

“Appearing as a Witness in a Civil Case”

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by

James R. Keller

I. Overview of civil litigation procedure

Introduction

Certain items are common when testifying in any civil case. Civil litigation involves a dispute between two or more parties over a private matter that does not involve criminal conduct such as a misdemeanor or a felony. Stated another way, any matter that is not criminal in nature falls into the category of civil litigation. These materials focus on civil proceedings.

Virtually all testimony in a civil matter starts with the administration of an oath to the witness which essentially will take the following form:

Do you swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth [so help you God]?

Without this oath, the testimony lacks formality and is subject to uncertainty whether the testimony is truthful. The oath is the cornerstone of being able to offer testimony. It is entirely about telling the truth no matter the consequence. Anything less will be a disservice to all involved, of course wrongful and more likely than not will contribute to an adverse result for the position and party the witness supports or favors in the dispute.

When testifying, be informative, to the point, conversational, relaxed (if possible) and focus on the jury and judge (rather than the lawyer asking the questions). The jury wants to know what the witness knows and will initially give you the benefit of the doubt. A jury’s trust can shift quickly, however, if the jury senses insincerity or an attitude. Nevertheless, truthful testimony involves varying forms and emphasis depending on the witness’ particular point of view and stake in the outcome.

Venues where a witness may testify are:

A. Court

Generally speaking, testimony in a court of law will either take place in one of the Missouri civil trial courts or in one of the federal district courts located in the State of Missouri. You may also testify in a state or federal court located in another state. Proceedings in any court will be pursuant to the various rules of civil procedure and evidence applicable to that particular court and administered by the presiding judge. The proceedings are relatively structured and subject to fairly strict rules as to admissibility of evidence. The ultimate decision in a court proceeding will be made either by a judge when the case is tried to the court or by a jury.

In a jury trial, the judge determines what evidence the jury will hear, supervises the flow and the presentation of evidence, rules upon objections, and determines what jury instructions will be submitted to the jury. The jury instructions set out various general principles of law and apply them to the facts of that particular case so that the jury can consider the evidence and reach a decision. By and large, the jury verdict is either “yea” or “nay” and, if “yea,” typically includes the assignment of some dollar amount of damages. By contrast, a bench trial typically does not yield a decision at the conclusion of the trial and may often be in the form of a written decision with sometimes extensive findings of fact and conclusions of law from the judge provided at some point after the trial.

B. Arbitration

Two or more parties may at the time they have a dispute or in advance of their dispute (such as when they initially enter into the contract) agree in writing that their dispute will be decided by binding arbitration to be decided by one to three arbitrators, depending of the dollar amount of the dispute. Arbitration is entirely a creature of agreement, and without an agreement to arbitrate, the dispute will be resolved in a court of law or equity.

Missouri law provides by statute that written arbitration agreements are binding and enforceable. The statute reads:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract, except contracts of insurance and contracts of adhesion, to submit to arbitration any controversy thereafter arising between the parties is valid,

enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§435.350, R.S.Mo.

Unlike court, where a judge is drawn at random, the parties typically select the arbitrator or arbitrators by mutual agreement after their dispute has ensued and after they have had an opportunity to review the background and experience of the arbitrators eligible for selection. The selected arbitrator typically is somebody experienced in the subject matter of the dispute. The hearing in an arbitration usually is conducted in a conference room where the setting is less formal and the procedures are more lax. Arbitrators generally allow more evidence into the hearing, including quite often, hearsay. An arbitrator's decision will not be rendered at the conclusion of the hearing, but rather a written decision will be rendered by the arbitrator within 30 days or so after all the evidence has been received and the hearing has been concluded.

In both trials and arbitrations, witnesses are sworn in and their live testimony is received under oath and subject to cross examination.

II. Documents

Before testifying in any proceeding, it is important that the witness know what documents may be used during the testimony and that whenever possible all relevant documents should be reviewed by the testifying witness in advance of any testimony. Per Rule 58.01 of the Missouri Rules of Civil Procedure, a document for a party to a lawsuit includes:

writings, drawings, graphs, charts, photographs, phono records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 56.01(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, and photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 56.01(b).

Rule 58.01.

In a dispute involving construction and engineering, the relevant documents often impact greatly and sometimes flat out determine the outcome. Lawyers will pay particular attention to all drawings, plans, specifications and any drafts by the engineers involved, as well as all notes, letters and drafts of same that are retained at the time of the dispute. These documents provide a bounty of potential review and cross examination by at least one party to the dispute.

A witness' recollection can fade over time but documents provide a fresh, current accounting of past events.

III. Type of testimony

There are two types of witnesses: those who provide factual testimony and those who provide expert testimony.

A. Fact witness

A fact witness' testimony is based upon personal observations. As a fact witness, you may or may not be otherwise involved in the dispute but your testimony is based on what you saw or know, not what you think or surmise. You are like a reporter, being asked to recall specific events and matters. As a fact witness, you may or may not be personally involved in the outcome of the case.

B. Expert witness

An expert witness is someone who through special training, education, skill or familiarity with a given subject can offer testimony not otherwise generally known to the "common man" or the judge, jury or arbitrator.

The most effective expert witnesses are those who explain in simple terms what often is complex and acquired over many years of learning, reading and doing. An expert witness needs to understand all the ways the fact finders (judge or jury) absorb, process and retain information, including verbal, visual and kinesthetic, and use all these methods when testifying.

An effective expert witness breaks technical terms into simple, understandable language. He or she does not impress with how much he or she knows, but rather how well it can be explained.

There are many cases citing the legal standard that must be met before an expert's testimony will be allowed into evidence in a

court of law. The case most recently on point that discusses the various standards for expert testimony comparing the Missouri statute to evidentiary standards set out by the United States Supreme Court for testimony in federal cases is *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.2d 146 (Mo. 2003). The Missouri Supreme Court has determined in *McDonagh* that §490.065, which sets out the standard for expert testimony in Missouri, will apply in trials in Missouri state courts. The statute reads as follows:

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.
4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefore without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

Once a person has been qualified as an expert, his or her opinion is not automatically admissible but still must be grounded upon a reasonable degree of certainty. A typical question to see if the expert's opinion passes legal muster is:

Q. Do you [Mr. or Ms. Expert] have an opinion within a reasonable degree of certainty based upon your knowledge and experience in the engineering industry?

A. Yes.

Q. What is your opinion?

Reasonable certainty does not mean absolute certainty. While experts often are reasonably certain, they seldom are absolutely certain.

C. Party witness

A party witness is someone or some entity that is named as a party in the lawsuit or arbitration. A party witness almost always has a direct risk in the outcome of the case. The party witness is personally involved in the dispute. A party witness' testimony will be viewed by the judge or jury with some level of skepticism since such a witness will have an inherent bias. Persons examining a party witness' testimony are entitled to expose to some reasonable degree that person's personal involvement in the dispute as well as any interest (such as financial, emotional or otherwise) he or she has that could arguably color directly or indirectly the presentation and testimony.

A party witness may provide factual testimony, expert testimony (if otherwise qualified) or both.

If called to testify as a party witness, you should consult a lawyer before testifying and inform all parties who may be on your side and financially involved in the outcome, such as your supervisor and insurance carrier, including your errors and omissions carrier. A party witness needs to examine most closely what the dispute is about and what documents impact the testimony. Such a witness needs to be familiar with the testimony of others in the proceeding as well.

IV. Form of testimony

Testimony can come in several forms, far beyond and often far more important than what you dramatically see occurs in the courtroom as portrayed on television or in the movies. Often, the most important testimony occurs outside the courtroom and then is introduced into the trial, including by way of an affidavit, answers to interrogatories and an out-of-court deposition. Here are the various forms of testimony, each of which can have a decisive influence on the outcome:

A. Pretrial Discovery

1. Affidavit

An affidavit is:

- “A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.”
- “A statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation.”

Black’s Law Dictionary, Revised 4th Edition.

An attorney prepares the affidavit. That attorney usually represents someone with whom the witness is cooperative because an affidavit almost always is a voluntary act on the part of the witness. The affidavit consists of one or more written paragraphs that the witness has had an opportunity to review and then sign under oath. The other side is not present. Thus, an affidavit typically is viewed as being “one-sided.” The affidavit may be used in a legal proceeding for certain, usually limited purposes such as early procedural matters. It is important that the witness entirely agrees with the affidavit as it may later be used to cross examine what the witness did and did not say.

An affidavit may be used more broadly in an arbitration where the strict rules of evidence generally do not apply. In fact, affidavits often are admitted into evidence at the arbitration hearing on the merits.

2. Interrogatories

Interrogatories are:

- “A set or series of written questions drawn up for the purpose of being produced to a party in equity, a garnishee, or a witness whose testimony is taken on deposition.”
- “Written questions propounded by one party and served on adversary, who must serve written answers thereto under oath.”

Black’s Law Dictionary, Revised 4th Edition.

Interrogatories are written questions prepared by a lawyer and sent to one of the parties to the lawsuit to be answered under oath. The receiving lawyer prepares written responses and has one or more of his or her clients execute

the written responses under oath. An answer to an interrogatory can greatly impact the outcome of a lawsuit and must be reviewed carefully with counsel.

3. Deposition

A deposition is:

“A written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.”

Black’s Law Dictionary.

Most witness testimony takes place in a deposition which may or may not be used in the trial. The witness is sworn in, the lawyers ask questions in order and the witness provides the answers. The witness may or may not have his or her own lawyer present, depending on the nature of the dispute and that witness’ own potential involvement in the dispute.

A deposition typically takes place at the office of one of the lawyers or the court reporter who is taking down the witness’ testimony. The testimony may be limited when the witness is available at trial or expansive when the witness will not be available at the trial and the lawyer wants to preserve the testimony for use at the trial. Testimony may be videotaped; the witness is entitled to know this in advance so that he or she can dress and prepare accordingly.

While a deposition may seem deceptively casual, lawyers will later read those deposition questions and answers to a jury in open court and the testimony can have an enormous impact on a case, providing compelling evidence even though the witness was not in the courtroom at the time. Depositions require careful attention, preparation and must be taken seriously. Answers to deposition questions can win or lose a case, period.

4. Other pretrial discovery

a. Document requests

Lawyers typically exchange written requests for documents in itemized categories. Responses to these requests generally are that the documents will be

produced or an objection is noted as to why the requested documents will not be produced. On occasion, one or more persons can be compelled to testify at deposition or otherwise as to the responses to the document requests as well as the actual documents that are produced. As discussed earlier, it is very important that a witness understand what documents have been exchanged, and in particular those documents involving that particular witness.

b. Request for admissions

The Rules of Civil Procedure in courts around the country allow for a lawyer to submit written statements to the other side asking if that receiving party admits the truth of the statement. Once admitted, the statements are binding on that party and can be used to conclusively prove a particular point. While responses to requests for admissions are not, technically speaking, “testimony,” they often have a compelling effect on proving certain points at trial. Requests for admissions are infrequently used during the discovery process in arbitration.

B. Trial/hearing

Testimony at trial requires answers that are direct and to the point. The jury and judge will be viewing a witness’ manner and body language in addition to oral answers. Preparation is the key to successful testimony in court or at an arbitration hearing. Review of the documents and any prior testimony by that witness is crucial. Lawyers tend to spend considerable time in cross examination focusing on inconsistencies in prior testimony, even when such inconsistencies may seem to be very trivial to the witness. The best antidote for such cross examination is testimony that is consistent with prior sworn testimony and for the witness to be very familiar with all of his or her prior testimony. That is not to say, however, that circumstances may not require a change in a prior sworn statement, but a witness needs to be prepared to explain and defend the change, and withstand some heat for any change in testimony is fodder for cross examination.

V. Do’s and Don’ts Every Witness Should Know

A. Do’s

- 1. Tell the truth.**

2. Answer the question asked.
3. Keep answers short.
4. Speak in a conversational manner.
5. Respond by looking at the decision maker when possible (judge, jury, arbitrator).

B. Don'ts

1. Guess.
2. Assume you understand the question.
3. Provide long answers.
4. Discuss a document or exhibit without having it in front of you to review.
5. Have your arms crossed or hand on your mouth.
6. Offer opinions off the cuff.

VI. Conclusion

Truth is what any reputable lawyer will tell a witness is the one constant to how anyone, engineer or otherwise, should testify. Quite often the lawyer preparing a witness to testify (when the attorney-client privilege does not apply) will state in the preparation session that everything discussed is subject to review and cross examination by the other side and when asked about what was discussed, the witness should remember that the lawyer reminded the witness to tell the truth. "What did the lawyer say to you when discussing in private your testimony?" the other side asks. The witness' answer inevitably will be: "He told me to tell the truth."

This great advice deflates the opposition in a matter of moments. Nothing is harder to cross examine and attack than the truth. Nothing will get a witness off the witness stand quicker than the truth.

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