EFFECTIVE DEPOSITION AND COURTROOM TESTIMONY

Matthew J. Smith, Esq.

SMITH, ROLFES & SKAVDAHL COMPANY LPA

CINCINNATI, OH | COLUMBUS, OH | DETROIT, MI | FT. MITCHELL, KY | ORLANDO, FL | SARASOTA, FL

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I. INTRODUCTION

For nearly a quarter century I have had the privilege of practicing law as a trial attorney representing insurance carriers and their insureds. I can truly say I am proud of the record I have amassed in conducting jury trials. Ask any really good trial lawyer though and we will all tell you truthfully we quickly forget the "wins" but the "losses" are ingrained in our memories forever! Although I know first-hand the hard work it takes to prepare and present a jury trial, I have equally come to learn we trial attorneys win (or lose) our cases not generally upon our own strengths or courtroom prowess but instead because of the hard work, training and diligence those we call upon to serve as lay and expert witnesses devote to their own presentation of evidence in the courtroom.

I have likened my role as the trial counsel to that of a conductor. It is my role to make sure the "orchestra" of the case plays from the same music, to accentuate the nuances of each key section of the "music" of the case through just the right "instrument" and in the end to make sure the audience (jury) is enthralled, captivated and moved by what they hear from our "stage".

As I reflect back on my career, in virtually all of the trials I was involved in the testimony of the witnesses has played a crucial role in the outcome of the jury's decision. Sometimes this has been because of the high-quality of our experts opinion or a key witnesses' lay testimony and in other cases it has been because of the ability to effectively cross-examine an opposing witness to the point where their opinion or testimony was either substantially weakened or their credibility called into serious question.

More than a decade ago I began shifting my practice from bodily injury defense to focusing on "higher stakes" cases involving insurance fraud investigations and defense of insurers in bad faith litigation. These past ten years have shown more than ever before my

success on behalf of my clients in the courtroom is generally tied very closely in these highly sensitive cases to testimony from the witness stand of insurance personnel, origin and cause investigators, forensic accountants and law and fire department officials.

I have said for many years, but cannot stress enough to each of you, I really do not care how many claims you have investigated, how impressive your *curriculum vitae* may be, or even how good of a file entry or report you may author. If we are going to go into a jury trial together the only thing which is really important in the final analysis is how well you convey the nature and quality of your investigation to those jurors who are sitting in the box and who will decide the case. You can be the most learned insurance professional, public servant or expert ever on the face of the earth, but if you do not have the requisite skills and training to convey that knowledge, and more importantly, confidence in your work or opinion, to the members of that jury, we will collectively lose the case.

It is my goal to share with you some of my experiences, thoughts and recommendations to help you in the deposition or trial testimony aspects of your career and in so doing to help insure cases are won through the quality of your testimony.

II. THE FEAR FACTOR

Whether it is in a deposition setting or actual trial testimony, I am frequently told by my insurance company clients, our retained experts, as well as local and state fire officials, they absolutely dread the thought of either a deposition or trial testimony. To some extent this is not a bad thing. As I have told my clients for many years, the day I begin a jury trial on a Monday morning and do not find my stomach tied in knots, is the day I need to find a new profession because I no longer really care about the outcome of the case.

For any witness, the key balance you need to search for is between the tenseness and nervousness which is good, because it causes you to be slightly on edge with an increased flow of adrenaline, and the confidence of knowing you are the professional who has trained for many years in the field of insurance, accounting, law enforcement or fire science technology.

At the risk of making you over-confident, I cannot stress this latter point enough. Whether you approach testimony as a member of the public or private sector, it is important to remember the attorney who is questioning you probably handled an auto accident case last week, the probate of a will the week before and perhaps a medical malpractice case before that. We attorneys are notorious for doing a good job of "bluff and bluster," especially when we really do not know what we are talking about! In the states in which I practice, there are but a small hand-full of attorneys who truly understand and comprehend insurance law and the investigation of claims. Even amongst this number, the majority tend to be defense attorneys and there are very few plaintiffs' attorneys who actually are skilled in the field of insurance claims investigation especially when fraud or fire science technology is involved. When they are, however, they can truly be dangerous.

For this reason do not let your guard down, but when you approach a deposition, or trial testimony, it is important you keep at the forefront of your thought at all times the fact you have trained for many years in your chosen profession. This does not give you the right to be boastful, overconfident or belligerent. What it should do, however, is give you an added level of confidence and assurance in your deposition or trial testimony by remembering you are being questioned in the field in which ***you*** are most knowledgeable and the attorney is doing his or her best to "catch up" to the degree of knowledge, skill and expertise you possess.

In short, there is nothing wrong with entering a deposition or a trial with a certain level of fear and trepidation. Do not, however, let that become an insurmountable wall which you believe you need to scale. Your years of experience, combined with training such as this program, should help you strike the right balance between a good level of fear and nervousness and the confidence you need to succeed in the giving of your testimony.

III. WHERE DOES SUCCESSFUL COURTROOM TESTIMONY BEGIN?

Although I have been asked to speak with you regarding courtroom testimony, I really do not think we can begin this program with you walking into the courtroom with the judge on the bench, counsel at their respective tables with their clients, and the jury seated in the box.

The reason we cannot begin our analysis there is because the success, or failure, of your courtroom testimony probably had its foundation laid months, or even years, earlier when you gave your deposition testimony.

The old adage is very true an attorney does not ask a witness a question in trial which he or she does not already know the answer to. The reason we can do this is because of the Civil Rules of Procedure which permit the taking of deposition testimony well in advance of the jury trial.

I tell my clients 90% of the written transcript they pay for in cases is a pure waste of money. To use another analogy 90% of the deposition transcript is coal. My job as a defense attorney is to find the 10% of that transcript which constitutes the "diamonds" and string them together in a diamond "choker collar" to effectively cross-examine an opposing witness. Do not let this happen to you!

No matter how charming, prepared or informed you are on the witness stand you will not be able to salvage your testimony if you are confronted with sworn deposition testimony which

an opposing attorney uses to effectively undermine your investigation or opinions.

IV. WHY ATTORNEYS TAKE DEPOSITIONS?

This is a question which is generally not addressed in programs of this nature. In addition to having children to put through college, I would submit to you there are three very real reasons attorneys take depositions. Some of these may surprise you.

A. REASON ONE: TO "SIZE" YOU UP.

The most important reason we take deposition testimony actually occurs before you even raise your right hand and are sworn in. Remember as opposing counsel we probably have never before laid eyes on the witness we are taking deposition testimony of. If it is a party, or an expert, in a case we have no right to even contact or speak to that individual outside of the deposition setting. As such, the first, and primary, reason we take deposition testimony is simply to size you up and determine how you will present to the jury. This includes a myriad of factors from how you are dressed, to your posture, speech patterns, level of observable nervousness and whether you appear to answer questions confidently and straightforwardly, or hesitantly and equivocally.

Interestingly, ***you***, and you alone, have the sole control over these very important factors as to how the opposing attorney will size you up and believe you will present to a jury. This will also go a long way to determining what methods the attorney may use to cross-examine you both in the deposition and at trial.

B. REASON TWO: TO GET INFORMATION.

This is the most basic and obvious reason we attorneys take deposition testimony. Under the Rules of Civil Procedure the days of "surprise" witnesses are long gone. Not only must all witnesses be disclosed in advance, but through deposition testimony the attorneys have the right to explore all opinions, facts and information upon which either a lay or expert witness may testify.

In a well taken deposition, the attorney questioning you will want to identify all information and documentation you reviewed as part of your investigation and from what sources that information came. Because of this, you must be fully prepared to answer questions regarding your investigation, your opinions and the information and data upon which your investigation and opinions are based. You can only do this effectively, however, if you have reviewed all of the documents forming the foundation for your investigation or opinions and are fully prepared to discuss those documents and your opinions or findings.

For a witness who is not familiar with litigation, it is also important to know the scope of questioning in a deposition is much broader in terms of the information which can be sought than in trial testimony. The standard for questioning in a deposition is any question may be asked if it ***may*** lead to ***any*** discoverable information. For these reasons you may well be questioned regarding your education, family background, prior litigation history and other matters which may seem entirely irrelevant to you. The standard for deposition testimony is ***extremely*** broad.

Contrast this, however, with the much narrower and restrictive standard in a jury trial which is whether the question is relevant to any issue in the pending case. To visualize this in your mind, imagine the scope of permissible questioning in a deposition as being the solar system and the scope of questioning permissible at trial as being a single planet within that system.

You should review with the attorney who will be presenting your testimony in the case, well in advance of your deposition, the scope of the information which your attorney reasonably believes will be explored in the deposition so you are prepared fully and can answer all questions completely.

C. REASON THREE: THE OPPOSING ATTORNEY HOPES TO CATCH YOU.

If you did not already get my point from the introduction to this section, to me this is the most fun aspect of taking deposition testimony. The final reason we take depositions is for the day when the jury trial comes, not only to effectively cross-examine you, but eliminate you as a witness for the opposition.

If you are a lay witness, or an expert, my goal in taking of deposition testimony as the opposing counsel is to question you under oath in your deposition and make certain I cover all of the relevant points which may arise at the trial. You may rest assured when the day the jury trial comes, I will have reviewed your deposition thoroughly and completely and will have drafted my questions with an outline directing me to the specific page and line number so I know your answer to every question I intend to ask. In this manner, if your trial testimony in any regard deviates from your prior sworn testimony I will be able to confront you with the inconsistency and in doing so challenge you before the jury

regarding either the accuracy of your memory, or your truthfulness.

In like manner, I will also use your prior deposition testimony to cross-examine you and show where in questioning by your own counsel before the jury you gave differing answers than you told me months earlier in your deposition testimony. Again, I will use this to hopefully impact upon the jury your testimony is at best, inconsistent and perhaps tantamount to perjury.

It is important to remember, however, I can only use this type of cross-examination to "catch you" if you provide me the opportunity by giving testimony before the jury which differs from your prior deposition testimony. If you are an expert witness, then it is also imperative you be aware of the most recent court decisions regarding the scope and admissibility of your testimony as an expert. In a series of decisions the U.S. Supreme Court has vastly restricted the scope of expert witness testimony and the requirements for an expert to give opinion testimony in court. These are the *Daubert* and *Kumho Tire* cases which you should be intimately familiar with.

If you are an opposing expert witness and you give me the opportunity, I will use your deposition for purposes of: 1) a motion to strike you as a witness, 2) a motion for the court to conduct a *Daubert/Kumho* hearing regarding your qualifications, or 3) to undermine your credibility before the jury so no weight will be given to the opinions and findings you testify about.

I recently had the opportunity to take the deposition of an origin and cause fire investigator in a case pending in Ohio. He was one of the most pleasant gentlemen whom I have ever met, and with 26 years of experience in a major city

fire department he certainly met the qualifications to give testimony. Through cross-examination, however, he made so many concessions regarding his investigation of the subject fire no court would ultimately even permit him to testify. My final question in his deposition read as follows:

> *Q. Do you agree based upon the questioning here today, the additional documents you have now reviewed but had not seen before, and the standards we have discussed, your report does not meet the minimum requirements and standards for a proper fire investigation?*
>
> *A. (after a pause) Yes, I do….*

This is certainly not the type of situation you want to face in your deposition.

V. PREPARATION FOR EFFECTIVE COURTROOM TESTIMONY AFTER THE DEPOSITION AND BEFORE THE JURY TRIAL.

Once your deposition has been completed, and even if you did an excellent job, it does not mean you are "home free" and simply need to show up in the courtroom and charm the jury into a favorable verdict. There is much work which needs to be done between your deposition and the jury trial for effective testimony to occur. We will address each of those in this section for your consideration.

A. THE BOY SCOUT MOTTO: "BE PREPARED"…

We do not have the luxury of time here to address preparation for your deposition testimony. As you may have gathered already, and has been set forth, preparation for your deposition is probably even more crucial than preparation for your courtroom testimony. In general, however, the same basic rules we will address here apply to your deposition preparation as well.

Regardless of whether in deposition or at trial, if you are going to be an effective witness before the jury, you will need to spend an extensive amount of time preparing for your testimony.

To be prepared you must know fully your file or report together with all of the documents and materials upon which your claims decision, report, or opinions are based. In my opinion, however, even this is not enough.

I tell our attorneys they should be so prepared for the jury trial they should literally be able to say "Yes, your honor…" if they were told on the morning of trial to switch sides and try the case for the opposing party. So too, you must be prepared to know not only your file, report, documents or opinions but also know the opposing sides documents, report and evidence so well you are prepared to handle any question which may be asked of you.

B. MEET WITH THE ATTORNEY CALLING YOU AS A WITNESS AT LEAST ONE WEEK PRIOR TO THE TRIAL.

In my opinion, any decent attorney will be in contact with you well in advance of the jury trial to make certain you have all of the information and documents you need, and are fully prepared to give your trial testimony. Should that not occur, however, remember it may well be your reputation which is at stake when you testify, and you may need to take charge of the situation and contact the attorney yourself if he or she fails to do so.

I cannot stress this point to you enough. Giving of either poor deposition testimony or embarrassing trial testimony may effectively limit or end your career. Especially with the increasing use of deposition data banks and the sharing of information via the internet, if you are discredited professionally, disqualified as an

expert witness, or give very embarrassing sworn testimony, it may take years for you to rebound from that single deposition or courtroom experience.

It is imperative you meet with the attorney calling you as a witness at least one week in advance of your trial testimony. Insist on that meeting being a face-to-face meeting with the lawyer who will actually be calling you as a witness at trial.

The attorney may not be able to share with you, at that time, the exact outline of questioning he or she may ask of you due to many reasons including remaining final pretrial motions and the fact your testimony may well be impacted by witnesses who precede you to the witness stand. Nevertheless, the attorney should be able to fully explain to you the scope of your anticipated testimony and update you on any important developments in the case from the time of your initial investigation, deposition testimony and the start of the trial.

The same as the attorney has a duty to contact you and make certain you are informed of important developments concerning the case and the scope of your testimony, you too have a duty to arrive at this meeting prepared. You should have reviewed your materials, and your deposition testimony, and arrive at the meeting ready to discuss in an informed manner all areas of your anticipated testimony. You should also arrive at the meeting with a complete written list of any remaining issues, concerns or questions which you need to have addressed to your satisfaction prior to the trial. If possible, you may want to consider e-mailing or faxing such a listing of questions or concerns to the attorney in advance of your meeting so he or she can be fully prepared to address those questions during your pretrial meeting.

The pretrial meeting with the attorney should take a minimum of one to two hours to complete. I recently had the privilege of conducting such a meeting in our Cincinnati office with two very experienced fire investigators and one of our senior associate attorneys. That meeting went very well because in the same meeting we had the public sector fire investigator, the private origin and cause investigator and the two attorneys from our firm involved in the case together in one meeting to fully address all of the remaining pretrial testimony issues and make certain we coordinated seamlessly for the jury the testimony between the public and private sector fire investigators.

C. THE ATTORNEY HAS THE DUTY TO UPDATE YOU REGARDING KEY MATERIALS IN THE CASE PRIOR TO YOUR COURTROOM TESTIMONY.

Hopefully in advance of your pretrial meeting, but definitely no later than at that meeting, you should make certain the attorney has updated you fully regarding any new developments in the case since you completed your investigation and has provided you copies of other witnesses deposition testimony which could in any respect impact your testimony whether good or bad. The last thing you want to have happen is have new evidence come forth in cross-examination while you are on the witness stand which you never heard about before. This can be embarrassing at best, and disastrous at worst.

It is ultimately the attorney's responsibility to make certain you are apprised of any important new developments in the case, but you should include this on your list of items to review at the pretrial meeting as well. In cases in which our firm is involved we also make certain all witnesses, whom we are calling to testify, are provided complete copies of all deposition testimony and exhibits of any crucial witnesses in the case. This would include examination under oath or deposition testimony taken of the claimant(s)

and most assuredly complete copies of deposition testimony of any opposing experts who will testify at trial.

There is simply no way you can be an effective trial witness for the side you are testifying on behalf of if you do not know ***all*** of the evidence, information and opinions which will be presented to the jury by the opposing side.

D. COURTROOM TESTIMONY IS AN OPEN BOOK TEST, BUT YOU MUST READ THE BOOK TO KNOW THE ANSWERS!

Remember what I said earlier in this presentation, most attorneys will never ask a question of a witness on the witness stand which they do not already know the answer to. You can generally bank on this being true. If that is the case, then any question you are going to be asked by the opposing attorney in front of the jury will already have been asked of you in your deposition. The single most important thing you can do to prepare for effective courtroom testimony is to read, re-read and read again (yes do the math that is three times) your deposition testimony before you ever step foot in the courtroom.

Although I cannot "baby-sit" our witnesses, whether they are lay witnesses or experts, I do ask every witness whom we call in a case, and who has been deposed, to read through their deposition testimony a minimum of three times. I ask the last time they do this to be the night before their courtroom testimony.

It is also important you actually read and not skim the deposition. To use another analogy, your courtroom testimony is the final exam. It is the final exam upon which not only the case may rest, but upon which your reputation as a professional may also depend. For that reason, you should read your deposition testimony cover-to-cover and with an insightful eye asking yourself how you believe the opposing attorney may use the

deposition to question you, and how you will make certain your answers are consistent with your prior deposition testimony.

As a trial attorney, it is my hope opposing witnesses will not have read their deposition, or will not have done so thoroughly. The most enjoyable aspect of any trial for me is when a witness tells the jury "X" from the witness stand and I know they have already testified in response to the same question saying "Y" in their deposition. I can assure you, given the right circumstances, I will confront that witness with the following exchange:

> *Q. Do you remember testifying a few moments ago to the jury when you were being questioned by the plaintiff's attorney and telling the jury "X"?*
>
> *A. Yes.*
>
> *Q. Do you remember when I took your deposition testimony and asked you the same question….your Honor may I approach the witness and read him his deposition?*
>
> *(WHERE UPON THE QUESTION FROM THE DEPOSITION IS READ)*
>
> *Q. Do you remember when you gave the deposition testimony answer I just read you were under oath and swore to tell the truth?*
>
> *A. Yes.*
>
> *Q. Do you also remember I told you at the start of the deposition if you did not hear or understand any question it*

was your duty to stop me and tell me you did not hear or understand that question and I would explain it or repeat it to you again?

A. *Yes.*

Q. *Then would you please explain to the members of the jury given the fact you testified to "X" this morning and previously testified to "Y" under oath in your deposition at which time you were lying under oath?*

I do not think that is the type of questioning you want to undergo in a courtroom setting, or anywhere else!

E. DO A "DRY RUN" OF YOUR TESTIMONY IF IT IS WARRANTED.

One of the things you should discuss with the attorney who is calling you to testify is whether it would be prudent to do a "dry run" rehearsal of your courtroom testimony or even your deposition. This may especially be true if it is a large and complicated case, or if you do not have extensive experience giving courtroom or deposition testimony.

The biggest risk of doing a "dry run" of testimony is your direct examination may come across as rehearsed or stiff. Under no circumstances do you want that to occur.

Generally in cases where we do "dry run" testimony we will generally focus more on the cross-examination aspect of testimony than direct examination. We may, at most, do one or two "run throughs" of the direct examination to have an understanding of your answers, and to make certain you do not feel compelled to give all of the information until the appropriate question has been asked.

In the "dry run", however, we will focus extensively on making certain you can withstand potentially strong cross-examination. One of the nicest compliments I can receive from a client, or expert, when we do a "dry run" of their cross-examination testimony is after they complete their actual trial testimony they make the comment *"You were much harder on me in the run through than the opposing attorney was on the witness stand."* If a witness tells me that, then I know I have done my job well in preparing them for courtroom testimony.

One other aspect to consider regarding trial testimony rehearsals is whether those rehearsals should be videotaped. Again, this is something we do rarely but do utilize in the appropriate setting. You will not like watching yourself on video but it can be an extremely valuable tool in letting you see whether you answer questions directly, or evasively, whether you appear confident in giving testimony, whether you are shifting back and forth nervously in the chair and other similar matters which a jury will pay very close attention to. Remember, there is no such thing as the perfect witness or (heaven forbid) the perfect attorney. If you watch yourself in a video practice session do not be overly critical of yourself but use this as an excellent training tool to critique yourself and make certain your trial testimony presents as well as possible.

F. MAKE CERTAIN YOU KNOW WHAT TO BRING WITH YOU.

Review carefully with the attorney what documents you are to bring with you when you testify. If you have been subpoenaed to appear as a witness with certain records with you then it is mandatory you bring those documents. Whatever you bring with you to the deposition or witness stand, however, is generally going to be "fair game" for the opposing attorney to look at and question you about. I have literally had

situations occur where unbeknownst to opposing counsel their "expert" walked into court and had the answers to every question scripted and written out in advance, based upon a telephone conversation the expert had with the attorney several days before the trial. The jury did not find this expert to be terribly credible!

It is important to review with the attorney who will be calling you, exactly what information and documents he or she wants you to bring to the deposition or court and what information and documentation they do not want you to bring with you. As a general rule unless you are instructed by the attorney to bring documents, you should arrive for testimony with either no documentation or only your actual investigation file.

If you are to identify documents, reports, statements, photographs or any other information, make certain you have reviewed all of the information with the attorney who will be calling you as a witness before you step foot in the deposition or courtroom. This should all be addressed at your pre-testimony meeting. Generally, a well prepared attorney will have already premarked the exhibits and will show you all of the documentary evidence which you need for your testimony or to establish your opinion before the jury without you having to bring those documents with you to the courtroom.

VI. WHEN DOES YOUR COURTROOM TESTIMONY BEGIN?

Although this may seem trivial, and perhaps even humorous to you, this is an important consideration and one which is generally overlooked. The easy answer to the above question is when you take the witness stand. I would submit to you, however, your answer is wrong!

When you are going to appear for courtroom testimony as a witness you are normally not permitted to be in the courtroom during the jury selection process. You will not, therefore, know who the members of the jury are before you walk into the courtroom as a witness.

Since you do not know who the members of the jury are, there is every possibility the person you cut off on the interstate to get to the exit ramp, or stole the last parking spot in front of the courthouse from, or refused to hold the door open for while entering the courthouse, may well be a member of the jury deciding the case in which you are going to testify. It is imperative you be on your best behavior at all times because you have no idea when a juror may be watching, or listening, to you.

When you are walking to the courthouse, riding up the elevator, or even sitting outside of the courtroom waiting to be called as a witness, be very cautious about the comments you make. Especially with law enforcement officers and fire investigators, you may be sitting out in the hall with friends and acquaintances you have known for many years even though you may be on opposing sides of the same case. There is certainly nothing wrong with being friendly and polite, however, engaging in practices such as telling "war stories", sharing "off color" comments or jokes or making unnecessary or derogatory comments about this, or other cases, may all be overheard by the jury. Make no mistake if this happens the jurors <u>will</u> consider your out-of-courtroom comments in judging ultimately whether, or not, to believe your testimony.

VII. "CALL YOUR NEXT WITNESS...."

We have now reached the point where the courtroom door has swung open and the bailiff summons you as the next witness to be called for your side of the case. It may amaze you to know multiple psychological studies have shown the majority of jurors make up their mind whether they are going to believe, or not believe, a witness in the short time period between when the courtroom door swings open and the witness reaches the stand.

Say what you will, but everyday of our lives we do pre-judge people and make snap decisions regarding whether we find someone to be credible, or not. We generally do this before that person ever has the opportunity to say a single word. Jurors are no different.

I do not care how much you dislike wearing a tie, the time to be buttoning your shirt collar and pulling your tie up is not while you are walking to the witness stand. In the same manner walking to the witness stand while finishing a can of soda or a bottle of water is equally inappropriate. I have also seen situations where witnesses walk in with half of their file falling out or sticking out of messy file folders or briefcases.

If you are going to arrive for court and testify as a professional then look the part of the professional investigator and not like a piece of fire debris.

You do not need to go out and buy an expensive European suit to look good as a witness. In fact, I love nothing more than putting on the stand a public police or fire investigation official in their full dress uniform. If you are not a public sector employee, you can still arrive for court dressed professionally. For female witnesses, business appropriate dresses, skirts and even slacks are certainly appropriate. I generally prefer for male witnesses to wear a suit or sport coat and tie. If you do not want to do this at least arrive professionally attired in business casual attire.

Matters as simple as your posture and your walk to the witness stand are also crucial to a jury. The jury will be making an instantaneous decision as to whether you appear as a strong and forceful witness or someone who appears weak and unprepared. One of the things I normally do with all of our witnesses is to take them to the courtroom in advance (even if it is on a jury restroom break) so they know exactly where they will be testifying from and can enter the courtroom and walk directly to the witness stand.

Remember, you will also need to be sworn in as a witness. For that reason it is generally advisable to remain standing until the oath is administered to you and then be seated in the witness chair. When seated take a moment to then adjust the chair, and the microphone, so you are seated comfortably. There is equally nothing wrong with you nodding or smiling to the jury as you enter the courtroom and again when you are seated in the witness chair.

VIII. EYE CONTACT IS CRUCIAL

The single most important way we determine whether someone is telling us the truth is whether, or not, they look us in the eye. You must remember this when you are giving your courtroom testimony. When you are answering questions, it is absolutely crucial you make strong and direct eye contact with the jurors and speak to them as if they were the only persons in the courtroom when you are giving your answers.

If one of the attorneys is speaking to you, and certainly if the judge is speaking to you, you should make eye contact with the attorney or judge while they are talking to you. This includes while the attorney is questioning you. Once the question is finished, however, even if you have to reposition yourself in the witness chair, it is absolutely imperative you look away from the attorney and address the jury directly with your response.

There are several "tricks" which I use as an attorney to attempt to throw off a witness for the opposition. One of those is simply where I stand in the courtroom. When I am conducting direct examination of one of my witnesses, I will position myself normally to the side of the jury box or in a position where it is natural for the witness to be making eye contact with the jury while answering my questions. In contrast, when I am cross-examining a witness I will intentionally position myself so I have primary eye contact with the jury but the witness has to force himself into an awkward position to look the jury in the eye and answer.

Another strategy which I will use is to try to get the opposing witness to be so focused on the verbal exchange with me as the attorney he or she forgets the jury is there and is communicating with me solely leaving the jury to feel the witness is battling with me and not speaking to them. Both of these techniques can be effective tools for cross-examination.

There is also a huge advantage to taking the time to look at the attorney who is questioning you and then moving slightly in your seat to face the jury to give your answer. The human brain is a remarkable machine. In the few seconds, or less, in which you move your gaze from the attorney to the members of the jury, your brain will be analyzing the question and be doing a much better job of organizing your answer to the question than if you begin with a rapid response answer while still looking at the attorney questioning you.

IX. TAKE YOUR TIME BEFORE ANSWERING THE QUESTION

This is the single biggest mistake both lay, and expert, witnesses make in courtroom testimony. Numerous studies have shown we listen to fifty percent or less of what someone is actually saying to us. Psychological studies have further shown we normally speak over the last one third of the question or comment the other person we are engaged in conversation with is making. We do this because our brain "reads ahead" and interprets what the person is talking about and we then begin to formulate our response and actually start verbalizing that response before the other person is even finished speaking. Apply this test to your normal human conversations and it will absolutely drive you crazy because it so very true.

The hardest thing you will have to do as a witness giving deposition, or trial, testimony is to make certain you do not start your answer in any respect until you are absolutely certain the person questioning you is finished. Again, this is a technique I will try to use to engage opposing

witnesses to have them so focused on my questioning they do not have the time, or inclination to stop and think before they begin to answer.

If you wait until the attorney questioning you has finished their question completely there is nothing inappropriate with your then taking a brief second to simply look down or look toward the jury before beginning your answer. This may seem like an eternity to you, but it is probably a second or less. Most jurors, in fact, will think more highly of you as a witness if it appears you are thinking about, and reflecting upon, your answer before speaking. Although you should not do it on every question if a question, does require thought and analysis before responding, tell the attorney that. There is nothing wrong with you saying something along the lines of: *"Please allow me a moment to think about that before I answer."* or *"please give me a moment as I want to make certain I consider your question fully and understand it before I respond."* This shows you are not simply there to spew out answers but are carefully and attentively considering each question before imparting your testimony to the members of the jury.

If you do not understand a question, or need the question repeated or rephrased, there is equally nothing wrong with your asking the attorney to repeat or rephrase the question. Again, this is not something which you should take to excess, however, if you think about the question, and truly do not believe the question is asked clearly, or you do not understand the question, politely ask the attorney to either repeat or rephrase the question.

If you do this it should not come across to the jury as if you are "battling" with the attorney or you are trying to demonstrate you have such superior knowledge and expertise the attorney does not understand enough about the issue to ask you the appropriate question. When used correctly, however, this can be a very effective tool for you to gain the respect of the jury

and show the members of the jury you truly do understand better than the attorney the issues and facts in the case.

One additional reason to consider your answer before responding is another technique which I will often use in a jury trial. Oftentimes attorneys will state something as a true fact which simply is not correct. Our hope is the witness will be so focused on answering the question they will skip over the "inaccurate fact" and we can then return to that testimony on closing argument to show the witness was in agreement with something which factually may not be correct. Let me give you the following example:

> *Q.* *Now, even though you already ruled this fire to be an act of arson before you even left the scene, would you please tell the members of the jury what you did in terms of inspection of the appliances in the home?*

If you are focused only on the latter part of that question, you may simply begin by answering by telling what you did to inspect the appliances in the home. The crucial point here, however, is to establish you had not reached your opinion regarding the fire being an act of arson at such an early phase of the investigation. The appropriate answer to this type of question would be something along the lines of the following:

> *A.* *Counselor, I will be glad to share with the members of the jury the investigation I did of the appliances, and why they were not a cause of the fire, however, before I do so I do have to correct you and point out although I suspected this fire may be arson I did not reach a final conclusion until the entirety of the investigation was completed. Now in terms of the appliances….*

The important thing is to not allow an opposing attorney to put, or even imply, erroneous facts or findings which do not accurately reflect the investigation and opinions which you are there to present to the jury.

X. ANSWER ONLY THE QUESTION YOU ARE ASKED.

Remember your duty as a witness in deposition or trial is not to win the case single-handedly and you should not carry that burden on your shoulders. Your job is to answer the questions which are asked of you both on direct and cross-examination. You further have the duty to answer those questions truthfully, completely and accurately. Do not, however, wear out your welcome in front of the jury, or try to impart all of the information you may possess in a single answer.

On direct examination avoiding this type of problem should be relatively easy if you have followed the advice in this presentation and met with the attorney in advance and even potentially done a "dry run" through of your testimony. In so doing you will not be fearful of leaving out crucial information in one answer because you will know several minutes later the attorney is going to ask you a question more directly on point so you may address the next crucial piece of your testimony.

Making certain your answers are not too boastful, but are still complete, is more difficult on cross-examination. Cross-examination by its very nature is more argumentative and often times heated. Do not fall into the trap of trying to go "toe-to-toe" with the lawyer as this is exactly what he or she wants you to do.

Remember what I earlier you are the professional and the person most knowledgeable in your field of employment and the attorney is not. Although that is true, I equally want to share with you at this point a warning. Although I have had the privilege of being involved in

insurance claims and fire investigations for more than 20 years I could no more go out to a fire scene and conduct a dig and origin investigation or handle the adjustment of a claim than you could try a complete jury trial next Monday. When you are at your desk or on a fire scene you are comfortable being there because it is your "work place" and you are acquainted with the surroundings and what you need to do your job well. Remember, an experienced trial attorney is most at home in the courtroom because that is where he or she spends the majority of their professional time. This does not mean they are smarter or craftier than you, it simply means you are on their "turf" and you need to have your guard up at all times and not fall into traps which they will set for you such as engaging in argumentative battles.

XI. "OBJECTION, YOUR HONOR!"

One of the other things you need to be aware of in giving courtroom testimony is how to handle objections. Objections may be made either in your direct examination or upon cross-examination. The important thing for you to do is cease speaking and give no further testimony until the judge rules on the objection.

Even if the question asked of you is one you want desperately to answer, you run the risk of being admonished, and even sanctioned, by the judge if you proceed to answer before the judge has issued a ruling on the objection. Your duty when an objection is made is to stop speaking immediately and await further instruction from the judge.

As you may be aware from television and movies, when an objection is made the judge will either sustain the objection, which means finding the question to be improper or inappropriate, or will overrule the objection and allow you to proceed with your answer. Listen especially carefully to the follow-up question after an objection is made which is sustained. Especially if you are on direct examination, the attorney questioning you may try to reword the

question in a more appropriate and acceptable manner to allow you to impart the same information in your answer which has been found objectionable in the earlier question. Equally important, however, if the court sustains the objection do not try to then "wedge" what would otherwise be clearly inappropriate information into an unrelated answer as you will run the risk of incurring the wrath of the judge and potentially alienating the jury.

How objections are handled in your deposition testimony is markedly different than at trial. In your deposition there will not be a judge present to rule on the objections. If the deposition had to be stopped every time an objection took place to call, or travel to the judge's courtroom for a ruling, any simple deposition would probably take days to complete. Instead the attorney should tell you in advance if he or she is going to object to the question, they will place the objection on the record but in all probability permit you to proceed with answering of the question. Although this may seem odd to you, the reason for this is the judge will review the deposition transcript and rule upon any objections prior to the actual use of the deposition at trial. If the objection by the attorney is sustained (granted) then both the question and your answer will be stricken from the record and may not be used for any purpose.

There may be certain situations where a question is asked in a deposition which is so improper the attorney will not only object but will instruct you not to answer. Should this occur, you should follow the direction of the attorney who is calling you as a witness. If the attorney is wrong in instructing you not to answer the question, it may even necessitate your returning and giving additional deposition testimony (presumably to answer that question or questions only), however, if the judge feels the instruction not to answer the question was improper then any concern the judge may have on that point should be addressed to the attorney who gave you the instruction and not to you as the witness.

XII. "THE WITNESS MAY BE EXCUSED…" OR "NO FURTHER QUESTIONS"

Finally, you will come to the point in your courtroom testimony where you hear the magical words "the witness may be excused" or in depositions, "I have no further questions". At that time your testifying experience will be concluded and hopefully it will be one of which you are proud, had at least some level of enjoyment and most importantly where you played a substantial role in the jury reaching the proper and correct decision.

Although you do not have the opportunity to read and sign your courtroom testimony (even though it is being taken down by the court reporter or electronic recording in the courtroom) in a deposition you do have the right to read and sign your deposition testimony. This right should be reviewed with you by the attorney who is calling you as a witness in the pre-deposition meeting. Under virtually all circumstances, I insist upon our witnesses being afforded the opportunity to read and sign the transcript of their deposition testimony. This insures you have the final opportunity to make certain the court reporter has taken down your testimony correctly and also helps me make certain you are prepared as a witness since you will have read your deposition testimony through in its entirety at the time you read and sign the transcript. This, by the way is separate and distinct from the three other times I want you to read that same deposition transcript to be fully prepared for your trial testimony!

XIII. A COMMENT ABOUT SEPTEMBER 11, 2001

I would be remiss to not address something which I believe is extremely important and which needs to be understood by all personal involved in trial testimony by police and fire professionals. More than any other recent event the 9/11 terrorist attacks have had a profound

impact upon our specific area of practice in insurance investigation in regard to courtroom testimony.

Before September, 2001 I would routinely try cases where we would bring in a private sector investigator whose opinion directly contradicted the local fire department officials. Generally these would be cases where the local fire department classified the fire as accidental or undetermined and the origin and cause investigator hired by the insurance carrier determined the fire to be incendiary. In those pre-9/11 cases in speaking to jurors afterwards, jurors would generally overwhelmingly be willing to consider, if appropriate, higher levels of education, training and experience of the private sector investigator over the public sector official.

In my opinion, all of that changed on that September day in 2001. I come from a family where I am the first of three generations not to serve as a police officer. I have great respect for police and fire officials as should everyone. On that fateful day, however, especially the image of firefighters in America rose to an unprecedented level of respect and gratitude. That effect carries over today into courtroom testimony in fire investigation cases.

Although there are clear exceptions, most jurors today want to believe public sector fire investigators, even if they have little or no experience or qualifications and even if they serve on an all volunteer fire department. In jurors minds these men and women are still “heroes” and their community has the absolute best firefighters available anywhere. Because of this jurors are inclined to put what may even be an inordinate amount of credibility and weight into the opinions of local police and fire department officials.

Depending upon the side of the case you are on, this can be good, or bad. The important thing you need to understand is this is a reality which we will deal with for many years to come in handling of courtroom testimony of public and private sector investigators.

If you are a member of the public sector, this is something you can certainly utilize to your advantage, although I would advise you not to overplay the issue in any respect. You simply need to be aware you are viewed with a much higher level of respect and admiration by jurors than any time previously. If you are a member of the private sector testifying against a public sector fire investigator's findings you also need to be aware of this reality. The burden is going to be even harder on you in the eyes of those jurors to establish evidence to contradict the findings of the public sector investigator.

XIV. CONCLUSION

I love living my professional life in the courtroom which is why I chose to become a trial lawyer. I realize fully you may not share my zeal for spending time in depositions or giving trial testimony. That is fully understandable. It is my hope, however, I have been able to share with you information and suggestions which will aid you in your professional career and make you a more effective witness when the courtroom door swings open for you.

Now, go out from here and do the best job of investigating you can, and testify with the best professionalism and preparation you can give. Quite simply, your clients, and our jurors, deserve nothing less from you.