The Witness Guidebook:
Practical Suggestions for Testifying in Litigation

Oregon Water Rights Course
For Bureau of Land Management and Forest Service
May, 2006, Prineville, Oregon

Barbara Scott-Brier
USDI, Office of the Solicitor, Pacific Northwest Region
Holly McLean
USDA, Office of the General Counsel
Portland, Oregon

Introduction[1]

As a witness there are several situations where you may be asked to give oral testimony. These include testifying at depositions or at trial. There are differences between how you may testify in each. Depositions offer the opposing party an opportunity to examine you concerning the facts of the case, all of the pertinent circumstances within your knowledge. Trial testimony, on the other hand, is the opportunity for you to tell your side of the story. In any event, most of the rules set forth below apply to both situations and seek to ensure that your deposition or trial testimony will accurately reflect the true facts.

The deposition procedure is more informal than examination in a courtroom. It is held in the presence of the other side's attorney and your attorney. A qualified court reporter will record and later transcribe the questions and answers for insertion in the file of the case. Although the procedure is informal, you are, of course, under oath to tell the truth, and the answers you give are important because they can later be used at trial, particularly to show inconsistencies between your deposition and testimony at hearing. The opposing attorney in the deposition can inquire into anything which might lead to admissible evidence.

After the attorney has examined you, your own attorney can then ask you questions to clarify or modify any previous answers which he/she believes, from his/her knowledge of the case, were not entirely accurate or which gave a wrong impression of your testimony.

Trial is a more formal setting with an administrative law judge or a court judge overseeing the proceedings. In administrative proceedings, direct testimony, which describes your case, is often in writing, with cross-examination in a live hearing. In some administrative proceedings, direct testimony is also live. In cross-examination, the opposing attorney will be allowed to ask you questions relating to your direct testimony. Your own attorney can then ask you questions to clarify any previous answers. In court proceedings, generally all testimony is live.

There is no reason to be overly nervous about testifying. If you are well prepared and answer honestly, you will manage well. Even though you are in a legal arena with judges and lawyers, you have the advantage of knowing the facts first-hand, while they do not.

[1] The opinions expressed herein are solely those of the authors and do not reflect the views of the United States Departments of the Interior or Agriculture or those of the USDI, Office of the Solicitor or USDA, Office of the General Counsel. The authors gratefully acknowledge the various unauthored sources of materials contained in this outline.

A. General Rules for Testifying

1. Always tell the truth.

2. Listen carefully to the entire question before you attempt to answer it.

3. Pause before answering to give your counsel a chance to object to the question, if warranted, and so you can prepare your response carefully before beginning to answer. Be thoughtful. Quick answers may suggest either that you are not carefully considering your response, or that you have simply memorized your answers.

4. If a question is unclear in any way, ask the examining counsel to repeat it or phrase it in different language. Do not answer any question until you understand it.

    a. Be alert for double negatives.
    b. Be alert for compound questions. Ask for restatement or divide answer into separate parts.
    c. Be alert for underlying (unstated) assumptions.
    d. Pay particular attention to the introductory clauses to the question. Leading questions are often preceded by statements which are either half-true or contain facts which you do not know to be true. Parse out your answer.

5. Answer only the question asked. Be concise and as accurate as possible.

6. Don't volunteer more information than is expressly called for in the question. Extraneous information will only hurt your cause. If your counsel feels that more information is called for, he/she will ask for it at an appropriate time.

7. Do not guess. If you don't know or recall, say so.

8. If there is an objection to the question, listen to the objection very carefully. You may learn something about the question and how it should be handled from you counsel's objection.

9. Don't look for traps in every question. Your counsel will assist you either by objecting or by some other means, if needed.

10. Do not try to "second guess" every question. Although you should be deliberate in your responses, you should avoid creating the appearance of calculation, hesitation or apprehension.

11. Do not allow yourself to be forced into a flat "yes" or "no" answer if a qualified answer is required. You have the right to qualify your answers if necessary.

12. Be as specific or as vague as your memory allows, but stick to your true recollection. If you are asked when something occurred and you remember that it occurred on January 15, state "on January 15." If you cannot recall the exact date, state the approximate date.

13. Never characterize your own testimony. "In all candor," "honestly," "I'm doing the best I can," are out.

14. Avoid adjectives and superlatives. "Never" and "always" have a way of coming back to haunt you.

15. If you are asked about a document marked as an exhibit, read it before testifying.

16. If information is in a document which is an exhibit, ask to see the document before you answer.

17. If information is in a document which is not an exhibit at the deposition, answer the question, if you can recall the answer. Do not tip off the examiner as to the existence of documents he does not know about. If you cannot answer the question without looking at a document which is not marked as an exhibit, you may simply answer the question by stating that you do not recall.

18. Do not take any documents to the hearing or to the stand unless your counsel approves your doing so.

19. If you experience a flash of insight or recollection while testifying and this has not been previously discussed with counsel, hold this to yourself, if possible, until you have had an opportunity to go over it with counsel.

20. When the attorneys are arguing a point of law, do not try to add anything to the discussion. Keep quiet unless specifically asked a question.

B. Attitude on the Stand

1. Use a confident tone of voice. Be firm, but not aggressive, hostile, or belligerent (leave that for your lawyer).

2. Project an air of competence.

3. Do not be an advocate; that is your attorney's job. Your role is to assist the judge and jury.

4. Do not create the appearance that you are condescending toward other people in the courtroom.

5. Do not become defensive when cross-examination starts.

6. Do not change your tone of voice when under cross-examination.

7. Do not be afraid to correct opposing counsel, particularly if he/she misstates facts. But don't do it any more than necessary, and do it without belligerence or hostility.

C. Competence and Expertise

1. Be alert – assume all the counsel in the hearing are as expert as you are in the narrow field involved in the case.

2. Communicate your expertise clearly, concisely, and understandably. Avoid technical language and abbreviations whenever it is possible to communicate your point in "plain English."

3. Do not overstate your expertise; at the same time, however, do not allow your modesty to cause you to understate your qualifications.

4. Acknowledge the limits of your expertise. Be able to say "I don't know" without embarrassment. Do not express opinions that you are not qualified to give.

5. Be willing to disagree with the so-called "authorities" if you are convinced that they are wrong.

6. Do not be arrogant, but don't be so modest that you raise doubts about whether or not you are an expert.

7. Do not guess at an answer. If you guess wrong, opposing counsel is almost certainly prepared to discredit you.

8. Do not overstate your conclusions. It is in the nature of expert testimony to be less than 100% certain of your conclusions, and this does not question your competence.

9. Appear reasonable. Be able to concede gracefully that with different facts you might reach a different conclusion.

10. Avoid revealing surprise or displeasure at evidence developed during cross-examination.

11. Do not let the examiner put words in your mouth. Rephrase the question into a sentence of your own, using your own words.

12. Never express anger or argue with the examiner. If an examination is to become unpleasant, that is what your counsel gets paid for.

13. Avoid any attempts at making jokes.

14. Avoid even the mildest obscenity, any ethnic slurs, or references which could be considered derogatory.

D. Challenge Areas

1. If you have to make admissions you think are damaging, do so without embarrassment or fuss, and qualify them if you can without appearing to be grasping at straws.

2. Reveal to your counsel all adverse material regarding your background, qualifications, or interest in the case and all adverse facts or analyses involved with the case. This will enable your counsel to limit the damaging effect of such through direct examination, rather than allowing opposing counsel to capitalize on it on cross-examination.

3. Expect your qualifications to be challenged. You may qualify as an expert because of your education, training, and experience in the area.

4. Your familiarity with the case may also be challenged. If you have performed your tasks with diligence and in a professional manner, there is little to be feared from questioning in this area.

    (a) If you have failed to perform any examinations, tests, or studies that may or should have been performed, you should be prepared to explain why you did not perform them.

    (b) If you are asked to assume different hypothetical facts than those in issue, or that are contrary to your own first-hand knowledge, you may respond to the effect that “that isn’t the case here.” Be sure to qualify any answer with “these are not the facts as I know them”.

    (c) You may be questioned if your position is inconsistent with a recognized authority; however, the trier of fact will likely give more credence to live testimony than a textbook, treatise, or periodical prepared by an author unfamiliar with this particular case. That is up to the trier of fact, not you.

(d) Beware of stating that any particular source is "authoritative." It is much safer and probably more commensurate with your views to state that a source is "helpful," but not the final word in the area.

(e) If you are challenged by a source regarded as "authoritative," you may, and should, seek to distinguish this case from those referred in the source's material; you should also be willing to disagree with the "authorities" in the field, if you have sound reasons for disagreement.

(f) You should request to see any authoritative source which is being used by opposing counsel to impeach your testimony. Textbooks and treatises often become dated rather rapidly, and hence lose their authoritative character.

5. You may be asked if you have talked with counsel about this case in advance of the trial. You may respond that you did talk with counsel, since it is perfectly proper for an expert to have consulted with his counsel.

6. If you are questioned about your failure to bring certain records to the trial, you may respond that there is not information in those records which is inconsistent with your testimony.

7. You may expect some "trick" questions from opposing counsel. Normally, your counsel will object, but if he/she does not, you should <u>ask the examining counsel to clarify the question</u> before you answer.

8. Expect misquotations of your prior testimony, or minor differences in your prior statements and your testimony at trial. Clarify these if possible.

9. Avoid responding to hypothetical questions which do not contain enough information to support a conclusion or which contain incorrect information.

E. Leaving the Stand

1. When leaving the stand, do not manifest relief, triumph, or defeat (save it until you are outside the courtroom).

2. Do not clasp your counsel on the shoulder, give him/her a high-five, or exhibit any unprofessional behavior.

3. Do not leave too fast. Walk deliberately at a normal pace.

4. Leave the courtroom to avoid being recalled to the witness stand unless your counsel has instructed you otherwise. Often, opposing counsel will think of some additional questions but if you are not available, these cannot be asked.

F. Courtroom Rights of Witnesses

1. If the witness has a question about how he or she should answer a question or what he/she should do next, he/she may ask the judge.

2. The witness may also ask the judge for a ruling as to whether he/she must answer the question posed.

3. The witness may ask the judge whether the material asked for is privileged.

4. The witness may refuse to answer questions he/she does not understand. He/she may ask examining counsel to repeat, clarify, or rephrase the question.

5. The witness may admit that he/she either cannot answer the question or does not know the answer.

6. The witness may ask the judge whether he/she can expand or qualify a answer when a yes or no answer is requested by the examining counsel.

7. The witness has the right to complete his/her answer and should protest if he/she is interrupted or otherwise not given the opportunity to complete the answer.

8. The witness may refer to, and request to see, written records or other documents as a basis for the formulation of his/her opinion or to refresh his/her recollection of memory.

9. If the judge asks a question, answer.