LAWYERS ARE FROM VENUS

EXPERTS ARE FROM HELL

(They built it, so they know what it looks like)

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TIPS ON BEING AN EXPERT WITNESS:

Lawyers typically know more and more about less and less until they know everything about nothing. Experts on the other hand, learn less and less about more and more until they know everything about one thing. This often makes Lawyers jealous of Experts because although we are masters of the Courtroom, we have not mastered any particular subject.

The Lawyer/Expert relationship is one of the most interesting dynamics in litigation. As the Courts increasingly hear technological, physiological and geological cases, Judges, Lawyers and parties are relying upon Experts in their respective fields to give opinions on issues of both liability and damages.

Ultimately it is up to the evidence and the law as applied to the evidence that will decide a case. However, an Expert opinion on what that evidence means is a critical factor in helping a Judge who is the sole trier of fact in making a decision. Experts explain, expound, extrapolate, extinguish theories and expand the knowledge of all those in the Courtroom.

To be a better Expert, you need to understand what goes on in the Courtroom; you need to appreciate who your audience is and what their expectations are of you. To that end, with apologies to Moses and in deference to President Wilson, I have come up with my own 14 points on how to be an expert Expert.

1. Keep your resume current, accurate and comprehensive

One of the first documents a Lawyer reads in evaluating an Expert is the Expert's resume. Your resume should be kept current to reflect the fact that you continue to study in your field and are presumably gainfully employed unless otherwise explained. Your resume should be comprehensive in that it should provide for all of your degrees and most of your scholarly articles. It should contain references to the very subject upon which you are called upon to give an opinion; for example, if you are going to provide an opinion on the *co-efficient of subgrade reaction*, somewhere in your resume you should talk about your experience as a soils engineer and what, if any, writing or lecturing you have done on the topic.

Another example is if you are called upon to give evidence in a property dispute particularly about construction of a residential dwelling. You resume should talk about your experience in residential dwellings and not just commercial properties. The fact that you may have been retained to give an expert opinion does not mean the Court will automatically accept you as an Expert. Prior to hearing your views, the Court will conduct what is known as a *voir dire* or a mini trial of your qualifications and ability to serve as an Expert. The Court will consider not only your background and field of study, but what you are an expert in. Be prepared to say not only what qualifies you as an Expert but what field you are qualified to give expert evidence on. Note, you can be qualified as an Expert in several areas. Please review your resume with your instructing counsel to ensure that it is appropriate for the evidence you are about to give.

2. Confidentiality means you talk to the lawyer of the law firm that retains you

Lawyers like secrets. The solicitor/client privilege is the strongest bond known in law. Lawyers in law firms will therefore retain your services in order to make you "the client" and put you under the veil of solicitor client privilege. To paraphrase Benjamin Franklin, three people can keep a secret if two of them are dead. In order to prepare for litigation, lawyers must be able to speak openly, frankly and candidly with their clients and experts. The lawyer needs to understand both the strength and weaknesses of their case as well as that of the adverse party. The Courts have established benchmarks in the form of Rules and case law that provide what can and cannot be disclosed in the preparation of Experts and their reports. For your purposes however, treat everything as if it may be disclosed to the adverse party. If you wish to have a candid discussion with counsel, its best to do it verbally, preferably face to face. Under current case law, almost everything that is put to writing may be disclosed. Draft opinions, field notes, even telephone call records and memos to file may have to be disclosed. Shredded draft reports can be found on computer hard drives. Be careful what you put in writing; be prepared to stand by your opinion and remember that you are providing a report in an adversarial process.

3. Read your retainer

You are being retained for a specific purpose, i.e. to aid the clients and ultimately the Court. The Court will qualify you as an Expert in your specific field. Your report therefore, should be tailored to address only those questions you have been asked to answer in you specific field. Do not speculate or answer questions not put to you. The best retainer agreements pose questions that do not suggest an answer; for example, "cracks have been identified in a slab on grade, please undertake all necessary investigations to determine the cause". Avoid retainers that require you to come to a conclusion already drawn by the party retaining you; for example, "a Defendant caused the cracks in the slab on grade by repetitive use of its heavy equipment, please confirm your agreement". Your retainer agreement including your fee structure may be produced and you may be cross-examined on it. If you feel you are being asked to take a biased position it is better to decline the retainer than be humiliated in Court.

4. State your assumptions

It goes without saying that you should not make up the basis for your conclusions. Be prepared to justify your math; state all of your assumptions and describe in great detail your methodology. If you are relying upon a third party laboratory to test materials that will form part of your opinion, state the qualifications of the laboratory and how and when you dropped off the sample.

If you are relying upon scientific literature, manuals or books, make sure you have reviewed the most current editions; it is not uncommon for theories to be discredited by the same author between editions. Credibility is key to the weight given to your evidence. If you cannot show your "rough work" then the Court will be suspicious that you may have "cheated" in providing your answer to the questions posed of you.

5. Keep your drafts but number them

As described previously drafts and notes which form the basis of an opinion are produceable. There have even been cases where drafts have been produced after trial on an appeal where it is

been established that the draft report could have affected the outcome and/or was not disclosed despite a Court Order to do so. Nevertheless, you should keep a record of how many draft reports have been prepared. If you burn your drafts, then literally you should consider not only deleting it from your document management system but from your hardware as well.

When sending a report in draft be careful about providing copies that have not been cleaned or scrubbed if they are in Word; for example a Word document sent by email that has not been scrubbed will reveal all the changes ever made to it. It is always best to deliver copies by way of PDF. Draft copies should clearly be marked as "draft prepared in contemplation of litigation" and never be signed or stamped until the lawyer is completely satisfied.

6. Read, Re-Read and Read Your Report Again

The basis of your oral testimony is your expert's report. If your oral testimony deviates from your report it could call into question your credibility. Typographical errors are a normal part of life but they can be magnified in cross-examination. The report is your words and every word will be scrutinized. If you use words such as "may", that opens the door of possibilities when being cross-examined. Use definitive words such as "shall"; "cause"; "conclusively" and "the result of". If something is a possibility everything is possible; remember civil Courts use a standard of balance of probability but the Judge is not obliged to always follow the most probable outcome depending on the evidence. Your instructing lawyer will try to tighten the language of your report but if there is some doubt make sure you identify it to the lawyer so when the report is reviewed in your examination the risk can be identified and dismissed. If you ever doubted that the pen is mightier than the sword then you should spend an afternoon in a Courtroom.

7. Do not Download Your Report from the Internet

As silly and obvious as this may seem I have had occasion in the past six years to receive reports from opposing counsel where we discovered that the bulk of the report was downloaded from websites on the internet. On two occasions reports were disingenuous because they deleted qualifying words at the start of the portions downloaded. Sophisticated search tools are now available to counsel to determine whether or not your report is an original or whether it is cobbled together from the work of others. Not only is downloading a report from the internet plagiarism of the worst kind it is also an intentional fraud which could sink your client's case and expose you to damages for professional negligence. If you use the internet as a resource or you wish to pull from a website, there is nothing wrong with that as long as the website is identified in your report. Given that no one "polices" the internet I recommend avoiding it as a source altogether.

8. Your Report is not Prepared for Debating Society

Your report is being provided in an adversarial process. Typically the adverse party has engaged an expert who is qualified to give an opinion that is completely contrary to yours. The search for truth is often not the same as a search for justice although in fairness to the Courts and our system of law it's better than any other. As litigants and counsel we all wish we could go back in a time machine and see what actually happened when for example a building was constructed

however we cannot. We are archaeologists speculating based upon the evidence both written and oral. The hardest job in the Courtroom is that of the Judge who must make a finding of fact in an area that he or she likely has no previous experience. There is no too or fro in a Courtroom; rather there are examinations under oath in which you are called upon to answer questions put to you by your counsel or opposing counsel. Therefore it's important not to speculate on the stand or change your opinion without detailed consultation with counsel, preferably after Court is done for the day. Remember every fact must be proved in Court and the Court can only reach conclusions based upon the evidence presented to it. The judicial truth derived therefrom is what we as a society must abide by. Leave debates to your annual meetings.

9. Consensus

Typically a report is authored by one individual as opposed to a group. If however your report is based upon a consensus of opinion within your firm then it should be stated. If there is dissent within the group then that should be disclosed to your counsel before the report is submitted for consideration. Do not obtain a peer review of your report unless you receive the expressed written consent of your instructing counsel. A peer reviewed report is in fact a new report with an additional expert who may not have been retained in the appropriate manner. If you feel you need an outside source to peer review your report, work through counsel.

10. Leave Your Briefcase at Home

It is up to the parties and their counsel to make sure that all appropriate disclosure has been made for trial. To that end counsel will question you about some of the items we have talked about above such as your notes and drafts and assumptions. If you have not disclosed something to counsel then bringing it up in Court is not appropriate. Counsel will serve your report and your resume on behalf of their client. Court copies will remain available to you. Do not make notes, study notes, margin notes, post-it notes or any additional markings in your Court copy report until after your evidence is started. These notes will be producable if you refer to them on the witness stand. As difficult as it may be, leave your briefcase at home.

11. You Are an Independent Witness

Since you are a what is considered a "non-eyeball" witness you may be present during the entire proceeding and often time counsel will ask you to attend during the opposing parties expert evidence in order to provide help on cross-examination. You are there for the benefit of the lawyer of the client not for your ego. You are independent in your evidence; relax!

12. Admit the Obvious

As I have warned many times in this paper you will be cross-examined on your resume and your report as well as your oral testimony. Cross-examination typically is full of leading questions suggesting an answer. Opposing counsel is trying to get you to agree to a point. Do not guess where counsel is going; do not avoid a question; do not speculate and do not pontificate. Judges as are trained to spot liars. Lawyers are trained to salvage witnesses in cases that are hopeless. Answer the questions put to you and leave it to counsel and the Court to determine where the questions will lead. If there is an obvious answer to a question that may contradict an assumption made in your report then concede that. Your lawyer will conduct a re-examination and you may

be able to explain away a faulty assumption or change in direction at that time. In my almost twenty years of practice I have yet to see a perfect expert's report and I doubt very much yours will be the first.

13. Keep Your Opinions to the Point Etc.

The best experts tell a story on the stand. They make the story interesting and use references that the Court can understand. The more complicated an explanation the more likely the expert is wrong. Use short sentences in your report and in your answers. A civil jury is rare in this country so you do not need to dumb down your language. Your counsel will work with you to reference your answers in common day experiences and analogies that people will likely understand. You should be able to reduce the theory of your report to one or two sentences. Although a transcript is taken of your evidence a judge often relies upon their notes in rendering a decision. A judge will read the notes of your evidence along with the notes of all evidence at the conclusion of the trial. If your syntax is sloppy and your analogy or explanation unclear the notes will reflect this and your evidence will be given little or no weight. Remember trials are retrospective reflections of events that often occurred years if not decades before. Similarly a judge's notes may not be read until after several months of evidence so speak clearly and slowly so it may all be taken down. A good practice is to videotape a practice of your testimony and watch how you appear and speak. You would be amazed how the ego often differs from the video.

14. Bill Fairly, Often and Regularly

You are being paid for a service. Often times the case rests upon your testimony. You should never bill on a basis that will impair your objectivity. A retainer should be hourly and reflect industry standard and your expertise. If a party is successful their out of pocket expenses for your services may be compensated by the unsuccessful party. It is important that your accounts which will be reviewed by the Court in assessing costs accurately detail the work you have performed and the hours incurred. Expert's evidence can be expensive but if bills are rendered on a regular basis and particularly following an important milestone such as a delivery of a report they should be promptly paid. Do not be shy about billing. Your account will more than likely not be the most expensive account the client has to pay; this is reserved for the lawyers!