

The Art and Science of Being an Effective Expert Witness on Natural Resource Issues

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The 1980's revealed an increasing sense of the judicial system running the environment. Many critical issues were forced into the judicial process for decisions. *Judges will continue to levy decisions on resource issues in fields in which they have had no formal education or training.*

The resource manager is delegated to the role of providing input into the judicial process. The professional manner in which scientific information is organized and presented during deposition, hearings, trials, and appeals might well become the definitive "criteria" of a successful resource manager.

Truth

The concept of truth requires an adjustment in the *thought process of a scientifically trained resource manager*. A resource manager uses the scientific process and statistics as a barometer of credibility. Hypothesis testing, measuring for significant differences, analysis of variance, and regression are tools to verify and reject statements in the professional world. In the courtroom nothing is true until it holds up under cross-examination. Truth even has the perception of being negotiable.

The environment at congressional hearings or the courtroom are typically competitive, confrontational, and frequently antagonistic. Your lawyer's job is to have your presentation unfold in such a manner that the judge and/or jury believes that if you walked across water you would sink no deeper than your ankles. On the other hand, the opposing lawyer has the duty to present the opposing expert's witnesses in such a light that the judge thinks that the expert hasn't had a logical neuron fire in his head for at least a decade. Unless your testimony can pass the test of cross-examination, it is just rhetoric with no bearing on the outcome.

Establishing Credibility

The expert witness must fully understand the objectives of the case, the strategy of your lawyer, and exactly *what role you, as an expert witness, are being requested to pursue*. It is the responsibility of the expert witness to provide guidance and recommendations on the direction currently being pursued, additional information available, and most important, *any limitations in the case devel-*

opment logic. It is critical for the expert witness to establish professional strengths and limitations. The first cardinal rule is, Don't stray out of your area of expertise. When experiencing cross-examination, the easiest way to discredit your whole testimony is to over-extend in an area and be exposed. The message transmitted with damaging overexposure is that obviously everything else the expert witness has presented during testimony is equally suspect!

The expert witness has three levels of involvement in case preparation. The first is called discovery. Here documents and background information are exchanged with opposing counsel. The expert witness should advise his counsel as to what specific documents, records, data, and other pertinent information that may be germane to the case that opposing counsel might have in their possession. The expert witness should also develop a file of information on the opposing expert witness.

The second level of involvement is the deposition where, under oath, the opposing counsel is able to examine the basic position. This level requires close contact with your counsel in order to extract the greatest amount of information possible from the opposing lawyer's experts. This window of opportunity allows both sides to determine what information the expert witness will be relying upon for their testimony. As expert witness you should directly respond to the questions but not volunteer additional information, and certainly don't go off on a long rendition or philosophical discussion which often exposes weakness. Make the opposing lawyers do their work—don't make it easy for them. Another reason to be brief and to the point is to conceal the basic strategy of your counsel.

The third and final level is the presentation to the judge/jury if the matter hasn't been resolved after deposition. **The trial is the time for absolute professionalism.** Neat appearance, confidence, and a well-organized factual delivery are essential. Good lawyers will have previously rehearsed the complete presentation with accompanying visuals. All data and pertinent materials must be entered into the record at this time, but don't worry—that is the lawyer's job. When preparing for trial or hearings, lawyers will often take the precaution of video-taping expert witnesses who haven't had extensive public speaking experience. This can be a very effective tool to detect any offensive mannerism or personal habits that could potentially detract from the expert's testimony. The well-rehearsed

The author's experience is derived from 4 Congressional hearings and 10 separate court cases ranging from private individual versus private individual, major corporation versus Federal Government, producer's association versus state government and Interior Board of Land Appeals.

presentation is carefully constructed to cover the salient points of the expert's testimony, builds to a strong conclusion, and doesn't stray outside the expert's area of expertise. When responding to your lawyer's questions (i.e., direct examination) you must make good eye contact with the judge and jury if it exists. Be personable and professional. Statements such as "In my professional opinion"—are perfectly acceptable.

Cross examination has some simple rules for the expert: **Never lose your temper and always think ahead;** lawyers don't ask questions simply to hear themselves speak. Lawyers usually have a point they're trying to drive home and if they can do it at your expense—all the better. Figuring out the point they're trying to make isn't nearly as difficult as it may seem. You have just given your testimony and it obviously conflicts with what they want to hear; you know the opposing side's major objective now—try to prevent them from using you to make their point for them. If their questions are outside of your own area of expertise and you haven't offered an opinion on the subject, don't venture an opinion just because they asked you. A response of "That's not in my area of expertise" or "I don't know" are more than adequate. If you're not sure about answering a particular question, look to your counsel for guidance. They'll give you some sort of signal if the area is important—or object to the question—to at least give you time to think or regain your composure.

Field Preparation and Monitoring

Just as the old expression, "Marketing begins with the decision to produce", preparation for trial begins with the decision to collect data, conduct analysis, or manage resources. Preparation should have been complete long before you have any notion that anything you're doing has any bearing on any case. It's called the "Scientific Process".

You will feel much more confident when being cross-examined if the point you are making is backed by sound, reliable data. Educating the judge that natural resources are heterogeneous in nature, i.e., have great variability, is the first step. Efforts to reduce or control this variability are paramount and are traditionally included in the experimental design. Steps taken to account for variability must be pragmatically outlined by researcher and non-researcher alike. Logic and rationale are necessary to defend the inclusion or deletion of specific information. This information should be conveyed in laymen's language if at all possible.

An elaborate discussion of the scientific process is beyond the scope of this article; however, the steps are laid out clearly in other publications (Day 1988). The data collection phase is invariably the segment that the resource manager is associated with in the judicial process. There are some simple considerations that will lend credence to expert testimony. It is my experience that the judge is receptive to fewer points with greater detail in the most representative areas than a shotgun blast of superficial data.

One-point-in-time data collection is entirely inadequate

especially if long-term trends are desired. Ranges and forests change slowly, particularly in semi-arid environments. Continuity through time is vital, particularly when resource change or rate of change is equally as important as absolute numbers. Continuity is not assured simply by collecting data in May of each year; rather, consistency must be maintained phenologically.

The most prevalent example of inappropriate comparisons is before-and-after photo examples where one picture is taken in the spring green-up of one year and in subsequent years the shot is taken after leaf drop. Such practices clearly demonstrate unprofessional attempts at sensationalism and must be avoided to maintain professional and scientific objectivity.

The use of photography as an illustrative tool has wide acceptance in the courtroom. Color photographs have a greater impact on a judge/jury than the black and white high-contrast shots required for the professional journals. However, certain precautions should be taken to assure the photograph(s) be acceptable. The transect point should be clearly documented in the photo as to location, specific point and year. It is also advisable to include distinguishing background landmarks. Without such placement keys the opposing council can easily cast sufficient doubt to effectively reduce the intended message.

The job of an expert witness should be viewed as a challenge. However, the challenge can be readily met with professionalism, knowing your data limits, and fastidiously staying within your area of expertise. Common sense and wit have a distinct role. If these personal traits are combined with factual information, they constitute a very formidable opponent, a strong voice for natural resources, and an effective resource manager.

Citations

- Day, Robert A. "How to Write and Publish a Scientific Paper," 3rd Edition New York, Oryx Press 1988, p. 211.
 Sullivan, J.L., and R.J. Roberts. "Expert Witnesses and Environmental Litigation" Journal of the Air Pollution Control Association Volume 25, Number 4 April 1975.

