GIVING A DEPOSITION IN A HIGHWAY NEGLIGENCE CASE

By Daniel S. Turner, Professor and Head of
Civil Engineering Department
University of Alabama

INTRODUCTION

A Horrible Nightmare

Joe Highway Engineer felt queasy. His stomach churned and his knees almost buckled as he struggled to walk to the front of the courtroom. When he took the witness stand and faced the jury, the feeling became worse. Sweat was gushing from every pore of his body. He was lightheaded, his throat was dry and he was struggling to maintain his composure as the plaintiff's attorney marched toward him. This was the moment he had been dreading for months.

Two hours later Joe knew with certainty why he had dreaded this date with destiny. By now his clothes were drenched. The opposing attorney, Tiger Brown, certainly deserved his reputation as a hatchet man. He had chewed Joe up one side and down the other. Joe was horribly frustrated. Every time he had tried to explain the special reasons for his innovative design, the attorney made mincemeat out of him. He was thoroughly confused and embarrassed. He had no idea how to answer the questions without making a fool of himself.

The frustration reached a climax when the plaintiff's attorney picked up a typed document. He turned to face the jury but spoke to Joe saying, "Now Mr. Engineer, I have just heard you try to explain why you thought your design was so superior, even though it killed the husband of my client. Your explanation seems to have changed completely since your sworn deposition of just six months ago. I am going to read the statements you made about your design during that deposition. Then I want you to tell the jury WHICH IS THE TRUTH: what you said THEN or what you are saying NOW".

Joe suddenly sat upright in bed. His nightmare had returned. Could anything be worse than his lingering fear of going to court? He shuddered and tried to go back to sleep, knowing that this nightmare would continue to haunt him.

The Story Is Real

This scenario is repeated all too frequently in the United States. Today's highway officials are finding themselves hauled before judges at an alarming rate. This frequently comes as a shock to managers whose decisions have never been challenged in court. Now they find themselves awash in a morass of legal issues. Their productivity suffers and their frustration builds.

Highway engineers usually base their decisions upon careful analysis of data and thorough planning in order to obtain the best possible product for the public's money. The legal system is confounding to them because it does not seem to work this responsively or this directly. The situation is beyond their direct control. Decisions regarding huge sums of money are made by judges and juries who often do not even understand the technical issues and who may be swayed by technicalities or legal mumbo-jumbo.

Highway managers must realize that suing and being sued is a way of life in our nation. Private industry is used to the concept; all good corporations have staffs of the best attorneys that they can hire. The public sector is not accustomed to being sued, perhaps because it was shielded from suits for over 100 years by the principle of sovereign immunity. Now that the courts and legislatures are removing sovereign immunity, highway agencies must learn to function in a different legal environment. Highway employees must accept the fact that a portion of their time and resources must be devoted to legal issues.

Why Highway Employees Give Depositions

Highway employees may expect to give depositions for several reasons. First, they or their agency might be named as the defendant in the suit. Second, they might have firsthand knowledge of facts pertinent to the case. For example, they might have seen the accident, or they might have had knowledge of the alleged roadway deficiency which caused the accident. Third, they might be called upon as an outside party to establish the prevailing standard of care. For example, a plaintiff might call upon the state traffic engineer to testify which traffic control devices may be used in a private parking lot.

Purpose Of This Paper

This paper has been written to assist engineers in understanding the legal system with which they must learn to deal. In particular, the paper discusses the purpose and nature of depositions, and their role in identifying evidence about the key issues being contested in a legal case. The paper provides practical information regarding preparation to give a deposition, and reviews helpful tips for giving testimony during a deposition.

LEGAL ACTIONS IN A CIVIL TRIAL

Highway negligence cases are normally heard by the state court system as a matter of civil law. The rules and procedures which govern such cases are usually defined by state code. Although the code, rules, and procedures may differ slightly from state to state, the general principles are much the same.

The person bringing the suit is the plaintiff. The suit is usually initiated when the plaintiff files a complaint with the clerk of the court. The clerk then sends a copy of the complaint along with a summons (a citation to appear in court) to the person being sued, the defendant. The summons places the defendant on notice to file an answer to the allegations of the complaint or to file a pleading, attacking the complaint. (1) After the answer has been filed, the case is then said to be at issue. This means that the complaint and the answer are not in agreement about key issues, and factual and legal disputes exist between the parties.

At this point, the attorneys begin serious maneuvers to provide the soundest possible foundation upon which to build their positions. They conduct investigations and identify sources of evidence. They form strategies for preparing and trying the case. They frequently request that the court rule on pre-trial matters, presented in the form of motions (motion for summary judgment, motion to supress evidence, etc.). It is normal for the attorney to jockey back and forth, taking both offensive and defensive actions to gain the upper hand. (2)

Even prior to this step, many plaintiff attorneys will have done extensive work to determine whether they had a case. They or their investigators might have had many informal contacts with highway employees to obtain documents, statements or interviews. Highway officials need to be aware of these contacts, and of how to respond to them.

The Discovery Process

Every American has watched enough television to know how trials are conducted. The attorney that has center stage at ten minutes before the hour will win the case. A surprise witness will burst through the door, or a trusted aide of the attorney will run into the courtroom with the missing pistol, or the arrogant witness will suddenly have an attack of conscience upon being confronted with pictures of him and his secretary in a compromising position. Court cases are simple, whoever controls the floor ten minutes before the end of the show wins the trial.

The issue is obviously more complex than that. The "Perry Mason" syndrome has disappeared from American courts. The element of dramatic courtroom surprise has been removed, mainly due to "discovery", a clearly defined set of pre-trial procedures the court has made available so that evidence can be discovered. Attorneys now have the opportunity to know the strengths and weaknesses of both sides of the case long before the trial begins. It is now a common practice for most lawsuits to be settled sometime prior to trial, based upon the attorneys' knowledge of the facts (and their knowledge of who would probably win the case).

The Nature of Discovery. The discovery process consists of a series of actions sanctioned by the court so that the attorney can gather data about the issues being contested. There are two guiding principles to discovery:

(1) Every party to litigation is entitled to secure all evidence, information, and documents germane to issues, even if they are in possession of an adverse party, and

(2) such evidence, information and documents should be made available before trial.

These principles are generally applied by the courts in a manner that will secure a just, speedy, and inexpensive determination of legal actions. (3) In other words, discovery makes it possible for the strengths and weaknesses of the case to come to the surface as simply, quickly and cheaply as possible by bypassing many of the formal court actions.

The Proceedings May Be Casual. Highway employees who are called upon to give depositions are often surprised by the casual, courteous or even friendly exchanges between attorneys on opposing sides. Somehow this does not seem appropriate to them when the case may involve millions of dollars. Actually, the attorneys may be practicing gamemanship while operating under a well-defined set of rules. An apt parallel to the discovery phase of civil litigation might be a joust staged by knights of the roundtable. The knights had clearly defined sets of rules. Even during those violent games, they were determined to respond as gentlemen and to live within the rules, even to the point of death. As the jousting event proceeded, they saluted the king, each other and the crowd. They displayed the utmost in chivalry, even as they prepared to rush pell mell toward a disastrous meeting in center court. Attorneys are acting similarly, in as civil a manner as possible considering the circumstances.

Persons giving depositions are giving testimony for the court. They are witnesses. They must keep in mind that they are involved in an adversarial action no matter how casual or friendly the attorneys may be toward each other or toward the witnesses. Should the casual, informal air of the proceedings break down, the attorneys may revert to the full authority of the court to force the issue.

Actions During Discovery

During discovery, the court may require an attorney for one party to respond to a request from the other party's attorney. The attorneys are well aware of the rules and procedures and generally respond to each others' request rather than revert to allowing the court to force the issue.

The four techniques most commonly employed by attorneys to gather evidence during discovery include the following:

(1) Interrogatory: An interrogatory is a written series of questions about the case that one party submits to the other party. The person receiving the questions must provide answers within a specified time period. Normally, the respondent is required to provide a sworn statement that the answers are true. (4)

(2) Requests for Admission: These are written statements of fact addressed to one party by the other party with an inherent demand for admission that such statements are fact. (2)

(3) Deposition: A deposition is the sworn statement of a witness taken outside of the courtroom. (5) The majority of this paper will discuss the attributes of depositions.

(4) Production of Documents: This is a procedure provided by the court to allow one party to obtain written material from the other party. In highway negligence cases this may include items like plans, drawings, maps, construction diaries, correspondence, accident records, safety surveys and similar information.

RULES OF CIVIL PROCEDURE

In all states, there are written sets of rules under which trials are conducted. One portion of these rules is normally directed toward depositions. Transportation officials who must give depositions would benefit from knowledge of the rules which govern the process. Understanding the "rules of the game" makes one a better player.

Depositions

A deposition is the sworn testimony of a witness. It is taken outside of court, usually in the presence of only his or her attorney, the opposing attorney (or attorneys), and a court reporter. Some of the prominent characteristics of a deposition are outlined in the following paragraphs.

Notice of Deposition. The party desiring to take the deposition must give reasonable notice in writing to every other party to the action. This includes the witness, the defendant, the plaintiff and the counselors of record for these parties. The notice gives the time and the place for the deposition and the name and address of the person to be deposed.

Court Officer. A deposition is taken before an officer authorized to administer oaths by the laws of the United States or the laws of the state in which the deposition is to be held. This person has the power to administer oaths and to take testimony.

Recording of Testimony. The deponent's testimony is normally taken by a stenographer who will later produce a transcription. It is possible with the court's permission to use another manner of recording such as video tape.

Stipulations. The two parties in a case may modify the normal procedures used in the discovery process through written agreement (stipulation). This may mean changes in the time and place of the deposition, the type of notice, the manner of deposition, or the person before whom the deposition will be taken. When the changes are stipulated in writing, the deposition may be used in the same manner as a deposition taken in full compliance with the rules.

The use of written stipulations allows the free and general exchange of courtesies between members of the bar. This practice encourages the attorneys to work with each other without burdening the court.

Production of Documents. The notice to appear for deposition is frequently accompanied by a request for production (also called subpoena duces tecum) of books, papers, documents or other tangible things which are pertinent to the case, or which the witness has relied upon in taking actions or drawing conclusions. At the deposition, the opposing attorney will be allowed to inspect all materials so produced and to make copies of those materials which he or she finds to be pertinent to the case.

Examination Procedures. After the witness has been sworn, examination and cross examination of the witness proceed as permitted at the trial. Cross-examination is rare and is normally reserved to clarify answers of the deponent.

Either attorney may object at any point in the deposition to items like the manner of taking the deposition, the evidence presented, the conduct of either party, the suitability of a question or any other normal issue. The officer taking the deposition notes each objection as it occurs. The deposition then proceeds again as though there had been no objection. Any evidence taken subject to the objection will be subject to a judge's later ruling as to the validity of the objection and the evidence.

Motion to Terminate or Limit an Examination. If it becomes apparent that the deposition is being conducted in bad faith or in a manner that unreasonably annoys or embarrases the witness, the deponent's attorney may move to terminate the deposition or to limit examination. Upon demand of the objecting party, the deposition will be suspended until the court rules on the motion. These motions offer protection to the deponent; however, their use is reserved for rare instances of substantial abuse.

Failure to Attend Deposition. If the party giving notice of the deposition fails to attend the proceedings, then that party may be ordered by the court to pay the expenses of other parties, including reasonable attorney's fees.

If the party giving notice of the deposition fails to serve a subpoena on the witness and the witness does not attend because of such failure, the court may order the party to pay the reasonable expenses of all parties or attorneys who did attend.

If the witness, having received notice, fails to appear at the scheduled place and time, the witness may be compelled by the court to pay the reasonable costs of the parties.

Processing the Deposition Document. After the deposition, the testimony is normally transcribed by the court officer upon the request of one of the attorneys. Occasionally, neither attorney requests a transcript, so the court officer never transcribes the tapes. (Usually this occurs when the testimony turns out to be insignificant.) If a transcript is prepared, copies of any documents identified as exhibits during the deposition are attached to the transcribed document. The deposition document is submitted to the witness for examination. The witness reads the document and notes any desired changes in form or substance. The witness normally signs the document and returns it to the court officer, although the witness may elect to waive the signing.

The officer certifies that the transcript is a true record of testimony given by the witness. Any exhibits are uniquely identified as exhibits and appended to the deposition. It is next filed with the court in which the action is pending and sent by registered or certified mail to the clerk of the court. Either attorney may request a copy of the deposition from the court reporter.

Errors and Irregularities. All errors and irregularities in the notice for the deposition are waived unless written objections filed. Any errors or irregularities in the taking of the depositon are waived unless reasonable objection is made at the time of taking of the deposition.

USE OF DEPOSITIONS IN COURT PROCEEDINGS

The courts normally depend upon the best available evidence. If a person is available to testify in court, then the live testimony of the witness is the best available testimony. Any written record of what the witness said previously would be inferior, secondary evidence (hearsay) and would not be admitted. Depositions are normally not allowed in court because they may be hearsay evidence.

The following are a few of the instances when a deposition might be admitted as evidence during a trial:

(1) it may be used for the purpose of contradicting or impeaching the testimony of a witness during the court proceedings,

(2) it may be used if the witness has died since giving the deposition,

(3) it may be used if the witness is a great distance from the place of trial,

(4) it may be used if the witness is unable to testify because of age, illness, infirmity or imprisonment, and

(5) in some states the deposition of a party to the action can always be admitted, and the depositions of some public officials may be admitted.

If one party introduces part of a deposition as evidence, the opposing party may require that in fairness the entire deposition be introduced as evidence, so that the part to be considered can be correctly interpreted. When deposition testimony is admitted, it is subject to the other normal rules of evidence.

RECEIVING NOTICE OF DEPOSITION

Throughout the discovery period, the attorneys for both sides are maneuvering to find the evidence that best supports their positions. At some point, your attorney might identify you as a witness. The opposing attorney will then ask to depose you to discover what you are planning to say at trial. Usually, the legal proceedings will have been underway for several months prior to your receiving notice that your deposition will be taken.

Frequently, the first indication that you are being deposed will be a telephone call from your attorney. You will learn that your name has been given as a witness and that the opposing attorney wants to take your deposition. At the same time, your attorney might inquire as to your schedule over the next several weeks so that a suitable date might be found. Receiving notification in this manner means that the attorneys are practicing normal courtesies toward each other, attempting to make the proceedings as convenient, direct and economical as possible.

Less frequently, you may receive notice of a deposition in other ways. For example, the opposing attorney may send you a copy of the notice which your attorney receives. You might also receive a subpoena indicating the date and location of your deposition; however, it is rare to be subpoenaed without having first received contact from your own attorney.

STEPS IN GIVING A DEPOSITION

A new witness may be overwhelmed by the complexity of the legal system. There seems to be so many things to learn, and so many things that the opposing attorney might ask. The law may be seen as an imposing barrier.

The law becomes easier to understand if the deposition process is broken into several component parts. As each component is understood, the highway employee's confidence can grow. At the same time, his or her proficiency at giving a deposition and effectivenss as a witness will increase rapidly.

The following components are rational steps in the deposition experience:

(1) receiving notice that you will be deposed,

(2) understanding legal procedures and the issued being contested in this case,

(3) preparing to testify on the issues of the case,

(4) giving the deposition testimony, and

(5) performing follow-up activities after the deposition.

Each of these components is addressed as a major portion of this paper. Some of these steps are simple, while others will take time and experience to master.

PREPARING FOR THE DEPOSITION

If there is such a thing as a secret to giving a deposition, it is in total and complete preparation. Lack of preparation is not an excuse for a crisis but it may well cause one. (6)

Preparing for a deposition involves working hard and spending lots of time. First of all, it means conducting long discussions with your attorneys and depending upon their advice. It means learning what the case is all about and why you or your agency is being sued. It means reviewing your files and your agency's files and knowing what standard of care governs the issues of the case. Several approrpriate preparation topics are discussed in more detail in the following paragraphs.

Visit with Attorney. Upon receiving notice that your deposition is to be taken, your first action should be to telephone your attorney. Have a brief discussion to find out the general aspects of the case if you are not already aware of them. Schedule time for an extended work session with the attorney. The purpose is to learn as much as possible about the case and

especially about your role in the case. Typically, negligence suits involve automobile accidents in which the highway agency is alleged to have been negligent in designing, constructing, maintaining or operating the roadway. Learn from your attorney as many details as possible about the allegation. The attorney should help you understand enough about the legal issues so that you can be prepared to speak from a position of knowledge at the deposition. During this preliminary meeting, you may be able to assist the attorney by explaining the technical aspects of the case. You also may be able to identify department policies, guidelines or documents pertinent to the issues.

Do not leave this meeting without identifying your specific role in the trial and what the attorneys for both parties are attempting to establish through your testimony.

The Attorney May Limit Your Preparation for Deposition. In some circumstances, an attorney may prefer that the deponent do no preparation (or limited preparation) before a deposition. Your attorney's strategy at this point might be to minimize the amount of material the opposing attorney may "discover" during the deposition. A witness who does not prepare will not be able to recall as many specific facts while testifying (i.e., names, events, documents or dates). The tactical, short-range goal of your attorney may be well served by limiting the education of the opposing attorney.

Unless you have asked your attorney and were told to limit your preparation, plan upon doing a lot of work to get ready. Even if you are told to limit your preparation for deposition, your attorney will probably want you to prepare exhaustively for a later trial.

Legal Basis for the Suit -- Negligence? Virtually all of the suits against traffic agencies are filed upon the grounds of negligence. It is important for the witness to understand the legal basis of a lawsuit. To win a negligence case, the plaintiff's lawyer must prove:

(1) the defendant had a duty,

(2) the defendant breached that duty,

(3) the breach was the proximate cause of plaintiff's accident, and

(4) plaintiff experienced damages as a result of steps 1 through 3.

In its simplest form, the definition of negligence may be reduced to the failure to use due and reasonable care. Stated another way, a jury might ask itself, "What would a reasonable man have done in these circumstances?" in trying to decide a negligence case. The witness should keep the definition of negligence in mind while preparing to give testimony.

Your Agency's Documents. The jury in attempting to do its job will try to measure the defendant's actions against the established standard of care for the situation. The standard of care may be the agency's own guidelines and standards or it may be a widely accepted national publication such as those provided by the American Association of State Highway and Transportation Officials. One of the deponent's first actions should be to determine which guidelines, documents or policies are applicable. Copies should be obtained and examined prior to the deposition. While reviewing these documents, it may become quite apparent that the agency had planned wisely and had conducted its actions within carefully crafted guidelines. On the other hand, it is possible that the opposite was true -- the agency had no guidelines or its employees were operating outside of them. In either case, the agency's attorney needs to be informed of the facts so that he or she can make intelligent decisions in planning a strategy to handle the case.

During the review, the witness might make photocopies of the pages of guidelines or policies that apply to the case. For each document, include a copy of the cover for identification purposes. These copies will come in handy while talking with the agency's attorney and while giving the deposition.

Traffic Accident Report. The majority of negligence cases involve traffic accidents. It is helpful to learn the details of the traffic accident at issue in the case. This involves obtaining and reviewing the law enforcement agency's accident report. It may show activities on the part of the plaintiff that contributed to the accident. It might show road defects, missing traffic control devices or other facts of which you should be aware prior to giving testimony.

Check to see whether your agency had performed previous safety studies at this location. If so, become familiar with the results of those studies. If changes to the roadway had been recommended as a result of this or other studies, determine when the changes were made. If the changes were not made, determine why. Often the changes were found to be marginally effective and thus not the best use of the agency's safety money.

It is helpful to review the accident history of the location, especially when the review is performed with an agency employee familiar with interpreting accident data. Look for patterns that have occurred at the site, especially patterns of injury or fatalities.

Site Visit. It is helpful to visit the accident location while preparing for the deposition. Carry any available photographs, plans and copies of the accident report. While at the site, try to view it through the eyes of an out-of-state driver who had never traveled this route before. Your visit may identify missing or defective traffic control devices, sharp turns, sunlight in the driver's eyes or other factors that might help explain the accident. If you determine that your agency had not performed as well as it should have (i.e., missing signs, low shoulders) do not hesitate to tell your attorney. You are seeking the truth whenever you are involved in a legal action.

Other Documents. Ask your attorney if you should review the interrogatories and other documents which might be used in the case. These will provide an overview of the case which might help you direct your testimony toward the key issues. In addition review any information which you might have been asked to provide to the opposing attorney.

Final Preparation. The bulk of the preparation for the deposition should be done early. It is unfortunate if the witness does not begin soon enough to allow sufficient time to complete the preparation. Often it is impossible to tell how much time will be necessary until the documents and evidence have been secured and reviewed, so start early.

After the initial preparation has been completed, there are several actions which may improve the quality of the deposition. One of these is a final visit to the attorney. Another is a brief "refresher" review of the evidence.

The final visit to the attorney should be conducted on the day prior to the deposition or early on the day of the deposition. The meeting should be a brief session. It normally concentrates upon the present status of the case and the witness's role in the case. Major points of evidence may be reviewed and summarized. Many witnesses have developed a list of issues or questions which they wish their attorney to address at this meeting. The attorney may wish to offer information regarding the personality and mode of operation of the opposing attorney. It may be helpful for the witness to know the type of questions which may be asked. During this preparation, your attorney will refrain from placing words in your mouth; however, he or she may be able to give helpful pointers for answering certain types of questions.

The second activity which might improve the quality of the deposition is a brief review of the facts. It is helpful to organize your file and to prepare a short outline of the important points to which you and your attorney feel you should testify. A good night's sleep and a clear mind usually improves the attitude and performance of the witness. Arising early on the day of the deposition and reviewing the outline may provide a refreshing approach to the case. This last review should be limited to the prominent points to be covered in the deposition. It is not an appropriate time for the witness to try to "cram for the big test".

WHAT TO TAKE TO THE DEPOSITION

The notice of deposition often includes a request that the witness produce documents from his or her file. Typically, these are documents which the witness has used and which will have a direct bearing upon the case. A normal request might be for any maps, construction diaries, accident information, notes from investigative reviews, or standards and guidelines related to the case. As soon as you receive such a request, discuss it with your attorney.

Remember that anything carried into the deposition is discoverable by the opposing attorney. Prior to entering the deposition, show the entire file to your own attorney. He or she will want to review the file to filter out privileged information such as reports prepared at the request of the attorney for use in court on this case. The attorney also may remove non-germane material. Basically it is best if the file contains the facts and data specifically called for by the opposing attorney, or upon which the witness will reply in giving testimony. In addition, you might wish to have a copy of your curriculum vitae for the opposing attorney.

Since your file is discoverable, the other party's attorney may spend as long as necessary reviewing it and may ask the stenographer to photocopy the entire file and attach it to the deposition. Where a witness anticipates that parts of your file will be used as exhibits or will be copied by the opposing attorney, he or she may wish to make photocopies beforehand. Such copies are normally accepted by the attorneys if they came directly from the deponent's files. By carrying these copies into the deposition, it may be possible to carry all of the files back out instead of having to wait days or weeks while the stenographer copies them.

Since files are discoverable during the deposition, it is a good practice for a witness not to be deposed in his or her office. Otherwise, personal files and agency records might be subject to a time-consuming review. The point is not to hide this information. Indeed, the other attorney is entitled to any germane information, but only if he or she asks the correct and specific question in order to find it.

GIVING TESTIMONY

Conquering Fear

Most of us experience some measure of uncertainly or fear when we approach an unknown situation. This is especially true in the legal area which is fraught with latin phrases, concepts that are difficult to grasp, the threat of adverse publicity and the possibility of huge financial losses.

Overcoming fear and intimidation is not always easy but it is always necessary to become an effective witness. The first part of overcoming fear is recongizing the physical aspects. The human body attempts to work harder and run faster through the secretion of adrenalin. This adrenalin often surfaces as excess energy immediately before a big event such as giving a deposition or testifying in court. Recognizing the cause of the nervous energy and finding a harmless physical action to burn off the energy may relieve tension.

A second major tactic to overcome fear lies in completeness of preparation. A witness that discussed the case with his or her attorney, identified the key issues and reviewed the materials necessary to testify can answer questions authoritatively and confidently. Preparation for testifying might be compared to studying to take a test. If the student identifies the correct material for the test and studies it thoroughly, the test will be relatively easy.

A third major point that will help alleviate fear is for the witness to carefully identify his or her role. The witness's foremost duty during the deposition is to answer questions truthfully. A defense attorney once placed the issue in perspective when he stated to a nervous witness, "Your testimony will not win this case. Your testimony will not lose this case. My job is to win or lose. Your job is to state the truthful answer to questions." Do not try to be more important than you really are. Do not try to win the case by yourself. Let the attorney do the worrying about the loss and the gloating over the victory. Your job is to give facts.

The witness must remember that this will be an adversarial proceeding and that depositions are rarely enjoyable. The opposing attorney will be intelligent and highly trained in methods to discredit or discomfort witnesses, to dig for information and to otherwise pursue the quest for truth. Witnesses whose ego cannot withstand a challenge may soon find themselves trapped in a sea of their own words. Witnesses may expect challenge, intimidation and frustration from the proceedings; however, the most successful witnesses continually focus on one main point, that their job is to concentrate upon the attorney's questions and to constantly tell the truth in response.

A Good Witness Is A Good Communicator

Communicating with the opposing attorney, the judge or the jury is the most fundamental component of being a good witness. Witnesses who practice communicative skills (especially listening) usually improve as they learn more about the legal system and about giving testimony. Several good books have been written on this subject. (7) (8) In addition, many attorney's firms have prepared written materials to guide witnesses in giving testimony. (6) (9) Good articles have also appeared in the professional literature. (10) (11) Risk management seminars and training materials prepared for highway agencies may also include materials on legal issues and hints for giving testimony. (12) (13)

Hints For Giving Testimony

Where a highway employee anticipates giving testimony several times in the future, it may be helpful to obtain publications on the subject and to start a file of articles from professional magazines. The tips for witnesses shown below are illustrative of the information available from such references. (6) (13)

(1) Tell the truth to every question. There is no substitute. If the opposing attorney or the jury ever doubts that you have told the truth, the remainder of your testimony will be useless.

(2) Pause before you answer. This gives you time to think and your attorney time to object if the question is not reasonable. It is easy for a witness to anticipate the answer to a question and to try to respond before the attorney finishes speaking. Guard against rapid answers.

(3) Do not volunteer information. Make the attorney ask a specific and correct question to get the information he desires. During a deposition, a highway engineer was asked whether he had designed a certain roadway feature. His response was, "No, Joe Burns designed that when he was the Maintenance Engineer in the Third District office, but Joe is dead now so Jim Green handles that kind of work." Later, the highway engineer's attorney pointed out that Joe Burns had given six pieces of information when the answer to the question should have been "No." The opposing attorney is entitled to any piece of evidence, but one of the best defenses is to make the attorney work to find the information. Do not voluntarily give it to him or her.

(4) Give simple, brief answers to questions.

(5) Speak distinctly in realtively short sentences. Many a witness has been shocked to discover that the transcript of his or her testimony was full of long, rambling phrases and sentences which lead in great circles. Whenever possible, use short, distinct phrases. Where necessary, these answers may be modified with qualifying answers. For example, "Normally speaking, the answer to that question is yes; however, in this instance ...

(6) Do not guess at answers. If you cannot remember or do not know the correct answer, state so. "I do not know", is often the very best answer. A witness who tries to extend testimony beyond the scope of his or her education, experience and backgrund is preparing for the inevitable fall. Remember that attorneys are experts in exposing flaws in your testimony. Anything you say without being on a solid foundation may be the first step toward your fall.

(7) If you make a mistake, admit it and correct it. Do not attempt to cleverly cover up your mistake, as you will probably set a trap for yourself.

(8) Look directly at the attorney asking you the question and concentrate upon hearing and understanding the entire question.

(9) Do not look at your own attorney before answering unless your attorney has objected to the question. You will give the impression that you are unsure of your answer, or that your attorney is prompting you.

(10) Your attorney will sometimes object to a question which you have been asked. If you do not understand the objection or if you are confused, ask the attorney whether you should answer the original question. Your attorney may advise you to answer, to answer if you understood the question, or to state that you will not answer on advice of your counsel. This latter answer may lead to a heated discussion between the attorneys. If so, stay out of the discussion and let them work it out. It may even be amusing if you are able to watch it as a disinterested third party.

(11) If you are answering a question but are interrupted by the opposing attorney, state that you did not finish your answer.

(12) Despositions are often fishing trips for attorneys. They are attempting to offer bait, test the waters, and see what they might catch. They are attempting to discover some new information to improve their cases. Broad, very general questions without specific facts typify a fisherman trolling for a catch. Turn these questions aside by asking the attorney to be more specific, or by stating, "That is a very broad question. Our agency probably has hundreds of different documents like that. Which document do you wish to have me discuss?"

(13) Attorneys sometimes ask leading questions by making a statement and asking you whether you agreed. If any part of their statement is not correct, you may state that you do not agree, or you may qualify your answer by stating that you agree with part of the statement.

(14) Do not hesitate to disagree with leading questions from the other attorney. If you are asked a question which suggests an answer with which you disagree, simply disagree with a statement. Don't explain your answer. Make the attorney ask you another question if he or she wants more information on the subject.

AFTER THE DEPOSITION

After the deposition has been completed, the witness still has work to do. It is important to meet later with his or her attorney to review the deposition and to receive constructive criticism on the techniques used in testifying. The witness and the attorney should jointly determine whether the deposition has helped or hurt the case and whether new information was introduced during the deposition.

The witness should obtain a copy of the deposition as soon as it is available. The deposition should be studied for errors and misstatements. The attorney may be able to assist in determining which of the errors need correcting and which are inconsequential. Changes should not be made casually, since they almost invariably provide a fruitful source of questions for the opposing attorney to use during cross-examination at the later trial (to the embarrassment of the witness). It is very important for the deponent to get it right the first time to avoid changes in the transcript. After the review and any necessary changes, the witness signs and returns the deposition. This signing of the deposition is often waived by the attorneys through a written stipulation.

Regardless of whether the deposition is signed, the witness should obtain a copy and review it for statements of fact and to improve future testimony. Additionally, if the case goes to trial, the witness should review the deposition intensively to ensure that testimony in court will agree with testimony given in the deposition.

SUMMARY

Highway agencies are experiencing increased levels of suits. Employees find themselves frustrated from dealing with attorneys, from time lost in preparation for a trial, from negative publicity and from loss of funds. Employees may be tempted to view legal proceedings as nothing more than distasteful problems. They must realize that these problems will not go away and that they can not be ignored. The solution lies in learning more about the legal system and how to be aggressive in defending these cases.

This paper was written to provide an overview of the discovery process and of giving depositions. Superior witnesses are those who prepare scrupulously for testimony. They are certain about the facts to which they will testify and the techniques to use in testifying. They study the legal environment and they learn how to respond to changing legal issues. This paper has been prepared to assist highway engineers in becoming superior witnesses, by providing an introduction to the process.

(15) Occasionally questions will become extremely long or may be composed of several parts. If you do not completely understand the question, ask that it be repeated or ask that the attorney ask one question at a time so that you can address specific answers to specific parts of the questions.

(16) Attorneys frequently ask the same question several times or ask the same question several ways. You may choose to respond with, "I believe that I have answered that question previously."

(17) Do not memorize your testimony. If the exact date, distance or time is important to the opposing attorney and you cannot state it with certainty, simply say, "I cannot remember." If the attorney keeps pressing for an answer, you may wish to reply, "The date is contained on the accident report", or "The distance can be found on the highway department's map."

(18) Do not respond to challenges to your character, your family heritage or your comments. Leave your ego at home and keep your temper. An opposing attorney who can draw you into an argument or that can make you produce a quick answer has won the day.

(19) The courtroom is no place for humor. Do not try to give sarcastic, trite or flippant answers to questions.

(20) Do not depend upon technical vernacular. Stay away from acronyms. State your answer in clear, simple terms that can be understood by anyone.

(21) Where distances and measurements are part of the testimony, use easily understood units of measurements. A witness whose language is encumbered with ergs, foot pounds, or deltas will not communicate to a jury.

(22) Be careful in estimating time, speed and distance. If you are not certain of the values, qualify your answer by saying, "My estimate is . . . "

(23) A novice who has never testified will find it helpful to visit an on-going trial to watch witnesses testify under direct and cross examination. This will produce a much better understanding of the process than watching the distorted version often used in TV drama shows. While there are differences in courtroom and deposition testimony, the witness may obtain a good feeling for the process through courtroom observation.

REFERENCES

(1) Corley, Robert N., and William J. Robert, Principles of Business Law, Prentice Hall, Inc., Englewood Cliffs, N.J.

(2) "Legal Environment of Transportation". Course notes from Highway and Management Institute, University of Mississippi, Oxford, Mississippi, 1985.

(3) Lyons, Champ, Jr., "Rules of Civil Procedure, Annotated", Alabama Practice, Vol. 1, West Publishing Co., St. Paul, Minnesota, 1973.

(4) Lewis, Russell M., "Practical Guidelines for Minimizing Tort Liability", NCHRP Report 106, Transportation Research Board, Washington, D.C., 1983.

(5) Pivnik, Sheldon I., "Legal Liability in Traffic Engineering", Chapter 27 of Transportation and Traffic Engineering Handbook, Prentice Hall, Inc., Englewood Cliffs, N.J., 1985.

(6) "Preparation of Expert Witness", by Frank, Poinsett, Nachman & Frank, Attorneys at Law, Newport News, Virginia.

(7) Pagen, Alfred R., "Ten Commandments (More or Less) for the Expert Witness", Better Roads Magazine, June-August issues, Rosemont, Illinois, 1980.

(8) Poynter, Dan, Expert Witness Handbook -- Tips and Techniques for the Litigation Consultant, Para Publishing, Santa Clara, California, 1987.

(9) "Preparing for Your Deposition", by Hill, Hill, Carter, Franco, Cole & Black, Attorneys at Law, Montgomery, Alabama.

(10) Budinger, F.C., "Engineers in Court", Civil Engineering Magazine, American Society of Civil Engineers, New York, New York, August 1987, pg. 52-54.

(11) Reed, George L., "Coping with Litigation", Civil Engineering Magazine, American Society of Civil Engineers, New York, New York, June, 1985, pg. 52-54.

(12) "Risk Management to Reduce Roadway Tort Liability", a short course by the Public Works Training Division, Texas Engineering Extension Service, Texas A & M University, College Station, Texas, September, 1985.

(13) Turner, Daniel S., "Seminar on Highway Tort Liability", Report 114-88, University of Alabama, Tuscaloosa, Alabama, October, 1988.