PDHonline Course G129A (8 PDH)

The Architect as a Consultant/Expert Witness

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MODULE #3: Testimony by the Expert Witness

Overview

This module provides guidance for testimony as an expert witness.

Pre-Deposition Activities

Deposition preparation extends beyond reviewing all available material related to the case. Preparation should also address issues peculiar to the deposition environment. Consider the following example activities.

1. Establish Who Will Pay the Bill for the Deposition – While the attorney hiring you is responsible for paying you for the services that you render to him/her, he/she may not be responsible for paying you for time and expenses related to deposition preparation, travel to and from the deposition, and the time expended in giving a deposition. In many cases, the attorneys involved in the case agree to pay their own experts for the expert's deposition time and expenses. However, in a number of cases the attorneys agree that the attorney requesting the deposition will be responsible for payment of the expert's bill for deposition time and expenses. An understanding of who is responsible for the bill should be established prior to the deposition. (This information will become valuable at the start of the deposition as will be evident later in this module.)

2. Establish Deposition "Custom and Practice" – Deposition "custom and practice" varies from jurisdiction to jurisdiction. For example, in some jurisdictions the witness is expected to read and sign the deposition prior to publication unless there is an agreement at the beginning of the deposition that review and signature is waived. In other jurisdictions there is no requirement that a deposition be read and signed unless the witness specifically indicates a desire to read and sign the deposition at the time of the deposition. The expert witness should inquire about deposition "custom and practice" so that desired deviations can be articulated at the start of the deposition.

The writer always insists on being able to read (and correct errors) and sign depositions before it is distributed. Why? Because terms are often misunderstood by court reporters and misprinted when the deposition is typed. These errors can cause significant problems later at trial. And, on rare occasions, a question is misunderstood during the deposition and a faulty answer is provided. Upon reading the deposition, these misunderstandings can be identified and corrected prior to distribution, minimizing problems later at trial.

3. Ask for the "MO" of Each Opposing Attorney(s) – Before being confronted by an opposing attorney during a deposition or trial, it is important to know the attorney's *modus operandi* ("MO") – way of doing or accomplishing activities. It is especially important to know the attorney's "questioning style". Does the attorney ask questions

slowly or rapidly? Does the attorney tend to interrupt during the answering of a question and pose a new question? Does the attorney tend to ask (a) short questions or (b) long, involved questions that contain a number of constraints and many sub-parts that each requires an individual answer? Does the attorney tend to ask the same or similar questions repeatedly throughout the deposition in an attempt to trap the witness in answers that conflict? Does the attorney speak softly or loudly? Does the attorney attempt to intimidate the witness through sarcasm, the use of irritating voice inflections, or the use of profanity? (Sarcasm and voice inflections are not reflected on the transcript. And, many court reporters do not record profane words on the transcript. So, these situations require special attention. This issue will be addressed later in this module.)

4. Ask Your Attorney to Give You a "Dry Run" – While your attorney can never exactly predict the questions that you will be asked during a deposition, he/she should have an insight into the key issues that the opposition will be addressing during the deposition. Therefore, you should ask your attorney to prepare you by asking typical questions, allowing you to respond as you would during the deposition, and then critiquing your answers providing you with suggestions as to how you can improve your responses. Clearly, you do not want to be a "shill" for your employer-attorney and allow your employer-attorney to tell you exactly what to say, but you do want to make sure that your testimony is clear and focused.

5. Establish a System for "Cues" During Deposition – Once a deposition is initiated, your employer-attorney cannot coach you concerning sensitive questions or how to answer a particular question. It is therefore important to have some means by which the employer-attorney can signal you that a particular question is extremely sensitive and should be answered with care. The writer usually asks that, when a sensitive question is posed, the employer-attorney pretend that his/her mind had wondered and quickly ask that court reporter re-read the question. This action becomes the signal to the writer to listen to the question with extreme care and to answer the question with the same level of care.

6. Give the Complete Case File to the Employer-Attorney – In order to prevent information that might be sensitive, non-discoverable, or extraneous "scribbling" from being used by an opposing attorney during a deposition, TAKE NOTHING INTO THE DEPOSITION! Prior to the start of the deposition, give your employer-attorney everything in your case file and let him/her be responsible for deciding what information/materials should be disclosed at the time of the deposition.

As noted in Module #1, the writer takes the position that everything in a case file is the property of the employer-attorney; consequently, the writer has nothing personal that he can produce at the time of the deposition.

<u>At the Deposition</u>

Because depositions are normally conducted in the conference room of a law office in the absence of a judge, attorneys taking depositions tend to take on a “god-like” persona and make the witness feel inferior which leads to intimidation. Expert witnesses are especially subject to this influence because they often feel that their professional reputation is “on the line” and a poor performance will doom their ability for future employment as a consultant/expert witness. Consequently, the expert witness must be alert to opportunities to negate the influence of the environment. The following suggestions will be helpful in achieving this goal.

1. Select a Well-Positioned, Comfortable Chair – Many times the room being used for a deposition has windows along one wall. The witness should never sit facing the window and be subject (a) to the glare or reflection of the sun from outside objects or (b) to distractions from events taking place outside the building. Many conference tables have supports along the interior underside. Make sure that the selected chair is not close to a support that will limit leg movement. Often the chairs in the room are adjustable with respect to height. Adjust the height of the chair to suit your personal needs. (For example, since the writer often gets leg cramps from sitting in a chair too close to the floor for an extended period of time, a first step is to raise the chair to its maximum height from the floor.)

2. Sit in Chair in a Relaxed Position – Attorney’s often use body language as an indicator when a witness is under stress relative to a sensitive point. From the very beginning of the deposition to the very end of the deposition, the witness should display a relaxed response style. For that reason the witness should select a body position that (a) is comfortable, (b) allows legs and arms to move freely without demonstrating stress, and (c) permits easy repositioning of the posterior when ever numbness sets in.

3. Read Into the Record, at the Beginning, Any Requirements Relative to the Deposition – If your employer-attorney has indicated that the deposing attorney is responsible for the payment of your bill for fees and expenses related to the deposition, get that point “on the record” at the beginning of the deposition. The writer is especially adamant on this point. A typical transcript will begin as follows.

Court Reporter: Do you swear to tell the truth, the whole truth, and nothing but the truth so help you God in the matters pending in this case?
Witness: I do.
Attorney: Please state your name and address.
Witness: My name is John H. Doe, and I live at 1234 Main Street in Anywhere, USA. Now that we are on the record, the attorney that has retained me in this case has advised me that you are responsible for the payment of my professional fees and expenses relative to the rendering of this deposition. Since the laws that govern my practice require that I be remunerated for professional services and expenses, I must establish on the record at the beginning of this deposition that you will make payment on my bill within 30 days of the date of the bill. Do you so agree?

Such an aggressive nature serves notice that the writer will not be intimidated by the proceedings and is not ashamed to discuss fees. [One strategy used by many attorney’s, both during a deposition and during a trial, is to make the expert witness appear to be (and feel like) a “prostitute” because the expert witness is being paid to

render testimony. During trial, the pressure is increased when the attorney highlights the expert's fee for the jury and implies that the expert's fees are exorbitant. Hopefully, your employer-attorney will do the same to the opposition's expert so that issues of expert witnesses' fees will be neutralized.]

The normal next step after the writer's opening statement is a series of question from the attorney concerning the writer's professional fee structure and expenses. "Sly" attorneys will attempt to refrain from a commitment to pay professional fees and expenses and will move directly into questions relative to the case. In these situations, the transcript will typically read as follows.

Witness: I am sorry, but we cannot proceed until you have agreed on the record to make payment on my bill for fees and expenses relative to this deposition within 30 days of the date of the bill. Do you so agree?

To date, the response has always been as follows.

Attorney: I apologize. I let my mind wander to other matters. Yes, I will make payment.

The writer has a friend that used this ploy on a case many years ago; and, while the attorney never agreed to make payment "on the record", the deposition did continue, but the attorney became so upset over the dialogue that he "lost his edge" and failed to ask key questions that were central to the case. As a result, an opportunity to acquire important, key pre-trial information was lost.

Also, some where near the beginning of the deposition, the writer usually enters the following statement on the record.

Witness: Oh, by the way, I do not waive my right to read and sign this deposition. The deposition will not be official until I have been accorded that opportunity.

4. Listen Carefully to Questions – As implied earlier in this module, some attorneys ask the same or similar questions repeatedly throughout the deposition in an attempt to trap the witness in answers that conflict. Frequently, these questions will be the same question with imbedded information being in a different order. Sometimes, these questions will have a slightly different set of imbedded information to see if the witness is alert to the difference.

During a deposition for a case in the State of Louisiana, the deposing attorney began by asking a number of questions relative to a particular aspect of the case. Answers were provided. A different aspect of the case was then explored. Preceding this series of questions the attorney stated "Until I tell you differently, assume …" and several assumptions were given. The interrogation then proceeded to yet another aspect of the case, but the assumptions were not removed. Since the assumptions had no relationship to the answers to these questions, there was no problem. Then, the attorney returned to the first area of examination asking questions similar to the first set. The assumptions that were provided for the second area of questions did have an

effect on these answers resulting in a different set of responses. The attorney thought that he had the witness in position to be discredited.

Attorney: But, earlier you stated that … . You have just contradicted yourself.
Witness: Yes sir, but you will recall that at a point in time after asking your initial set of questions you told me that, until told differently, assume …, and you have not told me differently. Since those assumptions are still in effect, I was required to change my answers to fit the assumptions that you had imposed.

The attorney squirmed, and the court reporter nearly "fell off his chair" laughing at the attorney.

5. Note Discourtesies on the Part of the Opposing Attorney "On the Record" When Answering Questions – As noted earlier in this module, some attorneys attempt to intimidate a witness through the use of sarcasm or irritating voice inflections. Since sarcasm and voice inflections are not reflected on the transcript, the witness can negate these attempts at intimidation by "reading into the record" references to the attempts. For example, a response similar to the following might be used.

Witness: Before answering your question, I must state that I find the sarcastic tone that you are using in posing questions to be annoying, inappropriate, and highly unprofessional. I request that you refrain from using such a tone of voice.

6. Force Profanity on the Part of the Opposing Attorney "On the Record" – For the writer, profanity is not only offensive but has no place in professional interactions, especially in court proceedings. Consequently, profane utterances during a deposition, whether as a matter of normal dialogue or intended to intimidate the witness are met with rebuff by "reading into the record" references to the profanity. (And, the court reporter is forced to include the profanity as part of the court record thereby placing the attorney in a delicate situation.) Reference can be accomplished as follows.

Witness: Before answering your question, I must strenuously object to your use of profanity in the asking of questions. I consider your profanity to be offensive, in poor taste, and unprofessional. Please refrain from the use of profanity during this deposition.

7. DO NOT Be Afraid to Go "Off the Record" – When an attorney desires to handle a matter "off the record", he/she does so by saying "off the record". While a witness does not have a similar privilege, the writer has never been rebuked for such an action. In fact, the depositing attorney is usually so taken by surprise that he/she does not think to prevent the action. The writer normally reserves this tactic for three situations: the need for a restroom break, the need for something to drink because of a dry throat, and the need to have a reprieve from a situation where the writer is "on the run" during an intense period of questioning. Of course, the latter case is always coupled with the former case, and the reprieve is accomplished through a restroom break.

8. DO NOT Let the Opposing Attorney Control Tempo – Attorneys are at their "interrogating best" when they can control the tempo of the questions and answers. Frequently, attorneys will speed up the rate at which questions are asked to motivate the witness to speed up his/her responses. The more rapid the exchange, the easier it

is for the attorney to trap the witness into a response that is inappropriate. Therefore, the witness should be slow and deliberate in answering questions. Before answering sensitive or complicated questions, postulate the answer in your mind and redraft it in your mind before speaking the answer. And, if the tempo becomes too "heated", consider a restroom break or the need for something to drink in order to regain the tempo.

9. DO NOT Let the Opposing Attorney Intimidate You – While techniques of intimidation have already been discussed, this issue is so important that it needs addressing again separate from a discussion of the techniques of intimidation. Always remember, the only person that can intimidate you is you yourself. It is up to you whether or not you become intimidated. If you let the opposing attorney intimidate you, you will be intimidated. If you refuse to allow the opposing attorney intimidate you, you will not be intimidated.

10. Answer Questions Carefully – As noted earlier, interrogating attorneys set traps in an attempt to "trip up" the witness. But the careful answering of questions goes far beyond simply watching for traps. Consider the following examples.

a. You are employed by a plaintiff's attorney. The defense attorney that is interrogating you is attempting to get the case dismissed on the grounds that there is no real evidence to substantiate the claims of the plaintiff. You have the responsibility to ensure that pertinent information is "read into the record" during your deposition. But, the deposing attorney frames his/her questions in a manner that does not directly address the key issues that you need to discuss. Therefore, it becomes incumbent on you to find questions where you can provide an expanded answer that includes the information that you need to discuss.

b. Some questions are intended to make you look like a "mouth piece" for your client. Expert witnesses that always testify for the plaintiff can be discredited by a good defense attorney. A similar situation is true for expert witnesses that always testify for the defense. The writer, during his career as a consultant/expert witness, has worked in more cases for the defense but testified in more cases for plaintiffs. So, when the issue of previous experience is addressed during a deposition, it is often helpful to employ a technique of answering a question that is different from the one that was posed. (After all, politicians are experts when it comes to using this technique.) Consider the following dialogue.

Situation #1
Plaintiff's Attorney: In the cases in which you have worked, have you worked more for the plaintiff or for the defense?
Witness for the Defense: In the cases in which I have testified, I have testified more times for the plaintiff.

Situation #2
Defense Attorney: In the cases in which you have testified, have you testified more times for the plaintiff or for the defense?
Witness for the Plaintiff: In the cases in which I have worked, I have worked more times for the defense.

11. Dissect Long, Detailed Questions – Some attorneys like to ask long, detailed questions that contain a number of conditions/constraints and/or a number of sub-questions. Never, never, never barge into an answer without having a thorough understanding of the question. If the question contained a number of conditions/constraints, respond as follows.

Witness: Your question contained a number of conditions. I would like to ask that the Court Reporter re-read the question slowly so that I can get all of your conditions in mind before answering the question.

Frequently, an attorney that is attempting to "trip you up" will withdraw the question and ask a different question.

If the question contained a number of sub-questions, respond as follows.

Witness: If I understood your question correctly, it contained (state number) sub-questions. Let me respond to each sub-question in turn. Your first sub-question was "____". My answer to that question is "____". Your second sub-question was "____". My answer to that question is "____". …

Most interrogating attorneys will get so antsy that they will attempt to ask a follow-up question to your response to the first sub-question that they will interrupt you with a new question. Such an occasion is an excellent opportunity to let the attorney know that you do have some measure of control over the proceedings. Consider the following response.

Witness: Please excuse me, but I had not completed answering your previous question that contained a number of parts. If you do not mind, I would like to complete my answer to the previous question before responding to the question that you posed when you interrupted me.

Most attorneys will apologize for their interruption and let you finish answer the previous set of sub-questions. They will also refrain from asking any more, long involved questions.

12. Be Alert to Your Attorney's Cues – If you and your employer-attorney have developed a set of cues to assist you in avoiding problem areas, be alert for these cues.

13. DO NOT Volunteer Information (Unless Working for a Plaintiff) – As noted earlier in this section, it is okay to volunteer information if you are working for the plaintiff, and it is necessary to inject key information into the record. Otherwise, answers to questions should be short, concise, and focused on the issue(s) addressed in the question. Force the interrogating attorney to elicit desired information. Do not help his/her cause by offering unsolicited information.

<u>When You Review Your Deposition for Signature</u>

1. Correct Transcript Errors/Mistakes – When reviewing your transcript, utilize your privilege to correct errors of understanding on the part of the court reporter, correct mistakes that you made in answering a question, and change your opinion (if you have

changed your opinion). Court reporter errors are frequent, so watch for them. Court reporters are seldom familiar with terminology or how certain words are spelled. These errors should be identified through a signed addendum to the transcript. There will be times that you misunderstand a question and give a faulty answer. When such a case is recognized, explain your mistake through a signed addendum to the transcript. Finally, on rare occasions, your opinion relative to one or more issues of the case will change due to new information that you have received between the time that you gave the deposition and the time that it is presented to you to be read and signed. In these rare cases, use a signed addendum to the transcript to indicate your new opinion and the basis on which your new opinion was established.

2. Remember That the Deposition is Not the Final Word on Your Testimony – You are not bound forever to the opinions that you give on a deposition. When your opinion does change prior to testifying in court, be prepared to justify why your testimony changed. In addition, at the time that the deposition is given, you may plan to accomplish certain activities prior to the trial and so state at the deposition. However, prior to the trial, you may decide that the activities were not warranted. Again, when there is a change in plans, be prepared to justify why you did not complete your intended plans.

A good example of this latter situation can be found in an experience that the writer had in a case in the State of Louisiana when working for a plaintiff. At the time of the deposition, the writer planned to accomplish a certain set of calculations and indicated to the defense attorney during a deposition that the calculations would be accomplished prior to the trial. A few weeks later, the writer found that actual measurements had been made by another witness that demonstrated exactly what the writer planned to demonstrate through calculations. So, no calculations were made.

At the time of the trial, the defense attorney brought along a number of consultants to sit in the court room during the writer's testimony to dissect the writer's calculations and to develop a list of all of the errors in the calculations in order to discredit the writer. When the writer indicated that no calculations were made and that no calculations were required because the actual data had been measured, the defense attorney went ballistic. The writer was given the opportunity, through repeated questions, to continuously make the point for the jury that real-world data had been measured to substantiate the claims of the plaintiff and that there was no need for "guesses" through calculations.

3. Make a Copy of the Deposition for Review Prior Court Testimony – It is extremely important that you review your deposition prior to giving your testimony at the trial. Therefore, at the time that you read and sign your deposition, you should make a copy for later review. Why? On cross examination, attorneys will frequently attempt to imply that you said something in your deposition that you did not say in order to lead the jury into thinking that you were a liar or some one that would say what ever the occasion dictated. Having knowledge of what you said at the time of your deposition will greatly assist you in combating these situations. Your responses could be one of the following.

Witness: I have no recollection of making or implying such a statement or conclusion during my deposition. Please show me a copy of the deposition and the exact place in the deposition to which you are making reference so that we can clarify this issue for the benefit of the jury.

Or,

Witness: According to my recollection, you have taken my statement out of context and are, therefore, drawing an improper conclusion. Please show me a copy of the deposition and the exact place in the deposition to which you are making reference so that we can clarify this issue for the benefit of the jury.

One word of caution, however, after the case has been concluded (either by settlement or through trial), immediately destroy the deposition. Do not retain the deposition as a memento of your experiences. You can be assured that, at some time in a future deposition, an attorney will interrogate you about previous depositions that you have given, ask about the issues of each case, ask where each deposition was given, and ask if you have a copy of any of the depositions. A positive answer to having one or more copies of a previous deposition will always result in your being forced to provide those depositions to the attorney allowing the attorney to gain additional insight into your professional background and your abilities as a witness.

At the Trial

1. Dress Like a "Professional" – Architects, engineers, and scientists are not noted for being the best-dressed, best-groomed professionals. As one friend stated while standing around several engineers, "You can always tell an engineer by the nerdy shoes he is wearing." Clearly, many architects, engineers, and scientist can be distinguished by (a) wearing clothing that is either out-of-fashion or just inappropriate for the current situation, (b) having unkempt hair and/or clothing, or (c) having a number of pens and pencils in their shirt pocket. Testimony at trial in front of a jury is not the time to "look like a nerd". It is the time to "look like a professional business person". Therefore, court room dress should include a dark business suit, a white shirt for men or a white blouse for women, a conservative tie for men (no string ties or bow ties please) or a conservative scarf for women, dark socks for men and dark hose for women, and dress shoes for men and a low heels for women. And, prior to appearing in court, a hair cut for men and appropriate hair styling for women is definitely the order-of-the-day.

2. Take Plenty of Work to Keep Busy While Waiting to Testify – The expert witness is seldom, if ever, called to the stand to testify at the time predicted by the employer-attorney. Consequently, the expert witness should plan to spend time outside the court room occupying himself/herself. Take along several magazines or a book to read. If you have work to be done that is not bulky, take it along. These items should, however, be carried in a small brief case so that you look "professional". Absolutely, positively do not take your laptop computer to the court house!!!

3. Visit the Court Room Before Testifying – It is important that you feel comfortable

with the layout of the court room. Some time prior to the trial, visit the court room to gain an understanding (and feel) about the court room environment – the size of the court room; the door which you will enter when called to testify, where the judge and jury sit with respect to the witness stand; and the location of the tables for the plaintiff, defense, and court reporter. If you have an opportunity, sit in the witness chair and view the room from that position. And, don't forget to check out the lighting level and audio dynamics of the room.

4. Assume a Comfortable Position in the Witness Box – When you sit in the witness chair, find a comfortable position. You want to be as relaxed as possible when you testify.

5. Remember that, on Direct Examination, Answers Must Be Complete – Remember that your employer-attorney cannot ask you "leading" questions that will suggest an answer to you. Therefore, you must anticipate the real reason for each question and be ready to provide the information that the attorney is attempting to solicit through the question.

The writer must admit, however, that being "brain dead" on the witness stand can happen to any expert. Such an event happened to the writer while working on a case for a defendant in Federal Court in California. The employing defense attorney asked that the writer be present in court for the entire trial (which lasted over one week). Each day was spent in court sitting on a hard bench, and each evening was spent sitting at a conference table assisting the attorney and her team in preparing for the next day in court.

Friday morning arrived, and it was time for the defense to bring its expert on as a witness. The week had taken its toll. The writer was brain dead. The opposing attorney objected to the writer being qualified as an expert; so, *voir dire* was initiated. As the employer-attorney began to ask questions about the writer's background relative to education, training, and experience, it was time for the writer to volunteer information. Instead, every question was met with an answer consisting of a short phrase or sentence. The poor attorney had to agonizingly ask question after question in order to gain the information required to certify the writer as a qualified expert for the case.

6. Remember that, on Cross Examination, Questions Can Be A Trap – All of the suggestions made for answering questions on a deposition apply to answering questions under cross-examination by an opposing attorney.

7. Turn Toward the Jury When Giving Lengthy Answers and Establish Good Eye Contact – Normally, your court room testimony is a dialogue between you and an attorney. Therefore, your primary focus for eye contact should be with the attorney. However, some questions require a lengthy answer. In these situations, it is a good practice to turn toward the jury and speak directly to them, involving them in your answer, allowing them to establish a "personal relationship" with you.

The writer was involved in a case for a defendant in the State of Alabama that required the use of an expert that had never testified before in a court proceeding. The writer was asked to prepare the expert for testimony. While the expert was counseled relative to the techniques used by attorneys when interrogating witnesses at a deposition, the expert did not "take to heart" the admonitions and was soundly "beat up" during the deposition. That experience allowed the writer to capture the attention of the expert leading up to the time of the trial.

At trial, the expert made an "about face" and provided stellar testimony with an outstanding demonstration of the techniques that the expert should use to counteract the techniques of the opposing attorney. As his testimony climaxed under cross examination, the expert turned to the jury and proceeded to communicate directly with the jury. Because it was so evident that the jury had warmly embraced his testimony, at the end of the day, the plaintiff's attorney agreed to a minimal settlement in the case realizing that the large judgement that had been desired was no longer a reality.

8. Phrase Answers to Be Understood by an 8th or 9th Grader – Attorneys attempt to strike a jury that will be receptive to their arguments. This strategy often results in having a few jurors that have not completed high school and many jurors that have not pursued courses in applied mathematics, chemistry, physics, and (definitely not) architecture. In order to provide every juror with an understanding of the issues that you are discussing, it is mandatory that all explanations be made using the simplest possible language. Acronyms should never be used. Each concept or technical term should be explained as simply as possible. Where appropriate, analogies should be used to assist the jury in understanding concepts.

9. Use Illustrative Material Where Appropriate – **Large**, **clear** charts and drawings (that can be viewed and read at least twenty feet away) illustrating principles and information are helpful. (Note the emphasis on the words "large" and "clear". Poster-board-size displays do more harm than good.) Demonstrations are also helpful. However, demonstrations can "blow up in your face". If a demonstration is desired, it is better to use a video tape of the demonstration than to take the chance of having a poor, live demonstration – one that does not work or one that only partially works. The potential for embarrassment is minimized. And, the need to transport equipment and materials to the court room and expend time in set-up for the demonstration is eliminated. The result: less personal court room tension and pressure.

10. Avoid Answering Questions in Generalities – Ensure that each answer is specific, unambiguous, and responsive to an issue of the trial. If the question tends to elicit an answer bathed in generalities, frame your answer so that the question becomes related to a specific issue of the case with your answer directed toward that issue. Consider the following example where, as an expert for the defendant, you are asked the following question by the plaintiff's attorney who is attempting to negate a charge of machine operator error.

Attorney: You observed the machine operator operating the machine in question. Did the machine operator appear to have adequate control of the machine?

Witness: I did not have the opportunity of observing the machine operator at the time of the accident, but it is my understanding that the accident occurred prior to the time that the machine operator participated in the manufacturer's training program.

11. Keep Voice on an "Even Keel" – No matter how frustrated you may become during your court testimony, regulate your voice so that your speech pattern does not vary significantly throughout your testimony and your voice does not show stress.

12. Avoid Answering Complex Questions with a "Yes" or "No" Answer – Recall the discussion above relative to depositions where you were cautioned to dissect long, detailed questions. Opposing attorneys have a tendency, toward the end of the cross examination, to attempt to summarize a witness' testimony with a long, detailed question that can be answered with a simple "yes" or "no". Never, never, never fall into that trap. Inevitably, these questions are loaded with a "goodie" for the opposition so that either answer dooms your testimony. A "yes" answer will verify the "goodie" embedded in the question. A "no" answer will imply that you are recanting some of your testimony. Here is an example of this tactic.

Attorney: Now, let me make sure that I understand your testimony. You testified that ___ and that ___ and that ___ and that ___ and that ___. Did I understand correctly?

And, one of those statements sounded like what you said but was sufficiently reworded to allow the attorney to draw a completely different conclusion during closing arguments.

Also, be careful any time you are asked to give a simple "yes" or "no" answer if the question has several parts and all parts cannot be answered individually with a "yes" answer or a "no" answer. Often, when the witness attempts to address this divergence, the attorney will insist on the answer being a "yes" or a "no". If the witness persists in attempting to "divide the question", the attorney will usually ask the judge to instruct the witness to answer the question with a "yes" or "no" answer. The witness must then either violate his/her oath to "tell the truth, the whole truth, and nothing but the truth" or turn to the judge with the following response.

Witness: Your honor, are you releasing me from my oath to tell the truth, the whole truth, and nothing but the truth? Otherwise, I am in a "Catch 22" situation. A "yes" answer would not be a correct answer because part of the question requires a "no" response, and a "no" answer would not be a correct answer because part of the question requires a "yes" response.

13. If Interrupted with a New Question While Answering a Question, Ask the Judge If You May Complete Your Answer to the "Previous" Question Prior to Answering the New Question – Attorneys not liking an answer will often attempt to cut off the witness by asking a new question before the witness has completed his/her answer to the previous question. If you are cut off and have more to say, speak up. Maintain some measure of control over your testimony.

14. Listen Carefully to Questions – It is vitally important in court testimony to make sure

that each question is understood by both you and the jury and that each answer is understood by the jury. Here are a few suggestions along these lines.

a. If you do not understand the question indicate to the attorney that you do not understand the question and ask him to provide clarification.

b. If you think that the jury does not understand the question, as you begin your answer, restate the question in words that you think will be clear to the jury. They will appreciate your assistance and view you as being their friend.

c. Restate "constraints" embedded in a question in your answer so that the jury will have a clear understanding of the nature of your answer.

d. Indicate when a question does not make sense. From time-to-time, an attorney will ask a question that does not make sense. Say so. Don't try to give a bad answer to a bad question. The writer was testifying before an appellate judge in the State of Alabama and was asked two questions in a row by an Assistant Attorney General that did not make "sense". The writer's response to both questions was "I am sorry, but your question does not make sense from my perspective." The attorney gave up at that point.

e. Do not let an opposing attorney trap you with meaningless analogies. When ever you are confronted with an meaningless analogy, you will need to use your ingenuity to counter the analogy. For example, a friend of the writer was testifying in a case that involved the use of a transformer in a dental product that was to be used by a dentist while working on a patient. The transformer circuitry was not grounded properly creating a serious safety hazard. A law suit resulted over the design of the product. While the central issue in the case dealt with the issue of safety, the opposition was attempting to direct the attention of the jury away from safety and to the transformer itself. The attorney kept talking about how the transformer had been used in a foot bath that had been accepted nation-wide. And certainly, if the transformer was good enough to be used in the foot bath, it was good enough to be used in the dental product. Finally, to terminate the attorney's attempt, the writer's friend responded.

Witness: Well, I certainly wouldn't put my mouth in that foot bath.

The attorney immediately proceeded to another line of questioning.

Be Prepared

As you testify as an expert, you will encounter a number of different situations. Here are a few.

1. The Challenge that You are a "Prostitute" – As noted earlier in this module, attorneys attempt to intimidate with questions on how much you get paid for your consulting and how much you have earned (to date) on the case in question. Handle these questions in a professional manner.

2. Arrogant, Obnoxious, Tactless, Vulgar Attorneys – The section on interrogatories addressed this issue. If the situation occurs during a trial, use the same techniques. Speak up. Indicate as a part of your answer that you do not appreciate the attorney's behavior. The jury will generally agree with you, and the attorney's case is damaged.

3. Judges Who Are "Out of It" – The writer has faced two such situations. Both occurred in the Commonwealth of Kentucky.

In the first case, the judge fell asleep (after lunch) on the bench. The writer was on the witness stand. The employer-attorney who was proceeding with direct examination turned to the opposing attorney and asked, "What do we do?" The attorney replied, "Let's keep going and see what happens." Before the testimony was complete, the judge woke up.

In the second case, the judge mumbled responses when an objection was made. No one, not even the attorneys could understand whether the objection was sustained or overruled. So, in each case, the questioning attorney assumed that the objection had been overruled and asked a different question in an attempt to elicit the same information.

4. Exclusion from the Court Room When Serving as a Witness – In most jurisdictions, witnesses are not allowed in the court room except when giving testimony. As a result, the witnesses are "in the dark" with respect to what is happening in the court room. This situation can be nerve racking, but it is a necessary aspect of the legal process. If you can keep busy doing something else, you will experience far less frustration.

5. Hypothetical Questions (for Expert Witnesses Only) – Because of exclusion, expert witnesses generally do not know what evidence has been presented to the court and what testimony has been provided prior to their testimony, the expert witness must respond to hypothetical questions. And often, the opposing attorney crafts these hypothetical questions in a manner that will discredit the expert's testimony. Consequently, the expert must approach hypothetical questions with extreme care.

The writer was giving testimony for a defendant in a case in the State of California. The case involved an electric power transformer that was designed for operation in a high-voltage, electric utility substation. The transformer was rated at 50 MVA (that's MegaVoltAmpere) which can be written 50,000,000 VoltAmperes. The opposing attorney was continually asked questions about a 50 MilliVoltAmpere (that's 0.050 VoltAmperes) transformer. There was a difference of a factor of 1,000,000,000 in the two sets of units. The writer did not know whether the attorney just didn't remember the appropriate units or was "laying a trap". So, each answer was given for the performance of a 50 MilliVoltAmpere transformer and each answer was prefaced with the statement "For a 50 MilliVoltAmpere transformer, …"

6. Unprepared Attorneys – Module #2 contained examples of two attorneys that were

unprepared: the attorney in Kentucky whose expert became unavailable to testify and the attorney in Maryland that had a case brought to trial before he was ready. When similar situations occur in your practice, remember that you are a professional and have the responsibility to provide the very best possible service to your client. Do not let the attorney's deficiencies detract from your professional responsibility.

7. Agressive Judges – On occasion, you will face an aggressive judge. The writer's advice: "Deal with it."

A friend of the writer was confronted by a judge that was the former law partner of the opposing attorney. During his testimony, the judge continually interrupted the employer-attorney setting constraints on the testimony and/or rediculing the testimony. The friend reports that he kept himself under control and treated the judge with respect. He felt that the jury was sympathetic for the abuse that he had taken.

The writer testified in the State of Alabama in a case that was heard before a judge (without a jury). As the case proceeded, the judge finally became tired of the attorneys not making the desired progress and asked the attorneys to sit down and let him ask the questions. While the writer had never been interrogated by a judge before, it must be admitted that this judge asked the best questions ever entertained while on the witness stand and was the most thorough at getting to the heart of the issues related to the case.

Evasive Techniques to Difficult Questions

One final point: What does one do when confronted with a difficult question? Beside having the question re-read so that all constituent parts can be understood or saying that the question does not make sense or rephrasing the question into one that you want to answer, there is one other strategy. The writer has a friend that always responds "I cannot support that statement." He indicates that attorney responses are quite varied but always lead to an easier question being posed.

The Next Module

Module #4 presents the experiences of other consultants/expert witnesses and the writer's critique of these experiences.