Navigating the Trial Process: A Manual for Lead Inspectors and Risk Assessors

PREPARED BY LEAD SAFE HOUSING INITIATIVES
CHILDLAW POLICY INSTITUTE/CIVITAS CHILDLAW CENTER
AT THE LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW
LAURA MCCORMACK, CLASS OF 2010, PRINCIPAL AUTHOR

IN CONSULTATION WITH

MARY BURNS, J.D., LEAD SAFE HOUSING INITIATIVES COMMUNITY PROJECTS DIRECTOR
ROBERT BURNS, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY SCHOOL OF LAW
JAMES CAREY, PROFESSOR OF LAW AND DIRECTOR, CENTER FOR ADVOCACY,
LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW
STEVEN BROOKS, MACON COUNTY ILLINOIS LEAD RISK ASSESSOR (RETIRED)

AND

WITH APPRECIATION TO
STEVEN LUBET, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY SCHOOL OF LAW
FOR USE OF THE MANUSCRIPT
EXPERT TESTIMONY: A GUIDE FOR EXPERT WITNESSES AND THE LAWYERS WHO EXAMINE THEM
NATIONAL INSTITUTE FOR TRIAL ADVOCACY, SECOND EDITION 2009

REVIEWED BY
WILLIAM C. FABER, LAW FIRM OF WILLIAM FABER, LTD., DECATUR, ILLINOIS
FRIDA FOKUM, PH.D, ILLINOIS DEPARTMENT OF PUBLIC HEALTH
ERIK GIBSON, ASSISTANT STATE'S ATTORNEY, KNOX COUNTY, ILLINOIS
CHRISTINE SHEEHAN, ASSISTANT CORPORATION COUNSEL, CITY OF CHICAGO LAW DEPARTMENT
ANITA WEINBERG, CHAIR, LEAD SAFE HOUSING TASK FORCE AND DIRECTOR,
CHILDLAW POLICY INSTITUTE/CIVITAS CHILDLAW CENTER, LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW

This manual is made possible by a grant from the Searle Funds at The Chicago Community Trust.

Table of Contents

INTRODUCTION

This manual is designed principally for lead inspectors and risk assessors who want to know what to expect if they are subpoenaed to appear as an *expert* witness at a deposition or in court. Others may find it helpful, as well. This is unfamiliar territory for those who are not lawyers. Most people feel anxious at the very thought of being asked questions in either setting and you, as an expert in the case, may need some basic information that will help you say what you know in a calm, confident manner.

We start at the beginning, when you may receive a subpoena to appear either at a deposition or at trial. A *subpoena* is a court order to appear at a certain time and place. The subpoena might also mention certain documents you are asked to provide. When you get a subpoena, notify your Department's legal office and consult with them on how to proceed. The legal department will either direct you to appear at the specified time and place or they will move to "quash" the subpoena ahead of time, which means asking the court to dismiss it. Because you are not a *party* to the lawsuit (the person suing or the person being sued), you are allowed to talk to any of the attorneys in the case. One or more of their names may be on the subpoena. You are not, however, permitted to speak to the judge about the case without the attorneys in the case being present.

Expert: a type of witness who has some level of specialized knowledge that others in the case do not.

Subpoena: a court order to appear at a certain time and place and/or to provide documents.

Party: either the person suing or the person being sued.

Deposition: an interview under oath given by a potential witness as part of pre-trial preparations.

We then discuss the steps you need to take ahead of time to prepare: forming your opinion as an expert and considering ways to get your opinion across in a credible, confident manner.

The ***deposition*** is explained next in the manual, because the deposition is often the beginning of the lawyer's case. You may need some guidance here because you probably have not seen many depositions on T.V. courtroom dramas. Depositions are important but not all that dramatic, usually. Finally, we talk about trials and your role as an expert in court.

Your role in a lead poisoning case is very important. The judge or the jury looks to you for an understanding of technical matters that go beyond their own store of knowledge. If this helps, keep in mind that even lawyers who have been practicing a while get caught up in their own questions and make funny mistakes. We include some of those lawyer questions from actual cases in this manual and a few legal cartoons to bring a smile and add some fun to our efforts to guide you through the legal process.

BEING AN EXPERT WITNESS

The types of lawsuits where you, the lead inspector or risk assessor, may be called to testify generally involve a tenant (plaintiff) suing a landlord or property owner (defendant) for injuries to their child that may have been caused by the property owner's misconduct or negligence, or cases brought by the city or state against a landlord who violated an order. There may be other types of cases in which your expertise will be called upon, and the tips from this manual apply to most lawsuit situations in which you could find yourself.

Throughout the manual we will refer to the plaintiff's lawyer and the defense lawyer. Again, the plaintiff is the party doing the suing and the defendant is the party being sued. Since it is likely that the plaintiff's lawyer will be the one who subpoenaed you and will call you at trial, for clarity purposes we will assume that she is in fact the one who will call you.

You are an *expert* in your field. An expert has some level of specialized knowledge that the others involved in the case do not. Your role is to help the judge, jury, and parties understand the details of what goes into a lead inspection, what the results mean, how those results are obtained, and any opinions you provide about the situation from your experience on the particular inspection at issue in the case. You can assume that the judge, the jury, and the lawyers in the case know little about lead poisoning and lead inspections, so it may be helpful to discuss with the plaintiff's attorney using visual aids and demonstrations during your testimony, such as photographs of what deteriorating lead paint looks like and

Lawyer: "Doctor, did you say he was shot in the woods?"

Witness: "No, I said he was shot in the lumbar region."

how an XRF gun works and what its readings mean.

As an expert witness, you will be called by one side, most likely the plaintiff. You will usually first be asked to testify at a deposition, and some time after that possibly at trial. More about the deposition later, as it is a crucial part of your role in the case, but be aware that both the deposition and any testimony at trial will be under oath and a transcript of your testimony may be prepared that can be used by the parties throughout the life of the case.

As an expert, you are to form your own opinion about what happened from the facts of this particular case and your specialized knowledge, and then explain that position as clearly and confidently as you can. It is expected that you will be making certain assumptions to arrive at your opinion. As an example of an assumption, you may assume that your XRF gun is in good working condition as of its last use. Although your assumptions may be challenged by the defense lawyer, that is all part of the process. And any challenge to your assumptions just gives you the chance to further explain yourself and bolster your position. As long as your opinion is well thought out and based on your experience and knowledge, any challenges should be welcomed by you as a chance to enhance your credibility and explain your testimony. All the process asks is that you answer questions to the best of your ability. Be truthful, forthright, candid, and cooperative. It's as simple and complicated as that.

WHAT THE LAWYERS WILL BE DOING

Both lawyers will consider their clients' stories, the evidence, and the law to develop a *theory of the case*. The theory is just the story of what that side thinks happened. Throughout the course of the lawsuit, each side presents all the evidence, testimony, and arguments it has in support of its theory. The lawyer's goal is to present these elements of her theory to the *trier of fact* (judge or jury) in such a way that he or she will also accept that same theory as the more likely account of what happened.

For example, in a case against a landlord brought by a tenant whose child has been lead poisoned, the theory of the plaintiff could be that the landlord's failure to fix the lead hazards in the home within a reasonable amount of time caused his or her child's lead poisoning. And, the defendant's theory could be that although the home had lead hazards, the child's lead poisoning was caused or worsened by a different source.

Theory of the case: the story of what a particular party thinks happened.

Trier of Fact: whoever will be making the ultimate decision in the case, either the judge or a jury.

The plaintiff has the burden of showing that his or her account is the more likely. So, you will likely be called as an expert by the plaintiff because it was you who either discovered the lead hazards or can interpret what they mean and their potential effect on the child better than the parties can. This means that the plaintiff thinks your position will probably align with her theory of the case, or at least support it.

APPROACHING YOUR ROLE

Form a Theory of Your Opinion

Just as the attorneys each have a theory of the case, you should come up with a *theory of your position.* Your theory as an expert is an overview or summary of your whole position on the subject matter of the testimony. In a sentence or two, it should state a conclusion and explain, in commonsense terms, why you are correct in reaching that conclusion. Your job is to advocate for your theory, rather than the theory of any particular side. Even if your theory aligns with one side more than the other, you are standing behind **your** theory and the facts that you used in reaching that theory, not arguing for a particular party. You should reach your theory in an objective and disinterested manner.

To arrive at your theory, first figure out what your position is regarding the issue or issues you are testifying about. Base your position on the facts you've observed and reliable inferences from those facts. Also, identify for yourself the reasons you arrived at that position, any uncertainties, and any assumptions you made. Figure out exactly what you do know, what you don't know, and what you aren't sure about. You will likely be asked about what you are assuming and what you are uncertain about. Thinking ahead about your assumptions and uncertainties and their impact on your position will prepare you to talk confidently. It is not necessary to

Theory of your position: a sentence or two summary of your entire position on the subject matter of the testimony.

Reasonable degree of certainty: the minimum requirement for the opinions you tell the court. As long as you have sufficient confidence in your opinion to rely on it in your professional activities, such opinion meets this requirement.

have 100% certainty, as long as you explain your reasoning. **Reasonable assumptions and limited uncertainty are not weaknesses in your position;** they are expected in expert testimony.

On that note, most courts require that an expert's opinion be stated *"to a reasonable degree of certainty"* within the standards of the relevant field. Although "a reasonable degree" is difficult to define, that's for lawyers to worry and argue about. What's important for you about "reasonable degree" is that your opinion doesn't have to be 100% certain to be valid. If you have sufficient confidence in your opinion to rely on it in your professional activities, then you should feel secure in that opinion. Also keep in mind that "reasonable certainty" is just a minimum requirement for the expression of an expert opinion. If you have more confidence in your opinion, don't hesitate to say so.

Having a firm understanding of your opinion, including how you arrived at your conclusions, builds your confidence and credibility. And, developing a theory that is a few sentences summary of your position will give your testimony focus and help keep you on track. Anything you present should be relevant to that theory. A coherent theory gives the fact finder a context for understanding the details of your work.

Expressing Credibility with a Solid Theory

You are an important witness in the case, both at the deposition and the trial. Your testimony may be very important to the outcome of the case. The judge knows that, any jury will know that, and the parties certainly know that. Everyone needs to hear what you have to say in order to make sense of the case. You start out being credible. With a solid theory and some forethought about where you might have to explain certain assumptions, your credibility will stay intact.

Legal professionals have identified what makes an expert witness credible: coherent overview, clear narrative, comprehensiveness, command of information, rapport, fluency of pace, language, appearance, and demeanor. Presenting a coherent overview of your position, a clear narrative, being in command of your information, and covering everything that needs to be covered allows the trier of fact to

understand you and builds credibility. These four elements are essentially taken care of with a well thought-out theory. Without a well-articulated theory, your opinion runs the risk of appearing as nothing more than a collection of technicalities or bald declarations.

The last five elements—rapport, fluency of pace, language, and appearance and demeanor—are especially important at trial in front of a judge or a jury. Once you've grown comfortable with your theory and have developed a command over the information you're presenting, you will find these easier to manage. Ease of communication, visible comfort level, and the ability to speak without stammering or pausing too long all create a justified appearance of knowledge and reliability. An ideal speaking pace is fast enough to be reassuring, but not so fast as to seem nervous or devious.

What makes a witness credible:

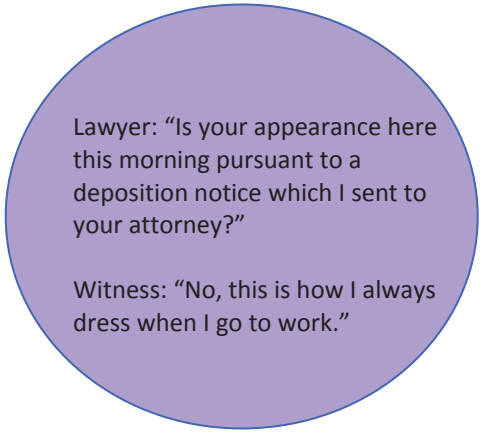
- Coherent Overview
- Clear Narrative
- Comprehensiveness
- Command of Information
- Rapport
- Fluency of Pace
- Language
- Appearance
- Demeanor

The trier of fact cannot avoid judgments based upon perception, so expert witnesses must be aware that certain behaviors, whatever their actual cause, may be perceived as signifying something else to a judge or jury. The following can affect someone's perception of you in a positive way: posture and eye contact, business attire, concise organization, conversational language, varied format, and use of illustrations and analogies. On the other hand, the following can affect people's perception negatively: abrupt responses, rambling answers, hesitation, constant self-references, anger or aggression, arrogance or condescension, and shifting posture or folded arms. Keep this in mind during your testimony. Again, a command of the information you are presenting in the form of a thought-out theory should put you at ease and cause these more unconscious elements to fall into place. Just be truthful, forthright, candid, and cooperative.

Mastering a Deposition: What to Expect

What is a Deposition?

A deposition is an interview under oath given by a potential witness as part of pre-trial preparations. Its purpose is for the parties to learn what the witness knows and to give all parties access to the witness' possible testimony. Often, a deposition is taken at a time when the parties don't even know if the case will go to trial. Since lawyers take depositions to learn what the witnesses have to say, depositions often cover everything that might conceivably be relevant to the case, and they can frequently seem disorganized and disjointed. Lawyers might jump from subject to subject, raise and drop points, return to earlier topics, and make no attempt to elicit a single linear narrative. Usually, your deposition will be taken by the defense lawyer and she will ask most of the questions. This is because she wants to get a sense of what you might testify to at trial and the basis for your positions. Occasionally, the plaintiff's lawyer will take your deposition to "preserve your testimony" in case you are unavailable for trial. Legal counsel from your department will most likely attend the deposition with you.



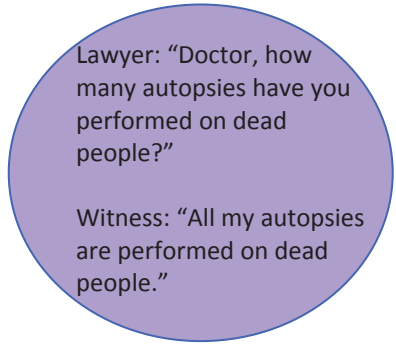
The deposition questioning is different from (in fact, pretty much the opposite of) how lawyers will question you at trial. At trial, the goal of the lawyer calling you is to bring out a specific point through a coherent and logical narrative. At the deposition stage, the lawyers may be asking everything they can think of so that they can eventually develop a logical narrative of your testimony, but they aren't there yet so be prepared for

a disjointed deposition. Time limits for depositions vary from state to state, but there is no restriction on the number of questions a lawyer can ask you. You have a right to breaks during the deposition questioning. Some lawyers will forge ahead tirelessly with the examination, but you are not required to endure hours of uninterrupted questioning. You are entitled to a break whenever you feel like taking one, or if you need to consult with counsel. Under some circumstances you can even continue the deposition on a later date if you are feeling sick or something is going on that could interfere with your ability to testify clearly and correctly. If this happens, your legal counsel will request a continuance for you.

Because many lawsuits settle before trial, your deposition could be the only testimony you give in the case. So, although the lawyer's questions won't be designed to allow you to give a coherent narrative, you should still approach your deposition testimony with the strategy outlined above: before the deposition, develop your theory and organize the information you used to reach your conclusions.

What to Expect

Although depositions are official proceedings, they almost always are held outside of court. At least one lawyer for each party will attend and so will a court reporter. Legal counsel from your department may also be present. Sometimes the parties themselves attend and occasionally the defense lawyer will bring her own expert to observe. Often, no judge is present so the atmosphere is typically somewhat informal. Even so, most witnesses feel more comfortable and professional in business clothes although there is no rule about dress. However you choose to dress, your demeanor should be professional and cooperative.



In preparing for your deposition, in addition to developing the theory of your testimony, it might be a good idea to do some basic research of the literature in your field (online, popular newspapers, journals, etc.). Many

lawyers in toxic substance cases have some knowledge of the topics involved and have consulted popular news and literature resources to obtain that knowledge base. So a conscientious witness will get familiar with the materials out there relating to the issues affecting the deposition.

During the deposition, each lawyer will be trying to use the information you give her in a way that will help her win the case. **Only answer the question that is asked, but give a fair answer to THAT question.** If the questioner wants more information, she will ask for it. Lawyers are trained to chase down any paths that might lead to something useful. Your answers may come from facts of the case, your research and testing, your knowledge of the area, your experience in the field, or your professional judgment based on training and education. Here is an example of answering more than the question asked:

> Q: In your experience and training, a home that was built in 1920, what sort of probability of lead paint would you judge there?
> A: Probably was painted with lead paint. *But as far as hazards, it depends on the maintenance of that property.*

Notice that the answer addresses the existence of hazards, something the question doesn't ask.

Since the deposition is likely to be somewhat disjointed, you may not completely understand the full implications of the lawyer's questions. No problem. As we have seen, the lawyers themselves are still in the information gathering stage, so they may also not fully understand the implications of their own questions. It is important to answer honestly even, and especially, if that means **qualifying your answers**. Here is an example.

> Q: With regard to the age of the home or structure, how does the age of the home affect, in your experience, the probability of lead based paint?
> A: Usually, the older the home, the more chance it has of having lead paint, *especially if the house was built before 1960.*

The Actual Examination

Lawyers have a general strategy for questioning witnesses in a deposition *examination*. They begin with some introductory and open-ended questions that invite you to share knowledge. And, particularly with experts, they need to inquire into your expertise, background, and education before they really get into the details of your testimony. It is a good idea to bring a copy of your Curriculum Vitae or Résumé to the deposition (and to the courtroom) because you may be asked details about your professional history. The defense lawyer may be seeking to establish the limits of your expertise. In the initial questions, you may also be asked how you became involved in the litigation and whether you are receiving payment. The following series of questions is an example of what the beginning of a deposition examination might look like.

> Examination: The series of questions you'll be asked by each lawyer.
>
> At the deposition, the examination will likely be conducted by the defense lawyer. At trial, the plaintiff's lawyer will conduct a direct examination and the defense lawyer will cross-examine you. Stay tuned for those fun details.

Q: Could you state your name for the record please?
A: John Smith.

Q: And you're with the Anytown Health Department?
A: Yes.

Q: What is your position with the Anytown Health Department?
A: I am an environmental health specialist and inspector.

Q: What does that job entail?
A: Many different hats. I do food inspections, plan reviews for new restaurants, nuisance complaints, investigations for lead poisoning…

Q: With regard to lead-based paint, what is your responsibility?
A: Well, when the department receives documentation from a doctor or laboratory that there is a child with an elevated blood lead level,

it is my responsibility to go test the residence to determine how that child became lead poisoned.

Q: Any other responsibilities with regard to lead paint?
A: Then I write a report for my department. In some cases, I will meet with the owner and explain what they need to do.

Q: Anything else?
A: That's about it.

Q: What training have you had with regard to lead paint investigations?
A: I was licensed as a lead inspector in 1996. In 1997, I became a licensed risk assessor. I get re-licensed every three years and have annual training.

Q: About how many inspections have you done in your career?
A: Hundreds.

Q: When were you first contacted about this case?
A: About a year ago.

Q: Have you testified in these types of cases before?
A: Yes. Once or twice.

Q: Is there a fee arrangement for your services in this case?
A: No.

After the background and preliminaries are out of the way, the questions become more pointed and are designed to explore some of the topics that were raised in the introduction and fill in details.

Q: Are you a member of any organizations relevant to your field?
A: Yes.

Q: Which organizations?
A: I am a member of the Anytown Lead Safe Housing Task Force.

Q: Can you tell us what the task force is and what its purpose is?
A: The task force is a coalition of advocacy groups, inspectors, health departments, and real estate professionals who meet every few months to strategize lead poisoning prevention efforts in Anytown.

Q: Lead based paint, what is it and what harm does it present to young children?

A: Lead was a very useful additive to paint as it preserved the paint and the shine. It was used until 1978 when it was banned because it can cause lead poisoning. In children lead poisoning can lead to difficulty learning to read, speech and language problems, aggression, and hyperactivity. At the highest levels it can cause seizures and even death.

If you are given a document at any point during your examination and asked a question about it, always read the entire document before answering. It is also not a good idea to answer any questions about a document without having it in front of you. If you need to see the document again (lawyers call this "refreshing your recollection") before you answer, you have a right to do so.

The lawyer may also pose questions toward the end of the examination that ask you to give your opinion. For example, toward the end of your testimony, the lawyer might ask, "Is there any further basis for your opinion," or "are there any more conclusions you have?" If you have presented all the information you have, instead of answering no, an appropriate answer to these types of questions is, "not at this time." Especially at the deposition, it is helpful to leave the door open on your opinions in case new evidence gets uncovered in the time before trial.

The end of the questioning tries to close off the important points with questions that themselves suggest the answer to you. These are called *leading questions*. Be mindful of these questions that lead you to a "yes" or "no" answer, especially long-winded questions packed with information. Before agreeing or disagreeing, be sure that all of what the lawyer said is accurate. It's fine to ask the lawyer to repeat the question.

Leading Question: a question that itself suggests a "yes" or "no" answer.

It's also fine for you to answer with a qualified "yes" or "no." It may be unintentional on the part of the lawyers, but **don't let words be put in your mouth**. Both attorneys may ask you leading questions. But, be particularly on your toes about leading questions by the defense lawyer.

Here is an example, emphasized in italics, of tricky leading questions that the witness handled well:

Q: With respect to a person, he or she can hire someone to test his or her building. Separate and apart from bringing in paint chips to the department, how does one go about finding somebody who can do this testing?
A: The easiest way is to go on to Anytown Department of Health's website. They have a listing of all licensed lead risk assessors, lead inspectors, lead supervisors, and contractors that work with lead.

Q: How does a person know, in your experience, to get on the website to try to find this information?
A: I'm not sure. All of the information that's given out usually mentions Anytown's website.

Q: In your experience, is it common knowledge that the general public can go to this website for this information?
A: I don't know. I don't know what the general public does. A lot of the general public doesn't have computer access. I do know that.

Q: And I understand that. But I'm asking in your experience, doesn't it appear that only a few people that you communicate with know that they could have had testing done?
A: Some do. Some don't.

Q: Based on your experience, would you agree that it is not generally known within the Anytown community concerning these some 35,000 pre-1978 homes, that people can, in fact, get access to the contractors who can come in and physically conduct a test for lead based paint?
A: I just don't know the answer to that.

Q: But that's probably true, isn't it?
A: I just don't know.

The best way to handle this leading examination is thorough preparation, self-confidence, and steady concentration. You will survive well so long as you have done your work, you believe in your position, and you listen carefully to the questions.

At the end of the defense lawyer's questions, the plaintiff's lawyer has the chance to ask some clarifying questions. So, if you made a mistake or were confronted with a prior statement that is inconsistent with a current position, the lawyer who will call you at trial has the opportunity to question you and clear up any confusion. In other words, although misstatements or ambiguities may seem serious as they occur, they may end up either trivial in the greater context of the case or cleaned up by the lawyer who will call you at trial.

If at any point in the examination one of the lawyers makes an objection, just stop and wait for the lawyers to finish their discussion. Also, don't worry about their argument with each other as it will likely be more about legal formalities than your testimony.

"Objection, leading the witness."

After the deposition, you will be given the opportunity to review your testimony in order to correct any errors and ensure that it accurately reflects your testimony that day. This is not, however, an opportunity to change your testimony. You may be asked to pass up the opportunity to read and sign your deposition testimony. This is called waiving signature. If you choose to waive your signature, whether your deposition transcript is correct or not, it will be accepted as your sworn testimony. You should never waive this opportunity. When you request to review your testimony, the court will prepare a transcript and provide it to you at some point in the days following the deposition. There will be instructions for signing or making corrections if you need to.

COPING WITH COUNSEL: DEPOSITION AND TRIAL

It is an expert's job to be truthful, forthright, and candid. There is no need for you to strategize, camouflage your opinions, or obscure information. Even if you are playing your role fairly, this unfortunately may not prevent lawyers from baiting, harassing, intimidating, beguiling, or otherwise trying to take advantage of you.

Trial professionals have also identified five principles to help witnesses cope during an examination:

(1) Avoid universal commitment
(2) Do not argue with counsel
(3) Resist free association
(4) Do not fill silences with words
(5) Do not hide mistakes or errors

- *Avoid Universal Commitment*: It is a common technique for lawyers to draw a witness into stating an opinion in the form of a broad universal assertion. Then, after the witness has committed to that universal principle, the lawyer will reduce it to absurdity by applying it to new facts and circumstances. Below is an example, emphasized in italics, of the questioner trying to get the witness to commit to a universal principle.

Lawyer: "Now sir, I'm sure you are an intelligent and honest man—"

Witness: "Thank you. If I weren't under oath, I'd return the compliment."

Q: With respect to the lead testing kits, that's not something you would recommend somebody really use?
A: There are all kinds of products on the market to be used for that purpose. The accuracy of some of these test kits is in question.

Q: *So you are recommending that they never be used?*
A: Well, testing kits can be used to give a person a general idea of whether or not lead is present, even though there are false positives and false negatives. Testing many surfaces can give someone an idea of whether they have a lead problem or not. Then, if they do, they can contact the health department for further information.

If, in answer to the italicized question, the witness said that she didn't recommend test kits, she would have committed to the principle that they are unreliable. Later on, if the lawyer asked about the reliability of test kits to determine generally if there was a lead problem, it would be trickier for the witness to then say that the test kits were fine for that purpose. It wouldn't be the end of the world, but it makes things more complicated and may make you appear less competent. That situation could look like this.

Q: I gather that it is your position that you would not recommend using home lead tests because their accuracy is questionable, correct?
A: Yes.

Q: So it would be your opinion that no person should use home lead tests to determine if they have a lead problem generally?
A: Well, I didn't say that. They could be used to determine if there is a problem.

Q: But you said that home testing kits were inaccurate?

Watch out for these words that could lead you to make a Universal Commitment:

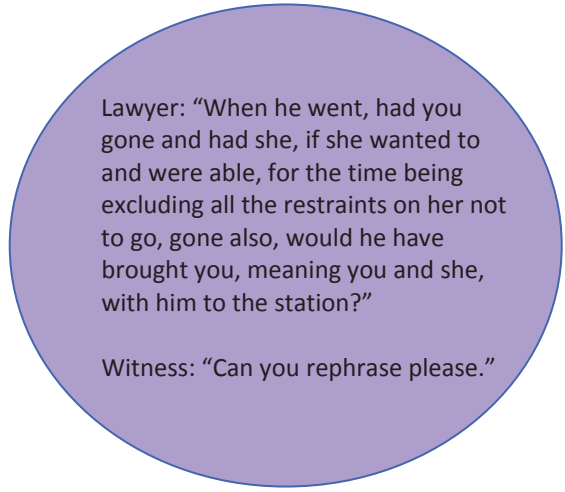
- Only
- Never
- Always
- Must
- Best
- Greatest
- Foremost
- Everything

Again, this is not the end of the world because you likely will be given a chance to explain. But, you are now being forced to concede that your original "principle" is not as ironclad as you claimed. The trap was laid, and you were led into overstating your opinion. Look out for these traps especially when

the lawyers are using superlative words and phrases in the question—like only, never, always, must, best, greatest, foremost, or everything—signals that a qualified answer on your part would be more accurate.

- *Don't Argue*: As we have said, your role in the case is to educate everyone and express your opinion. Keep in mind, however, that when it comes to your relationship with the defense attorney, her job is not to be educated by you, but rather she is trying to find the gaps or weaknesses in your opinion. Therefore, jousting with a skillful lawyer is a contest that you cannot win. There is a difference between arguing with the lawyer and qualifying your answers and clarifying. If there really is an ambiguity in her question that you need the lawyer to clear up, say something about that. But, don't nitpick the wording of a question if it doesn't affect the substance of your answer. You will never "convince" the defense lawyer of the truth of your position.

- *Resist Free Association*: Some experts are inclined to think out loud during a deposition, openly speculating about possible alternatives. The defense lawyer can encourage this tendency since your random thoughts may eventually include a misstatement or contradiction. Listen to your answer in your own mind before you begin to speak.



- *Compulsion to Answer*: No witness can answer every question. It's never a good idea to speculate, especially on the likelihood or probability that some event could occur. If you don't know the right answer, don't guess. You should not be hesitant to say, "I don't know," or "I don't remember," if that is the most accurate response. Even if the question seems as extreme as "Is there one chance in a million that it

could have happened this way," your answer should be "I don't Know." You also shouldn't worry about saying you don't understand if the question is ambiguous, vague, convoluted, or otherwise unanswerable. Also, the stenographic transcript of the deposition doesn't reflect pauses in your testimony, so you can pause and think for as long as you want after a question and the transcript will read the same as though you had answered immediately.

- *Don't Hide Mistakes:* Everyone makes mistakes, even the best prepared witnesses and lawyers. It is much worse to hide a mistake or try to obscure it than it is to acknowledge and explain it. Remember that the plaintiff's lawyer has the opportunity to ask you clarifying questions after the defense lawyer's examination.

TESTIFYING AT TRIAL

Everything discussed until now applies to trial testimony as well as deposition testimony. There are only a few additional points to know about trial testimony: there will be some differences in the manner of questioning by both attorneys, and there are some differences to keep in mind when you are communicating with a jury.

Direct and Cross-Examinations

Once the case has reached the point of trial, each attorney has developed a solid theory of the case and knows which pieces of evidence they will present in support of that theory. One of those pieces of evidence is your testimony. So in contrast to the deposition, the purpose of which was more information gathering, your *direct examination* during trial will be more focused. The defense lawyer is the lawyer who mostly questioned you during the deposition. In contrast, at trial your direct examination will be done by the plaintiff's lawyer, the lawyer who called you. She will be trying to elicit from you a more linear narrative that leads to a particular conclusion. Your answers should still be honest and cooperative, and you should recall that you are advocating your own position rather than that of a particular party, but expect both lawyers may be more pointed in their questioning.
At some point between the deposition and the trial, the plaintiff's lawyer should meet with you to prepare. During this preparation, you'll discuss the etiquette of trial, her theory, and the questions that she will ask you when you're on the stand. She will go over with you most of the questions ahead of time because during direct examination she is not allowed to ask leading questions. It's important for you to know where the examination is headed beforehand so you can be prepared to answer.

After the plaintiff's lawyer asks her series of questions, the defense lawyer will *cross-examine* you. Cross-examination questions generally

take the form of leading questions. Recall that the deposition is an official court record. So anything that you say in court that is different than what you said at your deposition is fair game for an attack, as are relevant reports you made, such as your original lead inspection documents. Often on cross-examination witnesses are confronted with their own earlier statements. Most witnesses are at least surprised, if not visibly upset, when confronted with their own prior statement that may seem inconsistent with their current position. This is an important reason for you to study carefully your deposition transcript and any other written statements you have made, such as in reports, before testifying at trial. Invariably, the witness strains to explain why the earlier statement is not actually inconsistent with his or her current testimony. The witness may be totally correct, but cross-examination is sometimes unfair and the insistence on arguing may diminish credibility. Since the plaintiff's lawyer will have a chance to question you again at trial after the cross-examination, don't worry. Let her do her job. She will create an opportunity for you to explain on *redirect examination* if she determines that it is beneficial to her case to do so. Thus, at trial it can be a useful strategy to just admit (and not be afraid of) any seeming inconsistencies during cross-examination because on re-direct examination, if it's an important point, you will be given a full, unapologetic opportunity to explain. Take our example about the lead testing kits from above:

Direct Examination: The series of questions at trial that the plaintiff's lawyer will ask you. This will be your main testimony.

Cross Examination: The series of follow-up questions the defense lawyer will ask you after your direct examination. Likely many, if not all, of the questions will be leading questions.

Redirect Examination: The follow-up questions to your cross examination that the plaintiff's lawyer will ask you.

Q: I gather that it is your position that you would not recommend using home lead tests because their accuracy is questionable, correct?

A: Yes.

Q: So it would be your opinion that no person should use home lead tests to determine if they have a lead problem generally?
A: Well, I didn't say that. They could be used to determine if there is a problem.

Q: But you said at your deposition that the home testing kits were inaccurate?
A: Well, yes.

Now, on redirect examination, here's what will happen if this is an important issue to the case of the plaintiff's lawyer.

Q: Mr. Inspector, when you said that home testing kits are inaccurate, did you mean they are inaccurate for every purpose?
A: Of course not. They are inaccurate as a determinant of the extent of a lead hazard. Lead tests are fine to use to determine IF there may be a lead problem. Then, if there may be, the home owner should contact the health department.

No matter how grueling or damaging the cross-examination seems, the plaintiff's lawyer will have the opportunity for redirect examination. This will give you the chance to explain every important factor in detail. In addition to taking comfort in the fact that you will have a chance to explain any flubbed answers, there are other techniques that you can employ to ease the tension of cross-examination.

To ease the tension of cross-examination:
- Cooperate as much as possible
- You don't have to answer "yes" or "no"
- Stay calm
- Think before answering
- Understand the question
- Make reasonable concessions
- Recognize any legal standards

- *Cooperate as much as possible*: The cross-examiner is not your enemy. It is just her job to ask questions, even difficult questions, and it is your job to answer them as well as you can. A cooperative witness will want to explain her opinion to the cross-examiner, not defend it inflexibly. **Cooperation can be disarming and can often diffuse very tense situations**. But, cooperation should not be

confused with passivity. There is no need to agree with everything the lawyer says or suggests. As usual, do not let words be put in your mouth and don't be led into agreeing with false, misleading, or over general propositions.

"NO, YOU MAY NOT GIVE YOUR ANSWERS A MUSICAL TWIST!"

- *You don't have to answer "yes" or "no:"* The cross-examining lawyer's goal is to dominate the examination and control your testimony. And often their way of doing this is by asking questions that get one word, yes or no answers from you. Leading questions. You can, however, try to give an accurate, cooperative response to a yes or no question using a full sentence. To the extent that you can, do answer with a full sentence.

    Q: Your determination of lead hazards on the property was based on the readings from your XRF gun, correct?
    A: Yes. I used the XRF gun because it is recognized in the field as the most reliable tool available.

- *Stay Calm:* Losing your composure pleases the cross-examiner because it could make you look biased or partisan. As an advocate for her client, the cross-examining lawyer is entitled to show emotion over the case. For you as an expert, however, emotion conflicts with dispassion and therefore takes away from your credibility. Sometimes, though, it is reasonable and unavoidable to show indignation if for some reason you are being unjustly attacked. Nonetheless, your goal should be to maintain composure. The more

riled up the lawyer gets, the more you should strive to remain unperturbed.

- *Think before answering:* Cross examination questions may be challenging, misleading, improper, coercive, unfair, or impossible to follow. You will be wise to listen carefully to the question and think before answering. This is sometimes easier said than done because many aspects of courtroom procedure discourage taking time to think, and the rhythm of cross-examination itself creates urgency for answers. Silence can also be very uncomfortable when you are sitting on the witness stand in the hot seat. And, extended silences and awkward delays are barriers to communication and can suggest that you are uncertain. So, you as an expert are caught between a rock and a hard place: your reply is probably coming too quickly if you answer instinctually, but your response may seem too hesitant if you take too long. What should you do? Pause briefly, but not unnaturally, before answering all questions, even if they seem straightforward. If you are faced with a truly complicated or challenging question, there is no way to avoid some silence, but you can eliminate awkwardness simply by letting everyone know that you are thinking. Say something like, "Let me think about that for a moment." Ultimately, of course, it is better to take too long while answering correctly than it is to answer quickly (and perhaps damagingly).

- *Understand the question:* Most questions should be straightforward, but you should not answer unless you are certain you understand. Some questions could be vague, convoluted, ambiguous, or worse. The easiest approach is to just ask for an explanation.

  Q: With regard to hazards to young children, what does your training and experience tell you about the hazards presented by deteriorating lead paint or lead paint hazards to children?
  A: I'm not sure I understand the question.

  Q: What hazards does lead-based paint, hazardous lead-based paint, present to young children?

Also, if a question is difficult to understand you could rephrase the question yourself in your answer. You can start your answer with a statement like, "If I understand you correctly, you are asking me…" Then answer your own question.

If you answer a question without first being sure that you understand it, you may find out later that you answered a very different question. For example, a question that asks you if you have "reviewed" a particular document could mean either that you read the document thoroughly or that you merely scanned it.

- *Make reasonable concessions:* There are two sides to every case. All expert opinions will have some statements that can be used to support the opposing party; therefore, almost all cross examinations will involve certain concessions. Your comfort level and your confidence can actually be enhanced when you readily make reasonable concessions unapologetically. In circumstances where a concession is unavoidable and harmful to your opinion, you should make the concession without a fuss because if you don't, it will draw unnecessary attention to it. Also, you will likely be asked about what you did not evaluate in reaching your opinion. Even though most of these omissions are irrelevant or trivial, that might not prevent the attorney from attempting to score points. Though this list of omissions might come off as embarrassing, keep in mind that for every matter that you didn't consider, there is something that you did consider. And, it is the exercise of your professional judgment that allows you to choose what to consider in the first place. Willingness to concede the obvious is a sign of professionalism and objectivity. In the following example, suppose that during the direct examination the plaintiff's lawyer had used some pictures of the home at issue in her questioning. The cross examiner then asks:

  Q: The photographs that Mr. Smith showed you were taken just under two years after you tested. You would expect the exterior windows to look more deteriorated 22 months after, wouldn't you?
  A: Yes.

  Q: You didn't take any photographs of the subject, correct?
  A: No. We did not.

- *Recognize any legal standards:* Expert witnesses are often expected to translate their findings into language consistent with statutory requirements. This can pose a problem since the legal rules may be somewhat different than how you gather your findings and draw your conclusions. Nevertheless, you can't deny the relevance of the particular legal standard. The challenge is to provide a professionally competent and legally relevant answer. Here is an example.

  Q: Is the function of the XRF gun to make a determination of the lead paint by surface area?
  A: Yes. It gives a reading of milligrams per square centimeter.

  Q: With regard to the risk assessment forms where you have identified specific locations of lead hazards, is it your opinion that those hazards, the lead levels that you found in your investigation using the XRF gun, were in excess of the Anytown city ordinance restricting lead to 0.06 by weight?
  A: Well, we don't measure 0.06 by weight. We measure milligrams per centimeter square with the XRF. Any reading over 1 is considered lead paint, and that surface considered a lead paint hazard if it is peeling or deteriorated.

  Q: Were your XRF findings in excess of the 0.06 by weight ordinance?
  A: Probably would be. Without knowing an exact conversion factor, 9.9 milligrams per centimeter square is as high as our XRF machine reads, and the lead hazards found in this home all read at the 9.9 maximum.

Building a Relationship with the Finder of Fact

We touched earlier on the elements of credibility. As we have mentioned, the fact finder will determine which facts are believable and relevant and apply those facts to the law involved in reaching the decision in the case. Either a judge or jury will be the fact finder. Establishing and maintaining credibility is especially important if a jury is involved. In addition to what we already covered on credibility, it is important as an expert to communicate with the jury. Your testimony is addressed to them more than to anyone else, so make sure you are comfortable talking to them. Look at them when you answer. Be conversational. The lawyers are asking you questions and you are answering their questions for the benefit of the jury. You are serving as a

kind of teacher. So, to the extent that you can, describe your opinions in lay person's terms. Also try to explain technical terms in a way that an ordinary person would understand. Consider the following example to illustrate the definition of lead poisoning as 10 micrograms per deciliter (µg /dL) of blood.

> A: To understand how small 10 micrograms of lead is, picture a pack of sweetener you put in your coffee. That packet holds 1 million micrograms. A deciliter is about half a cup. So 10 micrograms of lead in a deciliter of blood meets the Centers for Disease Control and Prevention's definition of lead poisoning.

Clearly, the trial setting is more formal than the deposition setting. But don't be intimidated by formalities. Answer honestly the questions that are asked and keep in mind that you are prepared, qualified, and confident.

CONCLUSION

With thorough preparation and an understanding of the trial process and your role as an expert witness, the experience of testifying at a deposition or at trial should be a positive one. The knowledge and experience you have gained throughout your career can make a difference in the outcome of a case and can help the judge or jury "get it right." We hope that this manual serves as a navigation tool to help you find your way through the legal worlds of deposition and trial.

Good luck!

"This manual will make an excellent learning aid to many."
- Steven Brooks, Macon County Illinois Lead Risk Assessor (Retired)

"Looks great and reads well. I like the breezy tone and layout. The manual will be a great help."
-*William Faber,* Law Firm of William Faber, Ltd., Decatur, Illinois

"Well written and very informational."
-Erik Gibson, Assistant State's Attorney, Knox County, Illinois

"This manual meets the biggest challenge in translating adjudication procedures into intelligible principles. It is clear, concise and concrete."
-James P. Carey, Professor of Law and Director, Center for Advocacy,
Loyola University Chicago School of Law

Eliminating Childhood Lead Poisoning

ChildLaw Policy Institute/Civitas ChildLaw Center
Loyola University Chicago School of Law
25 East Pearson Street, Suite 1107
Chicago, Illinois 60611
Phone – 312.915.6481
www.leadsafeillinois.org

2009