

Do You Qualify To Be An Expert Witness?



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Have you ever been served with a subpoena and asked to testify in deposition or court

as to your opinions and findings? There are two types of witnesses, an expert witness and a percipient witness. A percipient witness is basically an eye witness who offers testimony only on what he or she observed. An expert witness is a person who has specialized knowledge about a subject not normally possessed by the average person concerning the subject. He or she is either requested to demonstrate through the execution of specific skill sets or subpoenaed to opine on reports or actions he or she has performed.

Expert witnesses are usually paid a professional fee for their time and expertise; percipient witnesses may receive a modest stipend for their day in court. If the party serving the subpoena is requesting your interpretation of the facts of your report or the professional opinions you may have, you would be entitled to charge your professional rates for your time.

What qualifies you to be an expert? When you are hired to investigate and report on your findings, you should be prepared for everything that you have written or committed to your project file to be discoverable by opposing counsel. In writing a report and providing verbal opinions, there are specific guidelines governed by Federal Rule of Evidence 702. Under this Rule, your reports, files and opinions must be dependable. The Rule provides as follows:

[A] witness qualified as an expert . . . may testify . . . in the form of an opinion or otherwise if

- (1) the testimony is based upon sufficient facts or data,
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case.

Access http://www.bucklin.org/fed_rule_702.htm for more information on this rule.

Report writing

In creating a report for a client or documenting a project, it is important to remember that everything you put in your file may end up on the front page of the *New York Times*. It is always advisable to view each project as a potential legal case and take the necessary steps to be prepared to testify regarding your work. Are you prepared to demonstrate that your findings are based on reliable principles and methods and supported by accepted industry practices that comport with the standards of care applicable to the disciplines you practice? Will your written field notes, sampling logs, chains of custody and other related specific information shed a favorable light on your firm's credibility? Are the

photo documentation and laboratory reports capable of standing up to critical scrutiny? Are your graphs and floor plans presentable, succinct and understandable? Make sure your files on projects are neat and orderly. Finally, review the required components of your report with the attorney, if any, with whom you are working. In some litigation matters, your

report – and the deadline by which it is produced – must comply with Federal Rule of Civil Procedure 26.

Subpoenaed

Testifying is a contest, a game of skill. Choose your battles carefully and ensure that the battle you are fighting is one that you be-

lieve in and is defensible. Ethical standards for experts in litigation matters require that there be no conflict of interests. Further, it is important that you understand the instructions from your client (attorney) as to their client's concerns and confidentiality issues. There are

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significant legal implications for violations of client confidentiality and conflict of interest. Proper communications with the counsel you are working with are vitally important to a successful outcome for your services.

So how should you respond when you have received a subpoena that all your project files for a specific client must be delivered to a law firm and you must appear for a deposition on a specific date? A good first question to ask is "Who does the law firm represent"? Maybe you generated a report for a client with no

initial understanding that this report could end up in litigation. What do you do now?

Remember client confidentiality? The prudent course is to call your client. Find out if your client has hired an attorney and, if so, who it is. It may not be the same firm who served you the subpoena. Talk to your initial client and take direction from them and their counsel if they have one, prior to responding to the subpoena. Accept the fact that you will have to turn over your files and show up for deposition. However, be sure you speak with your client's attorney before turning over your files or sitting for deposition.

Attorney-expert relationship

When working for an attorney representing a client, the relationship of the attorney-expert team is critical to the successful outcome of your case. The expert's job is to report the facts and to support them in his testimony. According to Dr. Dietrich Weyel, CIH, "... the preparation for deposition and/or trial require an understanding of the expert's opinions by the attorney to allow for the proper questions to be asked and important facts drawn out ..."

How do you cultivate a productive relationship with your client? It starts with a con-

tract outlining what you will do and how you will be compensated. Often contracts regarding scope of work and payment go through the attorney, rather than the attorney's client. When being subpoenaed by opposing counsel for deposition or trial testimony, the process is similar. Provide the attorney with a contract for services and payment. Even though they are sitting on the other side of the table in a deposition or a trial, you are still entitled to a reasonable fee for your time spent testifying. At the beginning of a deposition, it is wise to state on the record that you expect to be compensated for your time testifying in the deposition and the amount of your fee.

Have your fee structure, CV and list of legal cases you have worked on available for email for all these transactions. When defining your scope of work and analytical procedures, conversations with your client's counsel will guide their understanding as to what you believe to be the necessary inspection, testing and supporting information (engineering studies, research, etc). Discuss the billing procedure. When will you get paid? Should you secure a retainer? Requiring payment of a retainer that you work against and replenish as necessary is a helpful way to ensure you will be paid in full. It is also important that you keep careful track of your time.

When retained to perform an inspection, identify key documents that need to be obtained. Provide your client with technical information from journals or standards that support your case and help them understand the complexities. Inform your client as the facts come to light and are documented, even if they do not support your client's case, as these also are discoverable. Always keep in mind that anything you commit to writing may end up in court. You are being paid for your expert opinions and advice. If the facts of the case are not in your client's favor, you may be the best witness for the other side. In such a situation, it may be better for your client to settle rather than continue with the case.

Deposition

So now you have created a report for your client (attorney); that report has become part of a law suit, or a previously prepared report has become part of a law suit; and you have accumulated all your files for deposition by opposing counsel with the necessary contracts in place to ensure you get paid. What is your next step? It is very useful to prepare all the necessary references that support the conclusions of your report and be able to quote them chapter and verse when being deposed. Proper Preparation Prevents Poor Performance. Whether your report is a simple three pager or a complex multi-document report, being able to show that your opinion is properly supported is critical to its credibility. Where appropriate, being able to quote building codes, industry standards of care or technical documents supporting your position helps you be confident, prepared and persuasive in your deposition. If you are an effective witness, your testimony may lead to a settlement, avoiding a trial. In my line of work, most cases settle before trial.

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attorney is review of another expert's reports or documents related to a project in litigation. Your ability to sift through the volumes of information in an orderly fashion and provide your client with an understandable summary is a truly invaluable service. Understanding what your client is looking for requires a quick review of all files and a phone call to your client describing what you propose to provide them and in what format it will be delivered. This is a critical call and must be made early on in the project to ensure you provide what they are looking for. Often there are numerous file boxes that must be reviewed. A system to compare reports and other documents is critical. Organization is the key. Be brief in your opinions and support them with references. Every document and email you produce is discoverable.

Frank D. Granato, Esquire, has the following advice for you when you are sitting across from opposing counsel at deposition. The answers you give at a deposition are testimony. It is no different from testifying in court. "If you don't remember, say so. Do not narrate, answer yes or no whenever possible. Make sure you understand the question correctly and ask opposing counsel to repeat as necessary. Do not speculate or guess about an answer. Pause before you answer a question. Do not answer questions when you

are tired. The deposing attorney is not your friend. Don't be afraid to speak with your attorney during questioning. Don't be eager to leave." These important points were taken from Frank's article available online. http://www.expertlaw.com/library/expert_witness/deposition_prep.html.

Trial

According to Wendy Busch, Esquire, a trial lawyer in Tampa, FL, in order to be effective, an expert witness "...should have substantial experience in his or her field, be well educated in the subject matter, be articulate and appropriately dressed, feel comfortable on the witness stand and be able to stand up well to cross examination. You should have available a list of articles or publications to which you have contributed, as well as a detailed CV, a list of your legal cases and a list of your professional service fees."

The best way you, as an expert, can serve your client's needs in court is to be able to stand up well under cross-examination. Keep your cool, do not take it personally and stick to your findings and opinion. This is a battle of wits, yours against opposing counsel's. By choosing your battles carefully, believing in your abilities, being prepared with the references and facts that support your case and understanding how the game is played, you

can present effectively. This is your chance to use your persuasive abilities to answer cross examination questions in a fashion that, within the bounds of accuracy, best presents your client's case.

If a question is asked looking for a "Yes or No" answer and your answer, though truthful, does not support your position, you can reply that by providing a simple yes or no answer, you will not be accurately describing the conditions you know to have existed in your case. Some answers are more complex than a simple yes or no. Whenever possible, use analogies that will be memorable to the jury. For example, when describing the effects of capillary action on drywall, you may want to refer to "Drywall and water is like Bounty, the Quicker Picker Upper". You have just painted a vivid word picture and the jury will know immediately what you are talking about.

To be comfortable with your case before a trial you must be as well prepared as your client's budget will allow. Keep in mind that while attorneys are intelligent people, you know your field better than they do, which is why you were retained in the first place. I cannot stress this enough; pre-trial preparation with your attorney is crucial to the successful outcome of your testimony. Inform the attorney that you must be asked the important questions that will allow you to explain and defend your position. Keep your language as simple as possible. If you use too

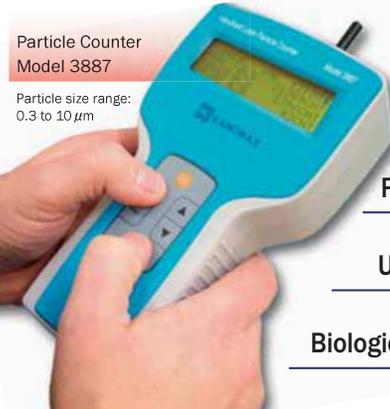
much technical jargon, the jury will not be impressed or, worse, will not understand your testimony and will disregard it.

In some cases, you may be able to be in court during the direct and cross examination of other experts in your field and provide questions for your client's attorney to use during cross-examination. The presiding judge will decide whether to exclude you from the courtroom during other witnesses' testimony. Often, however, when both sides have retained experts, the attorneys will agree that you and the opposing expert can remain in the courtroom during all of the testimony.

As an expert, you are more likely to see irregularities or opportunities in the other expert's testimony and can provide invaluable assistance to your client's case by assisting your client's attorney with questions for cross-examination. This has been a successful tactic in my experience, although it does require you to spend more time in court and costs your client accordingly. Just remember, when you take on the role of expert witness, be prepared to show your stuff in a way that best suits your client's needs and your conscience.

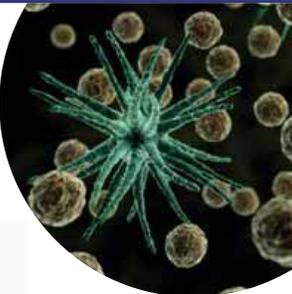
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