



HOW TO EXCEL AS AN EXPERT WITNESS

Some essential guidelines for advanced preparation

BY GARY VALENTINE, SR/WA, MAI, CCIM

There is an endless demand for honest and competent expert witnesses who can effectively present their analysis in a court of law. As a right of way professional, there are any number of circumstances in which you may be called on to testify in a court of law. In order to provide excellent expert witness testimony, you must prepare well, provide a clearly convincing story during direct examination and minimize damage to your case during cross-examination. There are a number of strategies that expert witnesses should keep in mind in order to be the best advocate for their own opinion.

Your client expects you to leverage your expertise and is paying you to solve problems. He wants your best opinion based on your education, knowledge, and experience. Preparation is the most important element

in your role as an expert witness. Start with a well-written report and an organized file. Make certain that you become intimately familiar with every piece of paper in your file before the trial. This includes witness statements, reports, complaints, interrogatories, depositions, photos, videos and exhibits. Be familiar with the judge and the courtroom. This extra level of preparation will give you added confidence during the trial, creating an air of professionalism that any trier of fact will interpret as being truthful and above reproach.

Becoming Prepared

Start by building a narrative, listing all the facts and opinions of the case as you read depositions and other material. A narrative report is often useful to refresh your memory

of the case. Furthermore, the narrative report will help you persuade by facts, evidence and reason.

Study the opposition's case, take notes and ask the client's attorney for additional documents, if necessary. Provide your client's attorney with cross-examination questions for his or her use, and keep your résumé up to date and relevant to the specific case. Make a few telephone calls to check on the opposing expert's qualifications. Memorize key facts, including the names of parties, important dates and pertinent figures. This will impress the jury and lend credence to your testimony.

Acing Direct-Examination

When presenting your testimony, try to assume the air of a friendly teacher. You are essentially telling a story, so keep your audience focused on what you are saying. Lead into each exhibit by creating interest, and explain its relevance before you reveal it to the courtroom. Finish making your point while showing the exhibit. Keep your exhibits simple, straightforward and logical. Direct-examination is also a good time to pay more attention to the jury in order to draw their attention to your testimony, rather than during cross-examination when it may be more disadvantageous to your case.

It is important to show confidence on the witness stand, but avoid arrogance at all costs. And offering opinions outside of your area of expertise is not in anyone's best interest. Do not criticize the opposing appraiser, instead critique the work product. Also, avoid slang and lazy speech, and watch out for filler words such as "um," "ah," "OK," "right," "you know," and so on. Say "yes," not "I suppose so." Use "62 minutes," not "around an hour," as generalities may appear imprecise and unprofessional.

Maintaining eye contact is important, as it keeps you in control, but do not stare or glare at the jury. Look at each person for about four seconds to establish a connection. This lets them know that you are sincere and honest. Assume the jurors have no background in your field, but do not underestimate their intelligence. The importance of appearing impartial cannot be underestimated.

Staying **ON POINT** during cross-examination

Here are some sample question and answers to help you stay on track, even when being aggressively questioned by opposing counsel.

Q: Are you being paid to testify?

A: No. I am being paid for my time.

Q: How do you justify charging such a high hourly rate?

A: My rate is based on my education, training, years of experience, and how much money I lose while I am doing legal matters instead of attending to my business.

Q: How many times did you meet with your lawyer in secret before you came to court to testify?

A: First off, he is not my attorney. Rather, he is the attorney who retained me to express my opinions in this case, and our meetings were not secret. We met three times.

Q: In the interest of saving time, will you agree to answer my questions with a 'yes' or 'no'?

A: I cannot agree to your proposal. I do not know the questions you are going to ask me, and to answer in the fashion you suggest may mislead the jury.

Q: Where are the written notes you made while visiting the subject property?

A: I utilized notes and incorporated them into my written report. After I did this, I discarded the handwritten notes because they were no longer needed. This is the document retention practice I have followed for the past several years.

Q: Will you agree that an expert should consider every relevant factor before arriving at an opinion?

A: Where possible, yes.

Q: You testify for the party that pays you. Is that correct?

A: When I testify at depositions, the deposing counsel pays for my time. When I testify at trial, the counsel who retains me pays for my time.

Q: Did you rehearse your testimony here today with Attorney Smith?

A: No. We discussed the case, the issues, and questions I would like to be asked.

“Excellent testimony preparation will give you added confidence during the trial, creating an air of professionalism that any trier of fact will interpret as being truthful and above reproach.”

Body language speaks volumes, so when entering the witness stand, make sure that the microphone is positioned comfortably in front of you so it will not be necessary to lean forward to be heard. When speaking, hold your chin up so that it is parallel to the ground. While on the stand it is best to speak confidently, and when walking to and from the witness box, remember to maintain upright posture. And be careful not to sit with others representing your client or talk while in the courtroom. You must be perceived as being an unbiased, disinterested, third-party expert.

Beating Cross-Examination

Basically, there are two types of cross-examinations — consensus-based and destructive-based. With consensus-based cross-examination, the opposing attorney attempts to secure concessions from you and then uses those areas of agreement to support their case. With destructive-based cross-examination, the opposing attorney attempts to discredit you or show that your opinion is inaccurate. Attorneys often start with the consensus-based approach and then switch to the destructive-based approach.

Your best defense is a well-supported presentation during direct-examination and a confident response to anticipated cross-examination questions. Be especially cautious about difficult or trick questions. You will want to avoid answering hypothetical questions without the necessary information and assumptions, as well as questions you do not fully understand. If an objection is raised, ask the attorney to repeat the question. Above all, be careful that your answers do not contradict previous ones. If you have the opportunity to make a counterpoint during cross-examination, it can be helpful to address the jury directly, otherwise try to pay less attention to the jury when being questioned by opposing counsel.

Remaining Objective

As an expert witness, it is your commitment under oath to serve the court objectively. You may feel that admitting you don't know an answer will damage your testimony. However, “I don't know” is a respectable answer. It shows that you are aware of and honest about what you do know. Good experts will answer directly and give information even when it is damaging. If you realize something is said in error during testimony, correct it as quickly as possible. One answer shown to be untruthful can sink all of your other testimony. An expert witness who has falsely testified on one matter may be regarded as having falsely testified on other matters as well. Your answers should have enough detailed information to respond to the question fully, but keep your reply to the point. It is important not to ramble and digress, as doing so could expose vulnerability in your testimony.

If an attorney presents documentation to you during questioning, take a moment to analyze the information carefully before answering any questions about them. Pay minimal attention to the tone of voice or attitude of the opposing counsel and disregard sarcasm, skepticism and other attempts to influence your answer. Likewise, if the attorney appears friendly and congenial, he may quietly try to discredit you. Answering questions too quickly gives the appearance of being too anxious or over-rehearsed. Calmly think about how you will respond before you say the first word. Most important, it is impolite and unprofessional to interrupt the counsel asking questions, or to become angry with the opposing attorney.

Finally, when you leave the witness stand, walk directly out of the courtroom without talking to anybody. You want to retain your impartial demeanor. Remember that credibility comes through believability. To be a successful expert witness, you must look the part, speak the part, act the part and be the part. ✪

References

- Babitsky, Steven, Esq. “Training for Expert Witness.” 22nd Annual Natural Expert Witness Conference, April 2013.
- Babitsky, Steven and James Mangraviti. “How to Sell Your Expert Witness Deposition.” Seak.
- Carner, Doug. “Turning an Expert Witness into a Great Witness.” Forensic Protection, 29 May 2012.
- Cedillo, Richard. “Practical Tips of Cross-Examination of Expert Witnesses”.
- Kolczynski, Phillip. “How to be a Successful Expert Witness.” November 2013.
- Lennhoff, David, MAI, SR/WA and James P. Downey, JD. “Litigation Lessons: A practical guide to expert witness.” The Appraisal Journal, Summer 2012.
- Poynter, Dan. The Expert Witness Handbook. Par Publishing.
- Talmage, Paul, MAI. “Cross-Examination at Jury Trial.” The Appraisal Journal, April 2003.
- “Expert Witness, Effective Courtroom testimony.” Forensic Magazine, February 2010.
- “Tips for Testifying as an Expert Witness in Violence Against Women Prosecution.” The Voice, American Prosecutors Research Institute, Volume 1, No. 6



Gary has been appraising real estate since 1983. He specializes in eminent domain projects and has testified as an expert witness in numerous court cases. He is a past President of IRWA Chapter 1, Los Angeles.