

NOTES FOR EXPERT WITNESSES GIVING DEPOSITIONS AND TRIAL TESTIMONY

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BASIC ISSUES AND DEFINITIONS EXPERT WITNESSES SHOULD KNOW

WHAT IS A DEPOSITION?

A deposition is a legal proceeding wherein witnesses are put under oath and asked a series of questions, which are heard, then transcribed by, a Certified Court Reporter.

PERCIPIENT versus EXPERT WITNESSES

In most civil litigation, there are two basic types of witnesses: 1) percipient witnesses, and 2) expert witnesses. Engineers are usually hired by attorneys to study some sort of problem and provide professional opinions as to the technical aspects of a particular case. In some instances, however, the engineer can be a percipient witness; which is more or less akin to an “eye witness”. An eye witness is someone who saw something, provided some manner of service, wrote, or said something that is thought germane to a legal case, but they are not expressing their professional opinion about the case-at-hand. Percipient witnesses are only accorded compensation for transportation and a token \$15 appearance fee, while expert witnesses typically charge about 1-1/2 times their normal hourly rate. If an engineer is called as a percipient witness, they cannot render any expert opinions; their testimony could only apply to the validation of certain facts they believe are true based upon direct observation or work.

QUALIFICATIONS

Experts are usually asked at time of their depositions to provide a copy of the professional resume, which is commonly attached as the first exhibit. An expert’s resume should be bullet-proof, and able to withstand the highest degree of scrutiny. Self serving comments such as “nationally renown for his contributions in the world of geotechnical engineering” can be pulled out of your resume and read to the court, which could prove embarrassing if it were shown you wrote it yourself. Let others be the ones to laud your abilities, your resume need not.

Another common title experts bestow upon themselves is “eminent in the field of geotechnical engineering”. There are quite a number of experts who have used this label in cases opposing me who: 1) have never authored a single publication in geotechnical engineering; and 2) who may only have taken one, or at most two, courses in soil mechanics.

Then how can they be “eminent” in the field you ask? Because of their experience and responsibility, such as come from owning their own firm. Just how owning your own firm leads to such technical prowess I have yet to understand, but the allegation is commonly made and accepted anyway, which speaks to how easily one can paint themselves as a truly outstanding expert in today’s legal environment.

In order to testify as an expert in the State of California, the witness needs to show one of the following qualifications: 1) be registered by a State (not necessarily California) in a particular field of expertise to which he/she will be opining; 2) having previously been accepted by another Court to provide expert testimony in other cases; 3) present credentials as a recognized industry leader, such as might be accorded a college or university professor; or 4) show a breadth of experience in an allied field, such as construction, which the Court deems relevant to the testimony-at-hand. Once qualified as an expert, it becomes easier to qualify a second or third time, etc.

The bottom line is: if the Court seeks to hear your opinion, you’ve just become qualified as an expert witness. No other “qualifications”, per se, are mandated by law. Its up to the discretion of individual judges.

FEES

The issue of professional fees invariably arises during depositions. The hourly fee for depositions is to be paid by the party noticing the deposition, usually one of the opposing counsel. In larger cases, a group of attorneys may agree to split the bill for your time, based on a pre-arraigned agreement or on a pro-rata basis, functioned by how much time each lawyer uses questioning you. The fee you are entitled to at the time of deposition is your hourly fee for deposition and testimony time, set forth by your own attorney in his expert disclosure, which also describes what subjects you may testify about.

The deposing attorney is only responsible for compensation of actual time spent in the deposition, while your own counsel is responsible for paying travel time and parking (if applicable in your professional services agreement). Some experts adhere to a strict 4-hour minimum charge for depositions, which is commonly shown on the ASFE Recommended Schedule of Charges and Terms for most geotechnical firms. Provided the deposing attorney has been notified of this minimum charge in advance, it can be assuaged, though not always easily, especially if it was a short deposition. My own policy has been to charge strictly for the time actually taken, and not a penny more. Lawyers seem to appreciate this and it serves as a testimony of witness integrity. Maintaining integrity is paramount to being an effective witness.

DECLARATIONS

In most of the smaller cases, physical facts or observations by engineers are commonly brought into evidence via sworn affidavits, or declarations. This process saves time and money compared to depositions. Declarations generally begin by setting forth a person's name, place of business, professional credentials, and possibly, background or specialized expertise in regards to the case at hand. For instance, the affiant might state their professional experience in the geographical area of interest, or in the particular subject matter. The balance of the declaration then seeks to establish a series of facts or opinions, as viewed by the affiant (the person making the declaration). The statements are numbered and written up on legal pleading paper for submission to the court. The attorney's office usually prepares the document after it has been edited by the affiant and meets the affiant's approval. Only then should the document be signed and dated. Declarations may or may not subsequently be brought into evidence, depending on the needs of the attorney.

TECHNICAL REFERENCES

The rules for legal testimony state that experts must bring or have easily available to them those reference materials upon which any of their opinions is based. This often means copying excerpts from textbooks, journal articles, notes or memorandums of phone calls with others.

Many experts blow off this requirement, as they feel it too unwieldy to cart in all the reference material which they have ever read about a particular subject during their career. However, seasoned experts will always prepare such files, and will routinely reference supportive materials upon which technical methodologies or opinions are based.

It is a good idea to have technical definitions at your fingertips, in case you are asked. Never try to recite a definition from memory, take the time to look it up, or state that you would prefer to look it up. Legally, you can be compelled to answer such questions without benefit of your references, so don't forget to bring them along to your deposition.

Reference excerpts can be used as powerful tools to sustain your technical views, and most attorneys will pour through such documents, looking for whatever items you have underlined, highlighted, or flagged with sticky notes. Generally, this is the only portion of reference material opposing counsel will pay any mind to, and you should set up your reference document files to build your case.

SPELL OUT ALL TECHNICAL TERMS

Save yourself a lot of time and bother later by making absolutely sure that technical terms and names are spelled correctly during your deposition. Sit next to the court reporter and speak slowly, spelling out all the technical terms. I used to see "shear strength" spelled "sheer strength", as the two sound almost identical. Never assume anything, take the time to make sure the terms are correctly applied.

KNOW BASIC LEGAL DEFINITIONS

There are several operative words in the legal world that lawyers understand more thoroughly than engineers. The most often cited are the terms “**negligence**” and “**reasonable**”. The two go hand-in-hand. A professional has an unalterable legal duty to provide services that are at all times deemed “reasonable” by his peers. One must be alleged to have performed services unreasonably to be found negligent; and negligence is a necessary prerequisite to trigger errors and omissions coverage from the engineer’s professional liability insurance. Plaintiff attorneys often search diligently for other engineers who will be willing to testify that a fellow engineer has been unreasonable in the performance of their professional duties.

The jury instructions read by judges in professional negligence actions state that “reasonable” is the average level to which other professionals of like kind and licensure are doing in the same area at the same time (see State of California, 1983). An expert may not have been practicing in the same area and time frame as they are testifying to the standard for. In such cases, they may rely upon “standard of care” interviews with other professionals who were, or cite documentation of like work in the same general area and time frame. Experts can also rely upon their discussions with others, and cite this as basis or partial basis for their own opinions.

Despite these supposed safeguards, there will always be people waiting in the wings to testify against you, no matter how diligent a job you may have provided. This is because everyone looks at jobs differently, and many have trouble differentiating from what they would have done versus what the defendant did. Other seemingly important issues, like whether or not you were being paid (in a timely manner) for the job in question, are usually considered irrelevant to your professional performance, and cannot be brought up as excuses for omission of services at time of trial.

SUGGESTIONS FOR EXPERT WITNESSES WHEN PROVIDING TESTIMONY

RULE #1: TAKE YOUR TIME

An expert witness should treat any deposition just like trial testimony, with the exception that the setting is more relaxed and **time, diction, appearance** and **style of testimony delivery** will not be recorded in the deposition transcript. You can take as much time as you want in carefully crafting your answers to difficult questions. Seasoned experts give depositions that read like college textbooks.

The expert’s number one goal should be to deliver as accurate and understandable a document as is humanly possible. This can be done in deposition by **taking your time to ponder, organize, and only then, answer questions**. Many lawyers will ask compound hypothetical questions (discussed later). The witness should be wary of assuming they understand compound or hypothetical questions that contain technical terms. This is because lawyers and engineers speak different languages. The lawyer may use technical terms, but they may not have the same connotation of that term that an engineer does. Consequently, such questions should be broken down into understandable parts. The result of blindly answer such questions can often prove unfortunate, and one’s word can be manipulated by a clever opposing attorney.

Think about the question for a LONG TIME before answering. Be sure that you absolutely understand the question, and consider whether or not it is answerable. Many lawyer questions are not answerable, because most engineering failures depend on a coincident series of physical factors, while many attorneys focus on only one or two things they want to “blame” for a failure. This tendency to focus on one or two issues usually emanates from desire to fix responsibility on some entity that is insured, as insurance money is the basic target of most trial lawyers.

RULE # 2: GIVE COMPLETE ANSWERS

Avoid giving simple answers to simple questions WHEN the real world situation is neither simple or uncomplicated. When you hear an attorney talk about “foundation failure”, “erosion”, “landslides”, “flooding”, or “ground shaking”, do not fall into the trap of believing they are referring to the case at hand! Answer the question as though you were

responded to an inquiry at your PhD exams, thinking of “all the world’s foundation failures”, “all the world’s erosion”, etc.

Here is an example:

Q: *“Dr. Soandso, isn’t it true that landslides are precipitated by excessive moisture?”*

Towards the end of a long day our immediate response would be to simply say:

A: *“Yes, water causes slope failures, that’s why we get landslides in the wintertime”.*

However, that would be the wrong response to this question. The proper response would be something closer to:

A: *“Yes counsel, it would be my opinion that landslides are generally triggered by excessive moisture, but in combination with other coincident events, such as a past excavations that may have over-steepened the slope, or a physical setting that had previously been prone to land slippage in the past. When the physical geologic setting is favorable to land slippage, then and only then, will the addition of moisture likely trigger slope instability”.*

Here’s why. In many instances the lawyer is looking to “hang” the failure on something man-made, or man-responsible, like a downspout leader, a drainage ditch, or runoff from someone’s rear patio. But what if the slope that failed was an old landslide deposit? Or, what if it was an old cut slope? Before answering the question, the expert should ask themselves: Would the failure have occurred absent the excavation for the slope?

The geologic setting is oftentimes the most important factor. The second most important factor might be past earthwork activity, such as the creation of cuts and fills. But, if this work was accomplished more than 10 years previous to the loss (and absent personal injury or evidence of fraud in the placement of the earthwork), such past activities are not legally actionable, so the lawyer is forced to focus on some fellow’s downspout.

A common ploy is to allege negligent maintenance of drainage facilities or improvements, especially those discharging above or onto a slope. In some cases the absence of maintenance may be a significant factor in precipitating the failure, but the discharge of a single downspout on a large cut slope is usually insufficient, in of itself, to trigger a large slope failure.

RULE #3: LEARN TO SAY “I DON’T KNOW”

A common problem with neophyte experts is their tendency to feel obliged to answer any and all questions posed, even when the inquiry is something they’ve not specifically prepared for, investigated, or previously considered. There is a common tendency to answer these questions as if being screened in one’s oral boards in graduate school, hoping they will provide an “adequate” answer.

Try to reel yourself in and appreciate the limits of your technical training and scope of investigation on a particular project. If you haven’t looked into the subject for which you are being examined, make one of two responses:

- 1) “I don’t know, I have not looked into that”; or
- 2) “I would have to **speculate**.....”

“Speculate” is the “s” word in depositions. Speculation is a legal term. Speculation is not allowed in courtroom testimony, so anything you opine past the use of that modifier would necessarily be struck by the judge. Lawyers know this, and will try hard to have the witness eliminate the “s” word, because it makes your answers useless.

The typical follow-up question when you say “*I don’t know*” or “*I’d have to speculate*” is something like: “*Come on Dr. Soandso, isn’t it common knowledge that such and such constitutes a sub-standard (read “negligent”) effort on behalf of*

any engineer with even the most basic technical training?" Be careful not to opine about specific issues and circumstances you have not investigated as part of the consultation for which you are being deposed.

Learn to say "*I don't know*" when you feel the opposing attorney has backed you into a corner, and the questions will usually end abruptly. Unfortunately, the "*I don't know*" answer doesn't feed the ego of many experts, because they enjoy being courted as the "expert". Humility will make a better expert of you in the long run. Overconfidence and ego in any witness invariably leads to problems, as discussed later.

RULE #4: KNOW WHAT YOUR OPINIONS ARE BEFORE YOU ARE DEPOSED

Believe it or not, many a harried expert rushes off to a deposition without really thinking through their opinions. Experts should expect opposing counsel to grill them in minute detail about every aspect of their opinions. The most common manner of examination generally revolves around the following **core questions**:

1) "What were you asked to testify to in this case?"

Never respond affirmatively to such an inquiry. We are not asked to testify specific things ahead of time by attorneys, our services are engaged to make a careful study of the facts, and then provide expert opinions about those subjects we have been asked to investigate. You should always be prepared to state what areas of expertise you understand you may be asked to provide opinions about. Always be careful not to opine about issues which you have not fully investigated in the case at-hand.

2) "What are your opinions in this case?"

This is a legally valid question, but one which carries harmful potential. This is because you may forget to include something, and opposing counsel can then use your answer to legally preclude you from testifying about those forgotten subjects. You may want to confer with your own attorney and jot down a list of the subject areas you may be asked to testify about at time of trial, realizing that anything you bring to the deposition in writing can be attached as an exhibit to the deposition.

3) "Can I see your file?"

By law the deposing attorney is allowed to look through any documents you bring to the deposition. If your file contains anything questionable, such as privileged attorney-client information, or papers relating to settlement conferences under Evidence Code Section 1152.5, you should confer with your own attorney ahead of time to see if he/she wants you to retain such papers in your file. You cannot hold up the deposition to suddenly undertake a review of your own files without risking the possibility of incurring sanctions.

4) Can an attorney force you to answer a question without referring to your files?

No, they cannot. I had one attorney attempt this ploy once, grabbing my references and stating "*I want to know what you know just sitting there, not what you can read to me*". I concluded the deposition immediately, despite a flurry of threats, but the judge sustained my actions. The rules of the deposition are the rules of trial, and those state that you can bring with you and refer to whatever technical supportive information you desire. As stated previously, don't let yourself be caught reciting technical definitions without reference. Some academicians are capable of reciting large volumes of technical data and information, but it is risky for an expert, in the heated stress of deposition, to depend solely on their memory.

5) "Are there any other opinions you are going to give at trial?"

This is the classic "closing" question to a deposition. It is another minefield question. If you forget something, it can be excluded at trial. Leave the door open for any future work, especially such work as may not be foreseen at the time of deposition, such as commonly occurs in response to unforeseen allegations that may be raised after your deposition by opposing experts. Answer that you may provide opinions about any number of subjects, as directed by your own

counsel, and that if new issues or information arise, you may reevaluate your own conclusions and/or testify about such matters.

6) Answering written questions read by others

In many large cases another attorney may have prepared written questions for your deposition, and someone more junior or senior in experience may be charged with actually taking your deposition. Less seasoned attorneys may simply read these questions into the record and politely listen to your responses. This kind of questioning can be tedious, because the deposer may not be tuned into the case, and will not be able to adjust questions according to your responses. These are the most boring depositions, and you may be repeatedly forced to respond that the question has been “asked and answered”. On the more humorous side, I’m always amused when they pop the question “*Do you have a criminal record?*” Believe it or not, this inquiry often follows questions about degrees, registrations, publications, honors and awards . It reminds me of that old attorney adage: “*If I was a crook, would I tell you?*”.

7) Expect repeat questions

If you are asked a question you feel has already been answered, say so. Respond “*I believe I have already answered that question this morning/afternoon, and my answer is the same*. The opposing attorney may be irritated by such a response and accuse you of providing an unresponsive answer (e.g. “*the witnesses’ answer is unresponsive*”). But, remember, you are not there to please him, your target audience is the judge and jury. Asking repeat questions is the oldest method of testing a witness to see if they are consistent in their testimony. By asking the same thing in a variety of ways, many hours or days apart, a lawyer can assemble the various questions together and attempt to color you as someone who provides inconsistent answers, is a hired gun, or can’t make up their mind. It’s a valid line of questioning, but often tests one’s patience.

8) Be flattered by personal attacks

There are some attorneys out there who are less than courteous, and on occasion, may behave like jerks. In most cases, there is deliberate method to their insults, jabs and verbal sparring: they want you to lose your cool in response to their insults. Most experts are bathed in some degree of ego, a kind of cool confidence that helps them withstand the rigors of cross examination. By attacking our credibility, attorneys know they will generally elicit a sharp defensive response, one that can later be read to the jury. Juries don’t like angry witnesses or angry attorneys.

Be flattered when you receive a personal attack, because such barrages usually arise when the opposing attorney finds himself without any substantive evidence to counter your testimony – so he attacks your credibility. This is the cycle of American politics: avoid the real issues and get down to character assassination. When someone goes out of their way to insult you, back off, take a few deep breaths, and think of some humorous response that will break the tension (e.g. “*Wow, I had heard you were an abused child,, but ...*”).

RULE #5: KNOW WHICH FACTORS YOU VIEW AS SIGNIFICANT

The key aspect of any deposition is to thoroughly understand what the expert sees as significant contributions to failure. Terms such as “reasonable” or “significant” carry enormous legal implications, as in something being a “significant factor” in triggering a failure (see Van Alstyne, 1969 and Olshansky and Rogers, 1992). Before being deposed, an expert should meet with his own counsel and discuss the various factors, how one rates them (usually in order of descending import), and how we came to such conclusions. Be ready to discuss difference between “**significant**” and “**insignificant**” contributions to failure.

As an expert witness I arbitrarily held that, for myself, “significant” meant at least a 20% contribution to the subject failure. I never encountered an opposing expert that disagreed with this cutoff, and many others have since employed the “20% standard”.

RULE #6: BE ABLE TO RECOGNIZE “GENERAL INFORMATION” QUESTIONS

Q1: *“If you were engineering something, wouldn’t you do such and such....?”*

Q2: *“I understand from reading your work on such and such that you are of the belief that”*

These kinds of prefaces are usually set-ups designed to trap the witness into agreeing with some manner of seemingly innocent **general information question**. Beware, because although you, as the deponent, assume these are general information inquiries, attorneys may intend them to apply such statements to the case-at-hand. This is the most common deposition “problem” for forensic engineers. You must remember that what you might or might not do in a particular case is almost certainly colored by the after-the-fact information you possess in regards to the actual performance of an engineered structure, be it a building, pavement or an embankment. We tend to think of general information questions in the vacuum of a perfect world, where there are no time pressures, communications difficulties, or problems with timely compensation.

It is a simple fact of the construction world that those jobs experiencing cash flow problems, regardless of cause, will inevitably experience shortcomings. Before you criticize a fellow engineer’s actions, you should be made aware of the entirety of the situation they were operating under, from first-hand sources (your own counsel may be slightly biased, and not a reliable first-hand source). Remember that in most instances, owners get what they pay for, that is why most states hold builders to a strict liability standard, as manufacturers of products. Graded lots, as well as houses, are considered manufactured products, and thereby, come under the purview of product liability torts.

Many experts perform poorly in this mode, eagerly offering expert advice as to how they would or would not have handled a situation, ignoring any reference to the standard-of-care then pervading the industry in a given area. The fact is most people’s memories, in of themselves, are unreliable indicators of when certain standards were introduced and subsequently became, is common practice.

RULE #7: BE READY TO TESTIFY ABOUT “TRIGGER THRESHOLDS” and RATES OF OCCURRENCE

In construction litigation cases good attorneys will inquire about what you believe to be “trigger thresholds” for either: 1) sounding an alarm or warning about a structure or embankment’s performance; or 2) something is sufficiently damaged so as to require repair or complete replacement.

Common “trigger thresholds” exist within the profession for concrete cracks, for patios, walkways, foundations, interior slabs-on-grade and exterior or garage slabs-on-grade, etc. For most concrete flat work the trigger threshold for replacement are cracks at least 1/4 inch wide. Other common trigger thresholds include floor levelness, commonly assuaged to be about 1 inch change in 10 feet or greater. Some experts prefer to use 1 inch in 20 feet.

Any expert should be prepared to present their “trigger thresholds”, and these values should be based upon something, such as published references, industry reports or applicable building codes. Most seasoned experts know the threshold values and remain consistent in their recitation of such. Beware that whatever threshold you cited in one case will likely be compared to that you give in another. Lawyers love to search for inconsistencies to impeach witness credibility.

All of this said, there exist considerable “gray area” in citing trigger thresholds. The issue in engineering design has historically been one of “serviceability”, not absolute performance standards. When engineers design a concrete tilt-up slab-on-grade structure for industrial application, they are not as prone to worry about limiting cracking and tilt of walls and floors as they would be with a residential structure. In residential structures, the recognition of cracking can vary between inhabitants, and is oftentimes a function of interior decor, outside the scope of most engineering services. For instance, if gypsum wallboard is covered with a dark colored wall paper, the **slightest** deformations will stick out as thin white “slivers” through the wallpaper. If the same wall with the same deformations had been covered with a rough acoustic covering of light color (usually white), the same cracks might escape notice.

Another gray area is **likely future performance**. It has long been recognized that in the construction of wood frame structures, such as homes, a number of adjustments will usually occur in the first few years of the structure’s habitation,

due to: 1) landscape irrigation causing underlying soils to absorb water and swell; 2) loading of the house frame by interior components and improvements; 3) cross grain shrinkage of timber, especially on the southwest exposure; 4) mixing of dissimilar building materials, one against the other; and 5) thermal expansion and contraction. A heavy winter or an earthquake may accentuate any of these common maladies, which the building industry terms “call-backs”.

The past decade has seen many call-back situations escalate into full-blown class action lawsuits. In such suits plaintiff’s experts usually cite overt problems with the worst performing unit, then assuage that the same phenomena will infect all the other units at some future time. Even in our litigious society, it is difficult to recover for damages that have not yet occurred, but this appears to be the trend in construction litigation. For experts on either side of such issues, the fundamental question often boils down to **rate of occurrence**: will the problems cited continue to manifest themselves at a more or constant, near-linear rate (common plaintiff argument); or do call-backs typically manifest themselves most fiercely in the first year or two, diminishing with time (common defense position).

What engineers usually want before answering “rate of occurrence” questions is **real time rate of occurrence data**, such as might be garnered from inclinometers, tiltmeters, or crack meters read over a period of years. Movement data can also be complicated by seasonal shrink and swell of expansive soils, so one must accrue data over sufficient time span to be truly meaningful. The luxury of time is seldom available to us in lawsuits, where one is constantly warned of impending discovery cut-offs and trial dates, only to see these come and go with seeming regularity, due to Court-approved continuances. Lawyers seldom allow time for the engineers to collect hard data, and when pushed for data acquisition, may prove fatalistic, responding that “*such data might hurt their case if the instruments show things really are moving*”. The lawyers aren’t the ones that actually have to testify, so its very tempting for them to ignore long-term data collection and instead encourage experts to opine a favorable response based solely upon “professional experience”. Seasoned experts don’t give in to such pressures, as they realize their peer credibility can be irreparably damaged when they overstep themselves and provide “cheap opinions”. In this age of binding arbitration and mediation with special masters, peer credibility is playing a larger and larger role in settling cases. What your fellow experts think of you is more important than pleasing one attorney for one consultation. Don’t be a whore if you don’t desire the moniker.

RULE #8: BEWARE OF COMPOUND QUESTIONS

Beware of compound questions. Compound questions are very common when an attorney is sitting across the table from you at the end of day and thinking out loud. These questions often sound reasonable enough at the outset, but then the question becomes loaded with additional baggage. Here’s an example:

Sometimes the set-up begins with flattery of some sort, playing up to what a big, wonderful, smart sort of person you are. Something like “*We met in the Rothschild case a few years ago and I was very impressed with your credentials, blah blah blah*”. When the deposing attorney sends flattery your way, beware of their motives. Compound questions are often prefaced by a series of easy-to-answer questions, to lull the witness into complacency. They might ask you if water is wet, if the sky is blue, if all concrete cracks, etc etc. Then, something slightly more complicated may be introduced.

Compound questions generally take the form of being “helpful”. For instance, after asking hours and hours of questions, the attorney may relax a bit in his chair and begin with “*Let me see if I’ve got all of this right here. If we were to summarize...*” Then comes the clincher questions, right when you’re thinking about being released and going home. It usually goes something like:

Q: “*Dr. Soandso, from what you’ve said here today, am I given to believe it is your opinion that water causes landslides, and that the more water one can prevent from entering a hill the better off they would be with respect to resisting slope movements, such as landslides?*”

That sounds like a reasonable question, and your first response, without thinking, would be to respond in the affirmative. But remember, an attorney can only read your response to the judge and the jury if they read the exchange in its entirety. The attorney may be focusing on water here because he wants to blame a slope failure on some downspout discharging on the slope 75 feet above the landslide’s head scarp. The landslide in question may actually be a cut slope failure, wherein the slope has been weathering for 30+ years, and finally gave up the ghost and failed. Stop and think if there are

any extenuating circumstances! If this is the case, BE CAREFUL. As an expert you should be able to delineate between raveling, rill erosion, earthflows, slumps and block slope failures. Which one is it? The correct response might be:

A: *“Mr. Blowhard, as I have stated previously, surface runoff is but one form of water that can play a role in destabilizing the face of an old cut slope. For a more deep-seated failure, such as appears to have occurred here, the accumulation of shallow groundwater is likely the straw that broke the camel’s back, but the camel was not born until the massive cut was made to accommodate Main Street, down below. As I have stated previously, it was the creation of the cut slope in a weak fissile shale member of the Briones formation that was the overriding, all-important factor in precipitating the subject slope failure, and the slope just sat there for 37 years, like a sort of ticking time bomb, waiting to go off.”*

That response is a complete answer, which disallows simple runoff as the single most important component precipitating the failure. This attorney had spent the entire day probing my opinions about a slope failure, then tried to pin the blame on a single downspout! Pushing aside patience, I had to continually reiterate what the major factors were precipitating the slope failure.

So, at the end of the day, he asks one more seemingly innocent question, after all, hadn’t I mentioned groundwater? Yes, I had. **But remember, your answers must stand alone with the questions.** It will never be read to the jury in the context of the entire deposition. The law only requires that the attorneys read the entire text of any given question and answer they select. If I gave into my fatigue and provided a simple reply, it could mislead the jury into believing that I felt local sources of groundwater were an all-important factor in governing the subject slope failure. As it was, my answer included all the other factors, and some of these were unfavorable to the opposing counsel’s theory of liability. So, the entire sequence (question and answer) was of no use to him.

RULE #9: RECOGNIZE HYPOTHETICAL QUESTIONS FOR WHAT THEY ARE

By far the most dangerous area for experts in deposition are hypothetical questions, especially when posed towards the end of the day, as we become tired and let our guard down. Hypothetical questions come in two basic varieties: 1) Those carefully constructed ahead of the deposition and designed with some particular goal in mind; and 2) Spontaneous hypothetical questions, thought up by the deposing attorney, on-the-spot. Spontaneous questions are easy to recognize because the attorney will start thinking out loud, resulting in a complex run-on question. Most of us relax our verbal communication skills as the days wears on, but in a deposition our end-of-the-day slow downs are all recorded by a court reporter.

When someone has fired a run-on question at you with all sorts of disjointed parts, don’t just answer, **stop**. **If it is a complex question, your first response should be to ask the reporter to please read the question back to you.** If the attorney has genuine intent with the question, they will usually be so embarrassed by the read-back, they will volunteer to re-phrase the question, usually simplifying it in the process. These sorts of exchanges are common towards the end of the day, when everyone is becoming weary.

However, hypothetical questions crafted before the deposition and read to you should be regarded with great care. These are usually intended to elicit a response favorable to some minor point the opposing attorney wants to make a big deal out of. Attorneys will usually preface such questions with phrases such as:

“If you were building a house in the hills, what would you do?”

Beware that such a preface can be used to show that you disagree with what actually was carried out in the case-at-hand.

Usually, hypothetical questions are more complex. They commonly set forth a series of supposed facts that may not appear to be relevant to the case-at-hand. You should realize they would not be asking the question if they did not have in mind some way to use your response to their advantage at time of trial. Some examples would be:

“Dr. Soandso, if you were counseling the potential buyer of a structure on Slipnslide Lane, and you saw a crack in their foundation, would you not bring that to their attention immediately, and advise them that such a crack might be indicative of future problems? Isn’t that just basic common sense in your field?”

That’s an actual question. If an actual physical setting, such as Slipnslide Lane, is mentioned, be aware that any response you offer will likely be applied to any and all structures in that area, regardless of details such as the structure’s age, engineering input or the geologic setting. Notice that it is really four questions rolled up into one:

- Q1: The first question inquires about cracks in concrete foundations.
- Q2: The second question asks about the duty to inform clients immediately about the presence of any cracks.
- Q3: The third part of the question seeks your agreement that any crack in the concrete is likely indicative of future problems
- Q4: The last part of the question is the sinker, it is asking you to provide a definitive statement about the standard-of-care for an engineering reconnaissance of a residential structure.

This is a loaded question. Your first reaction should be to break the question down into workable components, then answer each component individually. For example:

A1: *“Sir, you have asked a complex question, which contains several questions within the question. I would prefer to break the question into its basic components and answer each individually”.*

“The first part of the question inquires about structures on Slipnslide Lane, and I would be obliged to address that issue first. Slipnslide Lane has long been recognized as a scene of numerous slope stability, erosion, pavement distress and buried utility failures, dating back to the mid-1950s. However, many portions of Slipnslide Lane exhibit little or no evidence of earth movement, because these areas were situated on bedrock ribs not prone to land slippage, slope creep, or other forms of gross instability. So, the fact that we are providing any opinion about a hypothetical structure on Slipnslide Lane, in of itself, does not predetermine what our frame of mind should be, because each house site is somewhat unique and subject to differing types of natural hazards.”

The attorney won’t like that, and may accuse you of being evasive or non-responsive. I always found it ironic to be labeled “unresponsive” when I’ve just finished giving a 10-sentence answer to a one sentence question. That sort of name-calling shouldn’t preclude you from maintaining your professional integrity. Now for the correct response to Q2:

A2: *“Sir, in response to your hypothetical statement about “observing a crack”, I would like to state that in my professional opinion, all concrete is subject to cracking. The presence or absence thereof does not, in of itself, necessarily constitute some egregious hazard. I would need to know more about the crack, such as it’s length and aperture, or width, the style of cracking,, whether indicative of shear or tension, and the recency of cracking. It could simply be a tension crack caused by the concrete heat of hydration upon initial placement or due to inadequate temperature reinforcement steel. Just saying there is a “crack” is not enough information for me to opine upon, one way or another, sorry”.*

By now, the deposing attorney may become irritated, and you may be precluded from answering further, since you have not been careless. But, for purposes of illustration, let’s provide the answers to parts 3 and 4 as well:

A3: *“Sir, in response to your hypothetical statement about cracks in concrete being indicative of future problems, from a geotechnical perspective, I feel obliged to state that the simple presence of a crack, in of itself, is insufficient information whereupon to draw any such conclusion. As stated in my previous answer, this imaginary crack may be a hairline crack ascribable to concrete shrinkage, or any number of innocent mechanisms for occurrence which give no cause for alarm or concern in regards to likely future performance.”*

Answer 4 is the dangerous one. Just what is or is not “common sense” in your professional field of expertise is a common lawyer trap. Seasoned trial attorneys like to package a standard-of-care question with such innocent-sounding

terms as “**common sense**”. Always beware of questions whose components seem simple enough, **but are joined together in a hypothetical question**, where the obvious answer would appear to be “yes”. The correct response to Q4 would be:

A4: *“In response to the last part of the question about “common sense” in my field, I must state that, in my opinion, there is insufficient data presented in your hypothetical question to answer whether or not a particular conclusion would be “common sense”. In our line of work (geotechnical engineering), one of the great determiners is **time**, how long has the structure or structural component under evaluation been there? If we see a pavement crack ½ inch wide three feet back from the edge of slope, and the pavement was laid down 25 years ago, we may not be very concerned. But, if the pavement were laid 6 months ago, we might feel the same observation to be worthy of concern or mention.”*

RULE #10: NEVER ALLOW YOURSELF TO BECOME OVERCONFIDENT

The art of crafting hypothetical questions is far more intriguing than most realize. There was a case I worked on for the State of California years ago where an seasoned and imposing expert was completely fooled during their deposition, and what began as a no-lose plaintiff’s case was arbitrated soon thereafter at great savings to the State, who was a defendant in the action.

The plaintiff’s expert was a knowledgeable person, with doctorate degree, registrations, and numerous publications. We’ll call him “Dr. Expert”. He also possessed considerable trial testimony experience. In this case, however, he was covering a lot of ground, being designated to testify to a sweeping array of technical categories, several of which were on the fringe of his professional pedigree and experience.

The state attorney began by asking a lot of innocent questions, initially about qualifications. The man loved to talk about himself, his professional recognition, and so on, and the deposing attorney appeared impressed. This seemingly favorable impression caused the witness to become more and more candid, and he quickly slid into the seat of “*lecturing teacher*” to the attorney’s role as “*naive student*”. A few times the attorney asked simple questions, such as the “*definition of strain*”. She was surprised to learn that Dr. Expert didn’t provide crisp definitive answers to these “definition questions”, but waxed eloquent anyway, sounding solid and confident to the other attorneys attending the deposition. An interaction of comfort and confidence grew as the deposition progressed.

In the early afternoon, the deposing attorney began innocent probing of Dr. Expert, inquiring about what he had done on the case, acting impressed by every word Dr. Expert spoke. She even laughed at his little jokes during the breaks, and seemed impressed by Dr. Expert’s 50- page resume, which listed every consulting job he had ever worked on. All of these responses led Dr. Expert to become more comfortable and increasingly colloquial in his responses as the day wore on. By the end of the day he felt in supreme control of the proceedings and was sure the state attorney would probably retain him as her expert in the next earth movement case she worked on.

Towards the end of the day the state attorney asked some innocent questions:

Q1: *“Dr. Expert, were you able to evaluate the landslides on the opposite side of the highway to see if they were contiguous with those you studied on the west side of the road?”*

A1: *“No, everyone involved wanted to do that of course, but we weren’t able to gain access to that property. It seems as though the owner, Mr. Difficult, is a rather disagreeable character, and he continually denied us access”.*

Q2: *“Dr. Expert. What would you have done if you had been able to gain access to this parcel?”*

A2: Dr. Expert then outlined his standard program of study, carried out on the accessible side of the highway, **then added** how he felt the landslide on the other side of the highway was a completely different feature, unrelated to the “*negligent activity*” by the State which he alleged triggered the landslide in question (which spilled down onto the west side of the highway).

This response was a great “catch” for the deposing attorney, and she quickly followed up with two **hypothetical questions**. To do this, she successfully played the role of the naive “student”.

Q3: *“Dr. Expert, if a slide existed before the highway was built, would the highway’s construction have caused it to be renewed, or become, .. what you called, what was it, ah, reactivated?”*

A3: *“Nancy, that’s right, that’s exactly what it means. If the slides predated the construction of the highway, then the State would off the hook, but of course, as we’ve discussed previously, that was not the case”.*

Notice that Dr. Expert was now so comfortable he was addressing the attorney by her first name and congratulating her on her understanding of his fine tutelage in Geology 101. Next question:

Q4: *“Dr. Expert, what if I told you the state’s experts were able to gain access to Mr. Difficult’s property and that they carried out a study which confirmed the source and ages of the slides on his property to be one and the same, predating the highway’s construction?”*

Long pause

A4: *“Well, then, I’d say that we’d have to go back to the drawing board and reconsider the analysis we’ve made in this project, we’d have to take a second look, we’d need to, ah, ah, determine what other factors may have precipitated the accident.”*

Q5: *“Dr. Expert, are you saying that if the slides are of the same age and origin, before construction of the highway, that, ah, the construction work may not have been a significant factor in triggering the 1993 slide?”*

A5: *Well, yes, that would appear to be the case, though I still have trouble believing that could be the case, that’s really interesting, I just knew we needed to get on that site and look at that as well, but we don’t have the resources you have.”*

It was late in the day and the deposition concluded shortly thereafter. A settlement was soon reached in the days following Dr. Expert’s deposition, which had been put off till just before the trial was to begin. The state settled the case for about 10% of what they originally thought it was going to cost. What state attorney Nancy accomplished was the use of what we might call a “**masterful hypothetical**”, so innocently slipped into the proceeding, nobody but her noticed it for what it actually was: a deliberate ruse. Both sides had attempted to gain access to Mr. Difficult’s land, but without success. The State attorney simply asked a hypothetical question: “*What if I told you the state’s experts were able to gain access to Mr. Difficult’s property and that they carried out a study which confirmed the source and ages of the slides to be one and the same, predating the highway?*” That was posed as a hypothetical question, and Dr. Expert and his own counsel, bursting with overconfidence, had failed to recognize the “**if**” for what it was.

That they lost millions of dollars for such a small slip of the ear is the best example I can provide of the importance of attending to detail when operating in the environment of sworn testimony. Poor timing was a factor as well, as the plaintiffs had made themselves vulnerable by putting off their own expert’s deposition until the 11th hour, when it was too late to go back and ask the state’s experts about what they might have done on Mr. Difficult’s property. In actuality, they had never gained access to Mr. Difficult’s land.

Hypothetical questions can be powerful if they are used sparingly, offered only when the opportunity presents itself, with a witness and his counsel lulled into overconfidence. Neither an expert witness nor their attorney can ever allow themselves to become too complacent.

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