

ON BEING AN EXPERT WITNESS

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ABSTRACT

Expert witnesses are critical in the decision-making process involved in lawsuits. However, being an expert witness is a difficult and stressful job. Many issues should be understood before starting out on the adventure. Avoiding advocacy is the most important lesson. Getting your evidence presented in such a way as to be credible and complete is another. Both require an understanding of the process. Nothing will replace direct experience, but learning from other people's experiences may help.

1. INTRODUCTION

The comments in this paper are based on an experience by the author providing expert testimony in a trial in the Province of Alberta. There are likely some differences from province to province.

This experience gave me great respect for trial lawyers and judges. They have very difficult and stressful jobs. In this case, they were dealing with technical topics completely outside their normal experience. As such, they needed to learn about many technical topics, such as bearings, vibrations, shaft alignment, metallurgical engineering, mechanical engineering, and machinery packaging, to name a few.

The goal of the justice system, as I understand it, is to find the truth. Engineers want to help the court find the truth. In my opinion, the adversarial nature of the trial process does not lend itself perfectly to finding the truth. However, it is probable that, though the system may be flawed, it is the best system available to get the job done.

Certainly, the rituals and stress of the courtroom situation focus the minds of all concerned. Evidence seems to come out under examination on the stand that doesn't come out in pre-trial examinations. It seems as though people take the trial situation more seriously than the evidence gathering sessions that occur in the months and years leading up to the trial.

At the outset, being an expert witness seems simple. However, when you do not know all the rules of the game, playing can be very difficult. It is my hope that the following comments will be of assistance to others acting in the role of expert witness.

2. THE EXPERT WITNESS VERSUS A WITNESS

There is a distinct difference between an ordinary witness and an expert witness. As I understand, a witness is allowed to talk about those subjects with which the witness has direct knowledge. They are not allowed to give opinions. The expert witness is allowed to provide opinion about the events or evidence in front of the court.

3. GETTING THE MESSAGE ACROSS

It is important for an expert to not become an advocate for one side or the other in a trial. The judge has to decide the outcome of the trial, not a particular witness. The lawyers are paid to be advocates and they do a good job, in general. However, the confrontational nature of the lawyers on the two sides of the issue will tend to make an expert into an advocate for one side or the other. The lawyers will try to make their witnesses feel like they are part of a team. This process tends to cause witnesses to forget that they are to be impartial.

The real goal of an expert is to “get the message across” dispassionately. (The Association of Professional Engineers, Geologists and Geophysicists of Alberta (APEGGA) is drafting a document called “ . One of the interesting sections is about the expert not becoming an advocate.) It must not matter to the witness if some of his information or opinion is not beneficial to the side that called him.

The lawyer on the other side of the question will, however, be intent on limiting the breadth of the testimony from the witness, if not the detail, in an effort to limit the amount of damaging information and opinion from an expert. The opposing lawyer will try to refute the evidence of witnesses with the help of other expert witnesses. The integrity, personality and mannerisms of witnesses will be attacked by the opposing lawyer. This is to be expected and taken into consideration in preparations before the trial. These “games” should not be allowed to interfere with the presentation of evidence by the witnesses. They should not be taken personally. The witness may be working for the currently opposing lawyer in the next trial.

4. THE EXPERT’S CREDENTIALS

The training and experience of an expert allows him to provide opinion and evidence to the court. Having the expert’s credentials accepted is an important first step in the process of getting the message across.

Depending on the feeling of the opposing lawyer regarding the damage that testimony from a witness will cause for his case, the breadth of experience that the witness will be allowed to present will be fought more or less hard.

Expect comments like “He seems to want to testify about anything! How can one person have that much experience?”

A well thought out description of experience is helpful in this phase of the trial. More description of experience is better than less. If the description is very lengthy, provide a concise summary for the court. This summary may be sufficient. If not, the lengthy backup will be invaluable. For example, inclusion of lists of reports written by an expert should be considered.

5. THE REPORT AND REBUTTAL REPORTS

The experts on both sides of a question prepare reports and submit them by a certain date and time. These reports are then forwarded to the “other side”, whose expert witnesses then read and rebut within a prescribed time (typically 60 days). New experts may be called during this 60 day period. The new experts will provide reports that must be rebutted within the 60 days.

The importance of the reports becomes apparent during the trial. Subjects not discussed in the report are likely going to be out-of-bounds for the expert on the stand under direct examination. This is a critical area for an expert to understand. In order for the expert to be allowed to say what needs to be said, the report must be very carefully crafted.

Should the report be short, or long? In some courts, I am told, such as the Supreme Court, there is a trend to limiting the length of reports, from lawyers and witnesses. The burden on the court of reading massive documents has become too great. Unfortunately, great care must be taken in limiting a report size. The body of the report and summary should be kept short. Appendices could include all manner of “what if” situations, for example. Consider every possible variation of the facts. If left out in the reporting stage, they may not be allowed in the court later on.

6. THE AUDIENCE

I am speaking from limited experience involving a trial in front of a judge. Jury trials seem to be unusual for the type of cases that professional engineers get involved in.

The audience in the courtroom includes

- the Judge,
- a court reporter,
- a clerk,
- lawyers on both sides (many lawyers in some cases),
- other expert witnesses (making notes for their respective lawyers to help in cross examination, no doubt), and, sometimes,
- people associated with one side or the other of the lawsuit.

The audience that matters is the judge. There will be a formal title to use in addressing the Judge, which your lawyer will make clear before the trial. All comments should be made directly to the judge if possible. Actually turn and face the Judge. Look him or her in the eye. This in practice is not easy, since the lawyer is asking questions and you tend to answer to the person that asks you a question. Be that as it may, the judge is the one that needs to understand. Watch the judge as you are answering the lawyer’s questions. If you can see from the Judge’s reaction that what is being said is not being understood, try another way to explain the point.

The lawyer may use body language (consciously or unconsciously) to distract you as you are answering. Looking at the Judge will protect you from such distractions.

The court reporters work about half a day in court and the other half of the day is used to produce a finished transcript for the lawyers, witnesses, etc. to read the next morning. It seemed normal for two court reporters to be employed in a trial.

7. DIRECT VERSUS CROSS-EXAMINATION

Direct examination is done by “your” lawyer. (The quotation marks are intended to signify that the lawyer is not really yours, just the one that hired you, since you are not to be an advocate for a side.) The scope of comments made by the expert is limited by the credentials accepted at the outset.

Cross-examination is done by the other side’s lawyer. There seemed to be no limit on the opinions that can be presented by the expert in this phase of the trial. The cross-examining lawyer takes a chance every time he asks a question.

8. BASIC RULES OF EVIDENCE

These comments apply to what I learned in the context of Alberta Provincial Court. Other jurisdictions may be different.

In the not so distant past, the presentation of evidence in a trial was a free-for-all. Neither side had any idea what evidence was going to be presented. The experts to be put on the stand were unknown to the other side. Last minute experts could be brought in as the two sides saw fit. This led to both sides being “blindsided”.

More recently, it was agreed that the sides (read lawyers on both sides) should not be blindsided by the sudden introduction of a new expert witness at the last minute. (This is not to be confused with the introduction of a witness, which can be done at any time during the trial as either side sees fit. Recall the definitions of expert witness versus witness above.) The argument would appear to be that the lawyers need time to prepare questions for an expert witness. Since the lawyers are not expert in the technical fields, they need time with their own experts to understand and prepare for the new testimony.

This concept of not being blindsided does not appear to apply to expert witnesses, however. In fact, cross-examiners appear to want to be able to blindside expert witnesses. It would appear to be perfectly acceptable, for example, to suddenly withdraw major portions of one expert’s reports, even though they were key parts of rebuttals by opposing experts. Furthermore, all evidence is not necessarily available when the initial reports and rebuttals to the reports are written. New evidence tends to come to light as the trial proceeds.

However, the contents of the expert's report and rebuttal are used to limit the scope of direct testimony by the expert. (Such a limitation is not present during cross-examination.)

The rebuttal reports are, of course, based on the original report by the opposing expert. A completely different rebuttal report would have been written in most cases if the original report had been different in a major way. This process can lead to mystifying limitations on what an expert can say under direct examination.

9. AFTER THE TRIAL STARTS, BUT BEFORE GOING ON THE STAND

Daily copies of the trial transcript are made available to anyone with a direct interest. The current technique involves computers. Your lawyer will see to it that you are given those pages of the transcript that are relevant to your testimony. Reading and remembering these seemingly endless pages of testimony is a very big job. During the trial, an expert may need to spend almost all his time focusing on the trial, in order to keep up with changes.

Alternatively, it may be appropriate for your lawyer to have you sitting in the courtroom, taking notes and advising him as the questioning or the other experts goes on.

10. TEACHING THE COURT

Expert witnesses are likely to find themselves teaching the Judge and lawyers about technical topics of varying degrees of sophistication. Visual aids are usually of assistance in such situations. Having a text book on hand might be advantageous. Inclusion of the description in an appendix of your report might be useful, if you have the foresight to do so. The need to teach the court about certain topics is what drives some experts to write very large reports.

11. ON THE STAND

Being "on the stand" literally means standing in my experience in Alberta. This may seem a bit archaic, but it may be easier to think on your feet. However, after a few days and, in some cases, long days, standing gets "a little old". If nothing else, one develops a better appreciation for people who stand all day as part of their job.

I assumed that I could take nothing to the stand. Later on, it became clear that I could have taken a pen and note pad, for example. Everyone has the right to see what you take. A notepad could be useful for making notes or sketches for yourself as an aid to answering a question. Textbooks might be of use. An easel with a large pad of paper beside the stand can be useful. (I used an easel to describe certain topics. I do not know what happened to the pages that I wrote out on the easel.)

Modern computer techniques are not usual, it seems. If I had insisted, a monitor could have been brought into the courtroom. Power Point presentations are not unheard of in courtroom environments.

During examination by “your” lawyer, the opposing lawyer will rise with objections as often as possible. In some cases, the witness is asked to leave the room while the lawyers argue the merits of their respective positions in front of the judge. Eventually, a decision is made and the witness returns to the stand.

Otherwise, examination is a happy time for a witness. The lawyer is friendly and asking questions that are designed to help the witness tell the judge what he believes to be the salient points about the case.

Cross-examination may not be so pleasant. The good news is that there can be no further objections to what a witness can say related to the breadth of knowledge and experience professed by the expert. The cross-examining lawyer has the uncomfortable job of asking questions and not really knowing what the answer will be. It is hard for the witness not to have fun in those cases where the answer to a question is clearly not what the questioner was expecting. Continually remember at this stage that you are not an advocate!

12. HOW TO GET YOUR MESSAGE ACROSS UNDER CROSS-EXAMINATION

When being cross-examined, the lawyer asking the questions is motivated to try to get the answers from you that he is looking for. It is the job of the expert witness to ensure that the judge gets the complete answer.

This is a time when the advice not to be an advocate for a side is very difficult to remember. There will probably be a confrontational style to the questions that will make the expert “rise to the bait”. I suspect that this approach is intended to try to get the Judge to look upon the expert with less favour.

You will find yourself trying to be polite, and using expressions like “May I draw a sketch to show...”. However, the action of a witness asking a question suddenly gives the lawyer the right to interrupt the witness’s reply to the lawyer’s original question. Otherwise, it seems that the witness could talk forever in response to a cross-examiner’s question without letting the lawyer get in a word. However, once given the opportunity to interrupt or break the flow of thought of the expert, the lawyer may choose to say “No! Explain it in words.” There you will stand, wanting to explain something technical, but not being allowed to in a comfortable way. Some concepts are very hard to describe in words alone. Sketches can help an expert gather his thoughts.

The cross-examining lawyer has to allow a witness to reply to a question until the witness is done. Consider if you want to give him an opportunity to disrupt your reply, break your train of thought and generally make it more difficult for you to help the court understand the complexities of the issues.

Regarding sketches, there is a problem involving the transcript made by the court reporter. As I understand the process, the sketches do not get into the court record unless they are

made into exhibits. Consequently, as you, the witness, are making the sketch, you need to describe what you are doing in words so that, later, others can read the transcript and understand what was being sketched, but without benefit of the sketch in front of them. This creation of “word pictures” is not easy in my experience. I was advised to imagine I was talking to a blind person. The witness needs to have great patience and stamina as the process of giving evidence may go on for days.

13. CHARGING FOR YOUR SERVICES

You will find that providing services as an expert witness is demanding and stressful. As a rule of thumb, you should charge a premium for the time spent on the stand. Other people told me this before my experience. I heartily concur. My time on the stand, for whatever reasons, was one of the most stressful things that I have done.

14. ARE THERE BETTER WAYS

A current case for which I am an expert is teaching me more about the process of getting to the truth. The judge in this case has asked that the experts get together and try to find any points of agreement. The Judge is presumably looking to reduce the workload for the court. This seems to be a very reasonable approach on the part of the Judge. Time will tell if the approach works.

15. CONCLUSIONS

There are two extremes in expert witnesses: the expert and the novice.

Lawyers do not appear to be clear on the role of expert witnesses. The position of an expert witness in the legal system is an evolving one.

An expert witness must avoid becoming an advocate for a side.

An expert must not forget that he is not the person who will be deciding the case. That is the job of the Judge.

16. AUTHOR BIOGRAPHY

Brian graduated from the University of Calgary with a Master of Science in Solid Mechanics. His thesis was entitled *Acoustical Pulsations in Reciprocating Compressor Systems*.

Brian has worked with Beta Machinery Analysis since 1972. In his present position as Chief Engineer for Beta, he has performed troubleshooting services all over the world. Brian has many technical papers to his credit. The range of machinery problems they cover includes all manner of reciprocating and rotating machinery and piping systems, balancing and alignment of machines, finite element analysis, modelling of pressure pulsation torsional vibration testing and modelling, flow induced pulsation troubleshooting and design, pulp and paper equipment such as pulp refiners, etc. He has worked on hundreds of reciprocating compressor installations.