

## **Expert Witness 101**

**Paul W. Gantt, CSP, REA  
President  
Safety Compliance Management, Inc.  
San Ramon, CA**

**Gordon A. Stemple, Esq.  
President  
Gordon A. Stemple, A Law Corp.  
Fresno, CA**

### **Introduction**

One of the most rewarding aspects of working in the field of occupational health and safety is working in a position that matters, one that seems to make a difference. Whether it is designing or implementing a safety system, developing new procedures, or providing training programs, the job comes with its own set of unique opportunities to make a difference at the workplace and to impact the lives of those with whom we work. And the challenges that confront the safety professional are often huge given the wide diversity of subjects that encompass the world of health and safety programs.

One of those challenges becoming more in demand is the need for qualified consultants in the area of legal or litigation work. Many people simply refer to those who work in this discipline as Expert Witnesses, although that is just one aspect of the type of opportunity that may be provided. There is actually a whole range of areas where a qualified Safety professional may be able to work and make a difference. With the increasingly large recession and downturn in the economy, many in the legal field are predicting even more work as former employees are increasingly blowing the whistle or filing lawsuits against their former employers. Further, some experts are predicting that with cutbacks in many safety programs due to the economy, more accidents could result, making this area one where more and more safety professionals may find themselves working.

This paper will document some of the basic issues associated with working in the legal world as a safety professional. It is not intended to be the final authority on the subject, as that would be much lengthier. However, it will detail much of the basic information of working in this subset of occupational health and safety. It is expected that the initial paper and presentation will be met with a fair degree of interest, and that from this, additional programs will be added that will expand on the basic programs presented in this paper. Those future programs will provide a range of case studies and cover more of the details of how to become successful in this area.

## **Witnesses, Experts, and Litigation Consultants**

While you don't need to have a legal degree to work in a legal capacity, there are some areas of information that need to be understood in order to be successful. Some of this information and concepts that come into play in the legal arena are not those that can be adequately addressed in any depth in a relatively short paper. One of these is to have an understanding of what a witness is and what a witness can do or say. We often hear of cases where certain testimony is barred from a particular legal proceeding and this relates to the concept. This can happen due to the fact that an ordinary witness is limited in the scope of what they can speak about. They primarily can only testify as to the facts that an ordinary person would know. Facts such as what they saw, smelled, heard, or tasted. Facts related to what ordinary people who were exposed to that a specific set of circumstances would reasonably know. They are not allowed to speculate, guess, or offer an opinion in most cases.

On the other hand, an Expert Witness is allowed considerably more latitude in their testimony. Once someone is qualified through the process that will be later described, an Expert Witness is allowed to testify based not only on what they know having seen, heard, smelled, or tasted; but also they can provide an opinion or offer testimony based on hypothetical facts and circumstances that are presented to them through a review of the evidence in the case. Their opinion is based on their experience, education, and knowledge that are used to qualify them to become an Expert. The information that they use to render an opinion are often gathered through site visits long after the incident occurred, through the reading of the deposition testimony of others, and through a review of photographs that may have been taken.

Often, the Expert is asked questions by the various attorneys regarding the applicability of regulations as they relate to a set of circumstances in order to determine if what was done by others was, in fact, the correct and legal thing to do based on those regulations. As we know, regulations can often be confusing or leave much to the interpretation of others. In other cases, the Expert is asked what is the "custom and practice" within a given industry to help determine if the conditions present were those that are the norm or whether there might have been some deviation in what occurred in one situation as opposed to what should have or would have normally occurred.

Again, these opinions are not something that an ordinary witness can testify to, but rather someone who on the basis of their prior qualifications is allowed to opine in a given area. The responsibility is great and allows for considerable latitude on the part of many who work in this area. With the responsibility comes some rules that must be followed by the Expert.

However, not all of the work done in the areas of legal or litigation is done by a qualified and disclosed Expert. In some cases, safety professionals are brought in as litigation consultants who are simply part of a team to help review the facts and guide the attorneys or others into areas that may be pertinent or need further exploration. The non-designated litigation consultants are allowed to work invisibly behind the scenes and are awarded attorney-client privilege protection. This allows them to explore areas that may or may not be used in the proceedings. Unlike the disclosed Expert, litigation consultants who are assisting in the process are free to work with the legal team without full disclosure. This is not the case with the designated Expert who is allowed to testify and present an opinion. For the disclosed Expert, everything, yes everything that they say or do is discoverable by the opposition and must be disclosed when requested by the other

party. All written documents including field notes are subject to full disclosure and scrutiny by the other parties in the case.

## **Ethics 101**

Regardless of whether you are a disclosed Expert or a litigation consultant, there are some areas that are important to your success both in that capacity and in your continued work in the occupational health and safety field. The first of these relates to the concept of ethics. The best way to say this clearly is to simply use the phrase that ethics is **not** a four-letter word; but bias is. And when it comes to the whole aspect of your work in the legal arena you must be careful in everything that you do since there are many pitfalls that will be present as you work.

Perhaps the easiest way to work through the issues of ethics and bias is to emphasize that your approach to the work that you will do should always be done with an open mind. While you may have been hired by an attorney representing one side of the case, as an Expert you are not the advocate for that side. While the attorney who hired you is retained to represent the interests of their client, you are hired to provide testimony that is factual and accurate, period! And you are sworn to tell the truth, the whole truth, and nothing but the truth in your testimony in court, in reports that you complete, and in deposition testimony.

To do this, you must be open minded and not be subject to bias in any form. Even as a litigation consultant who is helping an attorney team develop some areas that would be helpful to the case, an open mind is also critical since it will help you and your team identify things that you absolutely will need to know. In this capacity you must be willing to explore areas that may not be ones that you may not have considered. You may be asked to consider situations and circumstances and to provide help in preparing a defense or a cause of action against the other party. In this role, you too will need to be ethical and not stretch the truth to its breaking point. Yes, you are more focused in your approach as a consultant, but clearly you should not become biased. In that role, you need to be fully open with your team and often tell them things that they might not want to hear but do need to hear. As the litigation consultant or Expert, you must not close your mind to simply focus in one area and one area only.

An area that is related to this topic is one that is commonly encountered by many who are working in the legal arena. This is the subject of becoming someone who works exclusively in one side of the case or the other. This is often termed becoming a plaintiff's expert or a defense expert. As we know, each legal case has two sides and often Experts or litigation consultants can develop the reputation of siding more with one type than the other. This is often an accepted practice for an attorney who is the advocate for the party, but the Expert or consultant should be careful in this by not simply being primarily one side or the other. One of the most frequently asked questions in any deposition of an Expert relates to the percentage of their work that involves either side of the equation. To do 90% plaintiff work could minimize your effectiveness and lessens the credibility in that it shows that you may not have as open a mind as you might otherwise have.

## **Getting Started**

Regardless of whether you will work as a disclosed Expert or litigation consultant, the process of getting started in the field is similar. To begin with, you must be the best in your particular field of expertise. You are, after all, representing yourself as expert in the field regardless of whether

you will be designated as such. Simply being a CSP or PE does not qualify one to work in any legal capacity if the experience that you possess is not related to the facts of the case. Often it is your reputation as a Safety professional and your ability to hold out your credentials, expertise, and even your verbal or written skills that will make the case more favorable to your side, so having strong communication skills is also required on top of the experience that you have. Continuing education, ongoing experience gained in a particular discipline, and attaining additional certifications are all ways that you can enhance your status in this area since they show that your information is current and not dated.

To illustrate this very important point, in a former CSP exam, there was an ethics question that asked about what you would do if you had worked as a CSP for 20 years in the manufacturing area. It relates that an attorney friend contacts you and asks to involve you in a case involving a construction accident. What would you do given this set of circumstances? Obviously, the answer is that you would decline since simply being a CSP would not necessarily afford you with the required competence in an area where you haven't worked. As we all know, the field of occupational health and safety is vast in its scope and someone can be very specialized in a particular area without having the breadth and depth of knowledge that is required in a particular discipline within the overall industry.

So to get started in this arena requires that you become the best at what you do. Do it well, do it better than anyone else, continually improve yourself in the area of your discipline, and establish a reputation as the "go to" guy (or gal) in a particular topic or area. Once you do, you will find that the word will soon get out. To help with this, you might focus on a specific area or discipline within the vast world of occupational health and safety. In this, you might become expert in the topic of machine guarding or fall protection. You can start with a limited focus, gain some experience and success, and then expand your roles as time and circumstances allow.

Once you have become the person who is most knowledgeable in a given area, you might also want to put out your Resume or CV packet on legal marketing sites. Findlaw, LexisNexis and other related legal marketing websites are happy to take some of your money and post your packet in various areas where attorneys and others can find you. Additionally, you can also begin to network with others in the field and state your interest in working in this area. Once you have done a few cases, you will often find that the work simply expands significantly as others begin to learn about you and your competence. Remember that in most legal cases there are multiple attorneys involved and often, those who were on the opposition side in the last case may ask you to be on their side on the next one. This happens sometimes just to take you out of the running and keep you from working with the other side. Don't be surprised if your level of involvement increases rapidly.

And speaking of this, a word of caution is needed given that it is often easy to become the "hired gun" in a particular area. Remember the earlier discussion of ethics as it relates to this area. A good reputation is one that takes a long time to achieve, a lot of hard work to retain, and something that can be lost in a nanosecond. Any misstep in this area is not easy to recover from. Each case that you get involved in should be one that you are comfortable working in, one where you have the necessary expertise, one that your conscience can be satisfied with, and one does not call into question your personal and professional ethics. Simply put, it is fine to turn down a case rather than risk damaging your reputation or putting your personal values at risk.

Once the word gets out that you are qualified and interested, you will likely receive a call from an attorney's office asking about your potential involvement in a particular case. While it is difficult to not get excited when this happens, you cannot simply agree to work with them until you confirm what you will be doing and who are the parties involved in the case. To do this you must ask questions and initiate a fact-finding mission. Any and all potential conflicts of interest related to the case must be identified. This requires that you ask about the specific facts of who is involved, including all parties related to the case. If one of those parties is someone who you know or have done business with, it could taint your work and limit your effectiveness. Avoid all appearances that you are not neutral in the case, remember, your professional reputation and ethics are on the line every time you get involved in a legal proceeding. Even if you don't consider a prior relationship with one of the parties as conflicting, the other side of the legal proceeding may use that to get you removed from the case at a bad time. So be sure to discuss everything that could potentially be introduced in the course of the case with the attorney who is retaining you to work on their team.

Next, inquire about the specific areas of the case and determine if you have the necessary background to do what is needed. Again, don't agree to work on a case when you won't add much to the effort. In many cases, the attorney will ask you to review the facts of the case for the purpose of determining if any regulations or custom and practice were violated, and then to opine as to whether or not those violations may have contributed to the accident or circumstance that occurred. If you don't have the necessary expertise, you should turn down the case since you won't be the best person to help. If you are in doubt, have an open discussion with the attorney or their assistant and lay out your concerns. A good attorney can help you navigate this area and end up with a good result. Remember that the other side of the case will have their own cadre of experts, both consultants and designated Experts. Often, the most qualified of those involved in the process will have the most credibility with the other party or the jury should the case actually go to trial. Speaking of going to trial, don't be surprised if testifying at a trial is something that you don't ever do. Attorneys often refer to going to trial as playing legal roulette in that even with a solid case, there can be issues of complications that cause the case to not go the way that you like or expect.

## **Working**

The actual work that litigation consultants and Experts perform varies considerably based on a number of factors. However, most of the work that you will do in either case involves a considerable degree of research. Based on the issues associated with the case and your prior experience, the research that you will perform may take up the majority of your time. You may be asked to research the areas involved in the case and provide a written report to the team. Remember that before anything is written, you must know whether it is subject to discovery based on your role in the team. If you are a disclosed Expert, even your written notes and drafts can be discovered in the process so understand who will see what you write before you write it.

During the research phase of conducting your work, you may come across some information that is not positive to the case. This makes it critical for you to let the attorney who retained you know about it, as they don't like to be surprised when the opposition Experts bring that area up in their testimony or reports. Bad news is made worse when you don't see it coming and the knockout punch is often the one that you don't see until you are already down. To identify a problem area with the case and disclose it to your team will help you to be prepared to deal with it as it relates to your case.

An example of this might occur when, in the course of reviewing the materials provided to you when working as a Plaintiff's attorney Expert, you discover that the person involved in the accident did not have all of the required training. In this instance, the person was injured when guardrails were not installed as required and the person fell and sustained serious injuries. Because you know that the absence of the guardrail was the primary contributor to the accident since the person fell in an area where guardrails were required, you and your team should not have any issues dealing with the lack of training. But, the opposing side will likely find out about the lack of training by the injured employee and might bring it up as a contributing fact. This may complicate the discussion and cause the case to focus on the failure of the employee to be trained and in the lack of the employee's employer to properly protect them from the hazards present. The case could easily derail unless you understand and confront the lack of training in your discussions and acknowledge that it was required but would not necessarily have prevented the injuries to the same degree as having an approved guardrail system in place would.

In addition to doing research and providing information, if you are a disclosed Expert in the case your role will also likely include testifying at a deposition. A deposition is a mini court hearing that is generally held in one of the attorney's offices. The office is usually that of the opposing counsel and you will be asked to bring in all of the materials that you have used in conducting your work. This will likely include a copy of your Curriculum Vitae (CV) packet, along with any notes, written materials, reports, pictures, or regulations that were provided to you or that you developed in the course of your work. Generally, it is best to show up with several packets containing all of the copies of these materials so that all parties in the case can review them while you are being deposed.

The deposition is recorded by a court reporter who swears you in by asking you to state that all of your testimony will be the truth, the whole truth, and nothing but the truth. At the deposition there are rules that must be followed and in your earliest depositions, these will be explained to you. Examples of these include the need for you to wait to answer questions that are asked so that only one person is talking at one time. Another includes the need to never guess about anything, although estimating is allowed. Others include the need to speak clearly and answer questions with a "yes" or "no" rather than "uh uh" or "uh huh." As you gain more experience giving deposition testimony, the rules won't need to be restated and your testimony will be given.

During the deposition, the opposing side attorney will generally ask you about your qualifications as an Expert. They will explore your background and lack of expertise, focusing more on what you don't have than what you do have in the way of credentials. They do this to open up opportunities to discredit what you are going to testify to and any opinions that you might be planning to present. Likely they have done some research on your background even before you get to the deposition, reviewing your website or even other testimony that you might have given in a particular area. Essentially, everything about you is subject to being discussed and you are literally on the hot seat through much of the process. This further restates the importance of maintaining a high degree of professional ethics and integrity since your past actions are all on the record.

Following the discussion regarding your background and qualifications, other testimony presented at a deposition will vary depending on the individual attorney asking the questions. In many cases, they will ask to explore all of the things that you have brought to the proceedings and will go through them item by item. If you read material in preparation for the session and made

highlights or notes in the margins, they will want to see those and may ask you about them. Never forget that as the Expert, everything that you do is on the record so be careful what you do.

Finally, one of the main areas of the deposition will be to discuss and fully identify all of your opinions and conclusions that you expect to testify to in court. This is done so that everything is in the open and that there are no surprises should the case ever get to court. The attorneys will demand and will push you to fully disclose what you expect to say. Don't be surprised when they challenge what you are presenting. Be prepared to defend not only what you say, but the basis for your having said it.

In their efforts to find out what you know and what you plan to say, they may ask questions or explore issues that are not within your expertise. In these cases, your attorney, who is also present, will file an objection on the record. Most of these are simply formal notices that get put into the written record and which won't get resolved unless they become critical to future proceedings. So even when an objection is registered, most often you still answer the question that is posed and your answer is placed on the record. In some cases, the deposition testimony can become quite adversarial and contentious among the various attorneys present. While this may be your first exposure to a particular attorney, the attorneys in the case have likely more track record working on the case and may have a history of contentious interactions. In most cases, the proceedings are civil and straightforward.

Typically, following the deposition, a written transcript will be sent to you for final review. When you get the transcript, it is important that you review it to ensure that what is written is actually what you stated. You are not allowed to add or change your testimony at this point, but if there are clear mistakes made, you can correct them. An example would be the misspelling of a term that is jargon within a given industry and which the court reported may have translated into a more common term that doesn't mean the same. This is your last chance to ensure that the record is clear since the deposition becomes a permanent record of your testimony and one that you may be confronted with if the case ever gets to court.

The final aspect of what the designated Expert could be involved with is the actual testimony in court. Testifying in court is rare, since most cases are settled prior to this occurring to avoid any chances that a verdict could go against either party. Preparing to testify in court is a significant event and likely will require that you prepare some exhibits to illustrate the points or conclusions that you are going to make. Often, you can discuss this with your attorney and the rest of the team who is working with you. Exhibits can be as simple as drawings or Power Point slides, or as complicated as video created re-enactments of what you believe to have occurred. The opportunities are endless and depend on the specifics of the case and the team that you are working with.

## **Money- Money – Money**

Many people who want to work in the legal areas of occupational health and safety believe that since the stakes of the cases are significantly high, the cost of their services should reflect that. However, this can be a double-edged sword. Charging too much may make you less likely to be hired initially and charging too little may make it seem that your value is not worth a lot. The rates that are charged by those in these fields can vary from less than \$100 per hour to thousands of dollars per day of work regardless of how many hours you put in on a given day. The amount

you charge is based on the value that you bring to the case and this is often referred to as how much water you can carry.

An often-used practice in this area is to charge amounts similar to your standard consultation rates for the consulting and research work that you perform. Because the work is similar and because you are already comfortable making those amounts, this practice seems reasonable. For those who will be designated as Experts and who will testify in either deposition or trial, an additional amount is often added to the hourly research amount given that it has a higher value overall in the proceedings.

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

## **Benefits**

While money is certainly a benefit for those working in the litigation and legal areas of occupational health and safety, it is clearly not the biggest benefit. The other benefits of working in this field are enormous and cannot be overstated. Personal experience has shown that you become a better Safety professional having gone through the process. This is due to the fact that as you work in this area, you will get the opportunity to read the testimony of others who are also experts in their respective fields. You will also get to analyze incidents at depths and in such detail that you will go back to your “regular” job with a higher appreciation for some of the little things that we often take for granted. And you will realize that the old adage of “an ounce of prevention is worth a pound of cure” is one of the most understated concepts ever disclosed.

This is because you will see the enormous cost of accidents go well beyond what is typically seen. Often, something that would have required a few hundred dollars to prevent is litigated in cases that cost directly tens of thousand of dollars for attorneys and expert help. Then, to add the insult to the injury, in many cases the damages awarded as a result of that failure to spend the initial money can be in the millions of dollars. Again, the benefit of seeing that first hand can't help but make you better at what you do as a Safety professional.

## **Conclusion**

This paper has explored the basics of working in the field of litigation and legal consultation as either a consultant or designated Expert. While it is not expected to present all of the issues that would make one successful in this field, it should provide the reader with a background on what is involved. Additionally, it is hoped that by providing this material, the Safety professional will have a better understanding of the issues confronting those working in the legal arena should they have an interest in working in it.



If sufficient interest is identified, follow-up papers and sessions can be given to explore in more depth some specific case studies and areas that will further expand the knowledge of those who have an interest in this area.