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## Ten Golden Rules for Testifying Experts

Many words of wisdom have been penned for the Expert Witness embarking on his or her first experience of testifying, and numerous training courses exist to coach the Expert through the minefield of the courtroom experience. Despite this, the Experts who perform best on the witness stand are not necessarily those who have attended the most training courses, or with the highest level of technical knowledge, but those who understand the importance and value of the Expert in the courtroom and, in particular, those who follow a few basic rules.

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### **1. Be prepared.**

Probably the number one golden rule! It is often said that to fail to prepare is to prepare to fail. Never is this truer than on the witness stand. Ensure that you know your report inside out. This is particularly important in the case of jointly authored reports. Opposing counsel frequently enquires at the start of cross-examination ‘for which parts of the report are you responsible?’ Make sure that you can answer for everything for which you have acknowledged authorship.

Never allow yourself to be caught out by your own words. Read and re-read your report such that you’re fully familiar with everything you have said.

Ensure that you understand as much about the procedural process as possible and, should the opportunity avail, visit the venue in advance to familiarise yourself with the layout of the facilities.

### **2. Remember that your role is to assist the arbitrator**

Although opposing counsel asks most of the questions, your answers are to the arbitrator. Try to look at the arbitrator when answering. It will help keep their attention. Eye contact indicates truthfulness. Always consider how your answer will help him – and do not hesitate to provide additional explanation if pertinent to the question and will assist the arbitrator’s understanding.

Strive to impart upon the arbitrator the utmost confidence in you and your testimony. If he is confident that you have taken your duty of impartiality seriously, and that your focus is solely on assisting him understand the issues and reach his decision, then the influence of your testimony is hugely enhanced.

You should never act, or be perceived as acting, as a ‘hired gun’. The witness who is seen to simply defend the case of his appointing party, however well-trained, however skilled, however eloquent, will not command the confidence of the arbitrator, and the impact of his evidence will be fatally diluted. The hired gun has shot himself in the foot!

Your credibility depends on the demonstration of your independence.

### **3. Do not stray beyond your knowledge.**

As the old adage goes, “stick to your knitting” – avoid making statements in your report that you cannot justify or do not have the expertise to support. If under cross-examination the questioning goes beyond your

knowledge or areas of expertise, you are fully entitled to point this out or caveat your responses accordingly. However, should the questions relate directly to opinions expressed in your report, you will appear weak if you cannot substantiate or defend your own words.

Keep to your instructions and your opinions on those matters. Do not try to be the advocate of your client's case. That's someone else's job!

#### **4. Do not think that conceding a point is a weakness.**

There are few more cringeworthy sights than an Expert squirming in the witness box as he attempts to defend a point as if his reputation depended on it. Actually, his reputation does depend on it; his reputation with the arbitrator depends on an accurate and relevant answer. Even if a concession might appear to weaken your client's case, it is far better to concede it and move on, than to have excessive attention drawn to it by a skilled opposing counsel slowly taking you apart.

Where possible, turn the point to your advantage. The best approach is often to answer the question directly, then justify it. *'That is correct...However...'* Use the opportunity, having directly answered the question, to explain why it is of no relevance, did no damage, was corrected by other matters, etc.

It is rare that an Expert sets out to deceive. But sometimes he can get carried away in his enthusiasm to defend his client's case. Remember, it is not your role as the Expert to defend their client's position. Your duty is to the arbitrator, and to give your Expert opinion on the matters referred to you to assist him with his decisions.

#### **5. Never display irritation with the questioner or answer back.**

In my dreams I think of all the retorts, the witty one-liners, or put-downs I would like to discharge at some of the interrogators I have faced in the past, but in my dreams is where such thoughts firmly stay! The Expert's ability to remain calm, resist provocation, and deliver a consummate professional performance is fundamental to gaining and retaining the confidence of the arbitrator. The arbitrator is unlikely to be a technical Expert in the subject under discussion. He needs your advice. Focus on that, and do not slide into pointless arguments.

There is never any benefit in locking horns with the opposing counsel. If your arguments are sound, your calm and reasoned responses to the questions will demonstrate the strength and validity of your opinions. An argumentative approach will be perceived as defensive and weaken your credibility.

#### **6. Plan for any potential weaknesses in your curriculum vitae.**

It is common practice for opposing counsel to commence his examination by questioning your CV; perhaps trying to imply a lack of experience in a particular field or jurisdiction. However, you can turn this into an opportunity. You should never claim experience that you do not possess, but you can use your answer to remind the arbitrator about the skills and experience that you do have; focussing on matters directly relevant to the issues in question.

Ensure you can reel off previous projects which involved similar type of work, or used similar contract forms, or were in similar locations. Demonstration of direct and relevant practical experience will always lend strength to your credibility.

#### **7. Understand the opposing expert's viewpoint.**

It is easy, having spent many months preparing your reports, to be dismissive of the other side's evidence. Do not fall into this trap. Ensure that you know as much as possible about the opposing Expert's views and know what they've said about your work. You do not have to agree with their views, but if you are ignorant of them you risk being caught out on the stand. They may indeed have identified a flaw in your arguments. If they have, you need time to respond. The witness stand is not the time to find out that your arguments are not as watertight as you thought!

Equally, should you have identified clear failings in your opposite number's opinions, you may even get the opportunity to point this out to the arbitrator in response to a question.

#### **8. Listen very carefully to the question.**

Ensure that you listen to and understand every question posed. If necessary, request that it be repeated. Failure to answer a question simply because you misunderstood it may give the impression of evasiveness. Sometimes counsel will ask long wandering questions with all types of extraneous comments slipped in. Take care not to agree with everything that is put to you!

Answer the question as directly as you can, then explain or caveat your response as necessary. Avoid hesitating when responding. I have seen too many Experts hesitate when asked a question, not because they cannot answer, but because they feel a direct answer would be detrimental to their client's case. Failure to give a direct answer to a direct question reduces credibility.

#### **9. Focus on the questioner and the arbitrator.**

Look the questioner in the eye when he asks his question. Look the arbitrator in the eye when you respond. Avoid too much eye contact with your own appointing legal and client team – a glance in their direction can give the appearance that you are seeking reassurance about your performance. Even an innocent glance following response to a question can appear to be asking “*was that the answer you wanted me to give?*” Focus on the questioner and arbitrator only!

#### **10. Own the court.**

When on the witness stand, try to ‘own’ the place. You are the centre of attention. Rightly take the attitude that, on the subject in question, you are the most knowledgeable person in the room, and are there to advise and inform the court such that it can reach its decision. Answer the questions at your own pace and in your own way. Dress smartly and speak with confidence, even if you are wracked with nerves (as we all are – every time!).

#### **In summary**

Many people find cross-examination a daunting experience, but it needn't be. Follow a few simple rules as outlined above and your testimony will receive the respect, and achieve the influence, that a properly prepared testimony deserves.

It has been said that, of the level of influence exerted by a testifying Expert, only 10% is attributable to the words used. The remainder is conveyed through voice, body language, demeanour, attitude, and confidence. If the arbitrator believes in you, he will believe in your product. Job done!

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