

Retaining a Business Resumption Planning Expert Witness, Part 3



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Date: Dec 16, 2010

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Potentially, you could be called some day to be a witness in a lawsuit. Your role would not only be important to the party for whom you appear, but also for the American system of justice. For a jury judge to make a wise decision they must decide on facts stated by competent professional witnesses who have sworn to tell the truth. People like you. In Part 3 of his three-part series, Leo Wrobel tells you exactly what you need to do and not do when serving as a witness.

In [Part 2](#) of this series, we promised you a view from the other side of the table regarding this subject from the lawyers. I actually got some tongue-in-cheek emails about the topic, some of which were quite humorous. As luck would have it, however, the lawyer I was going to use is consumed at present with a large case. Therefore, I did a little research on my own and found there is actually quite a bit out there on the topic.

Surprise, surprise the advice from lawyers that we found comports largely with the tips we gave you in the first two articles. Even so, this third and final article comes at the issue from a different perspective and we are sure you will glean a morsel or two here

What to Do and Not Do if Called as a Witness

Being called as a witness may make you nervous. Understanding what you are expected to do and how to do it will ease the anxiety and make you a better witness. Therefore, if and when you are called:

1. **Do not ignore a summons to appear in court** . Failure to appear in response to a subpoena could place you in contempt of court. That's a bad way to start.
2. **Follow the instructions attached to the subpoena** . For example, if there are instructions to call the lawyer who requested the summons for information as to when to appear for the trial, it is important that you do so.
3. **Review all the facts of the case before your court appearance** . If you are called as a witness, the lawyer on the case will discuss it with you before the trial. There is nothing improper in this. The lawyer has to find out in advance what you know about the case. If you are ever asked while testifying, do not hesitate to say that you have discussed the case with the attorney who called you as a witness; it's quite normal.
4. **Be truthful** . You are under oath when testifying and can be prosecuted for perjury if you lie. Don't let your personal judgment of who should win or lose color your testimony.
5. **Take your time** . Think carefully before you speak. You may be nervous, but do not answer questions before you fully understand them. It's okay to ask for the question to be rephrased, as will give you extra time to answer.
6. **Speak clearly** . Answer all questions clearly and loudly enough so everyone in the courtroom can hear you. A low tone of voice not only detracts from the value of your testimony, but it also may make the jury assume you aren't sure about what you're saying. Talk at a moderate rate, and do not mumble words.
7. **Listen carefully** . Do not attempt to guess at questions you don't hear or understand. If you do not know the answer to a question, simply state that you do not know the answer; do not try to tell people with you-know-what.
8. **Answer questions directly** . Give a simple answer *only* to the question asked. If a question can be answered with a "yes" or "no," do so. If you make a mistake when answering a question, correct it immediately. Don't volunteer extra information that could be used to trap you into a fishing expedition by opposing counsel (e.g., new lines of questioning).
9. **Do not fly off the handle** . Never argue with the lawyer asking the questions, even if he is an idiot opposing counsel like some of the ones I have had to deal with. Keep your composure, and act professionally. The opposing counsel will not be Roy Rogers or Dale Carnegie, and will probably test your patience.
10. **When someone objects, STOP your testimony** . If one of the lawyers raises an objection, or if the judge

speaks, stop your testimony immediately. Don't try to complete your answer. Listen to the objection carefully so you understand why it is being made.

11. **Try to be yourself.** Be natural and relax. If you tell the truth and remember you are just talking to me neighbor on the jury, you will do just fine.
12. **Help the attorney, if requested, with depositions and discovery.** A *deposition* is written testimony that is given outside the courtroom. Depositions are used, among other things, to help attorneys determine what potential witnesses know about a particular matter. In a deposition, lawyers for both sides and a court reporter (stenographer) are present. The witness is sworn in, just as in a courtroom, and everything said is under oath. In many instances, he or she will eventually be called to serve as a witness for the attorneys who have reviewed their deposition. Both sides will have a copy of the testimony provided by the expert witness during the deposition. Therefore, if you are the witness and change your story when later appearing in court, you will lose your credibility as a witness. Don't do it. Oh, by the way, if witnesses lie while giving a deposition, they may be prosecuted for perjury just as they would if they lie while under oath on the witness stand.

During the *discovery phase* of the case, both sides endeavor to learn as much about the opponent's case as possible. To a non-attorney, the discovery process may appear to be somewhat illogical, because your team may appear to be handing over its game plan to the opposing side. The process might also appear a little intimidating because the opposing side will use discovery to probe for weaknesses and gauge the most likely strategy to open your arguments.

As an expert witness, if you understand the reasons behind discovery, you will be less intimidated and a more effective witness. Talk to the attorney about discovery and your role in it in more detail.

Know Your Case!

Even a PhD level of technical knowledge will not help you testify if you do not have a working knowledge of the *facts* of your case. Preparation is the key to effectively educating the jury. As we pointed out in the last articles, good professional witnesses consider the courtroom their classroom, hence the reference to educating the jury.

If a witness fails to know all the intimate details of the case in which they are involved, it could end up costing him or her big time in terms of credibility. The same can be said about attorneys. Even lawyers who specialize in specific areas are oftentimes a mile wide and two inches deep in terms of their technical knowledge. They need to be well briefed by the technical professional. Oftentimes lawyers can discover a great deal about a case or the potential for a case by consulting with an expert beforehand. At that time, the expert witness, another technologist, or both can provide the attorney with a passable working knowledge about the technical aspects of the case.

Exhibits and pictures are especially helpful in the briefing process, and can be used later to help illustrate the case and educate the jury. During what is known as the pre-trial phase of a case, the expert witness and legal team will become even more familiar with the case, and with one another, essentially in forming a bond and partnership to assure your side prevails.

We hope these tips help you if you are ever called as a professional witness and we wish you the best of luck in any such endeavor.
