


HOW TO BE A GREAT EXPERT WITNESS

By Robert M. Young, Jr., Esq.ⁱ

Consulting as an expert witness in litigation can have many rewards. Design professionals are often needed to offer an opinion as to whether or not the design professional being sued for malpractice met the applicable standard of care in or not. Like teaching, forensic consulting forces you to keep abreast of current developments in the profession, and can become an additional “profit center” with very little overhead involved.

However, forensic consulting does not come without risks. In some states, including Californiaⁱⁱ, New Jerseyⁱⁱⁱ and Missouri^{iv}, those who testify as professionals no longer enjoy total immunity from being sued themselves, if their services to their client as a forensic expert fall below the standard of care.

If you already consult with regard to litigation, or are contemplating doing so, the following tips may prove helpful in avoiding the pitfalls of forensic consulting, and developing a successful practice.

-  **1. Always obtain a written retainer agreement, briefly summarizing the scope of your services and the manner in which you will be compensated.**

Forensic consulting is no different from any other part of your professional practice: The importance of obtaining a written contract cannot be overstated. Many disputes could have been avoided with even the simplest, one-page retainer agreement or contract. Obtaining a written agreement is important, as you may find it difficult to collect fees later, particularly if the attorney or law firm which retains you either loses the case or obtains a settlement below expectations. The retainer should include a provision that if your account is not current as of the time of trial, you will have no obligation to testify at time of trial.

-  **2. Explore and clear any potential conflicts of interest.**


When you are first contacted with regard to litigation, you should ask for the identity of each of the parties in the matter, and the attorneys and law firms representing them. In addition to potential ethical problems (offering adverse testimony about a person or company on whose behalf you previously testified), you should consider any potential adverse effect the consulting may have on your practice within your own professional business community. This is particularly true when you are being asked to review the professional conduct of one of your peers, and opine whether or not he or she met or failed to meet the applicable standard of care in your profession.

Failure to disclose any conflicts, or potential conflicts, to the attorney retaining you can have extremely embarrassing ramifications, particularly at trial, and can potentially render your testimony meaningless. Furthermore, by disclosing any conflicts or potential conflicts to the

attorney, they may be waived by the other parties. Potential conflicts can, and often are, waived, but should be done so in writing.

 **3. Never agree to take a case that is clearly outside your area of expertise.**

At the outset, you must candidly assess whether or not the area in which you are being retained to offer an opinion is within your area of expertise. If not, it can ultimately be professionally embarrassing and even damaging to your client's case. Be candid and refuse to take the case if you do not believe it involves an area in which you have the requisite experience, education and training.

 **4. Obtain a clear understanding of the factual and legal issues you are being asked to address.**

During your initial telephone call, or certainly at your initial meeting with your client, make sure you have a clear understanding of the issue you are being asked to address. If you are a professional engineer and are being asked to render an opinion as to whether or not another professional engineer in your same discipline met or failed to meet the standard of care, obtain a clear understanding of the specific issue. For instance, the issue may involve whether or not plans and specifications met the applicable Building Code, or whether they were "constructible." It may involve whether or not Requests for Information were dealt with and responded to in a timely manner, or whether the plans and specifications were submitted in accordance with the project schedule, so as not to delay other parties.

If you are being asked to form an opinion as to whether or not the services of another professional engineer met the applicable standard of care, be sure you understand what the legal definition is of professional negligence in the jurisdiction in which you will be testifying. I have "tripped up" many inexperienced experts testifying against my clients by asking, "You have testified my client's conduct fell below the 'standard of care.' How do you define the term 'standard of care?'"

For instance, in California, the current jury instruction with regard to professional negligence is as follows:

A [insert type of professional] is negligent if [he/she] fails to use the skill and care that a reasonably careful [insert type of professional] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care." [CACI 600.]

If you are a real estate appraiser, obtain a clear understanding as to what point in time you are being asked to evaluate the fair-market value of the property. Also, confirm your own opinion as to what you consider to be the nature and geographical area for comparable properties on which to base your evaluation with your client

☞ **5. Obtain all information and documents that bear on the subject matter of your testimony.**

Because of your expertise in the area, you might be in a better position to advise your client as to what documents you will need than he or she is. It is usually better to have more information than you need, than too little. The latter can have devastating results on cross-examination at trial if your client attorney failed to give you a key document which causes you to later alter your testimony or opinion. If, upon your review of the documents given to you, there are documents obviously missing, bring them to the attention of your client. One of the keys to forensic testimony is complete and thorough preparation. (Experts, like attorneys, are easily recognized in and around courthouses for the large-capacity sample cases and containers on pull carts that trail behind them!)

☞ **6. Make a list of all documents that you have reviewed and considered, as well as all codebooks, treatises, etc.**

After more than 30 years of litigation experience and retaining and encountering hundreds of experts in many disciplines, I have noted that the great ones invariably maintain a list in their file of all the documents they have reviewed and considered. Such a list can be extremely beneficial during the course of your deposition and during trial testimony itself, and can act as a touchstone or “safe harbor” when you are asked, under stress, to recount everything you have reviewed. This should include job files, blueprints, pleadings, deposition transcripts, and any other document you have consulted. This list should also include reference materials you have referred to and relied upon in forming your conclusions.

☞ **7. Make an outline of your ultimate conclusions and opinions for use in deposition and trial.**

Unless your testimony is to be given in Federal Court, where the Federal Rules of Civil Procedure require experts to author and submit written reports, most seasoned litigators will not ask you to reduce your opinions to writing. Frankly, the reason for this is that it makes it easier for opposing counsel to interrogate you, and cross-examine you on those opinions.

However, I have observed that many good experts prepare an outline of their opinions, often in handwritten form. This can be of great assistance and, again, can be used as a touchstone or “safe harbor” during the stress of a deposition or testimony in court. The outline can be very helpful when you are asked to set forth “all of your opinions,” and after two or three hours of testimony are asked, “Do you have any other opinions that you have not offered previously?”

As with public speaking, you should not attempt to prepare a script to be read verbatim, but merely an outline of your important opinions and conclusions. You are permitted and, indeed, should have your complete file on the matter in front of you at your deposition and at trial, and simply having the outline in your file will give you a “greater comfort level” that nothing will be forgotten.

☞ **8. Have a current resume or curriculum vitae, and have a copy in your file.**

Usually 10% to 20% of your cross-examination during your deposition prior to trial will be spent upon your educational background, training and vocational experience. Be sure to maintain a current, up-to-date curriculum vitae, and have a copy in your file. It will greatly facilitate having to recite your educational background, every job you have had since graduation from college, etc., as well as the technical papers and presentations you have given over the years.

☞ **9. Insist on meeting with your attorney client prior to your deposition, to go over your opinions and conclusions.**

In most litigation forums, the parties are required to elect their expert witnesses and disclose the general subject matter of their testimony shortly prior to the trial date. Thereafter, each party is given the opportunity to depose any adverse expert witnesses. Frankly, I have noted that it is the practice of many attorneys, undoubtedly harried and overworked, to meet with their expert 30 minutes or an hour immediately before the deposition, in a coffeehouse, cafeteria, etc. From my observations, this can have disastrous results. You should insist on meeting with your attorney client well in advance of the date proposed for your deposition. You should use this meeting as an opportunity to review the work you have performed, and offer your tentative conclusions and opinions on the subject matter. While you should never agree to change your testimony on an ultimate issue, going over your testimony will permit your attorney client to withdraw some issues from your scope of testimony, or to add additional ones which may be supportive of his or her theory of the case.

☞ **10. Be persuasive when testifying.**

Articles and, indeed, books have been written on the art of persuasion, and it is beyond the scope of this article to discuss it in detail. However, it is obvious that a good expert witness must be persuasive. Indeed, the legal premise for permitting experts to offer opinions, and not non-experts, is the premise that they testify as to issues which are beyond the knowledge and expertise of the average juror. The subject matter of expert testimony can be dry, technical and laden with technical terms, which is confusing to the average juror. I have noted that jurors have often based a decision not so much on what was said, but how it was said. That is, persuasive testimony. For this reason, forensic experts who have teaching experience in their area of expertise often make the best witnesses.

Nonetheless, a few points should be highlighted.

a. Be prepared to offer your testimony using simple terms and analogies. When you must use a “term of art,” be sure to explain the term so that it can be understood by a person with only a high school education.

b. Where you can, use illustrations, models or other demonstrative evidence to illustrate your testimony. The power of demonstrative evidence over verbal testimony cannot be overstated. We live in a world in which most people, and certainly jurors, obtain most of their

information visually over the television or internet. Use blow-ups of important documents so that the jury can refer to it as you offer your testimony. Consider the use of models. Models need not be elaborate. In one case in which I defended a structural engineer in the failure of a suspended two-way, flat-plate concrete floor system, my expert demonstrated the increased structural strength of a rigid structural diaphragm using simple blocks of wood, cardboard and thumbtacks during his testimony!

c. Do not try too hard to impress the jury with your background and credentials, so that on direct examination at trial, the attorney who retained you appears to have to “pull” your background and experience from you, rather than offering it up for 10 or 15 minutes after the simple question, “Please tell the jury your background, training and experience.” Stop after one or two points, and force your counsel to ask a follow-up question, such as, “What was your next job or publication?”

d. On cross-examination, only answer the question that you were asked, and stop. Do not volunteer information while answering questions on cross-examination. Do not be afraid of silence. Force opposing counsel to ask another question.

e. Once the question is asked on cross-examination, think before you answer it, to quickly formulate in your own mind what the best response is.

f. On cross-examination, be extremely careful of hypothetical questions. Under the rules of evidence, experts, and not lay witnesses, may be asked hypothetical questions. Be extremely careful when opposing counsel asks you a hypothetical question such as, “Would your opinion change if the outside ambient air temperature was in fact 90 degrees, and not 70 degrees?” Such questions may be a mere attempt to confuse you, or opposing counsel may have evidence that was not provided to you. Obviously, it is dangerous to simply answer that it would or could affect your opinion, if you are not confident of that. Do not assume that the facts given in a hypothetical are true, and remember that if you are not absolutely certain, you should simply answer, “I don’t know.”

In conclusion, consulting as an expert witness in litigation can have many rewards, but it has attendant risks. If you do forensic consulting, the foregoing tips should help you become a great expert witness, while avoiding the potential pitfalls.

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ⁱ Robert M. Young, Jr., Esq. is a partner in the Los Angeles office of the national firm, Wilson, Elser, Moskowitz, Edelman & Dicker LLP. Mr. Young chairs the firm’s Design Professional Practice Group in Los Angeles, which is dedicated to representing architects, engineers, land surveyors and real estate appraisers.

ⁱⁱ *Mattco Forge vs. Arthur Young & Co.* (1992) 5 Cal.App. 4th 392

ⁱⁱⁱ *Levine vs. Wiss & Co.* (1984) 97 N.J. 242, 478 A.2d 397.

^{iv} *Murphy vs. A.A. Mathews* (1992) 841 S.W.2d 671.