THE ROLE OF THE EXPERT WITNESS FROM THE EXPERTS POINT OF VIEW!

~Presented To ~

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By

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INTRODUCTION

• More than 1,100 retentions in court cases in 17 states. Did My side win them all? I don’t think so.

• 64% of my work has been with Defense and Cross Defense Attorneys.

• 36% of my cases were Plaintiff issues.

• 96% of my cases were settled prior to trial action.

• If the expert and their counsel do a good job and the opposition is willing to settle, the case will never go to court

PROFESSIONAL OBLIGATIONS AND ETHICS

• Credo of the Forensic Consultant – Handout
• U.S. Supreme Court Consultants Rights – 1974 Ruling (Handout)
WHAT QUALIFIES A PERSON TO TESTIFY AS AN EXPERT WITNESS?

- Person’s knowledge & experience relating to the issue
- Professional expertise
- Previous testimony experience
- The judge has the final say regarding whether a person qualifies as an expert in the matter at hand.

EXPERT WITNESS v PERCIPIENT WITNESS

- The Difference between a Percipient Witness & and Expert Witness.
- What are the Experts Rights & Obligations regarding these two types of witness Scenarios?

SUBPOENA ISSUES

- What constitutes a Legal Subpoena?
- What are the Experts Rights & Obligations once they have been subpoenaed in Litigation?

U.S. COURTS AND JURISDICTIONS

- Small Claims Court
- Superior Court
- Appellate Court
- Federal Court

Different levels of litigation impact significant differences in the amount of time required depending on the scope and size of the litigation matter.

- Size of the case file
- Investigation
- Research
- Level & quality of reporting
• Pressure
• Anxiety level
• Amount of income received

1st CONTACT WITH COUNSEL & YOUR AGREEMENT TO BE RETAINED.

• Confirm any client conflicts that might be pertinent to your involvement in the matter.

• Accurately discuss & determine your assignment, scope of your Investigation & direction of any future testimony with your Client /Attorney.

• Is the case viable? Evaluate the strength of the case and the Attorneys ability to try and win the case.

• Submit your CV, Fee schedule and Letter of Engagement to Counsel as rapidly as possible.

YOUR COMFORT LEVEL IN DEPOSITION & TESTIMONY SITUATIONS

• The expert will always know more about his field of expertise than the questioning attorney.

• Dealing with the skeletons in your closet.

• How the Expert can legally protect himself/herself during the Investigation, Report Publication & Providing Expert Testimony.

• US Supreme Court Upholds Consultants” – 1974 Landmark decision.

DETERMINING A FAIR & ACCEPTABLE FEE STRUCTURE:

• You are a valuable commodity!

• You are probably worth much more than you think!

• Your expertise will assist in resolving issues worth hundreds of thousands or Millions of dollars in value.
• Your skill & knowledge can short cut issues and save the Client/Attorney many hours of dead end research.

• Check with other people in your field to determine how they established their fee structure.

• You should always keep an up to date fee schedule and an archive file of all your past Fee Schedules. Be certain to date each Fee Schedule revision.

ENGAGEMENT LETTER

The Engagement Letter is the Rule and Guideline that you and your client are expected to abide by during your contractual relationship.

How to properly construct and use a Letter of Engagement (LOE).

• Never work without one

• Begin as consultant and then evolve into expert if required.

• Confirm the complete Identity & contact information regarding your Client, the Plaintiff and Defense counsel, and their staff that you will be dealing with. You also require the Case Title, Case number and Court of Jurisdiction.

• The LOE also describes and confirms in writing, who is responsible for payment of your fees and when you are to be paid.

Critical Engagement Letter Paragraphs

CLIENT and CLIENT’S COUNSEL agree that no case work will be performed, documents reviewed, or permission granted to designate CONSULTANT as CLIENT’S consulting representative or expert in this matter until CONSULTANT has received both a signed original Letter of Engagement and the invoiced retainer.
Once executed, this agreement shall be binding on and shall inure to the benefit of the parties hereto and their respective heirs, successors, representatives, and assigns.

If Counsel and/or Client submits documents for Consultants review, requests telephonic or visual, one on one consultation, requests inspection or other consulting services to be performed by the Consultant prior to Consultants receipt of the Retainer and/or the signed Letter of Engagement, It is understood by the Client and Clients Counsel that they are agreeing to all of the terms and conditions set forth in the Consultants Letter of Engagement Dated __________.

Collecting your fees from Attorneys and/or Insurance Carriers

- Getting fee payment in full prior to trial or arbitration testimony and at the conclusion of your Deposition.

- Be certain you get paid in full for all outstanding invoices and your estimated court testimony time and expenses prior to commencing your testimony. After your testimony is complete – At this time you are not quite as valuable to the Client and Attorney.

- Break up invoices into increments of less than $5,000.00. They will have to be reviewed by a lesser level of personnel and are easier to digest.

- Bill at least every month for services during the previous 30 days.

- You must go on record, when you are sworn in, that you expect to be paid for your deposition at the conclusion of the Deposition.

- 30 days prior to your Deposition, send a letter to your counsel that states, "You require payment of your Deposition Fee’s from all deposing Counsel at the conclusion of your deposition”. Request that he distribute this written requirement to opposing counsel, so they are aware of your conditions. This protects you and provides significant leverage for payment when you arrive at the deposition. No Ticky – No Laundry!
EFFECTIVELY PREPARING FOR DEPOSITION

- What is the purpose of the Deposition?
- Why you need to be properly prepared?
- Never start or continue your deposition until your Attorney is present in the room.
- Never host your deposition in your own office space or your residence.

Always perform a comprehensive review of your case file prior to any Deposition, Arbitration or Trial Testimony because:

- You get paid for the review.
- You have opportunity to organize and reacquaint yourself with the details of the matter and to improve your knowledge of the case.

HOW TO DEAL WITH TRICK QUESTIONS?

- I can’t answer yes or no to this question with out misleading the judge and Jury – Would you like me to explain why?

- Request that opposing counsel repeat or rephrase the question until you have a clear understanding of the question.

- If all else fails - simply state - I do not understand the question as you have presented it to me.

WRITTEN REPORT

- Why construction & quality of the written report is so important.
- Use Divergent Thinking. Learn to Use Evidence and other Points of View to enhance your own testimony.
A good written Report should contain:

- Who
- What
- When
- Where
- Why
- How Much
- That little extra nugget of accurate information that may not be inside the box of normal thinking.
- Succinct writing that accurately explains your reasons and supports your opinions.

EVIDENCE ISSUES

- DEMONSTRATIVE EVIDENCE – How do you use it.

- Never perform a trial demonstration unless you have practiced it, have it down pat and have presented the demonstration to Counsel.

- A bad or blown demonstrative exhibit will almost certainly be a credibility bomb and will probably be a “Case Killer”.

- Effectively determine the difference between Pertinent & Extraneous Physical and Written Evidence.

  1. Does the information validate your opinion or the opposition’s position?
  2. Is the Source of the information credible?
  3. Is there more than 1 outcome related to the evidence?
  4. Is there credible science and history to validate the evidence?
  5. Is the evidence recognized within the Industry standard & Practice?
CREATING AN ACCURATE & RESPONSIVE CASE FILE

- Each person should organize their file in a manner most comfortable for their use.
- The properly organized case file can save your Bacon at deposition and trial.
- Develop & maintain a consistent method of organizing the case file to systematically record & present the evidence.
- Your ability to easily use and present information from your case file will enhance your credibility during Deposition and Trial Testimony.
- Sample sheet of file labels (Handout).

TEN COMMON MISTAKES MADE BY EXPERT’S IN THE COURT ROOM

1. Use Technical words without explanation
   - Keep it simple – explain what you mean.
   - Speaking over each other
   - Not making use of charts & demonstrating evidence (discuss with evidence)
   - Don’t be a talking head
   - If you could send one or two items into the jury room – what would it be?

2. Don’t allow your ego to intrude into your testimony
   - Likeable is more impressive-important.
   - Always be diplomatic
   - Watch your body language
• The attorney appearing may have established a rapport with the jury

3. **Inadequate preparation for deposition and or trial.**

• At depositions, express all your opinions, or you may not be able to discuss them at trial.
• Master all facts and conditions that have led you to your opinions in the matter.
• Request & review of all relevant reports, depositions, & correspondence
• Organize your file for deposition & trial testimony

4. **Don’t offer opinions outside your area of experience.**

5. **Arguing with the opposing attorney – don’t do it.**

6. **Don’t initiate the judge**

• Failure to understand rulings on motions of limne & rulings on objections.
• Answering questions before judge rules on objections
• Failing to abide by limne rulings that have limited the scope of your testimony
• Not appearing on time
• Not knowing your schedule & failing to advise the judge/attorney of schedule issues.
• *Big mistakes to make – Judges unhappy
• Underestimating the length of your testimony

7. **Don’t answer a question without understanding the question.**

• Answer only the question that is asked
8. **Failure to understand everything you take to the witness stand** (including all notes) is subject to review by the opposing counsel.

9. **Failing to understand legal evidentiary issues & standards.**
   - Avoid back to hearsay
   - Expert can rely on hearsay evidence
   - You can list what you have relied on for a basis for opinion – but you can’t say those items agreed with your opinion
   - Make notes of web sites, magazines & articles, etc.

10. **Ignoring opposing expert’s view of the case.**
    - Failing to assist attorney in preparing questions for cross of opposing expert.
    - Attacking opposing expert’s opinion.
    - Failing to assist attorney in preparing question for the cross examination of witnesses and experts.

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