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Expert Witness 201:
Achieving Success in a Time of Economic Downturn

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Introduction

As with so many other areas of the economy, safety professionals have seen their share of cutbacks, or even the outright elimination of positions within the safety field. The economic downturn has significantly affected the way that many of us do our jobs. Often, there are fewer people who we need to attend to. In other cases, the programs that we provide have to be significantly reduced or outright eliminated due to the lack of funding. And for those safety professionals who are self-employed or who work for firms that provide services to other organizations, the loss of clients due to business failures or reductions has impacted us significantly. While there are hopes that a recovery is on the horizon, that horizon may sometimes feel like the proverbial rainbow with a pot of gold waiting for us. No matter how close it seems, it is always just a little further down the road.

One area that has not seen as significant a reduction for many safety professionals is that of litigation consultation. For many, the area of litigation consultation is often just dismissed as being one of serving as an expert witness. However the field is much broader in scope. Many safety professionals are finding new work in the area and finding it to be both financially profitable, as well as opening up areas that are challenging and rewarding on many levels.

There is actually a whole range of areas where a qualified safety professional may be able to work and make a difference. With the increasingly large recession and downturn in the economy, many in the legal field are predicting even more work, as former employees are increasingly blowing the whistle or filing lawsuits against their former employers. Further, some experts are predicting that with continued and prolonged cutbacks in many safety programs due to the economy, more accidents could result from those cutbacks. For those safety professionals who are qualified, there are numerous opportunities that could lead to new career moves. But not

everyone is ready to work in the legal arena, and not everyone is going to be successful. While the rewards and challenges are high, the competition for qualified "experts" is also increasing.

This paper will expand on the basic Expert Witness 101 paper and presentation that was presented at the 2009 Professional Development Conference of the American Society of Safety Professionals. In it, we will explore ways that a safety professional can set themselves apart from others who are working in the field. We will explore some of the common mistakes made by those working in the various fields. and will identify ways to overcome those and thus become more successful. To help set up the information that is presented, we will also review some of the basic issues related to serving in the area of litigation consultation and will present a short overview of the typical process involved in resolving a lawsuit. Many of the items discussed were obtained from discussions with a number of attorneys who use litigation consultants and expert witnesses in their work. They were asked about their use of experts and others, and in how they go about selecting and using them in the course of their work.

Background on the Process: Expert Witnesses and Litigation Consultants

As most of us who have worked in the legal world previously know, safety professionals and others who work with attorneys do so in various capacities, which range from the obvious to the not-so-obvious. In many cases, much of your work may be done before the case is even filed. In many circumstances, you will work as a consultant to help determine whether there is a cause of action or a breech of duty by someone that led to the accident or incident. This work is termed litigation consultation, and is performed behind the scenes by a non-disclosed person. Your background and expertise in a particular area is often beneficial to a law firm or attorney who is trying to make a decision as to whether or not some type of legal action is indicated or in determining the amount of fault that a particular party may have in a given set of circumstances.

Even when a lawsuit or other cause of action is filed, some work is done by the safety professional, working solely as a litigation consultant, which is also not disclosed to the other parties. In such cases, the litigation consultant will work with the team to help review the facts and guide the attorneys or others into areas that may be pertinent or need further exploration. They may conduct testing for the parties or conduct research that may or may not be used. The non-designated litigation consultants are allowed to work invisibly behind the scenes and are awarded attorney-client privilege protection. This allows them to explore areas that may or may not be used in the proceedings. For all intents and purposes, you will be doing exactly the same type of work in many cases as you do on a regular basis. In the case of legal consultant work, the work product may later need to be disclosed in a legal proceeding should one be filed and they be designated at that time.

As we also know from prior experience or training, the privilege of not disclosing work or action is not the case when it comes to the designated or disclosed expert witness. Such experts are allowed to testify and present an opinion related to the facts of the case or even to hypothetical situations presented in the course of their testimony. For the disclosed expert, everything, yes, everything that is said or done is discoverable by the opposition, and must be disclosed when requested by the other party. All written documents, including field notes, are subject to full disclosure and scrutiny by the other parties in the case.

Mistake Number 1: Charging More for Legal Work

In interviewing attorneys and law firms in preparation for this paper, one of the first items identified by them was the issue of money. Their complaint was not in how much was charged, but rather that the charges were different because the work that they asked for was for a legal case. Many people who work in the legal areas of occupational health and safety believe that, since the stakes of the cases are significantly high, the cost of their services should reflect that. However, this can be a double-edged sword.

One attorney stated it very simply by saying that if you charge $100 an hour for taking samples and performing an analysis on a particular area on a regular basis, you should charge the same when asked to do this for the legal matter. To him and others, it is a simple matter of fairness. Why should he pay for identical services at a higher rate when the work is exactly the same? Clearly this is true for much of the consultation side of the legal work that you could be involved with. If you want to get the work in the first place, set a fair price for your services and that is consistent with your standard rates for similar work or services. Certainly, it can be changed for the work involved in providing actual testimony in a deposition or in trial, since the rigors and level of expertise in these areas is different than normal work services.

A good way to work around this is to have a sliding scale of charges that you can use for legal work. In many cases, the safety professional who works in the legal arena charges his standard hourly consultation rate for research, reading, preparation for trial, and reports. This rate is consistent with other consultation and related work that is done for clients in a non-legal situation. Since the work and services are the same, the price that is charged is the same.

However, when it comes to providing actual testimony, either in a deposition or a trial, the rates increase by a factor of about 50%, or even higher in some cases. The increase is due to the fact that this part of the work in providing actual testimony is considerably more difficult, involves more stress since the work is often challenged, and often is the most critical to the actual success of the project. Most attorneys understand this and are willing to pay the premium for those services that are not customary or the norm for the safety professional.

So, the first of the key points to make you more successful is to be fair in your billing. Don’t simply double the rates because the work involved may potentially be used in a trial.

A second aspect of pricing involves setting fair rates in the first place. Charging too much may make you less likely to be hired initially, but charging too little may make it seem that you’re not worth the value. The rates that are charged by those in these fields can vary from less than $100 per hour to thousands of dollars per day of work, regardless of how many hours you put in on a given day. The amount you charge is based on the value that you bring to the case, and this is often referred to as how much water you can carry.

To go about setting your rates, you might consider asking around to others who offer similar services, confirming that your service fees are consistent with others who have similar credentials. Your colleagues can often tell you what they charge for their basic services. If your rates are in line with the norm, you should have a good idea of what to charge for those standard services. The premium for testimony comes from your ability to be persuasive in your presentation and to make the complicated matters, which those in the safety field often take for granted, more easily understood by others who may have limited knowledge of the subject matter.

Finally, there is considerable value in having the ability to effectively communicate your positions or opinions. We all know of really smart people who cannot elaborate on even the simplest aspects of their work. But if you are also an effective public speaker who can clearly and concisely convey your findings and opinions, your worth is increased significantly and attorneys are willing to pay for this. As you speak, remember to adjust your language to the intended audience. In the end, the amount you get paid is a direct reflection on your value to the team, and the more credibility and horsepower that you possess, the more you can charge.

Mistake Number 2: Overstating Your Qualifications

Another of the commonly discussed issues with the use of an expert or litigation consultant is that of overstating your qualifications and areas of expertise. While much of the work of safety professionals is diverse, you cannot be an expert in every subject category. For example, while your work may involve some application of ergonomics to help in your workplace, and while you might have done this for many years, you would not necessarily pass the test of being the best for a case involving ergonomic issues.

What makes you qualified for work in various areas of the legal arena is direct education and very focused experience in a particular area. Using the example of ergonomics that we used above, someone who is an expert in this field would have more than the basic training that one may have to manage the simple, day-to-day ergonomic issues at their workplace. Even though you have done this for a number of years, you are not as qualified as someone whose sole job is working in the ergonomic field, and you should not say that you are qualified in that area.

However, while this is the case, it is also important that you do not understate your qualifications. It is not uncommon for an attorney to try to demine your background by showing you are not qualified because you do not have specific knowledge of one aspect of the case. Such was the case where an accident occurred involving a particular type of excavator. The use of the equipment caused an injury, due to the fact that a pre-shift/use inspection was not conducted. In the course of the questioning, the attorney kept questioning the expert during the deposition as to his direct experience with the specific make and model of excavator involved in the accident. The line of questioning could have caused the expert to be taken aback for a bit, and even question himself. However the expert was able to present his opinion regarding the more global aspects of the case, one that did not involve the direct experience with the particular equipment type, but rather with the requirement that all mobile equipment, such as the excavator in question must be inspected prior to operation regardless of the make and model. While the expert in this case had never operated that type of excavator, or any excavator for that matter, he was able to get the point across that he was qualified in this instance to provide an opinion related to the safe and compliant operation of the unit and to not be intimidated in the process.

Mistake Number 3: Testimony Errors

While there are numerous areas that create problems for those wanting to become and remain successful working in the area of legal issues, some of the most common mistakes that make you less effective and less successful in your work relate to the manner in which your testimony is presented. Attorneys use several commonly employed tactics to diminish the effectiveness of your opinions. While it would not be possible to adequately present every one of those tactics, following is a short example of some of the ones used along with a short explanation of how to adjust or respond.

The Bully. The first of the techniques that will be discussed is that of bullying the witness. For many who are new to providing testimony, the opposing attorney will often try to

force you to be hesitant by challenging you on many areas of your work. An example of this would be when they ask you for each and every written document ever prepared for a case that you are involved with. In going through these, they may challenge you on minute details that have nothing to do with the case but which put you back on your heels and make you hesitant to testify.

Anecdotally, this occurred to me when I was asked for a particular date that something happened. In response, I reviewed my day planner that had a single line entry of when a conversation occurred. The attorney asking the question confronted me as to why a copy of my day planner was not in the packet that I had provided to them as part of the subpoena for the deposition. At this point they took my day planner and made copies of the entry for no other reason than to intimidate me early in the process. Needless to say, had I let that get to me, the remainder of the day would not have gone as well as I would have liked.

Countering the bully or intimidation techniques is actually straightforward and not complicated. Here are the recommendations for taking on someone who is confrontational:

1. Be really prepared before you go into the deposition. Have all of your files organized, so that you can quickly produce the materials requested. Ensure before you go into the files that materials are complete, and that you haven't omitted anything.
2. Study the history of the opposing counsel through a review of their prior questioning of previous witnesses as you review the written materials provided to you. This will help anticipate both the issues that they are interested in, as well as the manner of their questioning. Remember that the punch that knocks you out most often is the one you don't see coming, so preparation is one of the keys with a bully or intimidation tactic.
3. Next, when you are being questioned, consciously remember that one of the goals of the attorney may be to get you flustered, and keep you from remembering things or helping you to make mistakes as you testify. Be slow and deliberate, and always remember to go slowly through your files to help you stay on track and become less flustered. Again, the more familiar you are with the case materials and facts, the better you will be able to respond without being intimidated.
4. In all of your responses, remain the gentleman (or woman) that you are and do not respond to the intimidation in anything other than a polite manner. Do not let the heat of the moment cloud the manner in which you respond, regardless of how you are asked the questions.

The Blank Piece of Paper Technique. During the course of providing a deposition or testimony in trial, some attorneys will sometimes resort to holding up a piece of paper and spending time reviewing it. Since you cannot see the paper, the attorney may take some time to study what is there, even though the paper may be completely blank. During this, you are wondering about what is there that is so important as to take up this amount of time. Following this, the attorney may go off into an area where they state things that are intended to get you off your game and derail what may have been a series of good responses that are in opposition to what they want to hear. All the while, you are wondering what was on the paper. By using the paper technique, they cause you to question things about what you are saying. Often, they will come back to you with a line of questions that misstate previous testimony and cause you to back pedal a bit.

Again, the manner to counter this tactic is fairly obvious to those who have some experience in dealing with it. The method is to carefully collect your thoughts about what is being asked and to not let the time delay bother you. Following this technique, ask for clarification as to the questions being asked including what was the basis of the question. In some cases, you can ask to see the context of the line of questions so that you can appropriately respond. But don't get suckered into believing what they say solely on the basis of them having a piece of paper in their hand. Stay with the facts, as they are the reason for your being there in the first place.

The Columbo Technique. The final commonly used tactic is what is referred to as the "Columbo method." As you may recall, Peter Falk played a detective in an older television show. In the show, the often-disheveled actor, who usually had a cigar in his fingers, would disarm people by the manner in which he questioned them, since he looked and acted like someone who did not know what they were doing. He would start and stop lines of questioning and ask things out of order. However, in the end, usually when he was leaving the room, he would pause and ask the question for which he had set them up. It was usually through this process that the answers he was looking for were provided.

Much like Columbo, some attorneys will not be organized in their questioning. In some cases, this could be related to their degree of preparation for the deposition. However, do not allow the lack of organization on their part derail your organization as you respond to the questions. Keep on track, answer the questions directly, and let the facts speak for themselves. In your response, you may need to be more measured, and answer the question that was asked directly with a simple answer. Then, if there is additional information that is important to getting to the truth of the matter, offer to provide that as well using your own format of presentation.

<u>Mistake Number 4: Documentation</u>

The issues involved with documentation related to your work in the legal arena would fill an entire textbook. However there are a few areas that are worthy of an overview as we conclude the discussion on common mistakes that will make you less successful. The primary thrust of these issues involves the amount of material that you document and how you document it. Remember that everything that you have written as a disclosed expert witness is fully discoverable by all parties involved in the legal action. Your written reports, including drafts, need to be clear and direct. The handwritten notes that are in your files and that you use in the process of developing your opinions are also open to scrutiny, so always be conscious of this as you write.

Many qualified and successful experts have developed a number of techniques and methods to document their work. One proven technique that is helpful in organizing files in preparation for testimony or even reports is to organize the information into areas. My personal favorite is to have a single document that is a master file. In my master file I have sections for the following:

1. **Time log**. A listing of the date, amount of time, and work activities that were performed in relation to the case.
2. **Personnel log**. A listing of the names, titles, and organizations for each key person in the case. This can be broken into groups, based on the organizations or parties in the lawsuit. It is also helpful to include the names of the attorneys who represent the various parties, so you can formulate ideas related to their methods of interviewing and areas that they think are important.
3. **Items Reviewed**. In this section, list of all of the materials that were reviewed in preparation for the case. This list is very specific, and details the title of every document

that was reviewed, as well as the specific regulations or other materials that were consulted in the work.

4. **Notes**. In this section, you should have the information that you obtained during your research and review. Putting it into a table or column format can help direct you to where it was found in the research and what was said. This can help later as you formulate your opinions, in that it will give you background on how you arrived at them.
5. **Opinions.** The final part of your log could be a section that contains the opinions that you will present. Often, it is helpful to number them and then refer back to the notes that you relied upon to come to that conclusion. By doing this, the opinions are based on the facts that were detailed in the note section, rather than simply conjecture on your part. It is hard to argue against the opinions that are based on the facts presented. In order to counter the conclusions or opinions, the opposition must dispute the facts that were presented.

Conclusion

This paper has explored some of the techniques that can be used by those who are successful working in the field of litigation and legal consultation as either a consultant or designated expert. While it is not expected to present all of the issues that would make one successful in this field, it should provide the reader with a background on what is involved and help to make them more effective in their work. Additionally, it is hoped that by providing this material, the safety professional will have a better understanding of the issues confronting those working in the legal arena should they have an interest in working in it.