

VRA – Vocational Rehabilitation Conference 2008  
Expert Evidence  
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## EXPERT VOCATIONAL EVIDENCE

### **Background- what is an expert?**

In legal proceedings, an expert is simply someone who has special knowledge that may assist the trier of fact (the judge or jury) in making decisions about the facts in a case. As a result of the special knowledge, an expert may give 'opinion' evidence. Only an expert may give an opinion. One writer described the role of an expert as follows:

“It is thought that in some cases expert evidence is simply evidence of a fact which cannot be received by an untrained person. An expert who looks through a microscope and identified a bacteria cell is perceiving a fact no less than the man who sees a robbery committed under his eyes. The difference is only that the expert is conversant with microscopes and microbes.”

Buzzard, JH., May, R. & Howard, M., *Phipson on Evidence* (London: Sweet & Maxwell, 1976).

Vocational experts also have special knowledge that may assist the trier of fact in making decisions about facts in a case. Vocational experts are usually retained in a legal action to:

1. To complete an initial assessment of a patient and make recommendations for vocational rehabilitation. A vocational therapist may be retained as an expert to carry out the recommendations, to complete a final assessment, or for a combination of these reasons;
2. To provide an opinion on a plaintiff's employability for a particular job or for any job, considering physical or cognitive impairments of the person. The expert may consider the patient's sustainability, or long term prospects or the need for vocational placement assistance;
3. For the dual purpose of assisting in active rehabilitation or treatment and to give evidence in court concerning their opinions;
4. By plaintiff or defence for an opinion and/or reply to other expert's reports; or
5. To assist counsel, and not to provide a report for court purposes.

The opinions of vocational experts on a plaintiff's current level of need and predicted future need are critical components in establishing how much financial compensation a plaintiff is entitled to. This may include services needed by a plaintiff to retain his or her present employment.

The court cannot award compensation for a plaintiff's future needs without a solid expert opinion on the precise nature of the plaintiff's present and future functional state. What the plaintiff may have achieved vocationally in the past and what he or she is now likely to achieve as a result of the injuries, must be determined by the court. In cases where lawyers become involved early in the rehabilitation process, we often retain experts who may participate in a client's life for many

years, including throughout the course of the client's recovery, rehabilitation, plateau and finally trial. In other cases, only a single assessment after a client's condition has plateaued may be requested for the purpose of determining a permanent level of impairment and providing vocational recommendations.

When considering vocational recommendations, work trials and testing in the field are often essential. Until attempts are made, any real barriers to successful re-integration into the work force may not be apparent.

### **The legal test for loss of earning capacity**

In BC the legal test for discerning loss of earning capacity is well known to lawyers as it has not changed significantly in the last 20 years. A frequently cited decision is that of Mr. Justice Finch in *Brown v. Golaiy*. The decision was in the BC Supreme Court, but the deciding judge is now the Chief Justice of the Court of Appeal. Justice Finch stated as follows:

7 In *Andrews et al. v. Grand & Toy Alberta Ltd. et al.* (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 19 N.R. 50 Dickson J., as he then was, characterized the problem of assessing a claim for lost ability to earn income in this way (p. 469 D.L.R.):

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity of which compensation must be made: *The Queen v. Jennings, supra*. A capital asset has been lost: what was its value?

8 The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;

2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

*Brown v. Golaiy, (1985) 26 B.C.L.R. (3d) 353; (1985) CarswellBC 830, BCSC*

When making these decisions, it is essential to understand that the Court is to “assess” damages, not “calculate” them. Judges who try to calculate them are considered to have made a reversible error. When making assessments the court is expected to consider both positive and negative contingencies in a plaintiff’s life. Some of these contingencies could have very significant impacts upon the ultimate assessment of damages undertaken by the court.

Loss of capacity is not the same as loss of income. In some cases, there can be an award for lost capacity without a loss of income.

### **The legal test for future care needs**

As courts do not award ‘care’, but may only award funds to pay for care (past and future) it is essential to know the legal test or standard the court will use in discerning the award. In 1977, the Supreme Court of Canada ‘capped’ non-pecuniary damages (damages for pain and suffering) at \$100,000.00. With inflation this number is approximately \$315,000.00 today. The Court also allowed injured victims to receive compensation for the goods and services that they needed to provide for their care, where the need is proved upon balance of probabilities.

In the leading case of *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 at 462 (Supreme Court of Canada), Mr. Justice Dickson explained the concept of “full compensation” for pecuniary losses, including cost of care awards, as follows:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitution in integrum* is not possible. Money is a barren substitute for health and personal happiness, but the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

The current law respecting the assessment of damages in very serious personal injury cases was described by Madame Justice McLachlin, ( then of the B.C. Supreme Court) as follows:

The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined. *Milina v. Bartsch* (1985), [49 B.C.L.R. \(2d\) 33](#) (S.C.) at p.84:

Mr. Justice Harvey in 1999 said:

In an historical perspective, here revisiting the trilogy, the test for the standard of care generally is whether a reasonably-minded person of ample means would be ready to incur the expense. When measuring reasonableness, the expense should not be a squandering of money.

*Brennan v. Singh*, [1999] B.C.J. No. 520 (S.C.)

The recent decision of *Mitchell v. We Care Health Services Inc. et al.* B.C.J. [2004] B.C.J. No. 1400 (S.C.) affirmed that this remains the legal test to be used when considering the reasonableness of a proposed expense.

### **Formal guidelines for expert reports**

The rules for admissibility of expert reports in B.C. are set out in the Supreme Court Rules, Rule 40. The basic requirements are for an expert opinion to be admissible are:

- Clearly state expert qualifications
- Clearly state and identify what is your opinion
- Clearly state the underlying facts and assumptions underpinning your opinion, and do not mix assumptions with opinions
- Avoid argument, speculation and biased or inflammatory language
- Stay within your area of expertise
- Avoid giving opinion that does not require your expertise to give, or is beyond your expertise.

Good expert reports include the following:

- A listing of all reports and records relied on, or reviewed.
- A description of what, if any, facts or assumptions were derived from the documents reviewed.
- Which facts and assumptions are relied on is clearly identified.

If these are not included, the report is objectionable and must be corrected prior to trial, or risk being ruled inadmissible in part or in its entirety.

## **Area of Expertise**

If it is only an expert who may give opinion evidence, it follows that an expert must give opinion evidence within their area of expertise. Hence the qualifications of the expert must be clearly outlined for the court. The starting point is usually a *curriculum vitae* or a summary of qualifications in the report itself. Regardless of the form it takes, a clear statement of qualifications is necessary, to define and limit the scope of opinion evidence that an expert may give. Qualifications should be complete and verifiable; this is not the place to be modest. In the case of two experts with the same apparent qualifications, they may be each entitled to give opinion evidence on the same issue. However, the differences in experience and training as between those experts, together with their demeanor and presentation on the witness stand, may be used by the court to determine how much weight or reliance to give to each opinion.

The threshold for the admission of opinion evidence is relatively low. The threshold for its acceptance in preference to another opinion is much higher.

The case of *Vallance v. Vallance* [1994] B.C.J. No. 3288 (S.C.) illustrates the principle that experts must stay within their area of expertise, or risk having their opinions ruled inadmissible. In that case, the trial judge considered the limits on the scope of an expert's expertise. In *Vallance*, several portions of a written medical report in a motor vehicle injury claim were ruled inadmissible because they were outside the expert's area of expertise. The expert, a medical doctor, described himself as an expert in "orthopaedic and spinal surgery". The following is an example of a passage that was ruled inadmissible because it ventured into the area of vocational expertise.

“No harm or damage would accrue should she choose to return to her former work as a barmaid/waitress. However, she may find this work uncomfortable and may wish to consider alternative vocations requiring less lifting. Clearly she is not totally disabled and many vocations are available in the guideline stated above. Vocational counselling may be helpful should she choose not to return to work in her former capacity.” (page 2)

The court found that the physician was not qualified to opine regarding what aspects of the job the plaintiff could or could not not perform.

A report will also be found inadmissible if it is unclear who the author of the opinion is. Joint opinions are not admissible. Each expert must be responsible for only his or her own opinion: *Heidebrecht v. Fraser-Burrard Hospital* (1995), 15 B.C.L.R. (3d) 189 at pp. 190-191).

### **Scope of expertise**

#### **Usurping the ‘role of trier’ of fact or offending the ‘ultimate issue’ rule**

Lawyers call the ‘ultimate issue’ the issue that must be decided by the judge or jury in a proceeding. A very clear example is whether a criminal accused had the intent to commit a crime. In a personal injury matter the ultimate issue can be causation, contributory negligence or the specific quantum of damages to be awarded. In general, the closer an opinion gets to the ultimate issue, the more inclined a court will be to reject it. The justification for this prohibition is said to be that such an opinion would “invade the province” or “usurp the function” of the judge or jury. :

In other words, if the expert opinion goes beyond providing the trier of fact with the tools to make a decision and actually makes the decision for them, the expert opinion may have gone too far. J. Sopinka, S. N. Lederman, A.W. Bryant, *The Law of Evidence in Canada* (Ontario: Butterworths, 1992)

In a Supreme Court decision called *Sengbusch v. Priest* (1987), 14 B.C.L.R. (2d) 26 at 40 (S.C.), the court held that:

An expert's opinion is only admissible if, and to the extent that, the opinion will furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.

Or, as stated another way by Mr. Justice Lowry in *Rowe v. Bobell Express Ltd.* [2003] B.C.J. No. 705:

It is because the subject matter is beyond the common understanding of judge and jury that assistance is required to ensure that the trier of fact draws the right inference or conclusion from the facts on which the opinion is based: *R. v. Mohan*, [1994] 2 S.C.R. 9 at 23-25.

In other words, if the expert opinion goes beyond providing the trier of fact with the tools to make a decision and actually makes the decision for them, the expert opinion will probably have gone too far. For example:

- a medical expert noting that ongoing pain will make the patient retire at 55 instead of 65
- ◆ a medical expert concluding that a court should award a plaintiff damages for a scooter instead of a wheelchair.

### **Facts and Assumptions**

While styles vary, expert opinion reports should have an identified section outlining the facts and assumptions upon which the report is based. The assumptions may be given to the expert by counsel and if given must be accepted for the purposes of the report. For example counsel may instruct the

expert as follows: “For the purpose of your report, please assume that Mr. Jones has suffered a depressed Glasgow Coma Scale of 3 for 12 hours”, or “please assume that Mr. Jones is unable as a result of his injuries to return to his former employment.” An expert should not argue about the assumptions or change them, but must accept that they are true for the purposes of the opinion to be provided.

Mr. Justice Lowry in *Rowe v. Bobell Express Ltd.* [2003] B.C.J. No. 705 gives some guidance on the matter of facts and assumptions.

Rule 40A of the Rules of Court permits the opinion of an expert witness to be proven by tendering a statement of the opinion without the necessity of the witness being called. The statement must, however, contain the facts and assumptions on which the opinion is based. As I have said before, it is my view that the statement should set out all of the facts necessary to the opinion, but only those facts: *Crutch (Guardian ad litem of) v. B.C. Womans’ Hospital et al.*, [2001] B.C.J. No. 1430 at para at 13-17.

The facts, known or assumed, should be immediately apparent. The reader should not have to cull them out of pages recording what was said in the course of interviews or observed during examinations or revealed by tests administered. Descriptions of professional assessments of that kind may be quite useful in a medical-legal report to counsel, but they are generally of little assistance and often serve only to make what should be a concise statement of opinion of an expert witness into an unnecessarily long and tedious document to read and understand.

What is necessary for the purposes of the rule is that the facts upon which the opinion is based by clearly set out, not that the evidentiary basis whereby those facts are to be proven be described. It matters not that the witness was told, or observed, or determined some fact. All that should be stated is the fact itself.

A report that does not include the facts and assumptions on which the opinion is based will be ruled inadmissible. An expert’s working papers that include the facts and assumptions will not be sufficient to cure the defect, as the goal of Rule 40A is to provide a mechanism whereby the expert’s report can be admitted into

evidence without the requiring the expert to testify: *Goerzen v. Sjolie* (1997), 142 W.A.C. 44, 86 B.C.A.C. 45 at p. 49.

The case of *Cogar Estate v. Central Mountain Air Services Ltd.* (1992), 72 B.C.L.R. (2d) (C.A.) is an example of a decision where a trial judge would not admit a report as a result of multiple flaws. The Court of Appeal upheld the trial judge's ruling because the report:

- (1) repeatedly offended the ultimate issue rule;
- (2) was replete with findings of fact that usurped the court's function;
- (3) many of the findings of fact made by Mr. Ostermueller were not of a scientific or technical nature and did not require expert opinion for their proof;
- (4) the report was a "thinly disguised argument made by a partisan advocate using slanted facts;" and
- (5) it was not possible to sever out the argument from the body of the report.

In a recent case argued by Webster and Associates, *Mitchell v. We Care Health Services Inc. et al.*, *supra* Mr. Justice Kelleher made the following comments on the approaches to cost of care by experts Ms. L for the Plaintiff and Ms. Q for the defence.

Although both experts endeavoured to assist the court, I was troubled by Ms. Q's approach to future care. She expressed surprise at the current cost of Ms. Mitchell's care and criticized that cost based on her view of the average cost of caring for a quadriplegic. Her report appears to be influenced not so much by Ms. Mitchell's needs as by what persons in similar circumstances typically require. This approach might be satisfactory when checking the eventual estimate to determine whether it is in a normal range, but the central question is what this plaintiff requires (*Mitchell v. We Care Health Services Inc. et al.* [2004] B.C.J. No. 1400 (S.C.) p. 33.)

**Source of Information: hearsay.**

The law allows hearsay evidence to support expert opinions, for example, a collateral interview. However, when relying on hearsay evidence, it is important to remember that when hearsay is a foundation for an opinion, the opinion is only as strong as the hearsay information itself. It is the lawyer's job to ensure that all the facts, and all the factual underpinnings of expert reports, whether hearsay or not, are proven in Court in order to support the opinion.

The following comments of Mr. Justice Thackray in *Anderson (Guardian ad litem of) v. Bicknell* [1998] B.C.J. No. 1847 at para 90 illustrate this point:

Mr. Justice Meredith expressed concerns about the expert's reliance on self-assessment by the plaintiff. I find that his concerns are not dissimilar to mine. The reflections from this senior judge confirm in my mind that there is merit in adopting a test of "performance", that objective evidence must be carefully considered relative to self-assessment evidence and that the reliance by experts upon such assessments and upon untested collateral evidence must be weighed with caution.

In vocational situations the need to rely upon hearsay evidence can be problematic. In a workplace assessment, a 360\* approach may be warranted and useful; however, it is probably unrealistic to expect that counsel will want to call each and every person who provided information. Many of these witnesses may have useful and specific comments that the expert would like to utilize in reaching his or her opinion. However, it may be prudent to limit the summary of observations of one or two co-workers and usually a supervisor who will be available to testify and support the opinion. Where the comments are general, this may not be an issue, but may be if the observations are specific.

### **Disclosure of the expert's file**

The expert's work when commissioned by counsel for the purpose of litigation is protected from involuntary disclosure by the doctrine of solicitor/client privilege. That privilege is a fundamental principle of Canadian justice which has evolved into a substantive rule. If the expert remains a confidential advisor to counsel, the work of the expert remains entirely confidential. This is useful when counsel has need of advice and information pertaining to a particular subject area.

However, once the expert takes the witness stand at trial everything in the expert's file must be produced to opposing counsel on request. Once the expert is testifying, the expert takes on a duty to the court and must not be partisan.

The rule is modified slightly for defence expert assessments. An undisclosed defence report is producible but only to the extent it recites what a plaintiff told the expert. That is not privileged, but the opinion is, unless voluntarily disclosed.

### **Interviews of Experts?**

Information and opinions provided by an expert retained by counsel solely as an expert are protected by solicitor-client privilege. The expert cannot be asked to disclose the information he or she possess to any third party and may not disclose it to any one without instructions to do so. That rule does not apply to a regular witness. There is no property in any other witness, and all witnesses may be asked for relevant information. An expert witness is treated the same as any other witness once the expert takes the stand. An opposing party cannot prevent counsel from speaking to his or her expert (subject to the lawyer's Canons of Ethics) on matters unless they are properly protected by legal professional privilege. *Pasco v. Bouchard*, [1987] B.C.J. No. 3100 (QL) (S.C.).

In the case of a treating practitioner, the practitioner owes a duty of confidentiality to his patient and will also owe a duty of confidentiality to counsel if counsel retains him or her as an expert in connection with litigation. However, the treating practitioner may legally be approached by defence lawyers under certain strict rules.

## **Appendix A - Preparing for Trial.**

### **Pre-Assessment**

In general, there are three types of experts who provide testimony:

1. Those who have a history with the plaintiff or “treating” experts,
2. Those who do not have a history and who are retained to provide medical opinions, following an examination.
3. Less frequently for vocational experts, those whose only role is to advise counsel, usually to assist counsel to prepare for direct or cross examination of other experts.

Non-treating experts will need to be informed about:

- the key issues in dispute in the case so as to define where they will need or want to focus the assessment
- what facts to assume or will they need to investigate so as to find the facts
- what areas of their expertise will be called upon
- the client and their personality (stoic, forthcoming, etc.)
- other relevant opinions that exist
- all available relevant records

Experts who do have a treating role may be more familiar with the plaintiff, but will need to be informed of each of the same specifics details listed above for non-treating experts.

It may be more difficult for a vocational rehab OT who has been with the client for many work trials, for example, to focus on the issues, but it is no less critical. Where there are numerous reports including from neurologists, radiologists, or others concerning a traumatic brain injury, the VRS will usually be asked to limit his or her findings to specific vocational impediments.

### **Preparing for Direct Examination**

Following early discussions with an expert or receipt of the expert’s report, instructing counsel will usually have a sense of the expert’s opinion and will be able to decide if it is useful. If not useful, counsel may ask that no report be prepared or determine that the report will not be served. That should not be a concern of the expert. The expert has been retained by the lawyer and the lawyer will determine if the expert’s opinion is required. It may not be. If not, and the

expert is not required for other purposes, the expert should send an account and normally will close their file at this time. Counsel is unlikely to reveal or provide the opinion to anyone else. If retained by the plaintiff, it is probable that the defence will never be aware that a report has been generated.

If a report is helpful, prior to service of the report expect that counsel will review the report in detail for factual errors, typos, misstatements and the like, with an eye to correcting any difficulties. This may occur at the last minute and experts should allocate some time to go through the report with the lawyer to make sure there are no problems with the report. Note: This does not involve “correcting or changing opinions.” Counsel should not attempt to do that and no expert should change an opinion to suit counsel. It does involve being sure that the vital “facts and assumptions” aspect of the report is correctly stated. This section has to be accurate.

Counsel and expert alike should check:

- To see if adverse reports have errors in facts and assumptions
- To examine the adverse opinions and determine how they may affect expert’s opinion
- If needed, experts may be retained to help counsel to prepare for cross-examination of adverse experts. They may know or be able to research suggestions for the cross examination of the expert and for counsel.

Pre-trial discussions are very important. Personal meetings are best and counsel will expect to pay for this. As well, the expert needs to budget time so that can occur. Both need to:

- Prepare ahead with the most salient issues highlighted – discuss and explain the differences of opinion, if any;
- Discuss relevant literature.

When called in direct examination, a witness may not be asked leading questions by counsel. It is essential to know this rule. An expert witness should be prepared to answer questions fully without much prompting. Typically, counsel will refer the expert to a section of the report and ask “explain that please.” A reminder that something important may have been missed is usually “Was there anything else”?

The first stage of the examination is usually the ‘qualifying’ stage and the expert will be asked about qualifications. This is, of course, vital in having opinion evidence admissible and should be completed with a tender of evidence: “I tender Dr. \_\_\_\_ as an expert in \_\_\_\_ and capable of giving the opinions in his report.” Again, the expert should be prepared to fully explain, without prompting, all of his or her qualifications, including specialty training.

The expert must be prompted to explain and expand where required, on the diagnoses, prognosis and all technical terms in the report. One method is to go through the report with the expert and advise them in advance of the terms you will be asking about. While this is proper, the decision of Mr. Justice Bouck in *Pederson v. Degelder*, 62 B.C.L.R. 253 limits the expert to clarifying the opinions in the report and not going further than that which has already been stated in the report. This case is treated by judges differently, some will allow an expert to more fully explain details in the report, others will not.

If the expert is aware of and conversant with the differences between his reports and others' opinions, medical differences are often readily explainable. It may be possible to canvas differences between different experts, without direct reference to adverse opinions that may never be put into evidence.

Opposing counsel may cross-examine on an expert's qualifications, as well as his opinions, and the ability of the expert to testify can be narrowed as a result.

### **Preparing for Cross Examination**

An expert should expect that file will or could be part of the cross examination. An expert should be prepared to deal with it in its entirety, i.e. notes, correspondence, examinations, etc.

An expert's previous testimony, previous papers and writings, may be fodder for examination. Discuss your previous works with the lawyer who has retained you. Counsel may look up and share with the expert any previous decisions that refer to opinions previously provided. The expert should be willing to answer questions about those decisions, especially if they might appear to conflict with the evidence an expert is giving now. If an expert have undertaken subsequent study or research, it may be necessary to outline the changes in the expert's qualifications over time.

If the opposing counsel has significant resources, they may be able to find an old text or article that may, with the advantage of surprise, confound the witness. Expert witnesses should expect opposing counsel to use their resources to find references to them and use that to lessen the value of the opinion you would give. They should think about the information they may be cross examined with. It is likely that counsel may give clues as to the areas of cross examination. If an expert is prepared, it is unlikely to be difficult for an expert to deal with. Surprise, resulting from inadequate preparation in the courtroom usually results in an unwanted result. While differences between the testimonies of various experts may not be fully canvassed on direct examination, a good expert should be prepared to fully explain the differences between his opinion and others on cross examination.



## Appendix A

### Practical Tips for experts giving evidence

1. Always listen carefully to the complete question before you answer. Remember to answer the asked, not that which should have been asked.
2. Always testify according to your best recollection of the facts. Not only have you sworn to do so, but a minor misrepresentation can seriously damage your credibility as an expert or as a professional.
3. Remember that all the answers you give will be transcribed by a court reporter and must be heard by the judge and counsel. You must answer all questions orally; movements, pointing and gestures are not recorded.
4. Keep your answers concise and to the point. When you have answered fully, which may only require only a “yes” or “no” stop and wait for the next question. Do not volunteer answers to questions not asked.
5. If you do not understand a question say so.
6. The counsel who called you is not allowed to ask the witness leading questions. Leading questions suggest an answer and that generally require just a “yes” or “no”. Your counsel is only able to ask open-ended questions to elicit your opinion. They are relying on you to tell the story.
7. Do not speculate. You are testifying as to your professional experience and knowledge. You will only be allowed to testify to the facts, opinions, and conclusions found in your report. You can explain the report and your opinions, but may not add opinion in direct evidence.
8. Do not underestimate opposing counsel, who will be thoroughly familiar with the facts, your opinion and other opinions. He or she will be well briefed by their own expert.
9. Be polite to opposing counsel regardless of his or her behaviour. He or she may attempt to anger, fluster or confuse you. Never argue with opposing counsel or lose your temper. It is not an uncommon tactic for counsel to try to goad you into an argument. If you react to this tactic by trying to put the lawyer in his place, you will lose that point.
10. If the Judge asks you a question, look at him or her directly when answering. Never argue with the judge. Always stop talking if the Judge starts speaking. If

the judge is taking notes be sure you are not speaking too quickly. Be particularly attentive to the instructions of the judge.

11. Do not give cute or clever answers.
12. Do not exaggerate or understate the facts. If you can only give approximate dates, times or places, do so, but specifically emphasize that your answer is only an approximation.
13. If you cannot remember an answer to a question or do not know the answer, say so. If you think the answer may be in your notes, stop and advise the questioner that the answer is in your notes and you would like to find it.
14. If one of the counsel objects to any question or answer, stop and wait. Counsel will argue about the legitimacy of the question and the judge may make a ruling. Never try to squeeze an answer in. Do not be offended by an objection.
15. Pay particular attention to opposing counsel's questions, He or she is allowed to ask leading questions and invite you to agree. Guard against agreeing automatically or out of nervousness. Be very careful that you have understood the questions. If you wish to qualify or add to your answer in any way, do so, even if counsel demands a "yes" or "no" answer. You are entitled to ask for clarification or to clarify part of premise in order to give a proper answer. However, answer only the question asked and do not volunteer information or speculate.
16. Pause before answering the opposing counsel's question if necessary to ensure you understand it. Take time to think about the question asked, if you need it.
17. Do not interrupt opposing counsel and do not answer his or her question until it is completed.
18. Remember, you may refer to your report and any exhibits filed in evidence while testifying.
19. As much as possible, express yourself in layman's language and explain any necessary terminology, especially when there is a jury.
20. Supplement opinions that arise from your personal professional experience with any studies or industry guidelines you may be relying on.
21. The standard of certainty required in a civil proceeding is "on a balance of probability," that is, greater than 50 per cent likelihood. Neither the criminal standard or "beyond reasonable doubt" nor scientific levels of proof are relevant.

