The following materials have been prepared by a lawyer from a lawyer’s perspective on working with expert witnesses. One of the premises upon which these materials are based is that as an expert hired in an adversarial setting (whether arbitration, mediation, or litigation), you are working with a qualified lawyer and the lawyer is your client. This is not to suggest that you will not have occasion to speak or meet with the actual litigant that the lawyer represents. However, it is my distinct advice that from the outset you make clear that you take direction from and serve at the pleasure of the lawyer. Engagement and retainer letters are a perfect opportunity to make that formally and expressly clear from the outset. A good lawyer is the captain of the ship and will not tolerate a client that vies for control of the case. The lawyer is the director of the presentation and bears the ultimate responsibility for the result. It is the lawyer’s job to manage the client’s expectations. An effective expert works closely with the lawyer to identify realistic goals and outcomes within the bounds of ethical advocacy.

II. Introduction

These materials cannot help you be a “good” expert. Substantively, that is up to you. It is why you went to school, spent countless hours honing your skills, in many instances became certified and accredited, and it is what you have devoted your professional life to doing. It is why you are here at this conference, to learn the latest trends in appraising in your discipline, hone your skills and enhance your knowledge. It all starts with your training, your experience and your expertise!

But being skilled and knowledgeable is only half the battle. If you want to be hired as an expert in a litigation setting, you have to be more than just good at crunching the numbers, statistics and analytics. You have to present, whether in deposition or in court, or both, and you have to do it well. In order to present...
well, you have to have…… presence! Presence too, like the substance of your area of expertise, can be taught and practice and honed.

Merriam-Webster Dictionary defines “Present” (the verb that is) as follows: to formally talk about (something you have written, studied, etc.) to a group of people; to bring or introduce into the presence of someone, especially of superior rank or status; to introduce socially; to bring (as a play) before the public to act the part of: perform.

The goal of presenting expert testimony is – helping the “trier of fact” (the Judge in a bench trial or the jury in a jury trial) understand an issue that requires some special knowledge or expertise to understand and that has some basis in scientific proof. Although many of you come from diverse localities and will have opportunities to testify in State or local courts, the Federal Rule of Evidence pertaining to expert testimony provides a good sense of what we are looking to accomplish in any courtroom or adversarial setting:

**Rule 702. Testimony by Expert Witnesses**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Your role as an expert is to teach the judge or jury something that is beyond their untrained understanding of the subject matter about which you are testifying. Be confident in your opinion and keep your answers and explanations simple and concise whether you are on direct or cross examination. Regardless of the subject matter, your credibility is everything. Although it sounds axiomatic – tell the truth, the whole truth and nothing but the truth.

**III. The Ground Work**

Doing your best work is within your control and your primary responsibility. You will know your subject, be it a business, a jewel, a parcel of real property, etc., and how to go about appraising it better than your client (be it the litigant herself or the lawyer for whom you are working). You will know your ethical parameters and Uniform Standards (USPAP) better than the lawyer that hires you. It is your
job to make the lawyer/client aware of anything that would limit your capacity to deliver what is expected of you. You have to have the discipline to reject any assignment that would have you compromise those standards or ethical considerations. Credibility is everything in this business. And if you go to trial or are simply deposed in a case and have compromised those standards – your prior opinions and testimony are potentially discoverable by an ambitious advocate looking to attack your credibility in the next case.

How do experts protect their credibility? Simple. Maintain your integrity in the application of your expertise. If you identify a pitfall in your ability to form your expert opinion, share that problem with your client immediately. Explain the issue and how it might undermine the quality of your opinion. Whatever the problem might be, it is not one you created. It is your job to point it out so that it can be resolved before your opinion is rendered or, at the very least, it has been disclosed as a potential drawback and your client has accepted it as a reality in the case and the potential impact on the result in the case. Let the client (lawyer) strategize how best to deal with it – with your knowledgeable help, of course.

IV. The Report

In most cases you will be asked to reduce your expert opinion to writing. Once you have a good working draft of your report, share it with your client before it is finalized. This is not to suggest that the lawyer might inappropriately place her imprint on your work product. Rather, in most instances, the expert has some degree of discretion in certain of the assumptions that she makes in rendering her opinion. Without compromising the application of your standards of practice or your ethical parameters, a frank discussion regarding those assumptions and, where there might exist some wiggle room without compromising the integrity of the opinion, a constructive dialogue regarding those assumptions and the exercise of that discretion is essential to having the lawyer and the appraiser on the same page, in complete accord with the approach taken in the report. Moreover, there may be less substantive and more stylistic presentations that the lawyer prefers in how the report is laid out, what exhibits or addenda are included, etc., which will also facilitate a good working relationship between expert and counsel. Your report should include definitions where appropriate (the definition of fair market value for example) and disclaimers – any information that might tend to undermine the quality of your expert opinion.
V. Experts and Depositions

A deposition is your testimony under oath. It is a tool used by the opposing attorney to discover what your opinions are and what those opinions are based on in advance of trial so that your adversary can factor your opinions into his assessment of the case and his trial strategy. It is intended to “pin you down” on your opinions so that there can be no surprises as trial. Typically, the deposition will be set at a mutually convenient time for you and for the attorneys involved in the case. It is also typical for the Notice of Taking Deposition to be “duces tecum” (Latin for bring with you) requiring you to bring your report and entire file to the deposition. You might also be required to bring your billing file (if not part of your main file for the case) and your Curriculum Vitae. (Have copies of your CV even if not requested.) It is entirely fair game for your adversary to review your entire file at deposition, with the exception of anything that might qualify as protected under the attorney-client privilege or work product privilege. You should consult with the lawyer with whom you are working if there is any doubt about what should be excluded from production at your deposition. Each jurisdiction is different. It may be possible for you to exclude certain communications between you and the attorney that show your thought process and discussions regarding strategy. You should familiarize yourself with the rules in your area as there may be ways of organizing your communications so as to take advantage of the protections offered by the applicable rules.

In most instances, the deposition of an expert is sought by the adverse party once your opinions have been completed. However, if you receive a notice of your deposition and your work is not complete, let the lawyer that hired you know so that she can advise the opposing side and give them the option of waiting until you have finalized your report. Skirmishes over the timing of depositions in advance of trial are common. It is simply your job to have your work completed reasonably in advance of trial or when otherwise requested by counsel by whom you are employed. Ask the lawyer for deadlines and whether trial dates have already been set in the case. Depending on the nature of the case and the issues in dispute, some lawyers will wait as long as they can before incurring the expense of hiring an expert, by which time trial may be imminent. Do not get caught agreeing to undertake an appraisal in too abbreviated a time for you to do the quality work that you pride yourself on doing.

Just as with your trial testimony, it is important to review your source documentation and your opinions with the lawyer you are working with in advance of your deposition. Ironically, it is the lawyers and experts that are most experienced with litigation that tend to become lax about pre-deposition
preparation. Even if the lawyer does not request a conference in advance of your deposition, be sure to provide her with your report and ask that it be reviewed and approved by counsel before your deposition.

If your report is complete at the time of your deposition, you should bring it and, if requested, your entire file (excluding any protected materials) with you. It is courteous to bring sufficient copies for the lawyers, opposing experts that may be present at your deposition, and even the parties to the litigation so that everyone in attendance can follow the deposition testimony as your report is reviewed. To the extent that there are source documents or other materials upon which you relied in forming your opinion contained in your file but not in your report, the adverse attorney is entitled to inspect the contents of your file and request copies of anything of interest. Be mindful of what is requested as it may provide some insight into the fact that the opposing lawyer will take in cross-examination at trial.

If you make any adjustments to your opinion or report (schedules, charts, etc.) following your deposition for any reason whatsoever, notify the lawyer so that she may advise the other side. It is not uncommon for tweaks to be made over the course of further discovery in the case – you might learn of a material fact from the deposition of the adverse party or opposing expert that you had not been aware of or considered relevant previously. There is no shame in making a thoughtful adjustment to your opinion based on newly available information. The key is to provide your revised report to the adverse side sufficiently in advance of trial so that if they have any questions about those changes they have the option of reconvening your deposition to inquire as to the substance of any such modification to your prior opinion and the reason such modification was made.

The attorney taking your deposition has the following 3 main objectives:

1. To discover who you are – your background and qualifications as an expert in your field. A good attorney will inquire of you regarding your CV and look for anything that is not entirely accurate. Make sure that your CV is completely accurate and up to date!
2. To discover what you were retained to do and what you in fact did (the scope of your undertaking may have changed over the course of time).
3. To discover the conclusions and opinions that you reached and the facts (and/or assumptions) upon which those opinions were based. By memorializing your methodology and conclusions in deposition, the attorney can develop her trial strategy accordingly.
But note: Attorneys have different styles. Some are more aggressive in deposition than others. One lawyer’s style might be to befriend the expert in deposition, have the expert relax and become more conversational in her approach in order to have the expert witness speak more freely and provide answers beyond the scope of the question, only to take a more assertive approach in cross examination at trial, when it counts. Do not let the attorney’s style catch you off guard. Maintain a healthy skepticism about an overly friendly adverse attorney. Remain professional and follow the suggestions contained in these materials.

Be concise. If there is one thing you take away from these materials, it should be that you are only to answer the question asked; nothing more, nothing less. When you are being deposed, the adverse lawyer taking your deposition is likely to ask open ended questions that allow you to craft your answers in a narrative form. Unlike cross examination at trial where a skilled attorney will ask perfectly appropriate leading questions (questions that suggest the answer in the question itself), in deposition, when simply trying to secure your background and experience and the essence of your opinions, the lawyer’s inquiry is much more likely to provide the expert with some latitude in explaining his answer. DO NOT FEEL THE NEED TO EXPLAIN. Answer only the question asked and explain only if a follow-up question seeks an explanation. A skilled lawyer will continue to pursue an explanation by asking further questions. A lesser attorney might move on to the next issue or topic. It is not your job to explain all of the nuances of your work. It is the lawyer’s job to inquire until he has fully secured the entirety of your thought process in reaching your opinions. Your opportunity to “shine” as an expert, to fully explain and expand upon your methodologies and opinions, is at trial – not in deposition. Answer the questions as concisely as possible and go home.

There is little technical difference between the testimony at a deposition and the testimony in the courtroom, with the exception of the judge presiding over and ruling on matters in court as they arise. Objections available to the lawyers at deposition are typically preserved for ruling at trial. If the transcript of the deposition is used to impeach your trial testimony, the judge may rule on those objections at that time.

Never inject humor into your deposition testimony. While a little levity never hurts, particularly during tense situations, an attempt at humor can easily be misinterpreted when the cold transcript of your deposition testimony is later read. If you catch yourself cracking a joke, add: “I am kidding of course” or words to that effect so that the record is clear.
“Read or Waive?” As with lay witnesses, you will be asked if you want to read the deposition transcript if it is ordered. Do NOT waive that right. Receive a copy of the deposition transcript and review it for accuracy. Court reporters are human and sometimes make mistakes. Or, you might have misspoken and wish to correct your testimony. There is no shame in doing so. Share any misquoted statement or misstatement with the lawyer so that she can formally make the correction to the record using the customary procedure in your jurisdiction.

VI. Before You Testify

From the time you complete your work, sit for your deposition and appear at trial, time will pass – sometimes months will pass. Be sure to review your report and the transcript of your deposition testimony before appearing in court. Again, pursue a meeting with the attorney to discuss your trial testimony so that you are both on the same page. The courtroom is your stage and there are no re-takes. Can you imagine movie stars not practicing their lines before filming their next blockbuster? Of course not. Remember, if you make any tweaks to your opinion or report or come across additional support for your opinion after your deposition and before trial, provide the new material to the attorney so that it can be supplied to the adverse party. Failure to do this could lead to the new material (and any adjustment to your opinion) being excluded from evidence at trial, undermining the quality and persuasiveness of your entire work product.

VII. Showtime: Trial Testimony

This is why they pay you the big bucks! It is time to appear in court and persuade the judge or jury with impressive credentials, competence, candor and professionalism. Remember, you are not an advocate – you are an expert. Decorum is critical. By stating your opinions with authority but without being argumentative or appearing to want to persuade, you will have the best chance of having your opinion accepted by the trier of fact and positively impacting the result at trial.

A. Direct Examination: You have practiced. You have reviewed your Report and you know the material inside and out. The purpose of your direct examination is threefold:

   i. Tout your credentials. Unless you are an expert that appears routinely before the same group of judges in a particular jurisdiction, you are an unknown entity. On direct examination counsel will spend the first 5 or 10 minutes providing the court with your education, credentials, work experience and
everything else that not only qualifies you to render an expert opinion, but impresses the court with just how qualified you are. If there is anything remarkable in your background that makes you uniquely qualified to render an opinion in a particular case, that element of your CV should be highlighted. A good lawyer will “read” the judge or jury – insuring that she is not belaboring the point. In a bench trial, judges are more likely to glance at your CV, conclude that you are qualified and coax counsel to move on to the substance of your testimony. More latitude will be given in explaining your background and experience to a layperson jury.

ii. Make your report come to life. Judges and jurors alike can easily get that glazed over look when handed multiple pages with a lot of fine print. Assume your audience is lazy and does not want to read the very work product that you poured your heart and soul into. This is your opportunity to teach what you know to your audience. Define any technical terms used in your report that a lay person would not typically be familiar with. Concisely and articulately summarize and paraphrase the salient points contained in your report and break those points down into easily digestible pieces. You have identified those essential points in your pre-trial conference with counsel. It is now counsel’s job to ask questions designed to elicit those salient points in a straightforward, lineal fashion. Making your testimony understandable to a lay person who does not have the same background and experience that you have – that is the art of being a great expert. Be a good “story teller,” sharing with your audience the step by step approach you took to reaching your conclusions. You must be able to synthesize the information, no matter how complex it may be, into its most basic, understandable form. This colloquy between you and counsel on direct examination should go seamlessly, interrupted at times, perhaps, by the occasional objection by adverse counsel.

1. If an objection is interposed, stop talking – do not answer the question posed. Let counsel and the judge deal with the legal sufficiency of the objection. Listen carefully to the objection and counsel’s and the judge’s
response to it. That dialogue may hold a clue as to how to answer the question if it is rephrased in order to address any legal defect.

2. If the objection is **sustained**, say nothing and await the next question. It may be revised to elicit the same answer the prior question was designed to elicit or it may be an entirely different question.

3. If the objection is **overruled**, you may proceed to answer the question that was objected to. If you do not recall exactly what the question was, ask the lawyer or court reporter to repeat it.

iii. Identify any weaknesses in your report and confess to them. This is a critical offensive maneuver designed to take the sting out of any damaging cross examination. On cross, you may not be given the opportunity to explain your answer, leaving to redirect examination any rehabilitation of your testimony. Redirect by the attorney you are working with is designed to explain and/or correct any perceived damaging testimony that came out on cross. But if you can anticipate the cross and deal with it on direct, you have effectively sent the message to the judge or jury that you are aware of this perceived deficiency and have accounted for it – you were not caught off guard, having a weakness brought to your attention for the first time during cross-examination.

iv. Acknowledge being paid for your work. There is no shame in being paid for your time and expertise. You may be asked this question on direct or on cross, but either way, readily acknowledge that you have been compensated for your time. The lawyer you are working with can easily inquire of you whether being paid had any impact on the integrity of your opinions.

v. The essence of our adversarial system is to arrive at the truth. As an expert witness, your purpose is to assist the court in determining that truth. By keeping this purpose firmly in mind, you will always steer the proper course.
B. Cross Examination: Cross examination is designed to discredit and impeach your direct testimony. There are several keys to withstanding cross examination with dignity and effectiveness.

i. Listen, think and answer – in THAT order! Make sure you understand the question. You may ask that it be rephrased if it is confusing or susceptible of more than one interpretation. Think about the point of the question – what is it intended to elicit – but do not get too bogged down with trying to understand where counsel is going. Answer the question in the simplest, narrative, non-confrontational way. If you do not know the answer to a question, admit that you do not know. There is no shame in acknowledging what you do not know.

ii. Answer the question asked. Cross examination is not an opportunity for you to direct the conversation. You do not have that authority. It can come across as unduly combative if you avoid answering the question asked and opt instead to provide information that was already elicited on direct. Using your prior deposition testimony or insights they have gained from evaluating your report with the assistance of the adverse expert, an effective trial lawyer will structure their questions on cross in a leading fashion, eliciting a yes or no answer – nothing more. Your ability to explain your answer beyond a simple yes or no will depend on the judge. Most judges will give an expert more latitude in explaining their answers than they will a lay witness. However at times your opportunity to explain may cut short – leaving to redirect examination anything you perceive you must explain (and provided the lawyer with whom you are working knows to invite an explanation of anything that may have come out in a less than desirable fashion during cross). While it may be uncomfortable to sit and be limited to yes or no answers, maintain confidence that your expert opinion is accurate and well supported by the evidence. This thought will keep you from feeling compelled to blurt out additional testimony and from appearing argumentative with the adverse lawyer.
iii. Never lose your cool. He who angers you, controls you. Keep everything in perspective. You have done your job and done it well. You have explained your findings and conclusions thoroughly. If you allow yourself to lose your cool on cross, you have undermined the effectiveness of your direct. Answer confidently, making eye contact with the judge or jury as you answer.

iv. Do not be argumentative. Arguments are best left to the lawyers. You are an expert witness with an opinion based on your assessment of the data made available to you in advance of trial. You can, essentially, agree to disagree, not giving up any ground.

v. Stand your ground politely and professionally. Watch your body language. Sit up straight and tall and proud just as you did during direct examination. Smile slightly if you can do so without seeming trite or condescending. If the answer to a question is “No” then it remains so no matter how many times the same question is repeated or rephrased. Do not fall for the trap of feeling as if you are required to give a different answer just because the same question is repeated multiple times.

vi. Concede any valid point made by adverse counsel. Refer to your prior testimony on direct as having already identified a particular flaw. If something legitimately new is brought to your attention during cross, take your time, assess its validity and concede if it is valid. There is nothing worse than refusing to acknowledge a valid counter-point when everyone in the room sees the wisdom and logic in the point being made. If you are presented with something you had not thought of, whether real or hypothetical, but can process that information while on the stand, determine whether that fact would change your opinion and say so. “I understand your point counsel, but even if that were the case, it would not change my opinion, and here is why…. ” is an effective way to respond in such a situation.
vii. Miscellany. If presented with a document during cross examination, take your time to review it carefully before answering any questions directed to it. If you need to refer to your file to refresh your recollection about something that you are asked about, politely ask to do so. The adverse attorney might ask what it is you are looking at. Tell him. Do not let the attorney interrupt your answer. During cross examination, skilled attorneys try to get into a rapid rhythm that is undermined when you take your time, answer at your own pace and insist, politely of course, that you be permitted to complete your answer. The lawyer you are working with should be attuned to this and likewise insist that you be permitted to finish your answer.

C. Attending trial when adverse expert is on the stand: Expert witnesses are an exception to the rule of sequestration at trial. In other words, where non-parties to the litigation are called to testify, they are typically excluded from the courtroom while other witnesses testify – the intent being to avoid collaboration between witnesses or for a witness’ testimony to be tainted by what she heard from another witness instead of testifying from his or her own personal knowledge or observations. As an exception to this rule, experts are entitled to remain in the courtroom, both before and after they testify to assist the lawyer with the cross examination of the adverse expert.

VIII. Conclusion

In the end, no matter what your particular expertise may be, your credibility is your most valuable asset. It must never be compromised, even on a matter that seems relatively trivial or unimportant. Tell the truth as you know it and freely acknowledge the limits of your knowledge. It is a wise man who professes his ignorance. An acknowledgement of your limitations is a sure way to bolster your credibility and engender the confidence of the trier of fact.
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