

Court Appearances: Expert Witness, Defendant, Plaintiff

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Introduction

We live in a time where society is very prone to litigation. People sue people. Government sues people. It is estimated that fifty per cent of all the attorneys on this planet are in the United States. It has been suggested that, that is the reason we are such a litigious society. The numbers appear to be a response to the need.

When there is litigation, there is evidence presented by both sides. In court this evidence is examined and cross examined by both sides. Because objects, records, photographs, and other inanimate objects cannot be examined and cross-examined, expert witnesses are called in to serve in this capacity.

Being an expert witness is a professional activity. As with any case, we must assess the matter at hand and decide if we wish to take the case, decline it, or refer it. One might treat the matter as a patient or client. If the case is acceptable, a contract needs to be entered into. What will you offer and at what fee? When will you receive payment and what do you expect from the attorney and/or client hiring you? Your fee should be realistic and certainly no less than what you receive at other professional activities. In addition your expenses relating to the case should be reimbursed. An accurate record of time spent on the case must be kept and should include: all phone calls, meetings, research and review, report preparation, depositions, court time, and travel time.

Examination of Witnesses

The sequence of witnesses is up to the district attorney or plaintiff's attorney. The defense's sequence of witnesses depends on the nature of the case, availability of witnesses and strategies. Evidence codes divide examinations of witnesses into four classifications to simplify rules regardless of how many examinations are conducted. The four examinations are: Direct, cross, re-direct, and re-cross.

Direct examination

Direct examination is the questioning of a witness by the side who called the witness. This starts with the witness' name, address and occupation for the record. Questions must be worded in such a way that they do not suggest a desired answer or the interaction may be challenged as "leading the witness". Statements like, "Isn't it true that ...etc." will be objected

to and sustained by the bench. Some leading questions may be acceptable. Refreshing the memory of a witness, for instance with children or those who have sustained trauma, to help them in their testimony, may be allowed.

Objections to this process may be:

- 1) Leading the witness
- 2) Asking for conclusion by the witness
- 3) Irrelevant questions

Objections are often psychological tools having impact on or lessening the strength of testimony. When an objection is made the witness must be silent. If the objection is sustained the witness cannot answer. If the objection is overruled the witness must answer the question. If a witness does answer when sustained the bench will jump on the witness and the response will be stricken from the record. Unfortunately in jury trials the jury will have heard the response regardless. If the answer given after an objection that was sustained is prejudicial or damaging a mistrial may be declared.

Cross examination

Cross examination occurs after the direct examination. The opposing side examines the witness. This is essential for establishing the truth. Cross examinations can:

- 1) Disprove story
- 2) Decrease weight of testimony
- 3) Show witness to be prejudicial
- 4) Show witness to be confused
- 5) Discredit witness

The cross examination is an effort of the opposing lawyer to overcome the impact of a witness' testimony. Leading questions are permitted. The cross examination can only cover what was testified to during the direct examination. Only answer the questions asked.

Re-direct examination

After cross examination the first attorney may ask questions to clarify statements made during cross examination. No new matters may be introduced unless permission is granted first by the bench. The judge may allow the defense to ask questions for further clarification during re-direct examination.

Re-cross examination

Contempt of court:

The bench (judge) has to keep order. Contempt of court can result in jail, fine or both. Reasons for contempt of court:

- 1) Refusal to answer question
- 2) Refusal to obey a subpoena
- 3) Misconduct of a lawyer

4) Misconduct of a spectator

Techniques on the Stand (in the Witness Box)

Admit-deny:

While being cross examined, an attorney will try to diminish the persuasiveness of an opinion. "Isn't it true that your profession does not have 100% accurate test for this disease?" can be answered as follows. If it is not true, the answer is clearly "No". If the answer is a "yes", but needs to be qualified, the witness should use a dependent clause. The dependent clause is important because the response is not considered complete until the end of the sentence. One could begin the answer with "Although", or "While", or "That's a complex question". For example, the above stated question could be answered, "Although the test for this disease is not 100% accurate, concurrent findings such as haemogram, chemistries, radiographic findings, clinical, presenting symptoms, and response to specific therapy in this patient support the diagnosis." In order to be effective, the denial portion of the answer must be stronger than the admission. This technique must not be over used or appear to be evasive on the part of the witness. Mr. Brodsky states: "Handle loaded and half-truth questions by first admitting the true part in a dependent clause, and then strongly denying the untrue part in an independent clause."

The "bought expert" accusation

As a witness, one is sometimes attacked for being biased because one has been hired for a fee for service. Rather than fade at this attack one needs to respond with, "Your question seems to imply that my opinion in this matter is for sale for a price. Would you like me to address this issue in answering your question?" or "It has been said 'whose bread we eat, his song we sing'. It is for that reason I carefully check my findings to insure no hint of bias in my conclusions."

The pull to affiliate:

When serving as an expert witness, one sometimes is drawn to a position of strongly supporting the position of the side one is appearing for. If this happens, one's impartiality and integrity as an expert may be compromised. Be sensitive to this and avoid emotional and personal involvement with the outcome. Do not lose objectivity or impartiality.

Keep current

Review current literature on the topic about which you will testify. You can be sure the opposing council has done homework in this area. The best defense is offense. If you are familiar with up to date material you will maintain credibility and be able to respond to attack.

Legal jargon

Attorneys will often discuss burden of proof or other legal terms. If asked one can reply, "I am trained as a health care professional, not an attorney. My clinical evaluations are based on sound medical principles, not courtroom rules or what the legal profession does." Stay away from legal concepts in your testimony unless you have full understanding of them.

Challenges to experience

As a witness one may be attacked for lack of experience, such as limited number of cases of the particular type being considered. Do not get flustered at this. Simply state the source of your knowledge, "I have studied this condition extensively in the literature and first hand. Although it is not common, the facts in this matter confirm its presence."

Changing your mind

Cross examining attorneys will often try to have a witness change their mind. Do not change your conclusions on a matter while being quizzed. Your conclusions on the case were formed by your study of information presented prior to court. Stick with your opinion. It was formed from specific data.

Collaborative criticism

Attorneys may try to attack testimony based on lack of knowledge in the field. Rather than fight this, criticize your field as requested (if true) in a poised matter of fact way, but look for ways to regain control. "Yes, there is a lot we do not know, but the tests that were performed did support the diagnosis."

Concepts and definitions

Attorneys may question one's knowledge of terms and concepts. Be prepared to answer them, and practice beforehand with a colleague asking questions.

The courtroom as a place of identity

We feel comfortable at home or at our offices. Spend a little time in the courtroom when it is empty and attend open court to feel comfortable with being there.

Credentialing

To establish qualifying yourself as an expert witness, prepare a list of questions for the attorney to ask during the direct examination. Cover the following: education and degrees, employment, licensing and certifications, memberships, honors and awards, publications, presentations, grants, skills, consultations and experience. If you are cross examined on your credentials admit limitations, if present (we do not know everything). Be comfortable and matter of fact.

Direct examination

Always meet with the attorney beforehand and go over questions carefully. Feel comfortable writing or rephrasing questions at that time. If there are areas where you are uncertain, discuss them with the attorney. If you are asked an unclear question while on the stand, ask that it be asked again in a different way. Unless it is unavoidable, do not work with attorneys that will not meet with you before court appearances to discuss your testimony.

Disasters and fishing expeditions

If you have blundered while giving testimony, correct the error as soon as possible. If you

cannot correct it, let the matter go and move on.

Cross examining attorneys will often go on fishing expeditions looking for a weak spot to discredit the witness (e.g.. ignorance and insecurities). Remember what the limits of your knowledge are.

Fraternization

When in court or its environs, do not discuss anything with anyone. If need be one can mention the weather. This caveat includes hallways, toilets, restaurants, or in the court during recess.

Court Presence

If you believe in your testimony, testify in a manner that shows it. If your profession is attacked for past errors in belief, respond by declining to answer since history is not your area of expertise or note that the past events are obsolete today. If you are asked about minimum standards, do not discuss the ideal!

Do not be humorous. It is often taken as poor taste by judge and jury.

Intimidation

Some attorneys are intimidating by nature. Some attorneys are extremely adversarial. Some attorneys are intimidating when the evidence is strongly against their case. Respond to intimidation by taking time in answering their questions, and by speaking in a calm manner in a lowered voice. Carefully restate the question separating the content from the attack, for example, "So what you are asking is whether.....etc."

Negative assertions are useful when opposing attorney attempts to coerce you into agreeing with them. Questions beginning with, "Isn't it true....?" can be responded to with, "To the contrary..." or "Not at all..."

Cross-examination questions that are true, but are presented in a pushy manner, should be agreed to strongly, "Of course that's true." or "My goodness, yes." or "Certainly."

Centering yourself to appear

Trials and hearings seem to run at their own pace. This is not similar to our own professional life of tight productive scheduling. Be prepared for down time or you will get annoyed and therefore less effective. Relax, spend time reviewing the case, memorize facts pertaining to the case, and bring other work to do while waiting to testify. Remember that you are charging for all your time including waiting. (I have written some excellent papers while waiting in court houses.)

Testimony

Using the language:

Talk neither too much or too little

Be calm and poised

Do not be too quick or too slow in responses

Speak in smoothly flowing statements using understandable language

Use original analogies

Use your voice to best advantage by varying the volume, speaking slowly, stressing syllables and breathing

Defense against the learned treatise

A document, article or book is presented to you to examine, by the opposing attorney, that is contradictory to your testimony; or the attorney reads a statement from a contradictory source. Ask to see the document. If the attorney asks you to respond to written material (usually underlined to read aloud), state that you can not comment without reading the entire document because it would have no meaning out of context. Request an hour recess to review the material. This is usually declined.

The attorney discovers something you have written that conflicts with your testimony. Respond with, "That is out of date" or "That is out of context" or "New knowledge has allowed me to be more learned."

The attorney uses the "prominent author says" ploy. Respond by asking, "Are you asking me if I know this author's work, or if I agree with every statement the author has written?"

Expertise

Experts are based on education, training, skills, or experience. It is easier to be qualified as an expert in court than it is to truly be an expert. If you think a case will be too troublesome or troubling, do not accept it. If you do accept a case and along the way you feel it inappropriate to continue, withdraw.

Listening

Listen carefully to all questions, both for clues as to answers and subsequent questions to be asked. If questions have been pre-written in order you can sometimes trip the opposing examiner by careful answers.

Maintaining control

Use time as an ally. Take a couple of breaths before answering. If the question is difficult sit back and ponder the question, gaze elsewhere and take a few seconds or so to respond.

Make eye contact with the whole court, the judge, the jury, other people in the court room, and the opposing attorney; but do not let the opposing attorney capture your gaze. Also do not continuously stare at judge or jury as this may be intimidating.

Establish a sense of space. Sit in the court before the trial. Sit in the witness box when the court is empty to get a feel of the space. Sit up straight. If pressured by an attorney, lean forward to answer establishing your space and some control.

Act professional, appear interested, reconfirm statements from practical experience, keep current in the literature, maintain composure and a relaxed demeanor. If you don't know the

answer to a question, just say so. Do not feel guilty or ashamed.

Learn the names of all the players in the room and use them in responses. "Well, counselor..." is not as effective as "Well, Mr. Jones..."

Fantasies of stardom and other theatrical considerations

Your testimony is most important, but do not think that you are the star performer. The added pressure of a star will interfere with your performance. Be satisfied to know that you are just a small part of the play.

Do not rent a tuxedo or wear a suit unless you usually do and you feel relaxed in it. Dress professionally, but you must feel comfortable in your costume to be most effective.

When making your exit, do not leave the witness box with signs of obvious relief. Leave straight and tall and in a confident manner. Glance at all the players. Act like a winner without being cocky.

Working with attorneys

If an attorney is indifferent, be assertive. If an attorney is incompetent, do not take the case unless you are willing to educate the attorney on the matter. In court, when attorneys argue, stay uninvolved and detached.

Conclusion

Testifying in court can be frightening, difficult or it can provide a sense of elation when demonstrating one's knowledge. Being cross examined can be terrifying or at least uncomfortable. Adversarial attorneys will try to distort matters or quiz a witness to the point of feeling humiliated, distressed or inept. If one keeps calm and remembers that they are there to uncover and elucidate the truth in a professional manner instead of being beaten down, one feels most satisfied (if not exhilarated) at the effort. Remember that witnesses must be honest at all times, be responsive to questions and defend themselves, their opinions and their integrity.

Suggested reading

Brodsky, Stanley L., Testifying in court - guidelines and maxims for the expert witness, American Psychological Association, Washington DC; 1991.

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