 500 active duty military personnel were tested on their ability to recognize two individuals, each of whom had interrogated their for 40 minutes as part of a prisoner of war survival program. After 12 hours of confinement, each participant experienced both (a) a high-stress interrogation in which questioning was accompanied by physical confrontation and (b) a low-stress interrogation without physical confrontation. A different individual had interrogated them in each condition. One day later, after recovering from sleep and food deprivation, each participant was tested on memory for the two interrogators using a live lineup or a photographic lineup. Correct identifications were significantly lower and incorrect identifications were significantly higher under the high- than the low-stress condition.

Other Estimator Variables That Are Characteristics of the Witness

In addition to the witness characteristics just described that affect the accuracy of eyewitness memory, additional factors can sometimes come into play. First, intoxicated eyewitnesses are less reliable that sober eyewitnesses, especially if they are intoxicated both at the time of observation and test. This would occur, for example, if an intoxicated eyewitness was presented a field show-up shortly after observing an incident. Dysart, Lindsay, MacDonald, and Wicke (2002) reported that under these conditions, although blood-alcohol level was not significantly related to correct identification when the eyewitness was shown a target-present show-up, when presented a target-absent show-up, the false identification rate was vastly higher in the high (52%) than the low (22%) blood-alcohol level condition.

A few personality factors are also associated with eyewitness memory accuracy. Shapiro and Penrod (1986) discussed several of these factors in their meta-analysis of facial identification studies. However, it is not likely that an eyewitness expert would be able to testify about these personality factors.
because eyewitness experts rarely test or interview eyewitnesses and are not permitted by the court to comment directly on the reliability of any witness.

**Estimator Variables: Characteristics of the Observed Event**

Exposure Time, Distance, and Lighting

It is generally true that characteristics of the observed event have a greater impact on eyewitness memory than characteristics of the eyewitness. This is because even the best eyewitnesses are relatively more reliable under some conditions than under other conditions. It is thus important, at the most basic level, to examine how well each eyewitness actually observed the perpetrator to begin with. This issue involves an assessment of how long each eyewitness observed the perpetrator, at what distance, and what lighting was available. These are the major factors that determine how many of the details in the perpetrator's face are likely to have been encoded into memory. Most eyewitness identifications occur from a photographic lineup, and in a fair and unbiased photographic lineup, a photograph of a suspect is included along with photographs of five other individuals who all match the description given of the perpetrator. All six individuals in the lineup should have the same general characteristics in terms of gender, race or ethnicity, age, and physical stature. The differences among the six individuals in the lineup are more likely to be in terms of the more specific details of each face, and it is these more specific details that are less likely to have been encoded if the perpetrator was observed very quickly, from some distance away, and under poor lighting. Although few would disagree that an individual cannot be observed in detail when seen after dark from several hundred feet away, the effect of brief exposure time may be less obvious.

A wealth of research exists on the effects of exposure time on eyewitness memory. In their meta-analysis of facial identification studies, Shaprio and Penrod (1986) reported a linear trend between exposure time to a face and the probability of correctly identifying the face. Memen, Hop, and Bull (2003) conducted a study that demonstrated this effect under reasonably ecologically valid conditions. They had mock witnesses view a realistic videotape of a crime in which the perpetrator was visible for either 12 or 45 seconds. Tested only 45 minutes later, the probability of a correct identification in the target-present arrays was vastly higher in the 45-second than the 12-second condition (90% versus 32%), and the probability of an incorrect identification in the target-absent arrays was significantly higher in the 12-second than the 45-second condition (85% versus 41%).

**Time Delay**

Although most jurors realize that their memory for an event declines as the time since the event increases, they sometimes do not apply this same memory fact to eyewitness memory for the face of a perpetrator. Perhaps it is the over-confident eyewitness saying, "I remember him as clearly today as the night of the attack a year ago," that trumps the good sense of jurors. Nonetheless, it is clear from the results of Shaprio and Penrod's (1986) meta-analysis that longer delays led to fewer correct identifications and more false identifications.

**System Variables**

System variables are those that are under the control of the criminal justice system and relate to how the witnesses were interviewed and the conditions under which an identification was made. The testimony of an eyewitness expert can be especially helpful in educating a jury about the potential fallacies in eyewitness identification that can result from the police identification procedures themselves, because people are not generally aware of the substantial differences in outcomes that can result from subtle differences in police identification procedures. Several excellent reviews are available of the effects of system variables on eyewitness identification (Wells & Olson, 2003; Wells et al., 1998; Wells et al., 2006). All of this work will not be summarized here, but rather, the three rules for conducting lineups suggested by Wells and colleagues (1998) are discussed.

The first rule is, "The person who conducts the lineup or photo-spread should not be aware of which member of the lineup or photo-spread is the suspect" (p. 627). This is also referred to as a double-blind procedure. This is important because if the officer administering the lineup knows who the suspect is, this knowledge (a) can be communicated to the eyewitness via verbal or nonverbal cues, and (b) can influence the officer's interpretation of the eyewitness's comments during the lineup. Regarding the first point, a large body of research exists on experimenter expectancy effects. This refers to the fact that individuals who have expectations about the performance of others (e.g., researchers, teachers, parents, judges, police officers) can communicate these expectations to their subordinates (e.g., subjects, students, children, jurors, witnesses) using a wide range of cues, and these cues can actually affect the performance of these individuals (Rosenthal, 2002). The experimenter expectancy effect can be eliminated in eyewitness identification procedures by simply ensuring that the officer administering the lineup does not know who the suspect is.

The second point of the above-stated rule number one is that knowledge of who the suspect is in a lineup can influence the officer's interpretation of the eyewitness's comments during the lineup. For example, if the eyewitness points to one of the filler faces in a photographic lineup and says, "That looks kind of like the shooter," the officer might interpret this as an ambivalent remark and respond, "Well, is there anyone else in the lineup who looks like the shooter?" However, if the eyewitness points to the suspect and makes this same remark, the officer is more likely to interpret this response affirmatively.
and ask the eyewitness to circle that face and sign the identification card. This is especially problematic because photographic lineups are rarely recorded, and the defense attorney is rarely present to observe this procedure. Thus, all the jury is likely to hear is that "the eyewitness positively identified the defendant.”

The second of Wells and colleagues’ rules (1998) is, “Eyewitnesses should be told explicitly that the person in question might not be in the lineup or photo-spread and therefore should not feel that they must make an identification. They should also be told that the person administering the lineup does not know which person is the suspect in the case” (p. 629). This rule follows from the finding by Parker and Ryan (1993) that eyewitnesses are less likely to false alarm and identify an innocent suspect if they are told that the perpetrator may not be in the lineup. In reality, however, what is more important is whether the eyewitness believes that she will be shown a lineup including the perpetrator, rather than what she is told. If, after a crime, an eyewitness has no contact with the police for several months, and then suddenly the stolen property is returned and she is asked to attend a lineup, the eyewitness is likely to attend the lineup with the expectation that her job is to select someone. Under these conditions, the eyewitness is likely to select from the lineup that individual who looks most like the perpetrator, even if she does not actually recognize that individual from the scene of the crime. In other words, the eyewitness simply lowers her response criterion. The probability of a misidentification increases when the response criterion is lowered. The testimony of an eyewitness expert can be useful in educating the jury about how an eyewitness can sometimes select an individual from a lineup because of system variables such as these and not because she actually recognizes the individual.

The third rule (Wells et al., 1998) is, “A clear statement should be taken from the eyewitness at the time of the identification and prior to any feedback as to his or her confidence that the identified person is the actual culprit” (p. 635). Although, as mentioned previously, the correlation between witness confidence and witness accuracy is not strong, jurors often do rely on an eyewitness’s expressed confidence in gauging the reliability of the witness. Thus, estimates of witness confidence obtained prior to any blistering feedback are less likely to be artificially inflated.

Estimator Variables and System Variables Together

Are the effects of estimator variables and system variables independent? No. When eyewitness memory is weak, system variables are more likely to have a stronger impact. Consider the situation in which two co-workers in a doctor’s office are having lunch. The office is closed, so when they hear some noise in the adjacent room, they walk over to see who might be there. When they see an unfamiliar man packing up a box, they ask him what he is doing. He claims to be looking for the restroom and leaves when confronted. The co-workers call the police, who have a suspect apprehended within 30 minutes. Both co-workers, standing together, confidently identify the defendant at a field showup at which they are told, “We’ve got him.” Under the conditions of observation in this situation, these eyewitnesses would be expected to have a strong memory for the perpetrator—they were close to him, the lighting was good, they were face-to-face talking to him for about 45 seconds, their attention was directed to the perpetrator by the witnesses’ suspicion, and they identified him only 30 minutes later. The witnesses should have been tested independently, and they should not have been given the biased comment, “We’ve got him.” Nonetheless, we have sufficient reason to believe that these witnesses have a strong and enduring memory for the perpetrator’s face, and such a memory is less likely to be influenced by flawed system variables.

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The Form of Eyewitness Expert Testimony

Generally, there are two aspects to the work done by an eyewitness expert witness: pretrial consultation and testimony. In many ways, these are two equally important roles. However, the extent to which an expert witness participates in pretrial consultation depends primarily on when he or she becomes involved in a case. The reality is that trial attorneys, especially public defenders, are pervasively overworked and are usually assigned a case only after the preliminary hearing. Consequently, they give their eyewitness expert witness about as much time as they have to prepare for a case—frequently only a couple of weeks.

Pretrial Consultation

How does an eyewitness expert get involved in a case? The first point of contact between an attorney and an eyewitness expert is normally a telephone conversation. At this point, the attorney has usually consulted with colleagues and identified an eyewitness expert who has the reputation that he thinks will work well with his case. In the initial telephone conversation with the eyewitness expert, the attorney describes the facts of the case relevant to the eyewitness identifications. The eyewitness expert takes careful notes and asks questions to fill in the relevant details. The purpose of this initial conversation, conducted for no fee, is (a) for the attorney to determine whether eyewitness expert testimony in general, and the testimony of this eyewitness expert specifically, is likely to work with his defense strategy for the case, and (b) for the eyewitness expert to determine whether a basis exists in the psychological research literature to question the reliability of the eyewitnesses in the case, and whether he or she wants to work with this attorney on this case. In other words, this is a two-way interview to assess fit, with each individual utilizing his or her own criteria. It is important to realize that this dynamic is operative because it has implications for some of the ethical issues discussed.
later in this chapter, specifically regarding what cases an eyewitness expert takes on and how this decision is made.

Once an eyewitness expert is retained on a case, he or she conducts the pretrial consultation. This involves reviewing all of the materials that present the facts of the case relevant to the eyewitness identifications. This usually includes the initial police reports, transcripts (and sometimes tapes) of interviews with each eyewitness, the investigating officer’s report, the photographic or live lineup, and the transcript of the preliminary hearing. In reviewing this material, the eyewitness expert identifies factors that are likely to have affected the reliability of the eyewitness identifications. These would include the estimator variables and systemic variables that were discussed previously in this chapter.

At this point, the eyewitness expert can also identify factors about which additional information is needed. Perhaps it is necessary to have an investigator go to the scene of the crime and identify (a) the location of lights in the area, (b) how well the face of a man with a baseball cap could have been observed from a second-story window above the alley, or (c) the extent to which a tree in front of the eyewitness’s living room window might have obscured the view of the perpetrator running down the street. Eyewitnesses’ memory for details such as these can be as unreliable as their memory for the perpetrator’s face. Independent corroboration of circumstantial details is often crucial, and an eyewitness expert can help identify important factors that need to be clarified.

The eyewitness expert also maps out the “identification history” of each witness. This is a timeline specifying what types of identification tests were presented to each eyewitness and the eyewitness’s response to each. From this information, the eyewitness expert can determine whether there may have been suggestive or biasing influences on the identification of the defendant. For example, it is not uncommon for an eyewitness to be shown an apparently fair and unbiased photographic lineup that includes the defendant and make no identification, but later to be shown a second photographic or live lineup that includes the defendant and identify him—perhaps saying “this man looks familiar.” One interpretation of this sequence of events is that the defendant’s picture in the second lineup looked familiar because he is familiar, but only from the first lineup and not from the scene of the crime. A substantial body of research provides a scientific basis for this phenomenon (cf. Pezdek & Blandon-Getlin, 2005). Also, as presented in the first section of this chapter, eyewitness confidence is also malleable and can increase over time if an eyewitness is repeatedly questioned or provided confirming feedback.

However, the point here is that this interpretation would not be possible without assessing exactly what transpired over time from the occurrence of the crime to the first identification by an eyewitness. Often, the case file does not include a report from the first photographic lineup that resulted in a “no identification” of the defendant; this can only be inferred from what the witness might have said subsequently in an interview or at the preliminary hearing. This is one reason why it is important for an eyewitness expert to be very familiar with the case file. I mention this because, in my experience, some judges try to limit payment for pretrial preparation and consultation. They contend that if an eyewitness expert knows the content area, all he or she has to do is come into court and testify. This view is inconsistent with the fact that the content of eyewitness expert testimony is not the same in every trial. The factors that are likely to have affected the accuracy of eyewitness memory and identification are not the same in every case. To identify what these factors are in each case, the eyewitness expert must be familiar with the case file.

There are several points at which the attorney might decide not to retain the eyewitness expert to testify in the trial. This decision is normally made based on whether the attorney thinks that the expert can advance his strategy for the case. The eyewitness expert can participate in this decision by offering her opinion regarding whether, on balance, she thinks that the eyewitness evidence is reliable. However, because the attorney, but not usually the eyewitness expert, knows the full scope of the evidence to be presented in a trial, he is usually in a better position to decide the extent to which eyewitness expert testimony is likely to facilitate his case strategy. In any particular case, the eyewitness evidence can vary along a continuum from very weak (the eyewitnesses really never saw the perpetrator very clearly and a misidentification is likely) to very strong (the eyewitnesses got a good look at the perpetrator and a correct identification is likely); generally, the utility of the testimony of the eyewitness expert would be expected to vary conversely along this same continuum. However, if the only evidence against a defendant is the eyewitness evidence, the attorney may feel that his best strategy is to have the eyewitness expert testify regardless of the strength of the eyewitness evidence. In this sense, the decision regarding whether an eyewitness expert should testify in a case or not is best made by the attorney. However, relevant to the third section of this chapter, it is the ethical obligation of the eyewitness expert to testify similarly to the facts of a case regardless of whether her advice to the defense attorney was for or against proceeding with her testimony in the trial. It is the job of the defense attorney—not the eyewitness expert—to provide the best defense for the defendant.

On a related point, the attorney will often request a written report from the eyewitness expert after she has reviewed the case file. This report is to (a) offer the opinion of the eyewitness expert regarding the strength of the eyewitness evidence and (b) articulate the specific factors that led to this opinion. Less than half of all cases on which I am retained to testify as an eyewitness expert actually go to trial, and this appears typical from my conversations with other eyewitness experts. The majority of these cases are settled prior to trial, and the written report of an eyewitness expert frequently plays a role in the pretrial resolution of these cases. In light of the potential importance of this report, it is the ethical obligation of the eyewitness expert to present in this report a balanced view of the reliability of the eyewitness evidence.
If the attorney decides to have the eyewitness expert testify in the trial, the next step is to prepare the testimony. Courtroom testimony is necessarily in a question-and-answer format; this is not an academic lecture by the expert. Thus, the attorney needs to be informed regarding those areas about which to question the expert and anticipate issues that are likely to arise during cross-examination. And, usually there is a best organization for presenting this information to make it clear and comprehensible to the jury. The pretrial work of the eyewitness expert can be very effective in preparing an attorney to present eyewitness evidence to the jury most effectively.

The eyewitness expert can also assist the attorney in preparing for the presentation of other aspects of the eyewitness case to the jury, specifically (a) introducing the eyewitness evidence in the opening and closing statements, (b) cross-examining the police officer, and (c) cross-examining the eyewitnesses. These and other suggestions for presenting eyewitness evidence to a jury have been discussed by Nettles, Nettles, and Wells (1996). It is appropriate for an eyewitness expert to assist the attorney with preparation of these other aspects of the case because this can help lay a foundation for the testimony of the expert and give the jury the proper frame of mind for the eyewitness expert testimony; thus, the eyewitness expert testimony is not processed in a vacuum, independently of other trial testimony.

Assisting in the Preparation of the Attorney’s Opening and Closing Statements

In an eyewitness case, both attorneys can expect that during direct testimony, the eyewitness will point to the defendant and identify him as the perpetrator of the crime. In anticipation of this, and to “steal the thunder” from the government’s case, the defense attorney should tell the jury during opening statement that this will occur. He should then present his interpretation for why this will occur by giving the jury another reason why the eyewitness will identify the defendant, a reason that has nothing to do with who committed the crime. The attorney should then tell the jury that an expert witness—a scientist with impeccable credentials—will testify to support this interpretation. During closing statement, the attorney should then summarize how the facts presented in the trial support his alternative interpretation of why the eyewitness identified the defendant, even though the defendant was not the perpetrator.

Assisting in the Preparation of the Attorney’s Cross-Examination of the Police Officer

Often, the reason for questioning the reliability of the eyewitness evidence rests on the procedures utilized by police officers in eliciting the identification from the eyewitness. These are the system variables that were introduced in the first section of this chapter. The eyewitness expert can help the attorney lay the foundation for this aspect of the expert testimony by identifying the procedures the police officer may have used that could have led to a misidentification. A number of sources present reviews of the scientific support for utilizing appropriate system variables (cf. Wells et al., 2006). However, rather than trying to convince the jury that the police may have followed procedures determined by scientific studies to be suggestive and associated with a high rate of false alarms, I think it is more effective to convince the jury that the police may have followed procedures determined by their own state police guidelines to be suggestive and associated with a high rate of false alarms.

In fact, the California Peace Officers Legal Sourcebook (2001) specifies, among other things, the following: (a) “You must avoid any conduct prior to the identification which might be ruled suggestive” (p. 8.1); and then a list of clarifying examples is provided; (b) “You must avoid any conduct during the identification which might be ruled suggestive”; and then a list of clarifying examples is provided (p. 8.2); (c) “You should not say or do anything during the lineup which would draw the attention of a witness to the suspect. To avoid any problems, try not to say or do anything during the identification” (p. 8.3); and (d) “If, prior to the lineup, the witness describes the suspect as having a particular or distinguishing characteristic, . . . make sure that others in the lineup also have this characteristic, if at all possible” (Adams, 1982; p. 8.3). When the attorney cross-examines the police officer, it would be useful to ask him the extent to which each of the specified state police guidelines for conducting lineups and showups was followed in conducting the identification in the case.

Assisting in the Preparation of the Attorney’s Cross-Examination of the Eyewitness

The most important thing for the attorney to keep in mind when cross-examining the eyewitness is to ally with the jury’s perception that the eyewitness is an innocent bystander, and to treat the eyewitness accordingly. In other words, the proper frame of mind is that the eyewitness is mistaken in her identification; however, a witness can be incorrect without being dishonest. During the eyewitness expert testimony, the expert should also emphasize this point, that even well-intended eyewitnesses can be mistaken. The jury should never be in the position of having to find the eyewitness dishonest or otherwise malevolent in order to find the defendant not guilty.

Trial Testimony of an Eyewitness Expert Witness

When an eyewitness case does go to trial, most of the substance of the eyewitness expert testimony pertains to what is referred to in the landmark California eyewitness case of People v. McDonald (1984) as “certain psychological factors that may impair the accuracy of a typical eyewitness identification, . . . , with supporting references to experimental studies of such phenomena (p. 246)."
Generally, this is done by presenting the estimator and system variables that the eyewitness expert identifies as factors likely to have affected the reliability of the eyewitness identifications. However, a successful expert witness does not simply present the jury with a list of the relevant eyewitness factors and the experimental support for each. Rather, the task of the eyewitness expert is to persuade the jury to evaluate the eyewitness evidence more analytically, so that they can more accurately judge its reliability in light of the eyewitness circumstances in the specific case at hand.

The first step in this process is to provide jurors with an accurate schema for how eyewitness memory works. If jurors believe that memory works like a video-camera, and this schema is shared by many jurors, then eyewitness memory is simply the process of playing back the digitized recording that was laid down with relatively higher or lower resolution. Such a schema would lead to many inaccurate conclusions about the reliability of eyewitness evidence. An important part of getting jurors to evaluate eyewitness evidence more accurately is to dispel this myth.

One approach that serves this purpose is to show jurors fallacies in their own everyday memory. For example, the eyewitness expert can ask the jurors to recall the features on the front and back of a U.S. penny, the features of the state seal (which is typically on the wall right over the judge's head), or the face of the security officer with whom they interacted when they entered the courthouse that morning. Let them think, well, these are not salient or important things, ask them to recall the face of the minister who married them or the face of the delivery room nurse who delivered their first child. When jurors attempt any of these memory tasks, they quickly realize that what they remember, even about salient and important things, is not just a mental photograph of what they viewed. Expert testimony, like good teaching, involves not just dishing out information, but actually transforming the way people think about a domain. This should be the goal of an eyewitness expert as he or she prepares to testify.

Another challenge for an eyewitness expert in preparing to testify is to realize that although his or her testimony must be grounded in the scientific research literature on eyewitness memory and identification, most people find a good example more persuasive than a library full of good data. Thus, most jurors are going to find that a point made by providing a memorable illustrative example is going to be more persuasive than presenting the results of a scientific study. As of December 2008, more than 210 post-conviction DNA exonerations cases are available to serve as examples of cases in which highly confident eyewitnesses have been dead wrong, many under circumstances that may approximate the conditions of the case at hand. Another advantage for an eyewitness expert in structuring her testimony around illustrative examples rather than scientific studies is that it reduces the chance that cross-examination will consist of a long and boring sequence of questions about picaayune details of experiments. Unlike a typical classroom lecture, when an expert witness testifies in court, he or she needs to contemplate the type of cross-examination that is likely to follow from the nature of the direct testimony provided. The form of the eyewitness expert testimony should take this into consideration.

What can be expected during cross-examination of an eyewitness expert? It is not uncommon for the district attorney to have in front of him several transcripts of previous testimony by the expert, against which to compare the expert testimony in the current case. Remember, the job of the prosecutor is to present the strongest case possible for the government, in this case, by reducing the credibility of the eyewitness expert. During cross-examination, an expert witness should be prepared to defend his or her fee, professional record, and the basis for any points made during direct examination. Chapter 10 in this volume, by Bailey and Mecklenburg, presents a critique of the typical eyewitness expert testimony. In preparing for cross-examination, eyewitness experts should plan their responses to the issues raised in Chapter 10. During cross-examination, the expert should also be prepared to present a list of the factors that would bolster the accuracy of the eyewitness evidence, and the research support for these factors. After all, there are few cases for which all of the evidence suggests that the eyewitness identifications are faulty, and such cases are not those that are likely to be prosecuted. Additional suggestions for how to prepare for cross-examination are presented in the section that follows, on ethical issues.

Ethical Issues Concerning Eyewitness Expert Testimony

Every expert witness faces a host of ethical issues when she enters the legal arena, from the first point of contact in a telephone conversation to the trial testimony. The American Psychology-Law Society provides guidelines for forensic psychologists. These guidelines address some of the ethical principles that govern work in the courts (see http://www.ap-ls.org/docs/SCFP%20January2006.pdf). However, the more subtle factors are more likely to challenge the ethics of an eyewitness expert witness.

To identify some of the more subtle factors, I contacted the 12 individuals whom I know throughout the United States who regularly testify as eyewitness expert witnesses. I asked each to specify the three major ethical concerns he or she encounters when serving as an eyewitness expert witness. I received responses from seven of these people; their comments, along with my own, provide the basis for this section of the chapter.

The most frequently raised ethical concern can be characterized as maintaining balance and objectivity. In California, where the courts have been more open to the testimony of eyewitness expert witnesses, the relevant evidence codes for appointing any court expert are California Evidence Code Sections 730 and 952 (see West's). When an eyewitness expert is first
appointed, the conditions for the appointment are typically specified by these two evidence codes. Evidence Code 730 simply states:

When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial.

However, Evidence Code 952 specifies that the communication between the expert and the lawyer is confidential. This means that information transmitted between the expert and the lawyer cannot be disclosed to a third person, other than those who are present to further the interest of the client. The fact that an eyewitness expert is initially appointed under the umbrella of these two evidence codes makes it immediately salient that the legal system in the United States is an adversarial system. The job of the defense attorney is to provide his best defense for the defendant. The job of the government's attorneys is to provide his best case against the defendant. An expert witness is retained by one side, usually the defense, but the expert witness is expected to be an objective, unbiased participant in the process. So, what does it mean to be objective or retained by a defense attorney in the context of an adversarial system?

The eyewitness experts with whom I consulted identified challenges to objectivity that vary along a continuum. At one end of the continuum are those situations in which it is easy to identify pressures to be nonobjective. One expert provided this example:

The worst situation I ever had involved an attorney who wanted me to say something I couldn't say. The facts involved something like this: A witness who first thought the perpetrator was Caucasian but then identified a light-skinned Black individual. The lawyer wanted me to say that that was not humanly possible, calling on research on cross-racial identification. I tried to explain that the cross-racial identification research did not say what he thought. He didn't want to hear that and refused to pay me for my time involved in travel, testimony, etc.

More typical, however, are the more subtle situations at the other end of the continuum; these occur throughout the process, from pretrial consulting to testifying. What can be the challenges to an eyewitness expert's objectivity during pretrial consultation? One expert offered this view:

I think of myself as an unbiased expert, but regularly face pressure to be an advocate for the defense attorney. Examples include being asked for advice on jury selection and how to cross-examine witnesses. These are questions that should be for the defense team, but not the expert witness. Are physicians who testify as experts asked to give advice about jury selection? I doubt it.

However, the opinions of the experts varied wildly in terms of the acceptable scope of the pretrial consultation. Another expert said,

I think the most basic ethical issue faced in this type of work is clearly separating the collaborative "strategy" work done with the attorney at the consultation/preparation stage from the objective testimony to be provided at trial. This is, of course, an issue in all cases. From the moment an attorney calls to the moment before I take the stand, I am their consultant. As their hired consultant, I do my very best to assist them in understanding the research in a manner that will help them build their case as effectively as possible as they zealously advocate for their client. However, once I take the stand, I must be an objective source of information, answering the questions raised by both sides in the most balanced and fair manner possible.

Whereas the former view emphasizes the need for objectivity on the part of the expert over advocacy for the defendant, the latter view considers the pretrial consultation as an opportunity to establish the foundation for the expert's testimony to strengthen its impact. Both experts agree, however, that objectivity is essential in their testimony. Nonetheless, based on the social psychology research on the impact of roles on behavior (Zimbardo, 1972), it is not clear that the type of role-switching suggested in the view of the latter expert is likely or even possible.

Prior to testifying, all witnesses take the oath that they will tell, "the truth, the whole truth, and nothing but the truth." But, what is "the whole truth"? The principal challenges to an expert's objectivity during trial testimony concern what is presented and how it is presented. In other words, to what extent does an eyewitness expert discuss factors that decrease versus increase the reliability of the eyewitness evidence, and is the research on both sides presented similarly? One expert emphasized the need to "accurately characterize research findings, avoiding overstating (or understating) the size of effects or generalizations of the findings, particularly as it pertains to the factors on both sides—those that would support and undermine an accurate identification." However, another expert framed the situation this way:

During direct examination, the defense attorney usually shapes the expert testimony by only asking questions about the aspects of the eyewitness evidence that should decrease its likely accuracy, and not mentioning aspects that should increase its likelihood. I don't deliberately suppress factors that I notice that speak in favor of the eyewitness, but the adversarial nature of the situation imposes some biases on what my direct testimony will feature. I am retained by the defense, and the defense attorney asks the questions—usually questions that I have suggested. This is not usually a problem because I only agree to testify in cases in which the eyewitness evidence looks pretty bad overall in terms of system and estimator
variables, but there are times when it turns out that the evidence is not all that bad.

This is where extensive pretrial consultation—the type discussed in the middle section of this chapter—can be useful in identifying the factors that both foster and undermine the accuracy of the eyewitness evidence. Once the factors on both sides have been identified, the defense attorney can decide, first, whether to have the eyewitness expert testify at all, and if so, what the best strategy is for introducing the relevant material. However, it is important for the defense attorney to know, prior to trial, what the expert will say on any point, so that the expert’s testimony is not shaped by the needs of the defense. This is one good strategy for maintaining the objectivity of the expert testimony.

It is easy for an eyewitness expert for the defense to be objective if he or she suspects that the defendant is innocent, but what about when this is not the case? The true test of an eyewitness expert’s objectivity occurs when, during the process, the expert develops the view that the defendant is likely to be guilty even if the eyewitness evidence is dubious. This can occur while reviewing the case file in the pretrial stage, or it can occur as late as the process as during testimony. It has occasionally happened to me that, during cross-examination, the prosecutor asks, “How does it affect your opinion regarding the reliability of the eyewitness evidence that the defendant’s fingerprints were found at the scene of the crime, and on the night of the murder, he told his sister that he shot the cashier by accident?” It is unlikely that facts such as these would only come to my attention at the trial, but it is possible. When asked a question of this sort, I respond that I cannot evaluate the validity of these other lines of evidence, and that I think it is important that each line of evidence be evaluated independently. This is true, and I think that it is an important point for jurors to understand that five lines of evidence against a defendant are not necessarily more compelling than two. When this occurs, I also use it as an opportunity to ask the prosecutor boldly if he is inviting me to comment on the culpability of the defendant. Nonetheless, it presents a challenge to my personal ethics if I feel that my testimony may be helping a guilty person.

This situation has arisen for other experts as well. One of the experts I surveyed said,

Occasionally, I have a very strong suspicion that the defendant is guilty. The eyewitness evidence is bad because of improper, biased, suggestive testing by the police, so I am compelled to testify that the science raises questions about the validity of the identification. I am ethically bound to critique the eyewitness evidence for the jury, but I am ethically challenged by the belief that—maybe because of me—a guilty person may go free while victims suffer more.

Nonetheless, in these situations, it is important that the expert’s testimony proceeds just as it would if he or she believed that the defendant was innocent. “This is because, first, the expert witness does not actually know whether the defendant is innocent or guilty; this is not the role of the expert, and the expert rarely has sufficient information to make this determination. Further, we know from the research on interpersonal expectations that was previously discussed that an individual’s covert expectations of a person affect how other perceives that person (Rosenthal, 2002). Thus, if the expert witness perceives that the defendant is guilty, this increases the probability that the jury will do so as well, and this far exceeds the appropriate influence of the expert witness.”

Another expert witness has taken the very strong view that not only should eyewitness experts only consider the strength of the eyewitness evidence, ignoring other lines of evidence when they are preparing for testimony, but that it is equally important in deciding which cases to accept that an eyewitness expert not consider other factors that might suggest whether the defendant is guilty or innocent. In this expert’s opinion, these actions would prejudice the case.

What criteria do eyewitness experts use to decide whether to accept a case? One expert witness offered this view:

How selective should I be in accepting or rejecting cases? Some cases are better suited for expert testimony than others. But should this be a basis for accepting cases? I have heard good arguments for being selective, and I have heard good arguments for taking cases on a first-come-first-served basis. I have to make this decision virtually every time I receive a call from an attorney.

For all eyewitness experts, various practical considerations affect which cases they accept. These primarily include timing and scheduling issues. There are other issues as well. For example, I am more likely to want to work in the future with an attorney whom I perceive to be well organized and well prepared for trial than with one whose style is to shoot from the hip in the courtroom. Thus, even if I am very busy, I am more likely to say yes to some attorneys than to others; that is, my criterion increases with my availability. Although this does not affect my objectivity, I often wonder if this is fair to the client. Another expert expressed a similar decision rule in considering the severity of a case. That is, “if it involves the death penalty, I am more inclined to do it even if I am too busy.” This makes sense if the expert’s decision criterion is aimed at minimizing the consequence of a misidentification. However, this disadvantages innocent people accused of less serious crimes. I recently questioned a defense attorney why his client did not accept a 6-month deal rather than going to trial facing 15 years to life. She convinced me that, for this man, 6 months in jail would essentially ruin his life; he would lose his job, his house, and likely his family. Six months in jail for this man would be comparable to a much longer sentence for an individual with more resources. Thus, the “severity of the case” is a relative judgment, and one that the expert is not likely to be able to evaluate fully.
Sometimes the decision as to whether to accept an appointment or not is based on whether the expert's fee can be paid. Expert witnesses (along with everyone else working in the courtroom) are paid for their expertise. Ordinarily, each eyewitness expert has a court-approved rate, and they are appointed (for indigent clients) or paid a retainer (for private clients) based on this rate. However, periodically a lesser fee is offered. I consider it inappropriate to work on different cases, sometimes in the same county, at different rates. This would also open the door for dickering about the fee for every case, a practice I would not find pleasant. Therefore, sometimes I turn down cases because my fee cannot be paid. However, another expert admitted that "my requirement to be paid for my expert services arouses a large ethical concern about unequal access to resources to defend oneself. Requiring payment for testimony contributes to the bad reality that there is highly unequal access to justice in our legal system."

Let me return to the issue of what it means to be objective in the context of an adversarial system. Let's be honest. Even the calmest, best-intended expert witness can enter the courtroom committed to being an impartial educator and leave the courtroom in a rage, hoping that the defendant is acquitted just to spite the government's attorney. This situation was described by Schofield (1956) more than a half-century ago when he recognized that something in the adversarial system "arouses the adrenals" (p. 2). The job of the government's attorney is to provide his best case against the defendant, and this often involves taking every possible step to discredit defense witnesses. The government's attorney will often (a) purposefully misstate the testimony of the expert to make him or her look foolish, (b) comb through transcripts of previous trials in which the expert has testified to attempt to perjure the witness, (c) try to identify weaknesses in the expert's academic record and provoke the expert by revealing his or her sensitivity about this, and (d) question the expert in detail about his or her fee and total income per year for the past several years. Schofield believed that, under such pressure, only a superhuman person could avoid taking sides and becoming invested in the outcome of the trial. Nonetheless, this should be avoided because it undermines the objectivity of the expert. How can this be avoided? Just anticipating this behavior during cross-examination helps minimize the sting when it occurs. But it is clear to anyone who has testified as an eyewitness expert that this line of work, although valuable to the courts, is not for the meek.

Notes
1. A target-present showup is one that includes a picture of the suspect and assesses the hit rate to and the miss rate for the suspect. A target-absent showup is one that does not include a picture of the suspect and assesses the false alarm rate to filler faces.
2. During a trial, an eyewitness expert witness cannot be asked about or comment on whether he or she thinks that the defendant is the real perpetrator; that is, he or she cannot “speak to the ultimate issue.” Nonetheless, this information can be offered by the eyewitness expert in a written report or written product that is not intended to be presented to the jury.
3. The classic study by Nickerson and Adams (1979) illustrates how poorly people can perform this simple memory task.
4. Here, I will not discuss the complexity of the legal definition of “confidential,” but eyewitness experts should be aware when they put anything in writing that a difference exists between what is considered “work product,” which is usually not discoverable by the opposing attorney, and a “report,” which is usually discoverable.