Being a witness: testifying in court

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Maria took Anna for a drink after they had both testified. Maria had testified as an independent expert witness, while Anna had given evidence about the treatment she had rendered to the patient. Both had been asked to testify by the same lawyer. Anna complained, "What a vicious, vicious experience. That cross-examination was brutal. How dare that lawyer suggest that I was lying. You looked really cool under pressure, Maria, especially when the lawyer questioned you about your qualifications. You must have felt terribly insulted?" "Not at all" Maria replied, "I fully expected that to happen. I made a special effort to be neutral and fair to both sides and that made me feel comfortable during the cross-examination." Anna thought for a while and said, "That is where I went wrong. I was trying to help my patient and said things that I could not really defend. Next time, I'm going to do it differently."

Knowing what to expect when testifying can make an enormous difference. It can turn an extremely unpleasant experience into a relatively comfortable one.

What is the single most important rule to remember when testifying?

Neutrality. Whether you testify as an independent expert witness or as the treating practitioner, a genuine attitude of neutrality and fairness will help insulate you from attacks on your credibility and will protect your reputation. Partisan support for one side or hostility to the other will detract from your credibility, will appear unseemly to the court or tribunal and will foster an aggressive cross-examination. You are testifying as a professional and should always appear to be one.

There is a double standard. Lawyers can be rude, aggressive and sarcastic when cross-examining a witness; such conduct is considered acceptable coming from them. However, if an expert witness responds in kind, he or she will be viewed as unprofessional. The reason for this discrepancy (besides the stereotype about lawyers in general) is that a lawyer has a partisan role, representing a party at the hearing, while the witness is expected to offer honest assistance to the court or tribunal.

What happens before I testify?

In all likelihood, you will have to wait after you arrive and before you testify. Lawyers are expected to have their next witness available immediately after the previous witness finishes and the lawyer calling you cannot be certain how long the witness before you will take. Before you arrive, determine from the lawyer whether you can watch the hearing until it is your turn or whether you must wait outside. Be sure to bring something to do while you wait as the wait may be longer than you think?

What happens when I testify?

Oath, affirmation and other preliminary matters: First, you will be asked to swear an oath or to solemnly affirm to tell the truth. An oath is religious in nature and an affirmation is purely secular. An oath can be sworn on religious objects other than a Bible, although the court or tribunal may not have one available. While it is unusual to do so, you can bring your own religious book or object. From the perspective of a court or tribunal, it does not matter whether you swear an oath or affirm.

At this time, you may be asked to spell your name. You may also be given information about legal protections you may have (e.g., to object to answering questions that may incriminate you in another proceeding). It is unlikely that these legal protections will apply to you but, if so, ask the lawyer about it ahead of time or ask the court or tribunal

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about it then. If there is a concern, you are free to consult with your own lawyer ahead of time and even to bring him or her to the hearing to advise you. This would be unusual, however.

Being qualified as an expert: Second, you will be "qualified" as an expert witness. The party calling you must satisfy the court or tribunal that you are an "expert" in the sense that you have some particular training or experience that gives you knowledge about certain matters above that of ordinary people. A registered member of a profession will almost certainly be an expert in some areas of that profession. If you are testifying as a voluntary independent expert, you would want to have seniority (7 to 10 years minimum) and competence in the area.

Normally, you will be qualified by answering questions posed by the lawyer calling you and by identifying your *curriculum vitae* or resume as being accurate (as an aside, be sure it is, the other lawyer might check up on it). The opposing lawyer may be given an opportunity to cross-examine you about your qualifications even before you get to the substance of your evidence.

Afterwards, the lawyers may make arguments before the court or tribunal on two issues:

(1) are you an expert at all? and, if so,
(2) what matters are you qualified to give expert opinions about?

The second question is usually more important than the first. The court or tribunal will decide the question simply on the basis of the evidence given. Thus, you may be restricted in the areas that you can testify about because the lawyer calling you did not ask the right questions. It is probably worth your while to review your relevant qualifications with the lawyer before testifying.

If you are giving primarily factual information, then you may not be qualified as an expert witness.

Examination in-chief: Once qualified, you will be asked questions by the lawyer who called you. This is called examination in-chief. Because it is assumed that you and the lawyer calling you have reviewed your evidence and that your evidence will not be hostile to that party, the lawyer will not be permitted to ask you leading questions about controversial matters. For example, you will be asked "What was the result of your analysis?" rather than "The previous practitioner was negligent, wasn't he?". This part of your evidence should not contain any surprises for you.

A common method of asking expert witnesses questions is by way of a hypothetical question. A hypothetical question asks you to assume that certain facts are true. It then will conclude with a question similar to the following: "Assuming that all of those facts are true, what is your opinion about...". The purpose of a hypothetical question is to clarify in the mind of the court or tribunal on what assumptions the opinion is given. Do not worry whether the assumptions are accurate or not; that is the job of the lawyer asking the question.

Cross-examination: You will then be cross-examined by the opposing lawyer or lawyers. These questions can be leading and usually are. Normally, the opposing lawyer will have one of two agendas. The first agenda is to attempt to get you to agree to statements that are favourable to the position of his or her client. You should listen carefully to the questions asked of you and give your honest opinion, whether or not it hurts the interests of the party calling you. A common form of this sort of question is to ask you to change the assumptions upon which the hypothetical question is based. For example: "Assuming the facts are as I have stated them, not as the lawyer who called you stated them, does that change your opinion?"

The second agenda of a cross-examining lawyer is to attack your credibility and the plausibility of your evidence. This does not always happen during cross-examination, particularly if you are fair and neutral. When it does occur, be sure to maintain your professional demeanour and attitude. If the question is abusive or otherwise improper, the lawyer calling you will object. Let him or her object rather than doing so on your own behalf.

Treat the questions seriously and provide a direct, meaningful answer. Generally, the shorter your answer the better. It is a mistake to avoid answering questions directly. It is an even worse mistake to try to anticipate where the lawyer is going and deal with that point rather than to answer the question directly. Where a question cannot be properly answered yes or no, you are entitled to provide a full and fair answer, so long as it is responsive to the question asked.

Completing your evidence: After cross-examination, the lawyer calling you can ask additional questions, called re-

examination, to clarify any matters that arose during cross-examination. The lawyer should not repeat matters dealt with in-chief. The court or tribunal may then ask you some questions, usually just to clarify areas of confusion. If the court or tribunal does ask you questions, it will usually permit the parties to ask any follow-up questions confined to the points raised by the court or tribunal. Generally, all of these additional opportunities to ask questions are quite brief; once you have finished your cross-examination, you are almost done.

Once you are finished testifying, you should ask the court or tribunal or the lawyer who called you if you may be excused from the hearing.

How to testify: You should try to be yourself as much as the formal proceeding and your neutral role will allow. Speak out in a clear voice so everyone can hear you. Being interrupted with frequent requests to repeat your answer is disconcerting. Speak slowly so that the court or tribunal can make notes. Pause between points. While, during testimony, you are having a conversation with the lawyer asking questions, try as much as possible to also direct your answers to the court or tribunal.

A common difficulty arises when you are not sure of the answer to a question. You are tempted to offer what assistance you can and you may be concerned about demonstrating a lack of expertise. However, it is a mistake to guess or speculate. If you do not know the answer to a question, say so. Similarly, it is a mistake to be overly precise when one is not certain of a date or a number. It is better to be vague than to be wrong.

As a witness, you have a few rights. Be sure to ask a lawyer to repeat a question if you did not hear it or to reword a question you did not understand. If you are interrupted before you complete your answer, politely ask to be permitted to finish. If you need a break for personal reasons, you will usually be accommodated.

After you testify

Ask the lawyer who called you for feedback on your performance after the hearing is over. This will assist you to improve your abilities as a witness. Just remember that being a good witness is subjective and you are wise, over time, to obtain feedback from more than one lawyer.