# ***COURTROOM PSYCHOLOGY:***
# ***HOW TO BE A GOOD WITNESS AND SURVIVE IN THE COURTROOM***

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## INTRODUCTION

One of the most exciting, and possibly one of the most challenging, phases of a trial is the cross examination of the expert witness. As an expert witness, it is crucial for you to understand the basic approach of the trial attorney during cross examination in order for you to maximize the effectiveness of your testimony during this phase of the trial. The attorney's job on cross examination is to create the impression that the expert witness is not credible, lacks full knowledge of the area, is biased or prejudiced, or is inconsistent in his/her approach and methodology.

The late Professor Irving Younger, a judge, scholar, trial attorney and teacher, was an expert in the area of cross examination. His *Ten Commandments of Cross Examination*, (Younger, *The Art of Cross Examination*, A.B.A. 1976), is one of the classic studies for attorneys in the art of cross examination. Younger stated his "Ten Commandments" of cross examination as follows:

1. Be brief
2. Use plain language
3. Use only leading questions
4. Be prepared
5. Listen to the answer
6. Don't quarrel with the witness
7. Avoid repetition
8. Don't let the witness explain
9. Limit questioning
10. Save it for summation

Above all, as the trial sages warn, do not, as the questioning attorney, ask a question on cross examination to which you do not already know the answer.

Is there an advantage to the expert witness over the attorney with regard to the subject matter of the expert's testimony? Clearly, the subject matter of the expert's testimony falls within the ambit of that witness's professional knowledge, and therefore the expert presumably has a superior knowledge of the area. However, the rules of engagement in the courtroom are the rules of basic trial techniques and evidentiary rules, the tools of the trial attorney. An attorney can arguably eliminate the expert's advantage with regard to the testimonial subject matter by

undertaking a thorough preparation.

With that in mind, it is essential for the expert witness to be as prepared as possible for the ordeal that awaits her. What follows in this outline is an overview of what the cross examining attorney is attempting to do during cross examination, and how the expert witness can be prepared to testify effectively.

## I. TRIAL TECHNIQUES USED TO IMPEACH THE EXPERT WITNESS

Techniques used:

1. Oath
2. Perception
3. Recollection
4. Communication
5. Assumptions made by the expert
6. In what area/specialization is expert qualified
7. Bias in favor of party calling her
8. Prejudice against opposition
9. Interest
10. Corruption
11. Criminal conviction
12. Prior bad acts
13. Prior inconsistent statements or writings
14. Impeachment by treatise
15. Fees for testifying
16. How often the expert testifies, for whom (prosecution or defense), which attorneys the expert regularly testifies for.

## II. CROSS EXAMINATION TECHNIQUES

Generally, the goals for cross examination are as follows:

1. Discredit the testimony of the witness being examined;

2. Use the testimony of this witness to discredit the unfavorable testimony of other witnesses;

3. Use the testimony of this witness to corroborate the favorable testimony of other witnesses;

4. Use the testimony of this witness to contribute independently to the favorable development of your own case.

1. FEE INQUIRY. The cross examining attorney inquires into the fees paid to the expert witness, if relevant, the frequency with which the expert testifies, which side calls the expert as a witness (prosecution or defense), how often has the expert worked with that particular defense attorney or prosecutor's office? This approach is usually used as a collateral attack when it is judged difficult to attack the witness directly on his opinion or his reasoning.

2. EXPERTISE OF EXPERT. The attorney may wish to narrow the area of expertise of the expert witness, and attempt to show that although this witness may be an expert in a particular field of practice, it is not this area of practice that is relevant in this particular proceeding.

3. VARY THE FACTS BY HYPOTHETICAL QUESTIONS. Inquiry is made by the attorney as to the expert's basis for his opinion. Thereafter, questions are asked posing varying facts, and the expert is then asked if his opinion would change, based upon the differing facts.

4. ATTACK ON CREDENTIALS. Be prepared to back up any claim made on your curriculum vitae. Many experts list organizations, training seminars, etc. that carry little or no weight. I have had experts claim that they are members of organizations, such as APSAC, yet cannot remember the correct name of the organization, its purpose, positions, recommended protocols, etc.

5. CONCESSIONS. Don't be afraid to concede that in your particular area of expertise legitimate differences of opinion may arise as to a particular issue. Failing to do so places the jury (or judge) in the position of possibly discrediting your entire testimony, rather than just that portion of your testimony that other experts might disagree with.

III. QUALIFICATION OF THE EXPERT

1. What did the expert rely upon to form his opinion?

a. Personal knowledge

b. Facts in evidence or inferences to be drawn from facts in evidence

c. Professionally reliable hearsay (that standard, within the profession, that is relied upon)

2. Memberships in Organizations.

3. Specific area of expertise and training of the expert, and its relationship to the specific issues within the trial.

4. Use of literature in the expert's subject area.

5. Subject expert v. litigation expert.

IV. HOW TO PREPARE FOR CROSS EXAMINATION

1. Know who is the expert for the opposition. Get all writings, articles, etc. written by, or about, that expert. Review that expert's reports, if any.

2. Know who your adversary is. Try to find out as much about her style, technique, etc. as possible.

3. Advise the attorney calling you as a witness of any weak areas of his case, and any personal or professional weakness that you as an expert witness may have.

4. In a complicated case, a run through of the expert's testimony, including actual Q & A in crucial areas of dispute, can be very helpful. A devil's advocate cross examination prior to trial can also help the expert solidify her presentation.

V. HOW TO BE A BETTER WITNESS ON CROSS EXAMINATION:

1. BEWARE OF MAKING GENERALIZATIONS ON YOUR DIRECT TESTIMONY. Part of any good cross examination is the testing of the witness's knowledge in his particular subject area. Sometimes the witness makes a broad, generalized statement on direct that may not be able to be substantiated on cross examination.

2. REMAIN PROFESSIONAL. Attorneys, on cross examination, may attempt to show that you are allied with the opposition, are biased in the opposition's favor, and therefore prejudiced against her client. The inference to be drawn is that you are, therefore, not at all believable as an "expert". Make clear that you take no particular side, you are doing your job, have nothing personal against the "opposition", and are as interested in a fair and just outcome as they are. Just be careful how you convey this sentiment.

3. BE AWARE OF THE STRUCTURE OF THE QUESTIONING. Most good cross examiners do not keep to a chronologically structured questioning approach. This serves to keep the witness off balance; the witness cannot anticipate what question might be next, and therefore the witness must spend more time concentrating on the immediate question rather than trying to anticipate where the cross examiner is going with his cross examination.

4. EXPECT THE VARYING HYPOTHETICAL QUESTION. An expert witness may be asked on cross examination whether her opinion would change if a fact(s) were changed. If the expert admits that her opinion would change then this may be used by the opposing attorney on summation to support his position. If the witness does not admit that her opinion would change if the facts changed, then the argument will be made that the expert is not credible because she has a fixed opinion that nothing could ever change. Conceding that your opinion might change if the facts were different is not fatal to your ultimate position.

The key to cross examination, from the attorney's point of view, is to control the witness. The attorney, on cross examination, should have several points which he wishes to make with the expert witness on cross examination. The cross should not be another opportunity for the witness to repeat his direct testimony. Although a jury does not react positively when an attorney "beats up" a lay witness on cross examination, the jury does react positively when an attorney reveals an expert as a hired gun, or not nearly as knowledgeable in the area of expertise as she professes. The expert is then perceived as "slick" and his testimony is viewed as an effort by the party who called him to confuse and distort the truth.

## VI. HOW TO BE A BETTER WITNESS ON DIRECT EXAMINATION

You may be called to testify in court in response to subpoenas for records or as a witness to events. Here are some practical hints and suggestions on what to do, and how to do it well, when you are asked to serve as a witness.

*Before You Testify*

1. If you are going to testify concerning records, become familiar with them. You should know what the records contain and be able to refer to them easily if you must do so while you are on the witness stand. If you are not generally familiar with your employer's procedures for making and keeping these records, find out. You may be asked to authenticate them as records made and kept in the regular

course of the employer's business.

2. If you are going to testify concerning some event that happened months, or even years, before, try to refresh your recollection. Return at least once to the place where the event occurred. Close your eyes and try to picture the exact scene; note the location of physical objects and approximate distances, for you may be asked about these things. If you gave a written statement ask to see it. Talking with friends or coworkers who were there may help to recall details that you had forgotten. But do not try to develop a common story. Remember: your testimony must state what you recall, not what somebody else told you.

*On Your Day in Court*

1. Dress neatly, but do not overdress. Your normal business attire is probably about right. If you are a medical doctor, don't come into court wearing a white lab coat (I have seen it happen!).

2. If you have received a subpoena, take it with you. It may prove useful, for example, if you are not sure in which courtroom the trial is being held.

3. When you arrive outside the courtroom, if you do not know the attorney who has subpoenaed you, ask for him and introduce yourself. If the trial is in progress and you must wait for a recess, it is usually best to remain outside the courtroom.

4. The attorney will probably want to discuss your testimony with you, which is a proper thing to do. If you are producing company records, however, do not turn them over to the attorney until the judge orders you to do so, unless the attorney for the company is there or you have been told to do otherwise.

5. Avoid any undignified behavior such as loud laughter from the moment you enter the courthouse. Smoking and gum chewing are usually permitted in the corridors but not in the courtroom itself.

*When You are on the Stand*

1. When you are called as a witness, stand upright while taking the oath. Pay attention and say "I do" clearly, so that all can hear. Try not to be nervous; there is no reason to be.

2. While you are on the witness stand, you are sworn to tell the truth. Tell it!

3. Talk to the members of the jury, if there is one. Look at them most of the time and speak to them frankly and openly as you would to a friend or neighbor. Do not cover your mouth with your hand. Speak clearly and loudly enough so that the farthest juror can hear you easily.

4. Speak in your own words. There is no need to memorize your testimony beforehand; in fact, doing so is likely to make your testimony sound "pat" and unconvincing. Be yourself.

5. Listen carefully to each question and make sure you understand it before you start to answer. Have the question repeated if necessary. If you still do not understand it, say so. Never answer a question that you do not fully comprehend or before you have thought your answer through.

6. Answer directly and simply, and a "yes" or "no", if possible, only the question asked; then - stop. Do not volunteer additional information that is not requested. Otherwise, your answer may become legally objectionable under the technical rules of evidence and may also cause you to appear biased. If, however, an explanation is required, say so. Sometimes an attorney will try to limit you to a "yes" or "no" answer. If that happens, simply say that you cannot answer the question "yes" or "no". Usually the judge will let you explain, but in any event, the jury will get the point.

7. The court and jury only want the facts that you yourself have observed, not what someone else told you. Nor are they interested in your conclusions or opinions. Usually you will be unable to testify about what someone else told you, and only "expert" witnesses are allowed to give their conclusions.

8. When at all possible, give positive, definite answers. Avoid saying "I think," "I believe," or "In my opinion" when you actually know the facts. but if you do not know or are not sure of the answer, say so. There is absolutely nothing wrong with saying "I don't know." You can be positive about the important things without remembering all the details. If you are asked about little details that you do not remember, just answer that you do not recall.

9. Do not exaggerate. Be wary of overbroad generalizations that you may have to retract. Be particularly careful in responding to a question that begins, "Wouldn't you agree that ...?" Note also that statements like "Nothing else happened" are dangerous; after more thought or another question, you may remember something else. Say instead, "That's all that I recall," or "That's all I remember happening."

10. If your answer was wrong or unclear, correct it immediately. It is better to correct a mistake yourself than to have the opposing attorney discover an error in your testimony. If you realize that you have answered incorrectly, say "May I correct something I said earlier?" or "I realize now that something I said earlier should be corrected."

11. Stop instantly when the judge interrupts you or when the other attorney objects to what you say. Do not try to sneak in an answer.

12. Usually, a witness should not ask the judge for advice; it is his attorney's job to object to any improper questions When, however, you appear in court without an attorney, as frequently happens when records are relevant to a dispute between other parties, it is permissible, if a question seems clearly improper, to ask the judge if you have to answer it. Do not abuse this privilege, however, as it will make you appear evasive.

13. Always be polite even if the attorney is not. Do not be an argumentative or sarcastic witness. Remember, the attorney has a big advantage: he can ask the questions.

14. The honest witness has nothing to fear on cross-examination. Some of the rules set forth above may make more sense, however, if you understand what an attorney tries to do on cross-examination. If your testimony has not been harmful to his case or if he thinks that questioning you further will prove fruitless or counterproductive, he may waive cross-examination or ask a few perfunctory questions. If, however, your testimony has been damaging to his client, the opposing attorney will want to argue to the jury that they should not believe you. To make that argument, he wants to make it appear that you are a liar or that you do not know what you are talking about. In either case, the usual approach is to try to get you to say things that the attorney can show are not completely true. He will then argue to the jury: "Since the witness lied or was wrong on this point, his entire testimony is unworthy of belief." Here are a couple of "trick questions" that attorneys will sometimes use:

a) "Have you talked to anybody about this case?" If you say "No," the jury will think that probably you are not telling the truth, because a good lawyer always talks to his witnesses before they testify. Simply say that you talked to whomever you did - the lawyer, the police or anyone else.

b) "Are you being paid to testify in this case?" The lawyer hopes that your answer will be "Yes," suggesting that you are being paid to say what the lawyer who called you wants you to say. Your answer should be something like: "No, I am not getting paid to testify. I turned the subpoena fee over to my employer, and I will receive my usual salary" or "I am being compensated for my time today, not for what I say".

15. Testifying for a substantial length of time is surprisingly tiring and can cause fatigue, crossness, nervousness, anger, careless answers, and a willingness to say anything in order to leave the witness stand. If you feel these symptoms, strive to overcome them, or ask the judge for a five-minute break, or to allow you to have a glass of water.

## VII. HOW TO SET A TRAP FOR THE INEXPERIENCED CROSS EXAMINER

An expert witness's dream cross examination is the inexperienced or ill-prepared defense attorney's cross that re-asks all the questions that were asked on direct. This gives the witness the opportunity to expound on her original testimony. Baring this opportunity, the expert witness can still attempt to steer the cross examination to another area, one which the attorney did not anticipate going into, either at that particular time in the cross, or did not intend to go into at all.

Frequently a prosecutor will have failed, on direct examination, to elicit certain, important information on direct, either because of inadvertence, inexperience, lack of true understanding of the case, or lack of adequate and appropriate use of the expert's knowledge. As a witness on the stand, the expert cannot advise the prosecutor that he failed to ask several important questions. By listening closely to the cross examination questions and looking for an opportunity to insert this previously "un-asked for" information into her testimony the expert can introduce this information. The mechanics are a bit tricky, and the best method in which to do so is to offer the bait for the desired area of information during an appropriate point in the cross examination. An inexperienced attorney, hearing a tantalizing statement by the witness may very well take the bait, even though he has no idea where it may lead. If all else fails, hope that the attorney realizes his omission, and that they will have the opportunity on re-direct examination to ask the questions.

The main reason for offering the bait is as a defensive move to divert the cross examiner away from his particular line of questioning. This technique is not without risk, however, and the witness should carefully consider whether to throw out the bait. The experience of the expert as a witness is a dictating factor.

## VIII. ADDITIONAL TESTIMONY TIPS FOR LAW ENFORCEMENT

1. Never engage in a direct argument with the defense attorney. This can only result in a loss of your composure and a loss in the value of your testimony.

2. The Assistant District Attorney (ADA) handling the case is well versed in the rules of evidence. If you are asked a question that appears to be improper or undeserving of an answer, wait for the ADA's objection. You must discipline yourself to halt your testimony instantly when the Judge interrupts you or when an attorney objects to a question. The Judge will rule on the objection and advise you whether you are required to answer the question.

3. Listen very carefully to the question asked of you and do not guess the question prior to its completion. Make sure you understand the question before answering. If you do not understand it, have the question rephrased.

4. Whenever possible, give positive, definitive answers. Avoid expressions like "*I think*", "*I believe*", "*In my opinion*". If you know, then say so. If you do not know, say so, and do not

make up an answer.

5. This is a biggie. The defense attorney may ask you, "*Have you spoken to anyone about this case?*". If you have, but your answer is "*No.*", then the Judge and Jury will know that your answer is probably incorrect because good prosecutors usually confer with a witness before the witness takes the stand. If your answer is "*Yes*.", the defense counsel may try to imply that you have been instructed as to what to say. The best course of action is to say "*I talked to the ADA and the victim.*", naming any and all persons you have spoken to in connection with your involvement in the case. Later on, on re-direct, the ADA can bring out that part of your job is to meet with the ADA prior to trial to "*review your testimony*", but that the ADA did not instruct as to what to say, and in fact, advised you to "*tell the truth*".

6. When interviewing a suspect, in an effort to obtain a confession, basic interrogation techniques speak about attempting to gain the trust of the suspect, in order to establish a rapport. Part of these techniques probably requires you to lie to the suspect. If that is the case, and you are asked at trial whether, while interviewing the defendant, you lied to him, the answer is "*Yes*." In fact, that's part of the jobs. Expect, however, that when you honestly answer "*Yes.*", you will then be asked whether you job also allows you to lie while in court. You must distinguish accepted interrogation (the better word is "interview") techniques, as opposed to your legal obligation to tell the truth in court, having taken the oath, and sworn to tell the truth. It's not an easy situation, and really requires some advanced thought, before you get into the courtroom.

## IX. CONCLUSION

As a trained professional in the area of child abuse and/or neglect, the law has charged you with an obligation not only to report your suspicion of abuse and/or neglect, but also to cooperate in the prosecution (or possibly defense) of such matters in Court. As an expert in the area your professional duties may bring you into a courtroom to testify. As long as the justice system requires you to take an active part in litigation (abuse and neglect litigation, criminal prosecution, etc.) it is incumbent upon you to be as prepared as possible to deal effectively with the justice system.