PDHonline Course G129A (8 PDH)

The Architect as a Consultant/Expert Witness

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MODULE #4: The Experiences of Others

Overview

This module presents the experiences and opinions of other consultants/expert witnesses and the writer's critique of these experiences and opinions. Three references are cited and reviewed. The writer has found each reference to have been extremely helpful. The reader may desire to obtain a personal copy of each reference.

Reference #1

"The Experts Speak", Engineering & Science, Pages 20-25, January 1987

This article was selected because it summarizes the opinions of various scientists and engineers that have served as an expert witness. The following quotes are cited to explore attitudes expressed by these expert witnesses.

Statement: "Not knowing how one's testimony affected the outcome of a case is frustrating, but perhaps more frustrating is to have one's expertise ignored."

Comment: Two issues are addressed in this statement. First, as the individual implies, most attorneys do not see the importance of letting their consultant/expert witness know the outcome of a case once it has been completed. The result is that the expert does not gain valuable feedback that will provide better service to the next employer-attorney in the next case. If the expert witness truly desires to gain feedback, he/she should aggressively pursue the feedback from the attorney once the case has been completed.

The second part of the statement represents a common frustration. Normally, the consultant has the responsibility of providing advice to the attorney on how matters should be pursued. Yet, in spite of the fact that the attorney hired the individual for his/her expertise, the advice is sometimes ignored. While this situation is frustrating, it should be remembered that the attorney has a better perspective of the "big picture" of the case and is the person with primary responsibility for client representation.

Statement: "A misstatement, even of the most innocuous kind, can be so magnified by a clever lawyer as to overshadow all the rest of one's testimony."

Comment: So true! That is why experts must always be on guard as they answer each question in order to minimize misstatements.

Statement: "I think that the adversary system is not good for getting at the truth of technical or engineering questions."

Comment: This writer agrees with the statement; however, the writer has only had one experience with an alternative. A federal judge in the Northern District of Alabama was hearing a patent infringement case that dealt with extremely technical issues. Rather than have "hired guns" square off against each other, he chose to only allow a court-appointed expert. Each party in the case was asked to compile a list of potential experts that he could use as a basis for selecting the expert that he would appoint.

Statement: "One of the advantages for objectivity in being an expert witness is that you get cross-examined. You usually have some pretty smart lawyer who has a very large incentive to destroy your credibility. And as a consequence, you over prepare and are overcautious about making blanket statements that you are going to have to backtrack on later."

Comment: While expert witnesses often initially view a case from the perspectives of "us vs. them" and our teams needs to "win", a reality check quickly converts this attitude to one of realizing that objectivity is the "order of the day" and that the expert must not compromise the truth.

Statement: "I've discovered over the years that I don't think very quickly on my feet. I'm reasonably good at presenting a case that I've thought about for some time, and I'm reasonably good at answering questions I've thought about for some time, but I'm not so good at answering questions on the spur of the moment that aren't directly related to what I am talking about. Lawyers are very good at asking questions that you would view as off the wall but that a jury would view as pertinent."

Comment: This individual has just qualified himself/herself to be a consultant but has eliminated consideration as an expert witness.

Statement: "Lawyers have ways of discrediting witnesses whether or not they are being paid. In cross-examination a lawyer will often ask an expert witness about his fee, and when this often sizable fee is revealed, the lawyer implies that the witness is merely a hired gun who will say anything his employers desire. But a witness who says that he has refused a fee is often branded a biased and fanatical supporter of a cause, a person whose objectivity must necessarily be suspect."

Comment: Since the expert witness is going to be taken to task whether or not a fee is charged, the expert should charge a fee and not be ashamed of the fact.

Reference #2

Reynolds, D. W., The Truth, The Whole Truth and Nothing But …. A Police Officer's Guide to Testifying In Court, Charles C. Thomas Publisher, 1990. (ISBN 0-398-05656-0)

This book was selected because it provides an accurate, detailed discussion of the techniques used by attorneys and how to combat those techniques. This writer

possesses several copies of the book and uses the book to train new expert witnesses that are facing interrogation by an attorney for the first time. Purchase of a copy of this book is recommended, and frequent reading is encouraged.

Paraphrase from Page 7: The judge's responsibility is to ensure that the parties receive a fair trial, not a perfect trial, but a fair trial. His goal is to not have his decisions overturned by an appellate court.

Comment: Just as each attorney in the case has a goal: "winning the case", the judge has a goal: "winning in an appeal".

Paraphrase from Page 8: The plaintiff's attorney is responsible for presenting the evidence against the defendant(s). His goal is to win because his fee is based not only on winning but on how much is won.

Comment: Plaintiff's attorneys, as a rule, receive a fee based upon a percentage of the judgement. After payment of all expenses relative to the case, the remainder goes to the attorney's firm as "profit". Because of the potential for large income, plaintiff attorney are very active in promoting legislation that benefits their ability to receive large judgements and, consequently, provide major support to political candidates in the hope that the candidate, after election, will be responsive to the wishes of the plaintiff-attorney community.

Paraphrase from Page 8: The defendant's attorney represents their party to ensure that their constitutional rights are protected.

Comment: Defense attorneys, as a rule, are paid on an hourly basis. Consequently, their desire to win comes not so much from the amount of money that they will earn from a particular case but from establishing a good reputation as being a good advocate for their clients.

Paraphrase from Page 9: Attorney's may try to keep evidence from the jury or present extraneous information to the jury. This philosophy comes from the concept of "best possible representation" for the client. This logic allows them to legally manipulate you on the witness stand, distort your testimony in front of the jury, and confuse any issue that might adversely affect their clients.

Comment: When the writer started out as an expert witness, he was counseled that attorneys have a different code of ethics from engineers and that the engineer should be careful to not adopt the code of ethics of attorneys. For attorneys, their ethics are based upon whether a situation is either legal or illegal or not yet adjudicated. On the other hand, engineers and other professionals realize that, while certain actions may be legal, they do not constitute appropriate conduct. No doubt this difference in attitude relative to ethics accounts for the difference in public respect for attorneys and in public respect for engineers and scientists.

Paraphrase from Page 9: You are never being attacked personally, only professionally.

Comment: When you are giving a deposition or on the witness stand, you may feel like you are being attacked personally; however, don't be surprised if, in a few months, the opposing attorney that was "after you hide" calls you and asks you to work on one of his/her cases.

Paraphrase from Page 17: When the opposition begins to ask you a series of questions about your qualifications, especially with flattering phrases, LOOK OUT! YOU ARE BEING SET UP!!!

Comment: While the writer has not experienced this phenomenon, it is interesting to learn from the experiences of others.

Paraphrase from Page 27: Never assume the meaning of a legal or technical term used by an opposing attorney when posing a question. Always ask for a definition before providing an answer.

Comment: The writer has found this admonition to be extremely important. For example, a defense attorney may attempt to demonstrate liability on the part of the plaintiff and address the issue of liability in a deposition. In situations such as this, the writer always asks the attorney to define the term. The same is true for all technical terms used by the attorney. The writer finds that attorneys do not like being placed on the "hot seat" and having to constrain themselves to a specific definition. They often turn the question around and ask the writer to provide a definition. For technical terms, the writer supplies a definition that is "friendly" for his testimony. For terms that might have a legal implication, a response is provided of the form "I can think of several ways to define the term, but I do not have training in the law and know exactly how the law defines the term. That is why I need your assistance so that I will know the context in which you are using the term."

Paraphrase and Quotes from Pages 29-30: Don't let an opposing attorney paraphrase your testimony in their own words. (This situation usually occurs when you are testifying about a significant part of the case and the attorney wants to magnify or minimize a portion of your testimony.) Key indications are the following "lead ins":

- "In other words what you are saying is . . .
- Another way to say that would be . . .
- To put it in other words . . .
- Let me paraphrase what you said . . .
- Wouldn't it be fair to say . . .
- Wouldn't you agree that . . .
- Isn't it a fact that . . .
- As you just said . . .
- Wouldn't you say that . . .
- I'm sure that you would agree that . . ."

Comment: Excellent advice!!! The phrases cited above should serve notice that the attorney is attempting to set a foundation so that he/she can discredit your testimony. Think twice before answering a question prefaced by one of these phrases.

Paraphrase from Page 33: An opposing attorney can ask you a question in one form at the deposition and then ask the question differently to elicit a different response at the trial. He then waives the transcript from the deposition in front of your face and indicates that you have changed your testimony.

Comment: Now you should understand the emphasis in the last module on knowing what is in your deposition and being prepared to "call the attorney's hand" when he attempts to question your creditability.

Paraphrase from Page 37: Open-ended questions (e.g., the request to define a term) are no-nos for opposing attorneys because they open the door for you to "talk forever." The only time that such a question will be posed is when the attorney is pretty sure that you can't answer the question and will look like an incompetent or he knows that your only possible answer is one that will help his case.

Comment: As advised, be careful of open-ended questions. The best is advice is to either (a) use the strategy of answering a slightly different question – one that does not make you look like an incompetent or one that reinforces a previous, similar point or (b) ask a "question of clarification" back to the attorney throwing him/her off his/her "game plan".

Paraphrase from Page 38: Opposing attorneys like to slam books and look disgusted. Don't become rattled.

Comment: Stay cool no matter what antics the attorney uses.

Paraphrase from Page 47: Opposing attorneys will intentionally ask confusing questions. Always ask for clarification.

Comment: Remember the admonitions from the previous module: Do not "barge into an answer without having a thorough understanding of the question". Ask for clarification. Or, Indicate that the "question does not make sense".

Paraphrase from Page 47: Opposing attorneys will jump back and forth in time. Help the jury out by indicating "time shifts" as you answer each question.

Comment: A good approach is to begin answers by recapping the time line so that jurors know exactly where in time your answer applies.

Paraphrase from Pages 47-48: Opposing attorneys will intentionally ask several questions at one time. These are usually times that the attorney is trying to trick you. In

your answer indicate the number of questions posed, repeat each question, and then proceed to answer each question. Be careful, the attorney will probably try to interrupt you. You may have to ask the judge for permission to finish answering the previous set of questions.

Comment: Great advice!!! (Exactly what the writer stated in the previous module.)

Quote from Page 49: "Even though courtroom procedure allows the attorney to control the questions, show opposing attorneys that you control the answers by asking an occasional question!"

Comment: A great technique for destroying an attorney's rhythm.

Paraphrase from Page 51: When you are giving a longer answer than expected or are saying something that the opposing attorney may not want the jury to hear, the opposing attorney may interrupt you. Just keep talking, ignoring the rude interruption. If he keeps asking the next question, keep talking. Then say, "I'm sorry, I didn't hear your last question" OR, you can stop and then respond, "I was not finished completing my answer to the previous question. I would like to finish that answer before answering your last question."

Comment: Great techniques for keeping an attorney under control.

Quote from Page 66: "Anything that you say outside of court can be used against you. Don't talk to the opposition except in a formal setting."

Comment: The writer's practice is to only talk to the employer-attorney outside of the court room and then only in private.

Reference #3

Surosky, Alan E., The Expert Witness Guide For Scientists and Engineers, Krieger Publishing Company (Malabar, FL), 1994 (ISBN 0-89464-749-0)

Organization of the Book:
Chapter 1 - Introduction
Chapter 2 - The Essential Expert
Chapter 3 - Something About the Law
Chapter 4 - Case Investigation
Chapter 5 - Case Research
Chapter 6 - Test and Evaluation
Chapter 7 - The Most Probable Scenario
Chapter 8 - Before the Deposition
Chapter 9 - The Deposition
Chapter 10 - Exhibits and Demonstrations
Chapter 11 - Before the Trial
Chapter 12 - The Trial - Part One

Chapter 13 - The Trial - Part Two
Chapter 14 - Business Development
Chapter 15 - Some Closing Thoughts
Appendix A: Bibliography and Source Directory
Appendix B: Glossary
Appendix C: Technical Records and Reports
Appendix D: Investigator's Tool Kit
Appendix E: Legal Forms and Documents

This book was selected because it not only serves as an excellent reference but also takes some positions with which this writer disagrees. Consequently, the book provides not only a broader perspective of the activities of the consultant/expert witness but also provides the reader with some different perspectives relative to how the expert witness should conduct himself/herself. Every consultant/expert witness should have a copy of this book on his/her book shelf.

Quote from Page 3: "The opportunity for experts to participate at the earliest stage of the dispute process does occur, but it is rare."

Comment: The writer is often frustrated that the employer-attorney does not hire the writer until just before time for trial. As a result, significant opportunities for the discovery of information are lost because interrogatories have already been served and depositions have already been taken.

Quote from Page 7: "The expert can serve two primary functions in the technical investigation of a civil dispute: that of an investigating consultant and that of a potential witness." The roles differ.

Comment: The previous modules have attempted to highlight this point.

Quotes from Page 7: The "trial counsel is an advocate in an adversarial proceeding." "The counsel presents evidence supporting only one side of a dispute. The expert is not an advocate for either side but is ideally an unbiased witness whose professional opinion happens to concur with the position of the friendly counsel."

Comment: This point was made in the previous reference. The expert witness should view his/her objective as being as unbiased as possible.

Quote from Page 9: "The rules governing … testimony … permit the expert witness to make inferences and develop opinions based on facts provided by others. They then allow the expert to enter these opinions into evidence, occasionally where the facts or data underlying the opinions are not admissible as evidence."

Comment: Note that the expert witness is accorded greater latitude that other witnesses and, in fact, greater latitude than the attorney with respect to the introduction of evidence. As an expert witness, you should use this latitude with care.

Quote and Paraphrase from Page 10: The expert witness must be able "to communicate complex technical information to a jury of lay persons in both a clear and persuasive manner" while being likable, exciting, and convincing.

Comment: Remember, your communication needs to be at the 9th-grade level. However, this admonition does not mean that you should be dull, dry, boring. Remember, in a sense, you are on stage and performing to an audience (the jury).

Quotes and Paraphrase from Page 11: "There are three broad categories of expert witnesses: the in-house expert" (that is usually seen as biased), "the avocational expert, and the vocational expert" (who may be perceived to be a "hired gun.")

Comment: All experts are viewed with some degree of disdain by opposing attorneys. So, do not become disheartened when being attacked by an opposing attorney.

Paraphrase from Page 16: An attorney can elicit technical opinions by stating the facts of a case in the form of a hypothetical question.

Comment: Just remember, the hypothetical questions posed by your employer-attorney are friendly and constructively support your testimony while the hypothetical questions posed by the opposing attorney are intended to be destructive with respect to your testimony.

Quote from Pages 17-18: "Under the best conditions, forensic work is precise and demanding for the expert. There must be a comfortable feeling of mutual respect, integrity, and personality compatibility with the attorney. There must be confidence that no attempt will be made to manipulate the work of the expert. There must be assurance that enough time will be allowed for a full review of the matter in question. … Unless you sense instinctively that all of these criteria are met, you are probably better off refusing the work."

Comment: Most attorneys treat the expert with respect and encourage professional behavior on the part of the expert. On the rare occasions where the contrary is true, termination of the relationship is the appropriate action to take.

Quote from Pages 41-42: "Avoid new, unique, or bizarre theories in developing most probable scenarios. Anything beyond mainstream technology will surely be attacked, disallowed, or the subject of appeal", especially "when you are the only expert testifying."

Comment: Here is another application of the "KISS" approach. Keep it short and simple. Do not try to get fancy, complicated, or adventuresome with theories.

Quote from Page 44: "The use of codes, standards, and specifications as evidence is biased in favor of the plaintiff. The common perception is that these documents …

define minimum safety levels and that noncompliance is strong evidence of an unsafe product." However, "the natural corollary that compliance proves safety is not an effective defense because minimum safety implies a marginal product."

Comment: Where there are codes, standards, and/or specifications available that relate to a case, it is important for the expert to understand how these constraints apply to the case; however, the only really-useful support that can be obtained from the constraints relates to either demonstrating that a design was inferior or that a constraint was violated – challenges that would only be made by a plaintiff.

Quote and Paraphrase from Page 49: "Test results are unpredictable!" Don't avoid a test because you may think that it is meaningless or because you are positive of the results that will occur. But, "be ready for unfavorable results. If you are unprepared to accept an adverse test result, you probably should avoid the test."

Comment: The lawyer is taught to never ask a question in court to which the answer is not already known. The expert should adopt a similar tact with respect to tests. Never initiate a test unless the outcome has a high probability of mirroring the results that are desired.

Quotes and Paraphrase from Page 70: "Opposing attorneys have a logical strategy" when questioning you. They can attack you on three levels: "your qualifications as an expert … the validity and accuracy of your opinions … all else failing, your character."

Comment: The opposing attorney will attack you! So, since you know that it is coming, don't let it intimidate you.

Quote from Page 70: "As they evaluate you during a deposition, opposing attorneys usually avoid giving you a preview of what to expect from them at trial. They will usually be cordial, soft-spoken, and appreciative of your helping their understanding of the case. Expect no histrionics in the questioning, and expect no reaction to your answers. But don't be surprised if a lawyer who is a pussy cat in a deposition becomes a full grown tiger in court."

Comment: Emphasis in this quote should be placed on the word "usually" in the second sentence. This writer has experienced more than a few attorneys that were other than "cordial, soft-spoken, and appreciative of your help".

Quote from Pages 71-72: "Be sure your client understands the full import of what you intend to say. Most trial lawyers are exposed to so many different disciplines in their work that they sometimes are unaware of the significance of a single piece of evidence or opinion."

Comment: Recall the beginning of the first module. One of the duties of the consultant/expert witness is to educate the attorney. Just as a professor in a classroom experiences a wide range of student understanding, experts will experience a wide

range of understanding on the part of attorneys. If a piece of evidence or an opinion is viewed to be of vital importance to the case, ask the employer-attorney to provide you with his/her understanding of that importance. You will them be able to determine whether or not you need to provide another "lecture" on the subject.

Quotes from Pages 72-75: Things to Do in Depositions.

- "Tell the truth.
- Make sure you understand each question.
- Respond only to what you are asked.
- Take your time before answering, no matter how long it takes.
- Be positive.
- Listen to your client attorney.
- Maintain concentration.
- Correct mistakes.
- Be careful of leading or misdirecting preambles to questions."

Things to Avoid in Depositions.

- "Don't guess.
- Don't cast your position in concrete.
- Don't argue.
- Don't be facetious.
- Don't talk about the case during breaks in process.
- Don't offer gratuitous information.
- Don't let the opposition put words in your mouth."

Comment: Excellent, concise advice! However, as indicated earlier, this writer has been known to answer a question different from the one posed on occasion.

Quotes from Pages 116-119: Rules for Courthouse Conduct.

- "Be especially careful of your behavior at all times when in or near the courthouse.
- "Give an initial impression of quiet confidence."

Rules in the Court Room.

- "Be aware that you are communicating to the court whether or not you are speaking. Walk at a normal pace ... Speak in a normal tone of voice" …
- "Breathe normally, and speak slightly slower than you ordinarily do."
- "Maintain a "nothing-to-hide" posture" (both while walking and sitting)
- "Maintain good, but not excessive, eye contact with the person or persons you are addressing."

Comment: Remember, more people will be watching you that you expect.

Quote from Page 119: "On direct examination you should be speaking only to your attorney. On cross-examination you should be speaking only to your opposing attorney. … The jury is for the most part like an audience at a live show."

Comment: As noted in statements in the last module, this writer feels that there are times that an expert should speak to the jury.

Quote from Page 127: "There is no way to face cross-examination without some apprehension."

Comment: If you haven't gotten the message by now that cross examination is a "tense" experience, you have not been catching on to a major theme of Modules #2, #3, and #4,

Quote from Page 128: "Remember that you know far more about your subject than the lawyer questioning you."

Comment: Remain confident, even under attack.

Quote from Page 128: "If you feel more alert in the morning or in the afternoon, your attorney may adjust his pace so that cross-examination starts at that time of day."

Comment: This writer prefers to have direct testimony and cross examination occur within the same morning or same afternoon session and asks the employer-attorney to make every effort to begin testimony by the writer first thing in the morning or immediately after lunch. Breaks in testimony due to lunch or an evening recess provide the opposing attorney(s) with added opportunity to prepare questions that will detract from testimony given under direct examination.

Quote and Paraphrase from Pages 128-129: "… the sole purpose of the opposing attorney is to discredit you. Don't take offense." The more severe the attack, the higher the compliment.

Comment: Really? Really!

The Next Module

Module #5 presents a case study in the form of a work activity. These activities will provide insight into a portion of the activities that must be accomplished by a consultant/expert witness.