

## ... So You Want to Be an Expert Witness?

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Like many of us in the “Baby Boom” generation, our knowledge base of the legal profession and civil trial procedure has been fashioned on what we picked up in watching re-runs of Perry Mason, LA Law, and The Client, inhaling the series of John Grisham novels, watching TV-trials played out before the American public, and what we were taught in our high school civics classes. Unfortunately, much of what is presented by Hollywood and described in today’s popular novels, however, does not accurately reflect the modern day reality of testifying in a civil courtroom proceeding.

Not long ago I received a telephone call from a past client inquiring whether or not I might be interested in serving as an expert witness in a major lawsuit involving his Fortune 500 firm. He was aware of my national reputation in the subject area because I have published widely on the subject. Frankly, while I was intrigued with the idea of serving as the national expert—it’s great for one’s ego to be introduced as the “expert”—I was somewhat concerned at being picked apart on the stand during trial by some Perry Mason or Kenneth Starr clone.

In order to make an informed judgment, I interviewed our firm’s legal counsel about the role of the expert witness, talked to friends who had served as experts, and researched whether or not my firm had any potential conflict of interest in taking on this assignment. Against my better judgment, I took the plunge and signed onto the defendant’s team. All in all, it turned out to be a great academic challenge. During the process, I learned a lot about civil litigation in the US today, which unfortunately surrounds much of what we do in the environmental profession. Whether

you are a client who is being sued by an opposition group, losing bidder, or an engineer or environmental scientist who has been asked to serve as an expert witness, you need to have a general idea of what transpires in most civil proceedings. You will find as I did that there is little, if anything, written for the non-lawyer, on expert witnesses. The following sets forth the lessons learned, or if you will a “Cliffs Notes” summary of the civil process and the role of the expert in such cases.

### What Is an Expert Witness or Consultant?

In general, expert witnesses or consultants are those persons who have special training, skill, education, or expertise beyond the experience of ordinary members of the public. Lawyers involved in environmental litigation use experts in a variety of ways. For example, since lawyers tend to be generalists, the expert or consultant may serve solely to evaluate the case and help determine whether the claim has merit. They may conduct onsite or laboratory testing to prove or disprove a point or help build or defend the case. In other cases, the expert may serve solely as an expert witness at the trial.

### Discovery

American jurisprudence provides a formalized method of collecting relevant data and information gathering prior to a trial. This legal gathering and research process, often described as the “discovery” process, is designed to provide the defendant and plaintiff with information collected by the opposing side, thereby eliminating most surprises at trial. Documents concerning the case being litigated are requested by both parties (papers, memos, e-mails, financial data, marketing brochures, business plans, etc.) and to help develop the strategy for litigation and defense. Typically, information, which may be vulnerable to exposure to competitors, can be covered by protective orders that shield dis-

closure from certain individuals in the litigation. Generally, experts can see such material if they sign protective orders. In this instance, the expert can help counsel to identify what type of documents or evidence is available to build the case or defense.

### Pleadings and Motions

The “pleading” is typically the first formal notice of the lawsuit that alleges the harm done to the “plaintiff”, the person who files the legal action. The plaintiff has the burden of proof in the lawsuit. Typically, the opposing party, the “defendant”, denies that the claims of the plaintiff are valid. The claims are often denied on the basis that the plaintiff waived their right to sue or that some other party was responsible for the alleged damages. Again, the expert can be helpful in developing the formal complaint or crafting the answers.

### Expert Reports

Experts are generally used in litigation to help the judge or jury’s understanding of the facts of the case. In this way, they can first help to establish and interpret the pertinent facts of the case by sifting through the often voluminous amount of paper obtained during discovery. Calculations, articles, and memos used to develop the expert report, as well as the report itself, must be made available to the opposing side.

### Depositions

The “deposition” is a direct way to gather evidence for trial from anyone with any relevant knowledge of the case, including the experts hired by either party. Witnesses are sworn to tell the truth by a court reporter and a transcript is prepared. Questioning is designed to probe the expert’s biases, potential weaknesses, and to accelerate the expert’s learning curve on facts surrounding the case or the industry in general. Many times expert depositions will be videotaped, and if that occurs, you need to be careful of your demeanor and facial expres-

**Table 1.** Rogoff's Six Tips for Testifying

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1. Tell the truth, and nothing but the truth.  
Careers and cases have ended when untruths are given in depositions or at trial.
  2. Think before you answer.  
Take time to consider your answer. This will at least allow your attorney enough time to object to the question or line of questioning.
  3. Answer the question asked.  
Even if you think the question is not relevant, don't follow-up with the question you think the examiner should have asked.
  4. Don't volunteer information.  
Quite literally answer the question asked and then stop. It is not your role to educate the examiner. Once you have answered, remain quiet. The examiner will use the pregnant pause and stare at you to get you to further elaborate on your testimony.
  5. Don't answer a question that you don't understand.  
If you don't understand the question, tell the examiner that you don't understand the question. Ask him/her to rephrase—it's not your job to ask the questions!
  6. Don't guess.  
Be as specific as you can, but never guess. If you can't recall, tell the examiner that you can't remember.
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sions as well as your answers to questions. Table 1 lists key tips on how to answer the opposing counsel's questions.

### The Trial

At trial, the expert witness will be used in direct examination to lay out the facts of the case and the story in terms a lay person can understand. The role of the expert is to unravel the mysteries of the case in terms of their special expertise. On cross-examination, the strategy of the opposing counsel is to destroy the credibility of the expert in the minds of the jury. They will confront the expert witness with apparent contradictions and errors in the expert report and deposition and even attack the expert's credentials. Rebuttal testimony and objections by the lawyers involved make for an exciting time, which some have termed similar to the medieval jousting tournament.

### Settlement

Prior to and during the trial there is always a possibility that the parties can negotiate an amicable settlement. In this case, they would jointly inform the presiding judge that the case has been settled.

### The Verdict and the Appeal

Lawsuits can go on for years even after the initial verdict by the judge or jury. The losing side can appeal the case to a higher court over a point of law or testimony, which they felt, was overlooked in the case by the presiding judge. In essence, the case is usually not over until both sides say it is or there is a decision by the higher court! Therefore, from an expert's perspective, all papers used in preparation of the case must be preserved until the case is settled.

### A Personal Side

The case for which I served as an expert witness involved claims of tens of millions of dollars. Both parties had invested millions of dollars in researching their complaint and defense as the case weaved its way through the Federal district court system. Experts on both sides provided focus for the case and eventually provided a mechanism by which both sides evaluated the merits of their case and preparation prior to trial. This eventually translated into a decision to settle the case before opening statements were made to the jury.

Having never served as an expert witness before this particular case, I was a little anxious about testifying in court. And yes, I was happy when the case was settled! However, the training and advice given to me by the defendant's counsel during the course of my engagement gave me invaluable insight and experience for future situations. Perhaps in a small way my expert report was responsible for narrowing the gulf between the two sides and resulted in a settlement, freeing up valuable court time.

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