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## *Understanding Psychology and Legal Tactics*

You do not need to be afraid of being an expert witness, but you do need to be wary. Even an inexperienced attorney or one who is not particularly sharp has the home-court advantage and knows the rules of the legal game. You will not always know everything that goes on in that legal setting.

In this lesson, you will learn psychological ploys and legal tactics that attorneys use in both deposition and trial settings. You will probably encounter all of these techniques in one setting or the other, or both, so learning about them in advance will benefit you greatly. Lesson 8 will expand on what you learn here for depositions specifically, while lessons 9 through 12 will concentrate on your testimony in trial settings. You will hear many questions in both settings and you must apply your intelligence and these trainings in the same way whether at a deposition or a trial.

## ***Different Styles of Questions***

You do not have to be frightened when facing an attorney but you do have to keep your thinking cap on. Most of the time, your problems will not lie with your mastery of your specialty. You are the expert. The problem, if one arises, is potentially the way in which you answer the lawyer's questions.

Lawyers may not know as much as you do about your subject matter, but they know how to phrase questions that can elicit a poorly worded or poorly thought out answer. You must take care in a legal setting in the same way that you have already taken care to master your area's subject matter.

If a lawyer asks you something that starts with "isn't it true that...," that lawyer is trying to lead you. If a lawyer starts a question with "you've said that ..." and follows it immediately with another question, think carefully about his opening gambit. Though he might only have rephrased something you said previously, he rephrased for his own benefit. You may have to correct his rephrasing before responding to his new question.

You should carefully analyze the question and decide what you need or want to say in response, and even then answer carefully. Maintain your wariness.

***TACTIC: When attorneys ask you questions, remember that they do not know as much as you do about your specialty's subject matter. They are often either fishing or bluffing.***

If the attorney says something incorrect in his question, briefly explain why it is wrong, demonstrating once again that you know your material. If the attorney asks a correctly phrased question, answer it as clearly and as succinctly as possible. You

should rarely elaborate unless and until the attorney asks specifically for you to do so.

### ***Questions That Attempts to Discredit You***

You will hear two major classes of questions. The first class attempts to discredit you, either personally or professionally. The second class of question seeks to trick you into either telling the other attorney something useful, or making a technical, legal, or simply verbal error.

### ***Accusations of 'Coaching'***

A common tactic that opposing attorneys use is to create the impression that you knew the exact questions and that you were coached with the desired answers. The key word is 'exact'. You have to counter that attempted impression; it's not acceptable to know exact questions and answers that were prepared by an attorney for you. You may know the general subjects for questioning but you must phrase your actual answers during testimony according to the actual questions that you hear. For example, here's a possible sequence of questions you may hear, along with some effective answers:

Q: Mr. Expert, did your counsel tell you the questions he was going to ask before you came here today?

A: We reviewed the subject areas that I would be testifying on.

Q: He told you the questions he would be asking, didn't he?

A: I did not know the specific words in his questions. I knew the general subjects of the questions.

Q: You told him what answers you would be giving, didn't you?

A: Discussing testimony is pretty normal for a pre-trial conference. I just restated the opinions that I would be testifying to in court today.

### ***Attacking your Impartiality***

Direct attacks on your honesty or integrity are not as likely as subtle ones. For example, asking how much money you make as an expert witness is a common technique used to create distance between you and the jurors. Attorneys will also sometimes ask whether you always work for the defendants or the plaintiffs in your legal work. Some of you will prefer to work for one side or the other in most of your cases. If this becomes a pattern, you should prepare for attorneys to try to establish that you have a bias toward plaintiffs or defendants in general and in this case in particular.

In the beginning of your expert witness career, much of your work may come from one law firm or even the same attorney. The opposing counsel may claim that you are biased in favor of this attorney. Your best defense here is to reiterate your neutrality in the matter and the thoroughness of your investigation, the reliability of your methodologies, and the objectivity of your opinions.

In order to more easily answer any questions along these lines, enter every testimonial setting knowing the details of your prior casework experience. Know roughly how many cases you have worked, how many times you have testified, and what percentage of the time you have worked for the plaintiffs or the defendants.

### ***Attacking Your Ethics and Your Integrity***

Attorneys may try to make the jury perceive that your integrity is questionable. For example, a standard question used to suggest that the other side bought your opinion is:

Q: How much are you being paid per hour to deliver your opinions today?

This misleading question suggests that your 'side' has paid for you to testify in a particular way. You want to tell the jury that you were hired to provide objective opinions about the facts in the case. For example:

A: I'm not being paid to deliver or testify to my opinions. I'm being paid for my time, knowledge and expertise. My opinions are completely my own, and my fees for service are independent of the outcome of the case. My company bills my time out at \$300/hour (or whatever the rate is).

If your reputation or expertise leads to well paid expert witness jobs, you may begin to hear questions like this:

Q: At your rate of \$300 an hour, Mr. / Ms. Expert, you must testify a lot in court?

If your answer to this question is 'Yes', you have to be prepared for the follow-on allegation that you are a professional expert, doing this primarily if not solely for the money. Your best defense is to redefine the reason for your retention – something like this:

A: I believe I have been retained several times because of my experience and knowledge, as well as my reputation for professionalism and objectivity.

***TACTIC: Attorneys can make frontal attacks on your credibility at any time. You should not appear startled by rude or abusive questioning tactics. Jurors will give you the benefit of the doubt if you just calmly and simply correct any misstatement by the opposing attorney.***

### ***Questions That Attempt to Manipulate You***

Open-ended questions are used to encourage honest expert witnesses to tell more, in simple terms, about subjects that are not easily or precisely phrased by opposing counsel. For example:

Q: What did your attorney tell you to say in response to that question?

Hopefully, you were not actually coached about how to answer a specific question. You will be much better served if you can honestly say:

A: She told me to just tell the truth in response to all questions.

Attorneys sometimes make statements and then ask you to agree or disagree with the statement. Sometimes they ask you to give a simple Yes or No answer to a complex question. If you cannot completely agree or disagree with a statement, say so: "I can't agree or disagree completely with that statement." Leave it to the attorney to decide whether to pursue any additional clarification from you.

Attorneys like to use leading questions, especially with experienced expert witnesses. A favorite is the "Yes/No Deal" question. With this question, the attorney tries to make a deal with you about how you will answer his upcoming questions. It can sound like this:

Q: The jury has been here for a long time and would like to get home as soon as possible. Can you agree to help everyone here by answering my questions with a simple 'Yes' or 'No'?

On the surface, it sounds simple and reasonable. However, you will severely hamper your ability to provide effective answers if you agree. A better response than 'sure' or 'yes' that leaves you total flexibility is:

A: As long as it's possible to do so without misleading the jury, I'd be happy to.

Manipulation can also include offhand assumptions. As an industry expert, it is tempting to use your answers to demonstrate your knowledge of your specialty. An attorney's question may try to use that inclination by including an assumption about your specialty area. For example, he may say something like:

Q: Given that you know about 'so-and-so fact' in your industry, please answer the following question.

If you answer the rest of his question, you are essentially agreeing to that fact, and the jury will assume it is true. In fact, however, the 'so-and-so fact' to which the attorney is referring may not actually be a fact; it may also be a critical point with which the other side will make a point. Additionally, if you agree that this referenced 'fact' is valid in your industry, then you will have admitted it is indeed a fact.

Be careful when answering any questions based on assumptions. Do not accept this assumption clause just because the other attorney says it confidently, unless you know it to be true all the time. You are the expert. You should know if it is 100% true, or only sometimes true.

When lawyers restate one of your earlier answers to a question, they are usually attempting to put words in your mouth. Even if it sounds similar to what you said, the attorney's words may have a different meaning under the law than your scientifically-based words may have meant to you. Listen extremely closely when an attorney rephrases something you said. Think about their phraseology in the same precise way you thought about your own previous statement. You want the record to reflect your technical precision. If the attorney's statement does not correctly and precisely characterize your statement's

meaning, just point out the inaccuracy and refer back to your earlier phraseology. Remember that you can ask the court reporter to read back an earlier answer.

***Questions That Constrain Your Answers***

Opposing attorneys can utilize a number of methods during depositions to limit your value at a possible trial. In a deposition, they can ask you to list everything you know about a particular subject, or all the possible ways you know that something could have occurred. It doesn't matter whether you list three or 13 items in response, the possibility remains that you may not think of everything at that moment. If you do not offer a flexible answer, you may not be allowed to expand upon the list during a later trial.

***TACTIC: Whenever you attempt to answer such a list-related question, end your answer with: "that's all I can recall at this moment." That allows you to bring up additional list items later.***

Another approach is to ask for only some of your opinions at the beginning of a deposition. If they do not explicitly ask for all of your opinions, and you do not enunciate all the opinions that you wrote in your report, you may not be allowed to express them in trial on the legal grounds that you did not say them during your deposition. Your best approach is to come to your deposition knowing exactly how many opinions you want to express, and the bases and foundation for those opinions. At some point during the deposition, you can specifically present those opinions. For example, you may be asked:

Q: Do you have an opinion in this matter?

A: I have four opinions in this matter. My first opinion is...

You now have the floor to continue with additional opinions. You do not have to say anything beyond your specific opinions until and unless the attorney asks you for the bases of those opinions. You will have the opportunity to provide additional details if the case goes to trial.

### ***Painting You into a Corner***

Attorneys like to make the jury dislike or disrespect you, thereby making it less likely that they will accept what you have to say regardless of your findings or the quality of your work. Many questions are attempts to reduce the jury's opinion of you in one way or another, even before you have a chance to express any opinions of your own about the issues in the case.

For example, attorneys will try to ascertain how much time you spend in your industry. A question such as "how much of your time is spent as an expert witness?" is common. If your answer is only 5, 10 or even 25%, then your answer is fine. If the percentage is higher than that, the attorney will make it sound as if you are no longer really an expert or a professional in your field, and that you are no longer in tune with your own science or discipline.

It may well be that you only spend a small percentage of your overall time as an expert witness. When you list other things that you do with your life both professionally and personally, it will be clear that you are not just a "hired gun."

The reality is that as you spend more time as an expert witness, you may earn a disproportionate percentage of your overall income doing so. Being an expert witness sometimes becomes a primary job for those who have retired from their specialty and yet are both good and successful at being an expert witness.

***TACTIC: Avoid being trapped into answering questions about expert witness work in terms of percentage of dollars. Answer in terms of what other things you do with your time.***

It comes across better if you are doing other things professionally in your life. If you still have a job and work full time, then there is no problem – expert witness roles will only happen once in a while and you will work them into the rest of your professional schedule. If you are an entrepreneur and have control over the way in which you spend your time, then a successful practice as an expert witness may take on a growing role in your overall work life.

Attorneys often try to get you to paint yourself into a smaller corner of your shared specialty than the other side's expert, who you likely will know from networking or simply working in the same industry. A favorite technique of opposing attorneys is to ask you casually if you are familiar with their expert. They might use words like 'familiar' or ask you directly what you know of the other expert's reputation in your mutual field. The attorney is seeking your aid in qualifying his expert. That is not your job; that is his job. A polite response about being familiar with the expert should be enough. Do not go overboard with praise, because that will lend extra credence to whatever testimony the other expert later offers.

### ***Different Styles of Opposing Lawyers***

Attorneys can ask many different types of questions in a number of different styles. Be prepared to answer factual questions, and be prepared mentally and emotionally for questions that are intended to affect you in a variety of ways. Some questioning techniques are simply meant to unnerve you. Others are intended