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Don't Let Your Tongue Trip You Up: Dealing with Hypotheticals During Expert Testimony

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Course description: Navigating testimony is one of the most challenging aspects of the job for any expert or investigator. This course provides advice and tips to anyone providing testimony about how to get through tricky situations and provide your best testimony.

You will learn:

- *How to navigate hypothetical questions.*
- *How to prepare for testimony.*
- *Tips and tricks for staying calm and composed while on the stand.*

Testifying in a criminal or civil case can be a nerve-racking experience. In this lesson we'll cover some common mistakes made while on the stand, including how to respond to hypothetical questions that may be asked when testifying as an expert.

Expert testimony is something investigators and accounting professionals may be called on to provide during a case. When you are providing testimony as an **expert witness**, you will be asked to provide some form of opinion as part of your testimony. Sometimes, a judge may decide halfway through a case that your planned testimony contains enough opinion that you should be designated as an expert, despite you not planning to be considered as such. By contrast, a **fact witness** can only testify as to the facts of the case as seen or experienced by that witness. Fact witnesses may not testify to what was said by another person, a concept known as "**hearsay**", and a fact witness can't provide an opinion related to those facts while on the stand (in most instances).

Dealing with Hypothetical Questions During Expert Testimony

When you're testifying as an expert, you may encounter what are known as **hypothetical questions.** Most of them will begin with something along the lines of "Let's assume for a moment…" The attorney will then change some facts from the case before asking the question, therefore creating a fictitious or hypothetical situation for the purposes of the question. Sometimes these facts will be very similar to the case you are testifying in, and other times they'll be so far-fetched that not you, nor anyone else in the room, will be able to tell what the attorney is actually asking you.

In a situation where an attorney has gotten out of hand with a hypothetical, it may be appropriate to point out (politely!) that the attorney has gone so far off track that the question is no longer understandable. It may also be appropriate to say something like, "I concede, counsel, that if things were different, they wouldn't be the same." Something light-hearted (but respectful) like this can ease the tension in the courtroom and allow you to ask for a breakdown of the question to make it more understandable.

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In practice, there are two different types of hypothetical questions. There's the kind of question where the attorney will have prepared it ahead of time in hopes of getting a specific answer from the expert, and the kind that the attorney will be creating on the spot, usually, but not always, on cross-examination.

In a perfect world, all attorneys would prepare all of their hypotheticals in advance; of course, that's not the world we live in, so you'll have to be proactive. In general, it's good practice to discuss possible hypotheticals with the attorney who asked you to testify, so that you know how to respond. These kinds of hypotheticals can be used to let the expert opine on the case in general, or even some specific aspect of the case, such as defining fraud under particular circumstances, and still avoid giving your opinion about the guilt or innocence of the person or entity on trial.

Hypotheticals that are posed during cross-examination by the opposing counsel can be trickier to handle, as you will not be able to spend time discussing these before the trial. Sometimes the opposing counsel will intentionally make the question difficult to understand in order to confuse you, as the expert, or even to confuse the jury. This is because a confused jury may come to a different verdict, especially in fraud cases when the prosecution must usually prove that the defendant had intent to steal and knowingly lied in order to do it.

Be wary of these confusing questions. Attorneys can use hypotheticals to attempt to trip you up in a variety of ways, such as trying to get you to offer an opinion of guilt or innocence, which is specifically against a CFE's code of professional conduct. Listen carefully for critical elements in the question that could change your opinions, especially for anything that negates evidence, and make sure you're clear in your answer that you're speaking purely hypothetically.

Many times, such things won't be blatantly obvious—you must listen carefully! In one case out of New Jersey[1], the prosecuting attorney referred to the person on trial as the "target" throughout the trial, as did others on the stand. Then, when posing a hypothetical question, the attorney referred to the hypothetical person as the "target" as well, as did the responding expert, and that was considered enough to make the hypothetical nature of the question null; the case was overturned on appeal.

In another case, *New Jersey vs. Miraballes*[2], the hypothetical posed was so similar to the defendant and specific facts in the actual case, that it wasn't a hypothetical at all. The defendant in the case was a 61-year-old Cuban woman who had been accused of dealing drugs and lived in public housing. The district attorney posed what was supposedly a hypothetical question, but the hypothetical defendant was a 61-year-old Cuban woman living in public housing. An expert witness was given the exact facts of the real case, then asked to opine whether or not drug dealing was occurring.

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[1] *State of New Jersey, Plaintiff-Respondent, v. Marcus L. Coley, Defendant-Appellant*, Superior Court of New Jersey, Appellate Division, Submitted August 22, 2012, Decided August 27, 2012.
[2] *State of New Jersey, Plaintiff-Respondent, v. Miriam MIRABALLES, Defendant-Appellant*, Decided April 25, 2007

The appellate court determined that it was so close as to not really be hypothetical, and therefore when the expert opined that the person in the hypothetical was guilty, they were really opining on the actual defendant. That case was also overturned on appeal.

In such circumstances, you may have to say that the hypothetical is too close to your actual case and that you can't provide an opinion due to your professional standards. This may feel awkward, but many jurors will respect you for this and will hold the rest of your testimony in higher regard.

Long story short: pay attention during hypotheticals, and don't inadvertently opine on guilt or innocence. A good way to do this is to plan your hypotheticals in advance with the attorney calling you to the stand, and make sure you're creating hypotheticals that are less likely to garner objections from the other side. The attorney may not think of this themselves, so don't be afraid to ask for time to prepare with the attorney.

It's also worthwhile to ensure that you are testifying as an expert, and that when they call you to the stand, they have all of your credentials available for the court and jury, so that you can properly explain your expertise.

In some cases, hypothetical questions can also be a good way to educate the judge and jury about fraud, fraud theory, and accounting concepts. Once the hypothetical is concluded you could then explain how those concepts apply to the case you are testifying in. As an expert witness this is your purpose, to educate about the often-confusing world of fraud and accounting. If, instead, all you've done is comment on the facts of the case, the opposing counsel can move to have your testimony changed to that of a fact witness or stricken from the case record altogether.

Hypotheticals can be used to illustrate information from "learned treatises", such as the Association of Certified Fraud Examiners' Fraud Examiners Manual, which discusses the red flags of fraud and other fraud theories. Or you may wish to use accounting and auditing standards to help explain how those standards apply to the case you are testifying in. If you're going to cite such learned treatises, make sure you can point out exactly where your references are—it doesn't happen often, but sometimes an opposing counsel will pull out the book, study, or article you're referencing; if that happens you want to be able to point out exactly what you're citing.

Tips and Tricks to Get You Through Testimony

Now that we've covered hypothetical questions, we can move on to common mistakes made on the stand, how to avoid them, and how to recover when a mistake is made.

Mistake!
Volunteering information or answers.

With all testimony, not just expert testimony, you want to avoid volunteering any information. Unless invited to do so by the court, only answer the question presented. Some attorneys may try to trap you during questioning by backing you into a corner and putting on pressure to answer in a specific fashion—the way to combat this is to avoid single-word answers.

Some attorneys may question this, asking for a simple yes or no, but in many cases the full truth of a situation can't be answered in such a simple fashion.

In other cases, especially if you're an investigator, you'll be asked to describe your actions. This is an exception to the volunteering information rule, as you'll have to answer in a narrative fashion to adequately answer the questions. Still, be cautious—going off on tangents during an answer can provide the opposition with ammunition for a harsh cross-examination, and you also run the risk of losing the interest of the jury, which is the last thing you want.

A good rule of thumb is to answer the question, then stop. Sometimes the answer will be a few words, sometimes a few sentences, but only provide what is needed to answer the question.

Mistake!
Lack of thorough preparation.

This is a mistake we've all made in life, and all have come to regret. When it comes time to provide testimony, it's not only important to be prepared, but also to be over-prepared. Know where every detail of your testimony comes from, how to explain it to the court, and what kind of questions you may be asked.

Insist that the attorney who is doing your direct testimony do witness preparation with you. Even if both of you think you'll be perfectly fine on the stand, it's always better to be safe than sorry. It's much easier to maintain your composure and beat nerves when you're in control and know your testimony. If the counsel who hired you refuses to prep with you, double your own preparation to make up for it.

Along the same vein, make sure you go over all of the documentation and evidence for the case personally, especially if someone else actually gathered or analyzed that information. The last thing you want is to be asked a question that you don't know the answer to because you didn't properly review the case before testimony.

Mistake!
Fudging the truth (a.k.a. lying).

As you well know, outright lying in a court of law is illegal. However, there are other ways to manipulate the facts without outright lying, and there are many reasons why a witness may do so: to make themselves look better; to avoid admitting mistakes; or, even to help their side win the case. It may be tempting to do this, especially if you're in a tight spot on the stand, but manipulating the truth will almost always come back to bite you in the end.

Instead of trying to manipulate the facts to suit your testimony, rely on the facts and the evidence to carry your testimony. Be precise and accurate in everything you say, and if you're going to mention technical or accounting concepts, make sure you explain those concepts in simple language. The judge and jury most likely won't have the same knowledge of accounting and fraud as you do, which is why you're testifying to begin with.

Remember, as an outside consultant or investigator, you have no personal stake in the result of the case. The lawyers are the ones who are advocating for their clients; your job is to present the facts and your opinion based on those facts.

If you realize you've made a mistake in your work, just admit that you made a mistake and provide the correction, along with any change to your conclusions due to the mistake, and then move on.

The momentary discomfort of admitting the mistake is far preferable to trying to hide it and getting caught in a falsehood later. Frequently juries will have greater respect for someone who is open and honest about their mistakes than someone who tries to hide them.

Mistake!
Not carefully listening to the complete question.

Sometimes while on the stand, it's easy to get caught up in the proceedings; you may begin to anticipate where the counsel is going with their questioning and start to plan answers ahead of time. This can be dangerous.

Regardless of where you think the questions may be heading, make sure you don't interrupt to answer. Juries may see this as rude, and studies have shown that likability goes a long way to gaining a jury's approval. If you're being rude, too technical in your speech, or boring in the way you give your testimony, the jury may give your opinion less weight, or simply tune out and ignore everything you're saying.

Your teachers probably told you to read the entire question before answering on a test, and the same goes while on the stand. Listen all the way to the end of the question—don't get lost in your head trying to consider your answer beforehand—then wait one full second before answering, just to make sure the question is actually complete. Pausing for a moment after the question also gives time for an objection before you begin your answer.

This style of question and then wait to answer can be difficult to learn at first. In American society, we typically converse socially much quicker than this, taking cues from the other person's tone and body language to infer when they're done speaking and immediately providing response.

Witnesses aren't the only ones who struggle with this; you may find yourself in a situation where the attorney asking questions isn't clear where the end of the sentence is or what they're asking. In such a case it may be appropriate to say something

Quick Tips!

- Relax! Being nervous or jittery can make the jury doubt your professionalism.
- Take a sip of water if your mouth is dry, or if you want a moment to think about your answer before you respond. If no water is available, it's okay to ask for it, the court will provide water upon request.
- Determine how loud you need to speak. If you have a microphone to speak into, adjust it to a comfortable position where you won't be too loud or too quiet, and where you won't hit it with any hand gestures.
- If asked a question by the judge, address the judge directly, which may mean you have to move your chair. Addressing the person speaking to you is considered polite, and as discussed, seeming rude can alienate the jury.

like, "If I'm understanding correctly, your question is…" and repeat what you believe you were asked. This will give the attorney a chance to make sure you're answering the question they really meant to ask.

It's almost always acceptable to simply say that you didn't understand the question and request that the attorney repeat it or say it differently. If you're confused, there's a decent chance that others in the room are as well.

Mistake!
Failing to think before speaking or answering.

On the stand, it's important to think before you speak. Saying the first thing that comes into your head, especially in a tense situation like a trial, can make you sound unprofessional, rude, or unknowledgeable, and the opposing counsel will be looking for ways to use your words against you or find a hole in your testimony.

Consider your answer before you give it. We all have different thought processes, and you may require a few seconds to gather your thoughts and organize them in a manner that the court will understand. Giving that moment for the question to conclude before answering can also provide you with some thinking time.

Don't be afraid of silence. If you need a minute to think, take your minute! It may be helpful to let the attorney and the rest of the court know that you are thinking as opposed to not answering, but it is much better to sit through a few moments of awkward silence than to provide an answer that is jumbled or incomprehensible.

Also remember while giving testimony that what you say may be quoted and used later on in the trial, so while you're answering, keep in mind what your answer will look like on paper. Sarcasm doesn't read well on paper or in court, and avoid attempts at humor. Most trials involve serious accusations, and it's easy for jokes to fall flat in such a tense environment. Also, if you are testifying in a criminal matter, the defense attorney will not take kindly to you being flippant considering a guilty verdict can have dire consequences for their client.

Quick Tips!

- Speak clearly, slowly and enunciate. Being stopped in the middle of an answer to be asked to speak up or speak more slowly can be embarrassing, and can interrupt your thought process.
- Speak calmly and confidently. If you don't seem confident in your own work, the jury may find it difficult to trust your opinion.
- Make eye contact with the jury and the person asking you the question. Making eye contact can show that you are engaged and attentive to the proceedings. Keep an eye on counsel, as well, for any nonverbal cues they may be giving you.

Mistake!
Guessing the answer or guessing the meaning of the question.

Guessing is almost never a good idea. Even if you guess correctly at the time, that lack of knowledge may be problematic later on. Know the meaning of the question (and the answer!) or ask for clarification. Even if you're 99% certain that your guess is correct, word your answer carefully. Say something like, "Almost certainly," or "I'm reasonably certain."

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Using qualifying language like "almost" or "reasonably" can give you an out later should you need one.

If the opposing counsel has asked you a question with several answers or has asked a confusing question, don't just guess the answer to keep things moving. You can ask for clarification, even multiple times, and "I don't know" is always a valid response.

Mistake!
Being evasive during answers.

This is another way that you can accidentally alienate the jury during your testimony. Giving evasive answers can make you seem untruthful or unknowledgeable. In our day-to-day lives we often want to avoid giving information that's negative to avoid discomfort and hurting the feelings of others, but in a courtroom, all of the facts must be known even if they cause harm to another.

If your answer is unhappy or discouraging in some way, don't avoid giving it. Answer calmly and move on. Remember, your job isn't to advocate for one side or another, to make the people in the courtroom comfortable, or to make yourself look good. Your job is to present the facts.

Virtually all cases have some "bad facts", circumstances which are less than ideal; just present them and move on. Being evasive or trying to hide or minimize bad facts gives them more weight in the eyes of the jury. If you're trying to hide it, they'll think it must be really important!

Mistake!
Responding to snippiness by being snippy or angry.

It's a natural response to get irritated when someone gets snippy or unprofessional with you. When you're on the stand, giving into anger will not only prevent you from thinking clearly, it can also make you seem less credible to the jury. Responding with a snippy answer of your own, or something rude, unprofessional, or sarcastic, will only hurt your credibility in the eyes of the jury.

Be the most professional, respectful person in the room. Occasionally, you may find yourself on the other side of personal attacks, which some questioners will resort to if they can't find anything in your testimony to question. It may be difficult, but keep your cool, and remember that it means they couldn't find anything else to attack you with, because your actual professional work was solid.

Mistake!
Failing to prepare for the inevitable nervousness.

We're all human, we all get nervous, especially when we're the center of attention, and every word said is being carefully measured. Sometimes you'll feel perfectly confident going into the court room or deposition room, only to be asked a surprising question that throws you off balance. Don't let the anxiety take you by surprise! Prepare ahead of time for the possible nerves and know how to cope with them while on the stand.

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For some, remembering that you have no personal stake in the case and that it's not about you can help settle your nerves. Deep breathing is also a tried-and-true tactic to calm yourself in stressful situations. Concentrate on taking a normal breath and exhaling slowly and silently; inhaling will take care of itself. If you inhale too fast or gulp air, you can actually make yourself light-headed, as opposed to calming you down. Before testifying, it can be helpful to prepare by visualizing yourself on the stand and planning out the small details so that you don't have to worry about those details when the time comes to testify.

One of the best ways to feel calm and confident is to be overprepared. If you know the case inside and out, there's much less to be nervous about.

Some practical tips for preparing to testify:

- **Know where to park your car.** Heading into a stressful situation is the last time you want to be driving around in circles looking for a parking spot. Be familiar with the location beforehand and know where you can park.
- **Get there early.** Give yourself plenty of time to get to your destination. Life never goes according to plan, so make sure you have a buffer in case of traffic or other setbacks.
- **Know what you're allowed to bring with you.** Certain courtrooms exclude cellular phones, for example, and some courts only allow lawyers to have them. Inquire ahead of time about what you can bring with you into the courtroom. That way you don't have to return to your car and drop something off when you should be in the courtroom already.
- **Know the layout of the courtroom.** Know where you can store your personal belongings while you're on the stand. You don't want to be fumbling around with a coat or bag when you're called for your testimony.
- **Know your audience and dress accordingly.** You always want to dress cleanly and professionally, but the location where you are providing your testimony can also influence how you dress for court. In a more rural community, it may not be appropriate to wear a thousand-dollar suit and a Rolex, where the same outfit may be perfectly acceptable somewhere else. Studies show that juries dislike highly paid "hired gun" experts, so don't dress like one, particularly in rural or economically depressed areas.
- **Be familiar with the technology in the courtroom.** If you're working with exhibits or other materials that need to be shown, check ahead of time to see what kind of technology the courtroom will have. If it's a more modern system with touch screen monitors, overhead projectors, and the like, prepare your materials and make sure the person responsible for the technology can easily navigate your presentation. If you're in an older courtroom, print out copies of your exhibits so they can be passed out to the jurors, if the judge approves.

The two most important things to remember: be overprepared, and take deep breaths. And don't forget to wear good deodorant!

You've got this!

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Glossary:

Cross-examination: This is the opportunity for the opposing attorney to ask questions of a witness, under oath, during a trial or hearing. This generally happens after the attorney who called the witness has done direct testimony questioning.

Direct testimony: This is the initial questioning of a witness during a trial or hearing, under oath. These questions are posed by the attorney who called the witness to the stand.

Expert witness: This a witness who, either by experience or education, is a specialist in a particular subject. Expert witnesses may present their expert opinion without having been a witness to any occurrence relating to the lawsuit or criminal case. This is an exception to the general rule against giving an opinion in trial, and generally requires that the judge agrees that the witness is an expert who is qualified by evidence of their expertise, training, and special knowledge. An expert witness must educate or assist the trier of fact, whether that's a judge or the jury, or their testimony won't be allowed.

Fact witness: This is a person who testifies under oath with first-hand knowledge of the matter in question.

Hearsay: This is second-hand evidence in which the witness is not telling what they know personally, but what others have said to them, and is generally prohibited except for specific circumstances.

Hypothetical questions: These are questions asked during testimony where a fictitious situation is created by an attorney to elicit additional information from a witness. These are used during direct examination to allow the expert to opine on the specific aspects of a case where evidence may not exist, or may be used to educate the judge or jury on technical aspects of the testimony. During cross-examination, hypothetical questions may be used to cast doubt on the testimony of the witness, or in an attempt to confuse the jury about the case at hand.