Effective Expert Testimony

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Chapter 50

Types of Testimony

To present effective testimony, an expert witness (analyst, entomologist, chemist) must be able to accumulate the scientific evidence necessary to prove a point. He/she is presumably educated to do this by academic courses and experience. He/she must also, however, be able to convey his/her findings to a judge or to a jury of 12 people, usually laypersons, in language that they can easily understand.

The scientist is trained by experts in this chosen field. He/she reads professional journals and converses with his/her colleagues. A very large portion of his/her conversations or communications, though meaningful to his/her associates, may be difficult or impossible for the layperson to understand. Therefore, the scientific witness must present his/her findings in such a way that all lay members of the jury, as well as judges and attorneys, can easily grasp their significance. Technical expressions must be clearly and carefully explained. A jury knows very little, if anything, about the laws of science, the cumulation of evidence, precautions taken to avoid error, statistical interpretation, etc.

Witnesses presenting scientific testimony fall into two categories. There are witnesses of facts and expert witnesses. The fact witness, even though he/she may have scientific training, can testify only to matters of fact that he/she has witnessed. He/she cannot give opinions. The expert witness is one who, by special study, practice, and experience, has acquired special skill and knowledge in relation to some particular science, art, or trade. Obviously, therefore, a fact witness must do only what his/her oath charges, namely, to tell the truth, the whole truth, and nothing but the truth. As an example, an inspector could testify, that he/she saw numerous insects crawling over the surface of stored-food packages in a warehouse. He/she could not be forced to venture an opinion as to whether the insects constituted a threat to the health of an individual who ate the foods. Such an opinion would have to be founded on the above-mentioned special study, practice, experience, etc. In other words, he/she would have to qualify as an expert in sanitation, public health, medicine, or some related scientific discipline. He/she could, however, offer the layperson's opinion that he/she found the observed conditions revolting.

Qualifying as an expert involves an examination of the individual’s academic credentials and the duties connected with his/her career, past and present. This includes various professional achievements, such as the publication of original scientific papers. The possession of a bone fide degree from a state university, or employment of some duration by a state or federal agency in the scientific field covered by the testimony, practically assures that the judge will admit a person as an expert. If a state's educational system trains a person and presents him/her with a diploma, the state's judicial institutions cannot deny these credentials without good cause. Previous expert testimony also helps to qualify a person as an expert witness.

The main reason for expert testimony is to interpret difficult to comprehend facts to the jury. The judge will usually explain this fact to the jury and say that the court will permit the expert to evaluate the evidence and explain its significance to the case under examination. Even though an expert witness is entitled to give opinions, usually more than a mere statement of opinion is required to achieve maximum impact. Expert witnesses should know or conclude that certain conditions or findings prove the statements they make.

In most instances, witnesses are excluded from the courtroom during trial. If this is the case, then the witness will be required to give opinions regarding hypothetical questions.

Procedure in the courtroom is very formalized, and is probably quite unfamiliar to the average scientist. There are rigid rules of evidence designed to protect the rights of the accused. Also, all evidence must be presented in the form of answers to questions asked by the attorneys. A trial is an adversary proceeding in which the two sides have separate witnesses, each of whom will be questioned first by his/her attorney (direct examination) and then by the opposing attorney (cross examination). The attorneys screen the evidence carefully, eliminating all that is irrelevant; they take extreme care not to omit any item pertinent to the case. Each tries to find inconsistencies in the testimony by the opposition or discredit the witness, and bring this to the attention of the court and jury.

The presiding judge is the ultimate authority in any given trial. His/her requests must be obeyed. In general, when it comes to evaluating evidence, the judge makes decisions on points of law, and the jury decides on matters of fact.

The jury is composed of 12 people of varied backgrounds. The conclusion of each one is of equal importance, and their verdict must be unanimous. The witness must speak loudly enough so that each juror can hear, and slowly and carefully enough so that each can remember as much as possible (jurors are forbidden to take notes). It is advisable to always address one's answer to the jury, or to the judge if no jury is present, rather than to the lawyer who asked the questions. Careful attention to the facial expressions of the jurors will make the witness aware of any lack of comprehension in time to simplify an explanation or expand upon it.

Effective Testimony

With this brief orientation to the courtroom scene, these suggestions about how to sharpen abilities as a witness should be read:

1. Think before speaking. A deliberate short pause before each answer, especially on cross examination, will prevent the expert from being stampeded into a poor answer.

2. Be frank. If a mistake or contradiction is made, admit it; don't try to cover it up.

3. Remain calm. Be polite to the interrogator even if he/she is insulting.

4. If a categorical answer can't be given, do not give such an answer; remember you swore to tell the whole truth. If forced to do so by the judge (only he can force you), say yes or no "with reservations." Similarly, do not answer any question that is not specifically asked.

5. If an answer is not known, admit it.

6. Avoid wisecracks. If you are given a "golden opportunity," remember that the attorney may be playing you for a fool. Injection of humor into a dry proceeding may be tempting, but should be done only if you are absolutely sure of the entire situation.

7. If not qualified as an expert witness, remember that the analyst can testify only to facts. Confine replies to matters of personal knowledge.

8. It is not enough only to tell the truth; appear to be telling the truth. The credibility of a witness often is judged very subjectively by the jury. These judgments often have their origin in the appearance and general demeanor of the witness, including clothes, posture, inflections of voice, and attitude towards the attorneys.

9. Be inconspicuous when not on the stand. You may prejudice yourself or the Government if you focus attention upon yourself.

10. Avoid conversations with principals or witnesses for the opposition. If conversations cannot be avoided, confine remarks to the weather, etc. If the defense attorney approaches you before trial, do not give him/her any information regarding what you know about the case. He/she has all of the information about you and your testimony before the trial.

11. Be sure the entire question is understood; do not hesitate to ask for it to be repeated if you cannot follow it completely. The attorney may try to make fun of your slowness and thereby try to discredit you. But this is much less damaging than having him/her get you thoroughly confused, and then proceed to show that you did not understand his/her question. Similarly, a multiple question should be broken down into its components, and each one answered completely.

12. Try to speak with the same speed and inflections when being questioned by either the Government's or the defendant's attorneys. A witness, especially an expert witness, is not supposed to be partial. The witness should maintain the poise and dignity of a professional person. Calmness or dignified reserve will inspire confidence in the speaker's integrity.

13. Don't answer any question objected to by either side until the court has ruled on the objection. If the witness has started his answer, he should stop if any objection is raised, and should not continue until either the judge or one of the counsels so indicates.

14. A lawyer is not sworn in, so he/she is capable of deception in an effort to fish for perjury or equivocation. Be careful if the lawyer asks for a comment on a book or document. Before answering, request to see the documents he/she read from. He/ she may be reading out of context or misquoting. Similarly, opposing counsel may ask if you regard certain persons in your field as recognized authorities. This is preparatory to asking you whether you agree with certain statements made by them. If you answer no (that is, you do not recognize them as authorities), then that line of cross examination cannot be pursued. Unless you definitely do consider a person a recognized authority, and are personally familiar with his/her publications, do not expose yourself by saying that you so recognize that person.

15. Avoid entrapment into detailed explanations of methods, equipment, etc. State that the method or equipment is widely accepted for use by federal and state laboratories. If directed by the judge or counsel to explain, then do so to the jury in the simplest, clearest way possible, stating that AOAC methods are recognized as the official methods of analysis.

16. Do not be afraid. "Stage fright" of a mild sort is natural. Remember that when you testify to facts, you "saw it happen." When you have qualified as an expert in your field, you will know more about the subject than any attorney, and as much as any other similarly educated expert. Therefore, you will understand what the attorneys are asking, unless they try to confuse you with trick questions or double-talk. You should recognize such maneuvers in time to protect yourself. There are times that you can stop cross examination by correcting the defense attorney.
17. If in doubt as to how to cope with a complex or misleading question, it is always proper to ask the clerk to repeat it, and answer each part separately. If you are flustered, or if for a moment you do not remember whether you are permitted to ask the attorney a question, you may say "If the court pleases, I should like to ask one or two questions of Mr./Ms" (whoever is questioning you). You will then be directed by the judge to request your clarification, or to answer the question as asked. By then you will probably have regained your composure.

18. The opposing attorney may attempt to test your abilities by requesting you to identify certain materials. The first thing to remember is that, obviously, the identification on which your case rests was not made in "two minutes." Therefore, identification of the "test" material must take place by comparison with authentic identified examples, probably aided by instruments of various sorts. Counsel for the government should object on the grounds that the "test" material is not pertinent to the case. If the expert is directed to respond (something that a fact witness could avoid simply because it is beyond his purview), you may offer an ofn1and or superficial opinion in which he/she can speculate on similarities and dissimilarities of appearance. He/she then can state to the best of his/her knowledge, under the present circumstances, [what] the material is. When thus confronted, indicate that you do not advocate nor voluntarily indulge in giving "curbstone" opinions and state that upon authorization by the court you will make an in-depth study of the material and report your conclusions. If the judge approves the study, be sure that you are allowed as much time for your new assignment as was used to prepare your data for the case before the court.
19. Notes may be taken while on the witness stand but these are subject to inspection by the defense. Remember, anything taken to the stand can be examined by the defense. Be prepared to take notes if hypothetical questions are asked. This type of question is usually very lengthy and sometimes confusing. Notes will help to give categorical answers to the questions.

Typical Testimony

The following is typical testimony (on direct examination) of witness presenting analytical evidence in a food and drug filth case:

Q: State your name and address.
A: John A. Doe

Q: What is your occupation and by whom are you employed?
A: I am a ___ at the ___ District of the Food and Drug Administration.

Q: What did you do with the sample?
A: I analyzed cans by method AOAC 440K, which is a determination of extraneous matter or filth in products as found in the "Official Methods of Analysis" of AOAC International.

Q: Is this method a published, standard, recognized method for determining filth in products?
A: Yes. The method I used is contained in the AOAC book of methods. All methods in this book are acceptable as official methods only after study and testing in different laboratories to show they are suitable for the intended analytical purpose and give uniform and reproducible results.

Q: Will you give the results of your analysis of sample 12345A?
A: (Ask for analytical results sheet.) The findings or results of analysis for each can are as follows: Can 1 contained rodent hair fragments of rat or mouse origin, and feather barbules; Can 2 contained

Q: Did you identify any of the insect material found in the sample as to type of insect?
A: Yes, I did. About one-quarter of the fragments were identified as being from the saw-toothed grain beetle; six fragments were from a dermestid beetle; four fragments were identified as being from Indianmeal moth larval form.

Q: Did anyone else examine the sample?
A: Yes, Mr. ___ examined hair fragments isolated from the sample and identified them, as well as confirmed my identification of insect filth. My assistant, Mr. ___ , opened the cans, weighed out sample portions, and otherwise helped with the analysis.

Q: Did Mr. ___ , your assistant, work under your supervision or independently?
A: Mr. ___ worked under my supervision during the entire analysis.