Do's and Don'ts of Expert Testimony
by Gary R. Trugman CPA/ABV, MCBA, ASA, MVS

Part of performing business valuation assignments for litigation purposes often involves giving expert testimony to explain and support your conclusion of value. While there is no one way that is more correct than others to accomplish this task, there are certain things that the expert should and should not do to make the process work to his or her advantage. This paper is intended to provide you with some tips that have proven to be effective for the author.

This discussion will separate deposition testimony from trial testimony. There are different strategies to giving testimony in each. The first and foremost strategy is to speak with the attorney that represents your client so that he or she can provide you with the manner in which you are to testify. Some attorneys like the expert to only give “yes” or “no” answers and others want you to be helpful to the other side. Do not take it upon yourself to use your own strategy. The attorney is the team leader!!!

The Deposition

In a deposition, you will be asked questions which you must answer under oath. The questions are asked by opposing counsel, and the process is usually recorded by a court reporter. Occasionally, the attorneys will agree to tape record or video tape the proceedings. Deposition testimony is as important as testimony given at a trial. Although no judge is present at the deposition, your testimony may be read back at the time of trial and make constitute part of your trial testimony. Questions asked at a deposition must either ask for relevant information or lead to the discovery of relevant information.

The opposing attorney will generally try to find out what you know about the issues in the case, your opinion and the bases and authorities for that opinion. He or she does not want
to be surprised at the trial by what you say. The attorney wants to have a benchmark against which to test your trial testimony with the hopes that an inconsistency between your deposition and trial testimony can be demonstrated to the trier of fact in an attempt to discredit the balance of your testimony.

It is your job to truthfully answer the questions. Do not try to win the case for your client with a single answer. An attorney once told me that you win a case much like you build a house, brick by brick, board by board, foundation to frame to close-in and on to the finish and clean-up work. Similarly, one answer will not cause you to lose or substantially harm your case, unless it is a lie.

No matter how many books you read, or seminars that you attend, the list of “DOs” and “DON’Ts” of depositions always seem to include the following:

DOs

- Tell the truth.

- PAUSE before you answer the question to give yourself time to think and to permit your attorney to make an objection, if that is appropriate.

- Answer the questions asked, not the question you think the lawyers meant to ask.

- If you do not understand question, don't answer the question; ask the attorney to repeat the question, rephrase the question or restate the question.

- Listen to the complete question before answering it.
• Listen to be sure that the question does not include a meaning with which you disagree.

• Speak slowly and directly.

• Answer questions only with information you know personally.

• The best answers for responding to an attorney representing the other side in a litigation are: a) Yes  b) No  c) I don't know  or d) I don't recall.

• Dress and act as if the Judge were present.

• Ask for a break if you need one.

• You may ask to speak to your side’s attorney at any time.

**DON'Ts**

• Do not volunteer information.

• Do not try to "dress up" your answer.

• Do not offer opinions unless the question specifically asks for your opinion.

• Do not debate, argue or compete with the attorney asking the question.

• Do not react personally to the mannerisms or the words which the attorney for the other side utilizes.
- 4 -

- Do not offer long narratives.

- Do not allow yourself to be rushed.

- Do not try to decide whether or not what you are answering is the most helpful answer.

The Trial

Testimony at a trial takes place before a judge and all rules of evidence apply. Questions at trial may only ask for relevant material information. Many civil and criminal cases are tried to a jury. Some civil actions, such as those seeking equitable relief, declaratory judgments or a divorce are tried only to a judge.

Similar to deposition testimony, there are some general do’s and don’ts here as well. As an expert witness, your objective, truthful testimony is what is expected of you. If you appear to be an advocate for your client, you might as well help the other side win its case. Let’s discuss the rules that you should always keep in mind when giving expert testimony.

Effective testimony is truthful testimony. Even if something hurts your client’s case, tell the truth. Usually no case is a clear winner. But in a civil action, the plaintiff only has to prove the case by a fair preponderance of the evidence. That means that your client wins if the finder of fact (the jury or the judge sitting without a jury) believes more of your evidence that it does of the opposing side.

Depositions and trials are not like the movies or television. A witness who lies not only makes a bad impression, but lying hurts your client’s case. A lie in one area permits the opposing lawyer to argue that you are also lying about other, more important, subjects. By
candidly telling the truth, you put yourself in the best possible position to reach your desired goal. Your client’s attorney can explain the truth but not why you either hid the truth or lied. Besides, lying under oath is perjury which can be punishable by fine, imprisonment or both.

An experience attorney knows that if the case is destroyed by the truth, then he or she will try to get the best settlement possible. If you are worried that the truth will hurt your client’s case, discuss it with your client’s attorney before you have to testify. The attorney may help you by discussing different ways of giving the same testimony so that it will not be so damaging. There is always the alternative of trying to not have you testify. But there is never the alternative of lying.

Unfortunately, many people get away with lying under oath. The one thing that has become obvious is that truth and justice have little to do with the outcome of a case. The reason for that is because the court system is designed to end disputes, not to right every wrong. However, the system does try to work toward fair results, and the truth is the best foundation for reaching that goal.

If you know something and you are asked, you must state what you know. Never state what you think must have happened, what you think you would do if faced now with the same situation or what you think you should know. Only answer the question if the information you have is personal knowledge and you remember that information. Some witnesses, trying to be helpful, make the mistake of guessing or estimating what they think should be the answer. This is dangerous.

If you do not know the answer to a question, don’t be afraid to say so. Often the opposing attorney knows the answer and knows you are unlikely to know. Therefore, you make a serious error in judgment if you guess. Even if you think it makes you appear ignorant or as if you are attempting to evade the answer, DO NOT GUESS!
Unless you are specifically asked, do not testify about your personal opinions and conclusions. If you state your opinion without a proper foundation, you violate the rules of evidence. Expert and non-expert opinions are admissible only where necessary to aid the court or jury in understanding the evidence. Ultimately, it is the judge's or jury's job to assess the evidence and decide whether to believe any or all of an expert's testimony.

As an expert, the basic rule on appearance is that you should look good. First impressions are generally made by your physical appearance. Do not overdress to try to impress the judge or jury. Do not wear a lot of jewelry. Do not use heavy make-up. Do not wear flashy or trendy clothing or clothing with bright clashing colors. Dress as if you were going on an interview for a job at a bank. Save your "fashionable" clothes for a day in the office.

Be on time for scheduled deposition and court appearances. The judge is allowed to be late but you should not be. In fact, try to arrive early in case parking is a problem. Do not chew gum, tobacco or your fingernails in or around the court. Be courteous and not hostile or rude toward the other party, the other lawyer or opposing witnesses, no matter how you may feel about them. Some attorneys try to intimidate or anger the opposing lawyer or witness. Others try to give you a false sense of security. You should smile to yourself when you recognize this tactic. When testifying, attempt to be helpful, but not overeager. Do not respond angrily to loud questions.

**Preparation, Preparation, Preparation**

There is no substitute for preparation. There is also never enough time to prepare as thoroughly as you should. Rarely do we have clients that are willing to spend the type of dollars necessary to allow us to prepare as much as we should. Nevertheless, preparation is the key to success.
You will be considerably less nervous if you have prepared with your client’s attorney before the deposition and again before the trial. The judge expects that witnesses will be prepared and will appreciate thorough preparation. By preparing, you will not have to memorize answers. You have to tell the truth and keep in mind the theory and outline of your client’s case. Your client’s attorney has to ask the questions to make sure that all points are covered. That is one of his or her duties. As experts, we should not worry about it. Memorization is not necessary. If you carefully think through the events about which you will testify and the basis for any opinions, you will easily be able to visualize them when asked at trial.

Lists of items or lists of terms and definitions which are involved in this case or which are to be used during your testimony can be prepared in advance and are sometimes made exhibits. It is expected that a witness will be nervous and forget things. That is why the attorney needs to know the important information about which each witness will testify and be prepared to ask the right questions. It may even be helpful for you to write out the questions that you want the attorney to ask you.

It would be foolish for your client’s attorney to either let you be deposed or to testify in court without first being prepared. Since your client did not hire a foolish lawyer (hopefully!!!), expect to be prepared for testimony.

In this way you will understand the theory of the case, the kinds of questions you will be asked on direct examination by your client’s attorney, the general information expected from each question or series of questions, the approximate order in which each subject will occur and the issues and kind of questions to expect on cross-examination and how to answer.

Thorough preparation, plus your truthful testimony, eliminates the need to memorize answers. Do not memorize in an attempt to avoid forgetting something. For example, if
you memorize the order of the topics and something happens to change the order, you might panic or forget. Instead, by preparing, you can be confident that your lawyer will ask the necessary questions. By listening to the questions, you will be able to give a full answer.

When you are asked a question, listen to the entire question. Do not start thinking about your answer until the attorney, judge or juror states the entire question. If you do not understand a word or term used in the question, or if you do not understand the question, then ask to have it repeated or restated. Often questions are wordy or have too many compound clauses. The attorneys are not necessarily trying to be tricky but rather attorneys often are not sure what they want to ask. It is impossible to write out all of the questions in advance, so attorneys are thinking as they are talking. If their question does not make sense, you need not struggle with the muddled result. Just ask, Would you repeat the question, please? or I don't understand the question. Also, your client's attorney may object to the form of the question.

The court will know if it's a bad question and so will the attorney. If the attorney is constantly rephrasing muddled questions, he or she will become more nervous than you. At this point, if the judge or jurors start shifting or sinking into their seats, it is because they are becoming irritated with the questioner - not with the witness.

Some attorneys, whether due to their own arrogance, embarrassment or incomprehension or in an attempt to embarrass the witness, ask in response, "What is it about the question you do not understand? Avoid the urge to respond with sarcasm, because you will lose points with the judge and jury. Instead, in a quiet voice, state precisely the nature of your difficulty with the question. For example, I do not understand what is meant by the word 'X'. I cannot answer all parts of those questions with one answer." Do not add, May I answer them one at a time? This will be heard as sarcasm.
Talk loud enough to be heard but do not shout. Do not drop the volume of your voice at the end of a sentence and whatever you do, don’t mumble. Keep your hands away from your mouth while you are speaking because this not only reduces the volume of your voice but it also appears as if you are uncertain of your answer. During the first few questions, if necessary, your client’s attorney should ask you to keep your voice up. He or she might even back away from you and ask that you talk loud enough so that your voice reaches where he or she is now standing.

During cross-examination, in an effort to be either intimidating or dramatic, an attorney may talk loudly, shout or talk almost in a whisper. If the attorney is shouting at you, your client’s attorney may not object on the theory that this tactic is working against the other side because the judge and jury are either irritated by the loud noise or feeling empathy for your plight. At some point, the judge may reprimand the attorney, even without objection by your client’s attorney.

If your client’s attorney waits until the opposing attorney has worked up a head of steam, the objection will certainly be sustained by the judge. But the opposing attorney may not be able to keep in control so that within a few questions your client’s attorney will again have reason to object. Now the opposing attorney may really get flustered as the issue is the shouting, not the question itself.

No matter what happens, you must not respond by shouting back. Keep your voice at normal level. Sometimes you can talk softer as the opposing attorney talks louder. This makes a greater contrast between the two voices, making the opposing attorney sound even louder. If the opposing attorney is speeding up the questions, pause a few seconds before answering. Actually, slowly count to three to yourself, and then talk slowly when answering. In addition to slowing the pace, sometimes the opposing attorney loses the train of thought and enthusiasm.
When answering, do not try to stare down the opposing party. Direct your attention to whomever is asking the question - your client’s attorney, the opposing attorney, the judge or the juror. By looking directly at the questioner, you give the positive impressions of being truthful and sincere.

In a jury trial the attorney may ask you to "tell the jury" about an event. At that point you should turn to the jury and look directly at the jurors. Try to actually look in the eyes of each juror. This is a non-verbal way of personally meeting each juror. Start at one side of the jury in the back or front row. As you answer the question, at the end of a phrase or sentence, move your eyes to the next juror. After you have done this with three or four jurors, you will find the others waiting for their turn. While this does not guarantee your side will win, it is harder to say "No" to someone the juror has met and trusts.

Occasionally, when being cross-examined, you may have the opportunity to take the initiative by saying something such as, "No. No. No, that is not the way it happened. Let me explain." At that point, you should turn to the jury, or if none, to the judge, and proceed to explain. If the opposing attorney cuts you off or objects, then it will leave the jury curious about what you were about to say and perhaps angry that you were not permitted to explain. In that event your client’s attorney, who will have another chance to ask you more questions, will ask, "Do you remember when the opposing attorney stopped you from explaining something to the jury?" After you answer yes, the next question will be, "Please explain now to the jury what you wanted to explain before."

Do not slouch in any chair, whether on or off the witness stand. Think of yourself as being on center stage from the moment you leave home in the morning until you reach home at the end of the day. Most attorneys believe that clients and witnesses should not react to the testimony of others. So, do not nod your head in agreement or shake your head, arms or hands in disagreement with a witness' testimony.
From the moment you leave your home in the morning until the moment you return home in the evening, be courteous and act as if a judge or juror is watching. The judge and jury will, from time to time, be watching your conduct in court even when you are not testifying.

**The Attorney**

Before going up to a witness, even the attorney's own client, an attorney will usually ask, “May I approach the witness, Your Honor?” The judge will almost always say "Yes." By following this formality it encourages opposing counsel to also treat the court and witness with dignity and respect. Some attorneys stand back from their witnesses in order to give them a lot of territory and in an attempt to add more formality and thus importance to the testimony. The opposing attorney may try to approach the witness or come half way from the podium or counsel table in an effort to "cut down" the witness' territory and thus try to psychologically cut down the value of the testimony. Some opposing attorneys will try to stand right next to the witness and look at the judge or jurors when asking the questions. If you find yourself in such a situation, you should also direct your answer to the judge or jury.

After the document, photograph or other paper (which served as the justification to come up to the witness) is shown to you, the opposing attorney should generally go back to counsel table. If not, your client's attorney can request the judge to instruct the opposing attorney to return to counsel table. In a jury trial, this request is initially made at the "side bar", out of the hearing of the jury.

Your answers to questions should respond with the information asked. Do not answer as if some other information was requested. In asking questions your client's attorney must stay within the rules of evidence. This means, for example, that you cannot state what someone else was thinking or what someone else saw. You can usually testify to what was
said by a party or testify about what you said or did or what you saw. But, if you are not responsive, the opposing attorney will properly ask the court to "strike" your answer.

Many questions can be answered with a straight-forward yes or no. If you avoid answering a yes or no question, it may seem as if your answer is not true, even though you are being truthful. If necessary you can say that you "cannot answer the question yes or no. If you want to explain your yes or no answer, the court should give you that opportunity. Otherwise, when your attorney gets to ask you more questions, you will be asked to explain or elaborate.

When on the witness stand, use the same words which you use in your every day life. Formal or unnatural language detracts from your credibility. Also, you should also "tell it like it is." If there was violent, abusive language used by the other side, quote the exact words that were used. This makes your testimony more credible and memorable. If technical or specialized terms are used, they should either be defined as you go along or be listed on a chart ahead of time, or both.

Do not argue with the opposing attorney or the judge. For example, if asked "Did you investigate the unreported income alleged by the opposing side?" it is argumentative to answer "Why would I do that since there was no unreported income?" If there was no investigation, just answer, "No". The attorney may then make the mistake of asking "Why?" At this point you will be able to give a long, detailed answer about why you know with certainty that there was no unreported income in this matter. If the questions from the opposing attorney are argumentative, your client's attorney can object. Another example of an argumentative question is "Were you lying when you testified at your deposition or are you lying now?"
When You are Cross-Examined

Fortunately most attorneys are not the devastating cross-examiners seen portrayed in the movies or on television. A reasonably poised witness who is telling the truth will find cross-examination less difficult than direct examination, and the resulting testimony will carry greater weight because it is brought out by the other side.

The other attorney is not the enemy. Do not be hostile, cute or a wise guy. Most of all do not try to show that you are smarter, tougher and quicker than the opposing attorney. If you are hostile you are an easier target to exploit on cross-examination.

Do not try to figure out what the other attorney has in mind or where that person is trying to go. Frequently the other attorney has no plan of cross-examination. Instead the other side is hoping you will respond with an evasive, wise guy answer, which gives a bad impression. Often the witness has been consistent and there is nothing that can really be disputed. Yet, if provoked, the witness’ credibility is lessened. So hold onto your temper and do not be evasive, over biased or stubborn. Your job as a witness is to be helpful by answering the questions. Do this and you will make the other attorney's job more difficult. The more the other attorney has to work, the fewer the questions.

Often questions on cross-examination may appear to you to be insulting, stupid, repetitive or irrelevant to the issue. Answer the question anyhow, if you are able. The judge and jury will sense the stupidity of the question and admire your patience. You must not object to questions, even if they are objectionable. That is your client’s attorney’s job, and very often an attorney may not make objections for a strategic purpose. At this point you must rely on your client’s attorney and not take matters into your own hands.

If a question is asked that you do not wish to answer for a valid reason, like unnecessary injury to a third party’s reputation, ask permission to not answer the question, stating the
reason. If the judge still instructs you to answer the question, do so. Refusal can result in a finding of contempt, or at least give the impression that you are hiding the truth.

In any event your client’s attorney always gets the chance to ask you more questions after the other side sits down. Therefore, on direct examination, you will be asked whether you recall being asked by the other attorney about "X", "Y" and "Z" questions, and if that information is needed, important or a consideration in forming an opinion on the subject matter in question in this case.

Most witnesses tend to be defensive on cross-examination because they are suspicious of the motives of the questioner. The witness most often displays a defensive attitude by evasiveness, hostility or outright lying. The clever cross-examiner will take advantage of these tendencies by phrasing questions that are argumentative or loaded with presumption. The best remedy, combined with your determination to be "helpful," is to answer the questions simply, directly and truthfully. For example, many questions will be opened with the phrase "Would you have this court believe that...?" Right off the bat there is the presumption in the question that you are not to be believed, and the tendency is to argue back. Instead, just answer yes or no and see how devastating the effect can be.

Another common ploy is to ask whether a witness has discussed the case with anyone. The answer, obviously, should be yes. The witness has usually talked to a attorney, a party and others. But the defensive witness will often be evasive or tell an outright lie. There are many forms of questions that tend to encourage your natural tendency to be defensive, but they are, in reality, a form of trick question recognized by the court, and it is the manner of your answer as much as the substance that will give an overall positive or negative impression. The real danger for the cross-examiner is that if the questions are answered well, the direct examination is enhanced, rather than undermined by the cross-examination. The skilled cross-examiner will end the questioning on recognizing the failure to undermine the credibility or composure of the witness.
Another symptom of defensiveness on cross-examination is the tendency of witnesses to gratuitously add unnecessary comments to their testimony. When you finish up a question with "And I can prove it," or "And that's the truth," or "And I have witnesses," or "No. Absolutely not," you are not underscoring the truthfulness of your statement. You are merely suggesting that the rest of your testimony was not truthful, or you were not able to prove it, or not supported by witnesses. Avoid these gratuitous phrases, which have a tendency to give an impression opposite to the one of credibility that you intended.

A basic trial rule for the cross-examining attorney is to never ask a question unless fairly certain of what the answer is going to be. For that reason, questions that begin with "how" or "why" are always fraught with danger. They open the door for the witness to come forth with seemingly endless self-serving testimony to explain how or why something was done or said. A well-prepared witness will look for these openings in order to get evidence in the record that was not admissible on direct examination because of restrictive rules of evidence.

For example, where you are unable to get the content of a conversation with a third party in evidence on your direct testimony because of hearsay, a "what was said" question to any part of the conversation on cross-examination may open the door for the entire conversation going into evidence. Attorneys frequently lose their case on cross-examination by inadvertently opening the door to areas of testimony that were not otherwise admissible, thereby making the case for the other side. Once the door has been opened, it cannot be shut as long as your answer is responsive to the question. The seemingly innocuous "Why did you take that action?" may well cause the attorney to cringe at the five-minute response reciting the medical reasons why that action was necessary.

During the deposition the cross-examining attorney may well ask "Why" or "Explain" questions even though the answer is not yet known. The very purpose of the deposition is to obtain the answers to these questions.
There are essentially two types of questions. Those that call for a "yes" or "no" answer and those that require a narrative answer. "Yes" or "no" answers generally are used to confirm information already known to the other side. Often there seems little need for most of this type of questioning unless the attorney wants you to be firmly wedded to your story. Of course, if you are telling the truth you have nothing to fear. It is more difficult to encourage opposing witnesses to talk freely, yet this is just what the other side should hope for in a deposition. Questions such as "What happened next?" or "Tell us about that," "Please explain," or a simple "Go on?" will all produce narrative responses. This is what the opposing attorney wants for answers in the deposition.

**The "KISS" Rule**

"Keep It Simple, Stupid." If, during cross-examination, you find that you are running on and on, you have said too much. Think about answering each question truthfully and with the least amount of words.

"Tell us your name and address." Most witnesses reply, "Gary R. Trugman, 1776 North Pine Island Road, Plantation, Florida 33322." However, if the answer was "Gary Trugman, Plantation" it also would have been responsive and truthful. Now the attorney has to ask another identifying question, "Where in Plantation?" or "What state is Plantation located in?" The point is you make the opposing attorney work for every little piece of information. Remember as a witness your job is to simply answer the question asked. It is a mistake to answer the question you think the attorney meant to ask. The typed transcript shows only what was actually asked. If the attorney makes a mistake in asking the question, that is the attorney's problem, not yours.

When being cross-examined the four best answers are, "Yes," "No," "I don't remember," and "I don't know." If you use these answers and stop talking, you force the other side to work hard to keep the questions coming. "Yes" and "no" are straightforward answers. If
you thought you once knew something and cannot remember, say so. “I can't remember.” Do not try to think how you would have reacted or what you would have said as that is a mistake and not truthful. It can lead you into a trap, for the other attorney may really know what happened. If you can't remember something the opposing attorney may ask you some other questions or show you a document in order to refresh your memory. If you then remember, good. If not, then do not change your testimony. If you think you never knew something and you do not now know, say, "I don't know." It is honest and it puts the other side in the position of having to ask more questions.

You may be asked the same question more than once. Sometimes the same question is asked four or five times. However, if a question is asked again, you do not have to change your answer. Be patient and do not fight or become angry with the opposing attorney asking the question. The opposing attorney may be trying to obtain just such a reaction. Instead you do your job and answer the question. Let your client's attorney do the attorney's job of objecting to the repetition of a question.

Sometimes judges permit several repetitions, over objection. Sometimes, knowing this or knowing that the judge will become irritated or impatient, your client's attorney will permit the repetitive questions to continue without objection. But you let your client's attorney deal with the situation.

If the judge asks a question during your direct examination, it usually requires a longer narrative response. If the judge also asks a question when you are being cross-examined, it usually requires a yes or no answer. In either event, listen to the question and treat it as if it is asked by the opposing attorney.
Conclusion

Being an expert witness requires a skill set that is separate and apart from being able to value a business. Like everything else that we do in our profession, we need to practice in order to get it right. Being an expert is not for everyone because of the adversarial nature of a litigation. Place within your own area of expertise and don’t get pulled into a situation that forces you to be very uncomfortable with the services that you are rendering for your client. If you are going to be successful as an expert witness, you must have the right temperament.