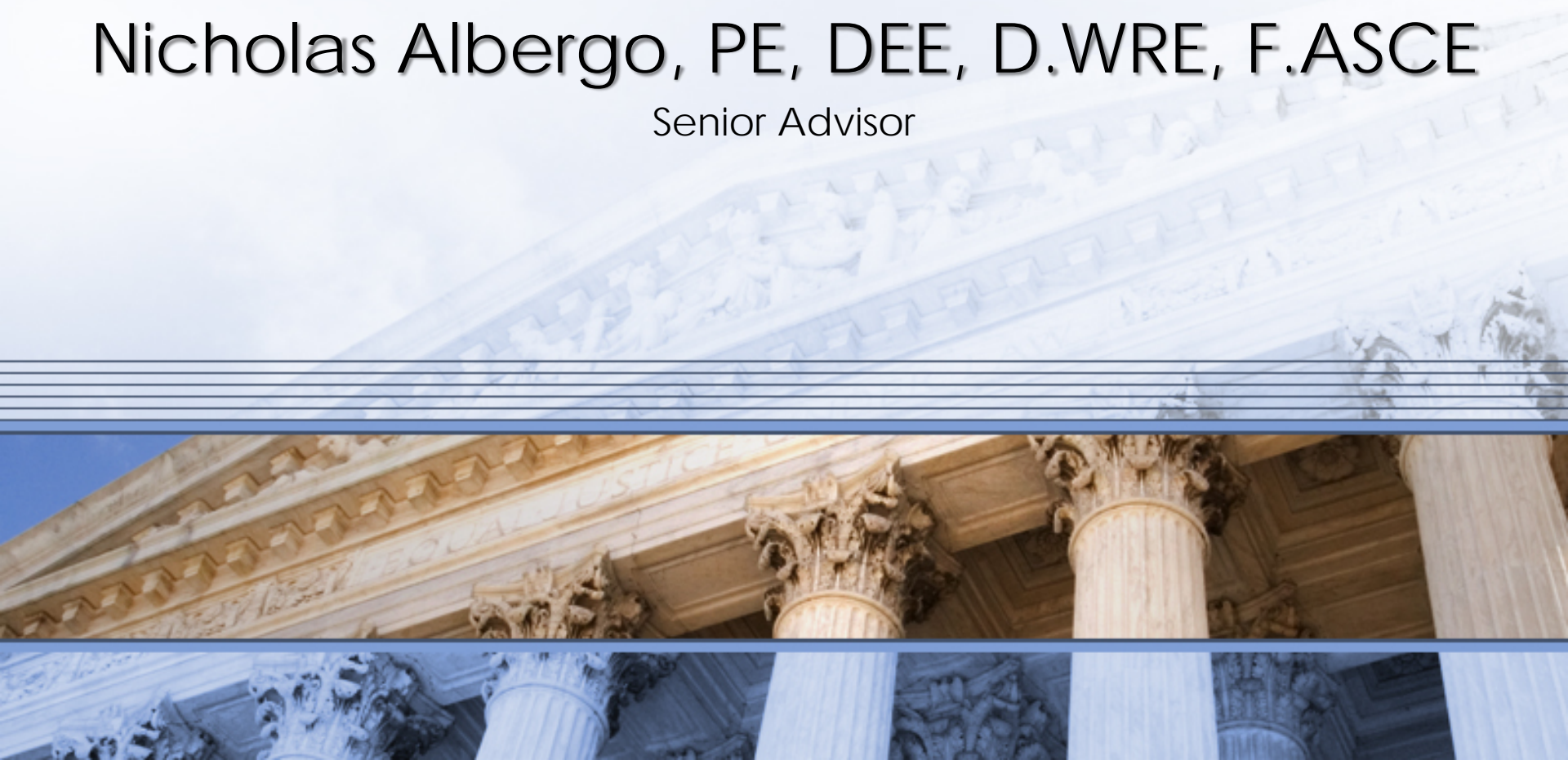


Tools to Ensure Effective Preparation and Testimony as an Engineering Professional

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Senior Advisor



Meet Your Instructor

- Nick Albergo, P.E, DEE was Founder and CEO of HSA Engineers & Scientists, a 380 person firm located in the southeast United States (HSA was sold to Conestoga-Rovers & Associates (CRA) in 2013 and CRA was sold to GHD thereafter)
- Nick wears many hats.
 - Frequent expert witness in litigation matters involving contaminant impact and cleanup.
 - Certified by the Supreme Court of Florida as a Circuit Mediator.
 - Engineering faculty at the University of South Florida
 - ASTM Vice Chair on Environmental Assessment, Risk Management and Corrective Action.
 - Co-founder and Keynote Speaker for the Florida Remediation Conference for over 20 years (700 attendees annually).
 - Patents in the area of bioremediation and authoring over 185 publications in the fields of environmental and chemical engineering.
- Broad International experience

Lecture Outcomes

- This presentation provides an overview of the factual and procedural information related to litigation, as it pertains to the function of the Engineer in the areas of:
 - What makes a credible witness?
 - How to perform a resume checkup to ensure accuracy and emphasize knowledge, experience and training
 - Managing your time
 - Preparing opinions and the substance of your testimony
 - Writing and defending your expert report
 - File management (email, document retention, etc.)
 - Strategic deposition preparation and tips to success
 - Strategic trial preparation and tips success

Types of Witnesses

- **Fact** - Testimony is typically limited to what the witness observed/performed or contributed but does not generally involve an opinion.
- **Expert** - Testimony is in the form of an opinion based on their knowledge, skill, experience, training, and/or education.
- **Character** - Testimony about the character of the individual on trial. Character witnesses are usually used by the defense to show that the accused person is of good moral character and would not be inclined to commit the crime in question because he has not shown a pattern of immorality or law-breaking behavior. They may be laypersons, such as a long-time colleague, or experts, such as the party's therapist.

Types of Privilege

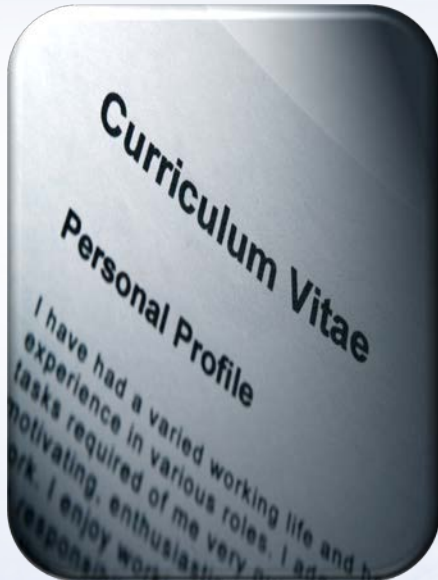
- **Attorney-Client** – Covers “communication” between the lawyer and client to seek legal assistance. Stronger than the work product privilege but protects a narrower class of materials (typically not documents).
- **Attorney Work Product** – Covers documents prepared in anticipation of litigation:
 - *Fact* – Usually pierced out of necessity.
 - *Opinion* – Usually protected unless anticipated to be presented in court.
 - *Condition* – Neither can use info in court.
- Self critical Analysis Privilege
- Joint Defense Privilege (insured & insurer)
- Trade Secrets Privilege

Fundamental Elements of a Lawsuit ("Pleadings")

- **Complaint**
- **Counterclaims**
 - Cross Claims
(multiple parties, contribution)
 - Third Party Actions
(may not have had initial involvement)
- **Discovery**
 - Deposition
 - Interrogatories
 - Request for Admissions
 - Request for Production of Documents
- **Motions**
 - To Dismiss
 - For Summary Judgment
 - In Limine
- **Trial**
- **Appeals**



What makes a credible witness?



**Your Background
(skills)**



Your Thoroughness

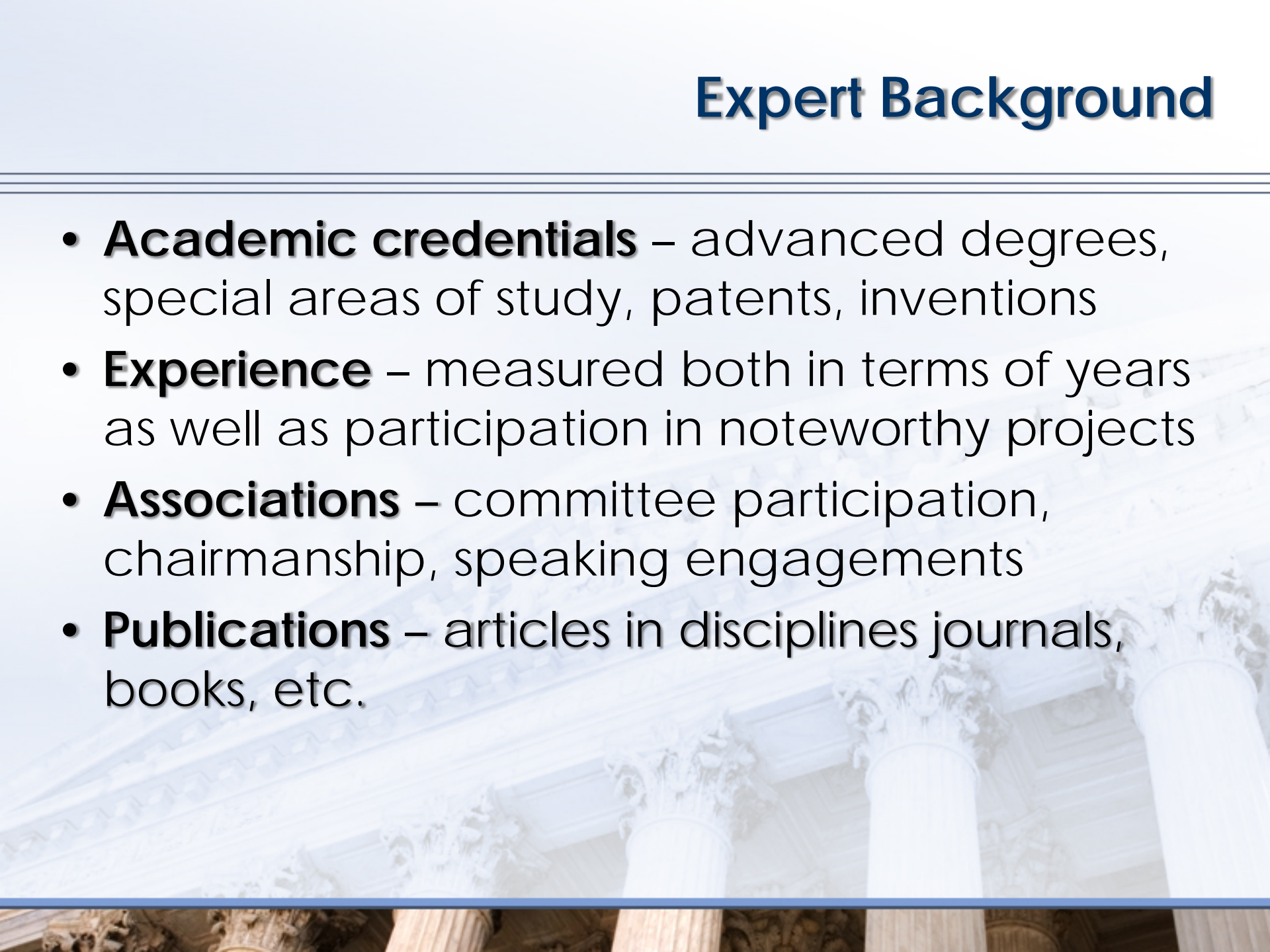


Your Clarity



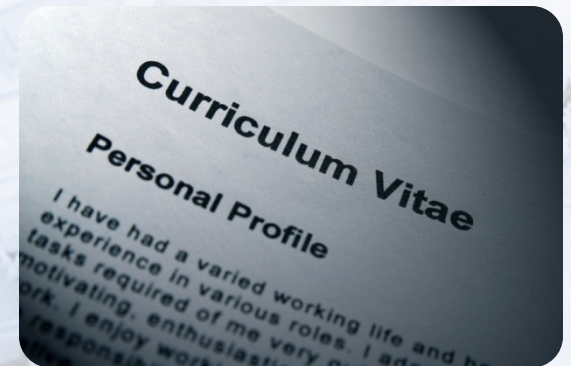
**Your Demeanor
(poise)**

Expert Background

- **Academic credentials** – advanced degrees, special areas of study, patents, inventions
 - **Experience** – measured both in terms of years as well as participation in noteworthy projects
 - **Associations** – committee participation, chairmanship, speaking engagements
 - **Publications** – articles in disciplines journals, books, etc.
- 
- The background of the slide features a faded, light-colored image of classical architecture, specifically a series of white columns supporting a decorative pediment, likely from a government or institutional building.

Verify Your CV!

- Correct position, title and duties
- Education and degrees
- Training
- Current licenses
- Areas of specialties and certifications
- Membership in professional organizations and societies
- Publications
- Teaching activities
- Professional accomplishments
- Practical experience
- Prior experience as an expert witness



Discovery Deposition Goals

Why are they taking your deposition?



Personal



Strategic

Discovery Deposition Goals - *Personal*

- Understand your opinions:
 - *What are they?*
 - *What is the basis?*
 - *How were they formed (e.g., methodology used)*
 - *When did you arrive at them?*
 - *What future tests/evaluations are you still planning?*
 - *Will you be modifying/changing your opinion(s)?*
- Establish your credentials/qualifications?
- Evaluate your credibility as a witness at trial and/or in front of a jury.

Discovery Deposition Goals - *Strategic*

- Lock down your testimony (typically for impeachment at trial)
- Probe for possible bias that can be used a trial
- Determine the factual assumptions that are the foundation of your opinion(s)
- Gather as much information as possible (*i.e.*, get educated)
- Use your opinions to help their side
- Intimidation
- Learn about the opposing sides' view of the case

Pre-deposition Conference - *Benefits*

- How do you fit in (i.e., Fact or Expert Witness)?
- What “documents” require production, what documents may be privileged, and what documents should be brought to Deposition/trial?
- What is the likely nature and type of questions that will be asked?
- How are areas of your work product that include the services of others within your firm to be handled, especially in how it affected formulating your opinions?
- Is there information pertaining to opposing counsel or other experts that might assist you in preparing for your testimony?
- Are there any Exhibits that may require preparation and that would be useful in clarifying technical matters?
- What is the likely schedule and timing of your testimony?
- What will be the venue and can it be moved?

Pre-deposition Conference – *Benefits*

(continued)

- Are there any holes or areas of concern in your report and/or approach?
- E-Mail and other extraneous communication
- Notes (what is kept in the ordinary and customary business practice?). There is no such thing as a private note privilege!



File Management

What Does “**Document**” Mean?

Each of the following original, each non-identical copy (whether different from the original by virtue of notes made or otherwise,) and any and all:

- Drafts
- Preliminary Versions
- Alterations
- Modifications
- Revisions

Changes and Amendments Including any and all:

- Handwritten
- Typewritten
- Printed
- Recorded
- Transcribed
- Punched
- Taped
- Photocopied
- Photo static
- Telecopied
- Filmed
- Microfilmed

Or otherwise prepared matter including, but not limited to, any and all.

File Management

(continued)

What is Included Amongst “Documents?”

- *Writings, Records, Reports*
- *Memoranda, Notes, Letters*
- *Minutes of Meetings, Analyses*
- *Telegrams, Telexes, Cables*
- *Electronic Mail, Mailgrams*
- *Test and/or Lab Reports*
- *Contracts, Agreements*
- *Photographs, Films, Tapes*
- *Transcripts, Correspondence*
- *Financial Statements*
- *Computer Printouts*
- *Worksheets, Notations*
- *Purchase Orders, Invoices*
- *Receipts, Ledgers, Vouchers*
- *Cancelled Checks*
- *Tables, Charts, Graphs*
- *Diaries/Diaries Entries*
- *Files, Pamphlets*
- *Papers, Deeds, Offers*
- *Grants, Assignments*
- *Amendments*
- *Post/Greeting Cards*
- *Calendars*
- *Memo/Desk Pads*
- *Tax returns, Receipts, Notations*
- *Specifications, Plans*
- *Real Estate Docs*
- *Drawings, Appraisals*
- *Work Plans, Design Information*
- *Balance Sheets*
- *Income Statements*
- *Books & Records*
- *Drafts or Bills of Exchange*
- *Compilations, Tabulations*
- *Regulations, Notices*
- *Confirmations, Prospectuses*
- *Transcriptions or recordings of telephone conversations or meetings*
- *Graphic or oral records or representations of any kind*



Document Storage/Retention

- Any other data compilation form which information can be obtained, however produced, and whether preserved in writing or on film, or downloaded to a file transfer protocol ("ftp") site, or recorded and/or copied on:
 - *Computer Disc*
 - *Laserdisc*
 - *Compact Disc*
 - *Film, Tape, Videotape*
 - *Computer card or other magnetic media*
- Or retained in a computer database(s), or any other form, and all drafts of the foregoing, which are in your possession custody, or control.



Deposition Preparation

Master the important facts from your reports

- What are your opinions?
- What is the greatest weakness in your opinion(s)?
- What were the key tasks performed?
- What methodology was used?
- Are they Scientifically Defensible?



Reasonable Degree of Scientific Certainty (Junk Science)

Daubert v. Merrell Dow Pharmaceuticals,
509 U.S. 579 (1993)

- Has the theory or technique been tested?
- Has it been subjected to peer review and publication?
- Is there a known or potential error rate?
- Is there widespread acceptance of the theory or technique within the relevant scientific community?

Video Deposition Advice

- Look presentable
- Speak to the camera and not the lawyer
- Make sure exhibits are clearly identified in camera



Video Deposition Advice

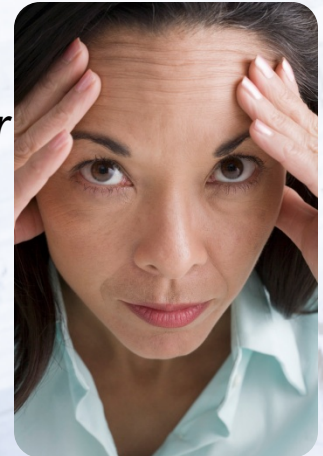
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Avoid appearing evasive, suspicious, nervous, or anxious



- *Appearing impatient*
- *Clearing your throat excessively*
- *Drumming on the table*
- *Excessive eye blinking*
- *Fidgeting with pens/pencils*
- *Gritting your teeth*
- *Head nodding or shaking*
- *Looking at watch*

- *Looks of disgust*
- *Playing with hair*
- *Rocking back in chair*
- *Shifting eyes*
- *Slouching*
- *Smirking*
- *Touching your face*
- *Wringing hands*
- *Getting distracted*



General Deposition Advice



Verbal



Location



Visual

General Deposition Advice - Verbal

- TAKE YOUR TIME!
 - *with document review*
 - *with answering questions*
 - *with repetitive questions – exercise tireless patience and politeness*
 - *allow time for objection*
- Tell the truth, simply and directly
- If you cannot answer with yes or no, advise “that appears to be the case” and leave it to counsel to decide what to do next
- Do not exaggerate
- Make counsel rephrase compound questions to a simpler form
- Avoid speculative “trap” words. I guess, I assume, I believe, It seems, I say or I estimate
- It is okay to “not know” or “not recall.”
- Listen to what is being asked
- Never waive your right to read and sign
- **Nothing is off the record!!**

Specific Deposition Advice



Specific Deposition Advice - Questions

- Don't do the lawyers job. They know way less than you. Avoid open-ended questions designed for you to teach. Let counsel pull that "Bumble and fumble" B.S. All they want.
- Beware of questions with the word "possible".
- Beware of a mischaracterization of your testimony.
- Beware of questions that begin with:
 - *Isn't it a fact?*
 - *Isn't it fair to say?*
 - *Wouldn't you agree?*
 - *Isn't it possible?*
 - *How certain are you?*
 - *Couldn't you have missed?*



Specific Deposition Advice - Answers

- Do not respond to silence! Make counsel ask another question. Don't elaborate or volunteer to "pregnant" pauses.
- Provide brief, succinct answers and wait for the next question.
- Be careful of false or inaccurate information as part of hypotheticals. Your opinion may change if the underlying facts (assumptions) change (or are false). Your opinion is based upon best info available to you and reasonably reliable
- Focus on listening to the entire question before beginning to formulate an answer (You cannot be actively listening and anticipating simultaneously .i.e., "I've heard a little and I can infer the rest.")
- Final wrap up questions – leave the door open!

Trial Hints



Deposition Mistakes

(Trial Hints continued)

Admit prior deposition mistakes quickly and move on.



Authoritative Writings – Be Careful

(Trial Hints continued)

Q: Are you familiar with the book, Groundwater by Allan Freeze and John Cherry?

A: Yes.

Q: Do you consider it an authoritative text in your industry?

A: Yes. *One of many.*

Q: Then you accept the limitations of the Darcian approach associated with flow in fractured rock.

A.: *“As with most published work, the authors or editors state things with which many in the field agree and other things in which they may disagree. Similarly, there may be things with which I agree and other things with which I may disagree. If you would like me to comment on a specific portion of the text, please provide me with the referenced page and ask me about that”*

Bullying

(Trial Hints continued)

Q: Professor Pye has reviewed your report and has determined that you have arrived at your opinion incorrectly. How do you expect the jury to believe you now?

A.: *May I see a copy of Professor Pye's report, or the document to which you refer so that I can respond to the conclusion to which you are referencing?*

Q: I withdraw the question.

Bullying

(Trial Hints continued)

Q: You are not an chemist, are you?

A: *No, I'm an engineer with substantial academic background and knowledge of chemistry and having worked for many years in the field where the knowledge chemistry and chemical reactions are paramount.*

Q: But you are not an chemist, are you? **A:** *No*

Q: You are not an Expert, are you, on the transport processes of advection, convection, and diffusion?

A: *These processes are within my area of expertise as an engineer and a scientist.*

Q: But you are not an Expert in the area of mass transfer?

A: *If you are you referring to absorption, evaporation, adsorption, drying, precipitation, membrane filtration, or distillation and can be more specific in your question, I will try to be more specific in my answer.*

Final Thoughts

- Do not show signs of boredom, exasperation, fatigue, or be argumentative. Exude
 - Confidence
 - Calmness
 - Control
 - Care
 - Coolness under fire
- Answer the question
- Remain honest/concise
- Testify to the jury/judge
- Be a knowledgeable professional
- Be meticulous with detail
- Be active in your field

