

Chapter Seventeen
APPEARING AS A WITNESS

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APPEARING AS A WITNESS

OBJECTIVE

To assist the EPA witness in presenting an informative, comprehensive, and credible testimony in civil and criminal proceedings brought under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) or other federal environmental statute. These proceedings may be administrative (before an EPA Administrative Law Judge) or judicial (before a Federal Court judge).

Under most circumstances, the inspector will be called as a “fact witness” to testify what personal knowledge they have of the case.

PREHEARING PREPARATION AND PERSONAL APPEARANCE

Prehearing preparation begins when the facility is assigned to you for inspection. If the case goes to a hearing, certain facts of the case will come from you. Every detail of your words will be scrutinized and questioned by the opposing attorney and the court. The following guidelines must be followed when preparing for a hearing:

- < The EPA attorney assigned to the case will need to have a thorough knowledge of the facts of the case before any complaint is filed, and these facts include those uncovered by your inspection. Make sure that your file is complete, and that the documents in the file are organized in some fashion that makes sense. Also go over the facts of the case with the assigned attorney before any complaint is filed. If you suspect there are any problems with the evidence in the case, bring those problems to the attention of your attorney.
- < After the complaint is filed and if the matter is set for a hearing, you must immediately, on becoming aware of the hearing date, make every effort to meet with the assigned attorney to determine your involvement in the hearing. Ask

what the attorney intends to prove by your testimony, and how the attorney intends to use any documents or items of evidence that you collected during your inspection.

- < Clear your calendar for the days you will be needed as a witness.
- < Arrange to meet with the attorney before the hearing date and have him/her go over your testimony and the evidence you have collected. You may give the attorney valuable information he/she does not have.
- < Ask any questions of the attorney at the earliest opportunity. It will be too late to find out what you are supposed to do once the hearing begins.
- < Dress professionally for court appearances. A well-groomed, neatly attired witness makes a more favorable impression in the courtroom.

GENERAL CONDUCT IN COURTROOM AND VICINITY

Your conduct must reflect the solemn nature of the administrative/judicial proceedings. Adhere to the following guidelines when in and near a courtroom:

- < Do not discuss a case with anyone not a part of the EPA team and then only when you are where no one else can overhear.
- < Do not whisper or talk to another person, or cause any disturbances in the courtroom.
- < If there are jurors, do not talk to the jurors or discuss the case within their hearing.
- < Sit in the seats provided for the spectators but as near the front as possible. (Your attorney and the court may need to find you.) If you have to leave the courtroom temporarily, tell someone where you are in case you are called to the stand.
- < Do not bring magazines or newspapers into the courtroom.
- < Show no incredulity or surprise at any testimony given from the witness stand or at statements made by the defense attorney.
- < Be on time when court opens and be available immediately when called to testify.
- < If, as a witness, you are not excluded from the courtroom, listen to the testimony of others. It may trigger a memory or an interpretation you had not thought of.

- < Do not interrupt the attorney while the hearing is in progress. If you must convey information, write it down and hand him the note. He will look at it when he can concentrate. If necessary, he can ask for a recess and talk to you.
- < If, as a witness, you are excluded from the hearing room, leave the hearing room. If you are not excluded, you may remain. After you testify, always consult the EPA attorney before you go anywhere or do anything.

PROPER TECHNIQUE ON THE WITNESS STAND

**Review this Information
Before Giving Testimony**

Proper technique on the witness stand is essential to providing valuable testimony. The following guidelines must be followed when giving testimony:

- < When called to the witness stand, unless previously sworn, go directly to the desk of the clerk of the court (or the judge) to be sworn.
- < The judge or clerk will ask you to swear that your testimony will be true. The answer is “yes” or “I will” depending on how the oath is worded. If you cannot, in good conscience “swear under oath,” state that you wish to “affirm” your testimony. Inform the U.S. EPA attorney of this prior to the hearing.
- < Your testimony will be taken down by tape recording or manual transcription by the court reporter. Your answers to questions must be made verbally rather than shaking or nodding your head. Dimensions and directions must be given verbally rather than demonstrated.
 - Sit erectly, but don't appear stiff or tense.
 - Always be courteous, say “yes sir/ma'am” and “no sir/ma'am.”
 - Speak clearly and distinctly. Don't be rushed. Take your time.
 - Look at and speak to the judge or jury. Speak plainly enough so that the judge or the farthest juror will hear you.
 - The judge may ask you a question from the bench. Address him/her as “your honor,” and answer the question fully. Otherwise, you may not speak directly to the judge.
 - Be factual.

- Do not show hostility toward the defendant or the opposing counsel. You can lose a case for the government by losing your temper. You must be objective and professional.
- If you need to use acronyms or technical terms, make sure you explain what they mean. You must make sure your attorney knows the terms before the hearing and that the court reporter knows what they are and how to spell them. Try to use everyday language when possible.
- In your effort to appear impartial and unbiased, do not become listless or “dead pan.” Be natural, candid, frank and “alive.”
- Do not appear impatient or overly anxious to testify.
- Do not have anything in your mouth. This includes gum, toothpick, tobacco, candy, or food.
- Keep your hands away from you mouth, face, and head.
- Attempt to minimize nervous tendencies, such as arranging clothes, tie, etc.

THE DIRECT EXAMINATION

Direct examination is answering questions asked of you by the government attorney. The following guidelines are applicable to both direct and re-direct examination. You must know before the hearing every question your attorney will ask you on direct, and every answer you will give before you take the stand.

Laying the Foundation For Your Testimony

The first question you will be asked is to identify yourself for the judge. You will be asked about your job and your qualifications to do whatever you will testify you did for this case.

The next set of questions will show the judge the area of your testimony and give him/her an idea of the facts of the case.

Questions usually begin broad and move to the more specific. Listen to what you are being asked.

Your Testimony

When giving testimony under direct examination:

- < Always tell the truth.
- < Answer only the question asked. Do not volunteer additional information.
- < Do not be afraid to say, “I don't know” or “I don't understand the question,” if indeed you do not know the answer. This answer must never be used to be evasive. You

may be qualified as an “expert witness” but this does not mean you are infallible; you can only answer the questions to the best of your ability.

- < Never use the word “indicate” to describe a communication made to you by anyone. This word is quite ambiguous, and unnecessary. It causes a witness to look like he or she is hedging in their testimony. People do not “indicate” anything to you. People tell you something, or state something to you, or nod their head in one manner or another, or point to something. Be specific in telling the judge or jury how the person you are talking about communicated information to you.
- < Do not give personal opinions.
- < Do not be hesitant about using your notes to refresh your memory and you must do so in cases of complicated figures, dates, etc.
- < If you do refresh your memory from notes, the defense has the right to examine them and make them an exhibit in the case.
- < Occasionally the other attorney will stand up and object to something being asked of a witness. If this happens while you are on the stand, stop talking and listen to what the judge says. He/she will tell you to answer the question or tell the attorney to change the question. If you have forgotten the question, ask to have it repeated.

CROSS EXAMINATION

Cross examination is done by the opposing counsel asking you questions. The following guidelines are applicable to both cross and re-cross examination:

- < The instructions regarding your testimony (listed previously under “Direct Examination”) are equally important when testifying under cross examination.
- < Under cross examination, you will likely be subject to more vigorous questioning than you were under direct examination.
- < The other attorney may try to confuse you or get you angry – that is what he/she is being paid to do. Try not to allow the other attorney to succeed at this attempt.

- < If the attorney challenges your truthfulness, your credentials, your ability to do your job, or your professional conclusions, remember this is good defense strategy and do not play into his/her hands by getting angry or insulted. Answer the question. Your professional performance on the stand will bolster your credibility.
- < If the cross examiner attempts to confuse you with rapid questions you must:
 - Answer him/her deliberately and at a comfortable pace.
 - Ask him/her to repeat or restate any unclear or confusing question.
- < Do not attempt to be argumentative with the cross examiner if he/she interrupts your testimony. The U.S. or EPA Attorney must make an objection to the judge if the interruption is not warranted. The government attorney will often allow you to clarify or elaborate on a point or redirect.
- < If the attorney's question to you is actually several questions rolled into one, point that out before answering, and proceed to answer the questions one at a time. If necessary, ask the attorney to restate the question.
- < Beware of questions to which the cross-examiner demands a "Yes" or "No" answer to a question if such an answer will not reveal the entire truth. Beware of hypothetical questions that require you to draw a conclusion that you are not comfortable with. Do not agree with the opposing attorney just to get him/her to stop badgering you.
- < If the cross-examiner should misquote any of your earlier testimony when asking a question, you should correct the misquote before answering the question.
- < If you make an error while testifying, correct it at the first opportunity. If you discover the error after you have completed your testimony and have been dismissed as a witness, discuss the matter with the government attorney. If you are caught in an error, admit it and explain it if possible.

PROPER CONDUCT AFTER TRIAL

After the trial, continue to conduct yourself in a manner that will bring credit to you and the Agency.

If there is occasion to speak to the defendants, be courteous regardless of their demeanor. Do not discuss your testimony or the merits of the case with them *even after the hearing is over*.

If you can, stay and hear testimony of others. You may hear problems or good points that the government attorney misses. Write down your thoughts or questions you think the attorney must raise and give them to him/her at a recess.

EXPERT WITNESS

In a hearing the term “expert” is a legal term meaning a person who has skill, experience or extensive knowledge on certain subjects. It does not mean this person is the best in his field or has a PhD.

If the government intends to offer you as an “expert,” the attorney is satisfied that you have the requisite knowledge. Often your experience is what qualifies you as an expert.