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8.1 Introduction

Science plays an increasingly significant role in many types of legal proceedings. The regulatory analyst is aware that their analytical methods and findings may be challenged in a court of law. The Food, Drug, and Cosmetic Act deals with government's attempts to protect public health and individual welfare by regulating the development and marketing of essential commodities. Analysts, engineers, inspectors, and investigators all play a part in the regulatory process, working in concert to uncover and document violations of the law. These violations of the law may stimulate a variety of responses, such as the warning letters, injunctions, seizure, civil and criminal charges and voluntary actions by the food industry and other responsible parties.

If subpoenaed to appear as a witness in a court case, the analyst should try to gain as much

information as possible about the trial process and what to expect. The potential witness should know the basics of the work performed, be aware of proper deportment in the courtroom, and understand the elements of the scientific defense. A prospective witness, who is particularly nervous about testifying in court, should "sit in" on a trial where scientific testimony is being given. Most court sessions are open to the public. Local court cases regarding illicit drug use, possession, or sale, which sometimes involve scientific testimony, occur almost daily in most moderately sized communities. Call the local district attorney's office or courthouse to find out when such cases will be tried. This chapter includes an attachment, "Deportment in the Courtroom - A Guide for the Witness and Those Who Aid in Court Cases", which offers helpful suggestions for potential witnesses.

Analysts who expect to testify should contact others in the field or headquarters who have experience in testifying in agency-related matters; analysts, compliance officers, General Counsel, and others can provide valuable information and insight. Staging a mock trial with laboratory personnel, investigations, and/or compliance personnel can be an excellent preparation exercise. Take advantage of oral reviews to practice answering questions related to analytical work if conducted at the district office or laboratory.

This chapter provides general guidelines and suggestions for the potential witness. Additional sources on science based testimony are given in part **8.5 General References**.

8.2 The Basics

The basics include those factors that are most familiar to Food and Drug Administration (FDA) analysts such as the chain of custody of samples, the analysis performed on the product including the results, and quality control procedures associated with the product or sample analysis. Since an FDA analyst represents the Agency and it’s enforcement efforts in court, every effort will be made to provide the proper training, guidance, and preparation prior to court room testimony.

8.2.1 Pre-Trial Conference

The witness will have the opportunity to discuss testimony with the government attorney at a pre-trial conference. This is the time to ask questions and to ensure that the government attorney fully understands the analyst's testimony. Any unresolved concerns and issues, such as problems with sample integrity, should be settled at this stage. *The witness's answers at trial should not be changed without the prior knowledge of government counsel.*

The pre-trial conference is also the time to ask any logistical questions. Witnesses should ask the attorney whether they are expected to go directly to the courtroom or to another room while waiting to give testimony. Witnesses also know where they should go after testifying; should they remain in the courtroom or in the building, or are they free to leave?

Whether testifying as a fact witness or an expert witness (see part **8.4.1**) analysts will be asked about their qualifications and professional history. Knowledge of a witness's schooling, experience, and professional achievements, including specialty certifications, training, and areas

of expertise, may have a positive effect on the jury by lending credibility to responses. However, recounting every detail of one's professional life may bore the jury. The witness, therefore, should discuss with the attorney which accomplishments should be disclosed.

8.2.2 Chain of Custody

One of the first areas of testimony will involve the chain of custody. "Is the sample that was analyzed in the laboratory the same sample that the investigator picked up at the firm?" "Was the sample tampered with, or contaminated, at any point?" The analyst can testify only to that about which he or she has actual knowledge. Most likely the first contact with the sample occurred when it was picked up from the sample custodian. This may have been followed by completion of the sample accountability record, breaking the official seal(s), performing the analysis, resealing the sample, and returning it to the sample custodian. See ORA Laboratory Manual (LM) Volume II, Section 2, Chapter 5.7 Handling of Samples for a complete discussion of sample accountability. The analyst may be asked about the conditions under which the sample was stored while in the analyst's care. "Who, besides yourself, had access to the sample?"

8.2.3 The Analysis

8.2.3.1 The Tests

It is very important for the analyst who is to give scientific testimony understand the basic principles of the tests performed and the instruments used. The analyst may have performed the same analysis for twenty years, but if clear, concise, and confident answers cannot be given to basic questions the impression is that poor work has been done for the past twenty years. The fact that an analyst runs a gas chromatograph every day does not mean that he or she understands the basic theory and principles of operating the instrument.

The analyst avoids being coerced into detailed explanations of methods and equipment. Stating that the method or equipment is widely accepted for use by Federal and State laboratories can help to keep detailed descriptions to a minimum. If directed by the judge or counsel to provide details or additional explanation, the simplest, clearest answer should be given; for example, rather than providing an exhaustive account of the Association of Official Analytical Chemists (AOAC) collaborative process, stating that AOAC INTERNATIONAL methods are recognized as the official methods of analysis would suffice.

The jury is the audience. The use of jargon and scientific terms unfamiliar to jurors should be avoided. A jury that does not understand the terms used by a witness will not understand the message given in the testimony. The scientist is trained by experts in his or her chosen field, by reading professional journals, and through conversations with colleagues. Repeating lengthy conversations or communications, although meaningful to associates, may be difficult or impossible for the layman or non-scientist to understand. The scientific witness presents analytical findings so that all members of the jury, the judge, and the attorneys can easily grasp the significance of the testing and results. Technical expressions are clearly and carefully explained. A jury may know very little, if anything, about the laws of science, the accumulation

of evidence, precautions taken to avoid error, and statistical interpretations.

The analyst should practice giving explanations of methodologies and techniques. The analyst may be very familiar with the procedures used but may have less experience explaining the procedures to those unfamiliar with the scientific principles involved. When possible, the analyst should describe the principles in understandable, everyday terms without being condescending. For example, capillary action by which a solvent migrates up a thin layer chromatography plate can be compared to the mechanism by which water travels up a dry paper towel.

8.2.3.2 The Method

The analyst is to understand the method used. Why was it chosen? How or why does it work? Responses such as, "Because my supervisor told me to," or "We always use that method," are not acceptable responses. The FDA policy has always been that, when in existence, official methods are used for sample analyses that are the basis for regulatory action. See LM Volume II, Section 2, Chapter 5.4 Test Methods and Validation for an explanation of Official Compendia and Analytical Manuals, respectively. The analyst may need to explain the meaning of a method's official status. Remember, use of official methodology does not relieve the analyst of the responsibility of proving method performance through quality controls, positive and negative controls, and recovery and reproducibility studies. Be prepared to explain why recoveries or certified reference materials were run; how they were run; and what they proved. Be prepared for questions concerning shortcomings of the methodology used and possible alternative methods that others may consider more reliable.

8.2.3.3 The Worksheet

One of the most important things the FDA analyst can do to ensure smooth testimony in court is to establish good analytical habits. Many analysts may hear senior coworkers state that they have been with the government for "X" number of years and have never been called to testify. Although this may be true, it is important to maintain credible, high quality science and documentation in the laboratory. Experience is not a substitute for good quality control. Before a case can proceed to trial, the veracity of the analytical findings is supported through the use of Quality Assurance/Quality Control (QA/QC) procedures. The analyst's worksheets will be subjected to many layers of review before they become introduced in a court of law. The analysis and documentation is to be complete and meet agency standards of quality to survive the scientific and legal scrutiny in the courtroom.

Proper documentation will be the basis for much of the analyst's testimony. By the time a case gets to court many months, if not years, may have passed since the analysis was performed. It is very unlikely that the analyst would recall details about the case or details of the analysis.

8.2.4 Quality Controls

Analysts should have general knowledge of their local laboratory quality system. For example, if part of the analysis involved recording a critical temperature, the analyst is to document that the thermometer was checked for accuracy on a regular basis and the thermometer met the

specifications before it was used in the analysis. This quality control applies to other instruments and equipment as well, and the local quality system should address the conditions for operation and specifications.

If the method used was not studied collaboratively or validated for the matrix in question, the analyst should be prepared to explain what types of validation were performed. Validation factors such as the use of method blanks, system suitability, certified reference material, and recoveries may be incorporated into the method. In other cases the analyst should take the initiative to perform the proper controls.

8.3 Giving Testimony

One of the best means of anticipating what questions the defense will ask is simply to see the case from the defense perspective. "What questions would I ask me to invalidate this testimony?" If at all possible try to set up a mock trial involving fellow analysts, supervisors, and compliance officers. Hold an informal roundtable discussion or a more formal setup where peers can provide the inquisition the analyst may face on the witness stand. This can be one of the most helpful experiences before trial. Unanticipated questions may come to light and in some instances may provide the analyst with a better understanding of how he or she will react under pressure. The principles enumerated in Attachment "*Deportment in the Courtroom - A Guide to the Witness and Those Who Aid in Court Cases"* are the result of observations in court of some of the things that witnesses could have done to make their appearance on the stand and the presentation of their testimony more effective.

8.4 The Scientific Witness

An FDA analyst's role in the courtroom is to serve as a scientific witness. The analyst needs to attest to what took place while examining a product in the laboratory. He or she provides an explanation of the underlining science and scientific testing procedures used to test the product. Most analysts serves as witnesses of fact.

8.4.1 Witness: Fact vs. Expert

Witnesses presenting scientific testimony fall into two categories: witnesses of fact and expert witnesses. Fact witnesses, even those who have scientific training, can testify only to matters of fact that they have witnessed. They cannot give opinions. The expert witness is one who, by special study, practice, and experience, has acquired special skill and knowledge in relation to some particular science, art, or trade. Obviously, therefore, a fact witness does only what his or her oath charges, namely, to tell the truth, the whole truth, and nothing but the truth.

Qualifying as an expert involves an examination of the individual's academic credentials and the duties connected with his or her career, past and present, such as various professional achievements and the publication of original scientific papers. The possession of a bone fide degree from a State university or employment of some duration by a State or Federal agency in the scientific field covered by the testimony practically ensures that the judge will admit a person as an expert. If a person is trained in a State's educational system and presented with a diploma,

the State's judicial institutions cannot deny these credentials without good cause. Previous expert testimony also helps to qualify a person as an expert witness.

The main reason for expert testimony is to interpret difficult-to-comprehend facts to the jury. The judge usually explains to the jury that the court will permit the expert to evaluate the evidence and explain its significance to the case being examined. Even though an expert witness is entitled to give opinions, usually more than a mere statement of opinion is usually needed for maximum impact. The expert witness should know or conclude that certain conditions or findings prove the statements he or she makes.

8.4.2 Scientific Defense

One of the burdens of proof in a case involving scientific testimony is that the science is sound and accurate. For example, in a case involving misbranding or adulteration, the prosecution demonstrates, beyond a reasonable doubt, that the product is actually misbranded. If the charge is subpotency of a drug, the science first shows that the drug in question is actually subpotent, if this is the basis of the allegation. This type of proof usually is provided by the analyst who analyzed the sample in question. The proof may be provided in the form of written results on the worksheet or verbal testimony of the analyst. In many cases the defense may stipulate to the report of the analyst. In other words the defense is saying that they do not contest the report, nor do they question the integrity of the analysis performed. In such cases, the analyst may not be asked to testify.

In other instances the entire basis of the defense may be that the results found are totally inaccurate. For example, the insect fragment in the soup was not actually an insect but an exotic vegetable; the drug analyzed was not subpotent because the chemist did not know what he or she was doing; the Salmonella found in the cheese was actually a result of cross contamination in the laboratory caused by a technique error made by the microbiologist. In these situations the analyst may be asked to testify.

The basis of a scientific defense is to cast doubt on the conclusions drawn from the analysis. This type of defense can be difficult to perform because the defense attorneys may not know enough about the subject to ask the right questions. Even if they learn enough to ask the right questions or are knowledgeable about the science, the jury may not understand what is being said. In cases where the defense brings in expert scientific witnesses to contradict the testimony and the conclusions of the prosecution's scientific witness, there is always the problem of whom the jury will believe.

Scientific defenses are generally a last resort when no other defense is feasible, or when the science is poor enough to warrant a court challenge. Nonetheless, an attorney who decides to use this defense will do his or her homework and at least gain an understanding of the principles behind the primary tests performed by the analyst. Without this knowledge the defense has no way of impeaching the expert witness.

8.5 General References

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Office of Chief Counsel. (1997, June). *Deportment in the courtroom - A guide to the witness and those who aid in court cases*. OGC Update 6, 11 pp.

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Attachment

"DEPORTMENT IN THE COURTROOM – A GUIDE TO THE WITNESS AND THOSE WHO AID IN COURT CASES "

I

Court contests are usually won by the side presenting the most effective witnesses. These are witnesses who in testifying impress judge and jury with their honesty, straightforwardness, knowledge and truthfulness.

By enunciating some of the principles growing out of cumulative experiences in the courtroom, help can be provided to the analyst to become more comfortable as a witness and therefore a better witness. Some of these principles the analyst has heard before and some are so obvious as to be almost unnecessary. But people can all benefit by their restatement.

A witness, to be effective, makes statements that are understandable to and accepted as truth by the judge and jury. It is not enough that he or she tell the truth; he or she also gives the impression of telling the truth. The testimony is to be clear and the witness credible.

The credibility of a witness is the product of a multitude of factors, not the least important of which are seemingly insignificant personal traits of the witness. Whether a witness is to be believed is a personal determination for the judge and each of the twelve on the jury, all of whom try to achieve that perfection in objectivity and fairness which is the goal of our courts. It is not surprising, therefore, that intangible elements often shape their appraisal of witnesses. Often these elements have their origin in the appearance and general demeanor of the witness; the attire, the walk, the posture, how he or she sits on the stand, how he or she answers questions, the inflection to the voice, the emphasis in speech, facial expressions, and gestures. These and other qualities begin to operate in subtle ways in shaping the jury's appraisal of the witness. The effect and weight of the witness testimony may be affected by that appraisal.

Besides being truthful and honest, making a favorable impression upon the judge and jury should be the next aim of the witness. It is axiomatic that the analyst can not please everyone. It is equally true that the analyst does not have much control over certain attributes such as face, figure, quality of voice, etc., that nature has bestowed upon a person. But there are things we can all do, and many which we should not do, to enable us to make a better impression. The principles enumerated below, are the results of our observation in court of some of the things that witnesses, in our opinion, could have done to make more effective their appearance on the stand and presentation of their testimony.

1. While sitting in the courtroom, either as a prospective witness or as an assistant to one of the members of the Administration, United States Attorney, or Office of Chief Counsel, do not engage in conspicuous behavior. Facial grimaces at testimony thought adverse to Government's case, or nods of approbation or approval at testimony particularly favoring the case should be avoided. They could result in public censure from the court if observed. Likewise, attracting attention to the self by talking in the courtroom during the proceedings; reading reports, newspapers, and the like; passing notes; rustling papers; passing comments, jokes, or remarks about the judge or this or that juryperson, or witness. Do not sit in groups. Spread out in the courtroom.

2. Dress is important. Dress neatly and conservatively.

3. Don't be an "impetuous prompter". An impetuous prompter is a person who sits in the courtroom and hears testimony which he or she believes erroneous and refutable and who rushes to the United States Attorney, the Office of Chief Counsel's representative, or Food and Drug representative to convey his or her thoughts on the erroneous testimony. While the analyst may have a contribution to make, hold suggestions until recess or for some other better time to transmit them. Even at recess, wait until the judge and jury have left before approaching counsel. Remember that, if the analyst has found flaws in the opposing case, our lawyers most likely have found them too. It is disconcerting to those at counsel table to have interruptions by witnesses and others in the courtroom who bombard them with suggestions on strategy. In addition to making the analyst conspicuous, it shows the analyst is strongly partisan, and does not contribute to the building of a good impression. Jot ideas down so they are not forgotten when an opportunity presents itself to confer with the U.S. Attorney, member of Office of Chief Counsel, or others who are directing the case.

4. Avoid conversations with principles of or witnesses for the opposing side during trial. The analyst never can predict when statements will be distorted to analyst’s disadvantage and perhaps the Government too. If the analyst cannot avoid conversation with them, confine remarks to matters other than the trial.

5. During periods of recess, do not engage in horseplay, wisecracking, or loud conversation, especially about the case. The analyst never knows when he or she is under the observation of the judge or members of the jury. Many government witnesses have found themselves embarrassed after making indiscreet remarks in the halls of the courthouse, or in the elevator, or in a nearby lunchroom, or restroom, to learn that the judge or a juryperson or opposing counsel

has been in the same hall, elevator, or lunchroom and had seen and heard them. Do not hold loud conversations of any kind in the corridor outside of the courtroom while court is in session.

6. Do not rush up to congratulate a government witness when that person steps down from the witness stand. Wait until court has adjourned. Avoid expressing any approval or disapproval of the testimony by glance, nod, or otherwise until leaving the courtroom. If designated to transport a witness to and from the courtroom, be especially careful to meet the witness outside the courtroom, not as the witness leaves the stand.

7. Avoid arguments with government counsel. Save suggestions on legal points involved until they can be informally discussed first with Office of Chief Counsel's representative or with the United States Attorney if no Office of Chief Counsel representative is on the case.

8. The analyst should not lose patience or temper while testifying. A cross-examining attorney may try to deliberately bait a witness to anger the person. Don't let it happen. Keep calm and unruffled. Neither thinking nor appearance of the analyst improves with rising ire. Be polite and courteous to everyone, including opposing counsel even if he or she is insulting.

9. Attorneys questioning the analyst on cross-examination will often try to force a categorical answer out of the witness, i.e., a "yes" or "no" answer. There is some justification for such attempts because the cross examiner is permitted to ask "leading questions." If a simple "yes" or "no" answer does not bring out the whole truth, it is the analyst's duty to inform the cross-examiner and the judge that the question can't be answered "yes" or "no." If the analyst does this, the court may insist on a "yes" or "no" but invariably will allow the witness to make any needed explanation. The analyst is sworn to give the truth and the whole truth and if a "yes" or "no" answer doesn't do just that, the court will afford protection when it understands the situation because it would not have the witness violate their oath.

10. The analyst should not be afraid to admit discussing testimony with representatives of the United States Attorney's Office, the Office of Chief Counsel, or the Food and Drug Administration. If asked that question, or any other, simply state the truth. There is nothing improper in a discussion of the analyst's testimony with counsel or FDA personnel. Remember that the opposing attorney ordinarily asks the question hoping to catch the witness swearing falsely.

11. Don't spar with the questioning attorney. Answer his questions frankly, factually, and confidently. Don't engage in a wit-matching contest. Sparring by a witness may suggest person is evading the question and often detracts from his/her credibility.

12. Wait for the question to be asked in its entirety before making a reply. The analyst should make certain that he or she understands it, never attempt to answer a question that is not fully understood. To do otherwise may lead to trouble and embarrassment. If a witness does not understand all or any part of a question, he or she may do one or both of the following:

a. I am sorry, but I do not understand [or, I am not sure that I understand] the question, could you rephrase it?

or

b. If you mean [state what you think the question is], then my answer is . . . or

combine (a) and (b) as

c. I am sorry, but I am not sure that I understand the question, but if you mean . . . then my answer is . . .

13. Don't be afraid or ashamed to admit "I don't know." If the analyst doesn't know the answer to a question, then he or she should say so. Don't try to cover up ignorance of some fact or set of facts. If analyst does, it may suggest evasion on the witness' part. Always tell the truth.

14. Wait several seconds before answering a question during cross-examination in order to give Government Counsel an opportunity to object if he or she regards the question as improper. On the other hand, on long delay, particularly with side glances at Government Counsel, may give the impression that the witness is being evasive. Try to speak with the same speed and use the same phraseology on cross-examination as on direct examination.

15. Don't answer any question objected to by either side until the court has ruled on the objection. If the witness has started the answer, he or she is to stop if any objection is raised by either side and is not to continue until the judge or either counsel indicates that it is proper to continue. If the witness has forgotten the question the witness should ask that the question be repeated.

16. Don't chew gum, eat food, or suck candy while testifying. It tends to detract from the otherwise professional attitude analyst displays as an FDA witness.

17. Answer each question by spoken words. Don't nod assent or shake one's head in dissent. The record of the analyst's testimony may be incomplete unless he or she answers each question with spoken words.

18. Speak clearly and distinctly. Use simple language. Remember the witness defeats their purpose if not understood, so don't try to impress anyone with vocabulary of infrequently used words. If the subject is technical and scientific, reduce the terminology used to an understandable level. If technical words are to be used for any reason, the witness should define them as he uses them.

19. Don't hesitate to ask permission to refer to notes to refresh one's recollection in testifying provided the notes were made at the time of or immediately after the event about testifying. The fact that the witness cannot recall exact details without notes is entirely understandable and, in fact, can be used to the advantage of the Government when it is shown that the opposing party does not have a written record of the transaction.

20. Come into the courtroom prepared. Know the facts. All pertinent dates and time should be checked. Arrange all documents and exhibits in order so that the testimony will be presented without fumbling.

21. The analyst should testify only as to facts about which they have first-hand knowledge. In most instances the witness cannot testify about what someone told him or her because it would be hearsay. The witness can testify about what the defendant told him or her, if what he told was connected to the case.

22. In testifying, keep the voice up. Too often judges have to admonish witnesses to speak up. Strive to have the judge and the whole jury hear what has to be said.

23. Answer only the question asked, but answer it fully and to the point. Don't volunteer unnecessary information. Remember the more said unnecessarily, the more is suggested to opposing counsel for cross-examination.

24. Unless the analyst is testifying as an expert, don't express opinions or conclusions. State only facts. An analyst should not assume expert knowledge in a field unless he or she is in fact an expert by reason of r training and experience. Reading an article on a subject does not make an analyst an expert in that subject. For example, an investigator is on the stand discoursing on the pharmacological effects of drugs, a field which he or she has only superficial knowledge. He or she could save himself or herself a lot of trouble by admitting, at the first pertinent question, that the pharmacology of drugs was outside of his or her field.

25. Don't exaggerate. State the facts accurately and don't embellish them. The court and jury are interested only in getting the unvarnished truth, so give them only that.

26. Be careful when the opposing lawyer reads from a book or document and questions the witness about what he or she read. Before answering, ask to see the document the lawyer has read from, in case he or she is misquoting or only partially quoting.

27. Never bring to the stand notes, files, or other material for help in testifying unless willing to have the opposing side see them. If they are used, opposing counsel has a right to see them.

28. In cross-examination opposing counsel may ask the witness whether he or she regards certain persons in the field about which they are testifying as recognized authorities. This is preparatory to asking the witness whether he or she agrees with certain statements which those authorities made in writings, etc. If the answer is no--that they don't recognize them as authorities, that line of cross examination cannot be pursued. Unless the witness definitely have heard of the named persons and are familiar with their works and do recognize them as authorities, that analyst should not expose him or herself by saying that they recognize them.

II

1. PREPARATION FOR GOOD PERSONAL APPEARANCE

Look and dress neatly and conservatively.

2. DISCUSSION WITH GOVERNMENT ATTORNEY

   The witness will discuss his/her testimony with the government attorney prior to trial. Make sure that the government attorney fully understands the testimony and any problems, such as, for example, the age of the defendant or poor sample integrity. This discussion may be informal but do not take it lightly, The analyst is *NOT TO CHANGE THEIR ANSWERS.*

3. GENERAL CONDUCT IN COURT ROOM AND VICINITY

   A. Don't be noisy in the halls in greeting colleagues or old friends.

   B. Don't talk to the defendant or his/her attorney in or near the court room.

   C. Do not whisper or cause disturbances in the court room.

   D. Do not talk to the jurors or discuss the case within their hearing.

   E. Do not sit within the enclosure unless invited.

   F. Do not bring magazines or newspapers into the court room.

   G. Show no incredulity or surprise at any testimony given from the witness stand or at statements by the defense attorney.

   H. Be on time when court opens and be ready when called to testify.

4. PROPER TECHNIQUE ON THE WITNESS STAND

   A. When called to the witness stand, unless previously sworn, go directly to the desk of the clerk of the court to be sworn.

   B. Take the oath in a reverent manner. Then proceed to the witness chair. If the analyst has a long or difficult name, he or she gives a card or paper with the correct spelling to the court stenographer.

   C. Assume proper posture, bearing and demeanor.

      1. Sit erectly, but don't appear stiff or tense.

      2. Always be courteous, say "Yes Ma'am","Yes Sir" and "No Ma'am", "No Sir", and "Your Honor."

      3. Speak in a clear, distinct and well modulated voice.

      4. Look at and speak distinctly to the jury. Speak plainly enough so the farthest juror can hear.

5. Do not speak to the judge unless he or she asks a question.
6. Do not appear eager to convict.
7. Do not show hostility toward the defendant.
8. Do not use idioms or language peculiar to the enforcement profession.
9. Be well poised and under self control.
10. In the analyst's effort to appear impartial and unbiased, he or she should not become listless or "dead pan." Be natural, candid, frank, and "alive."
11. Do not appear impatient or overly anxious to testify.
12. Do not have anything in the mouth. This includes gum, toothpick, tobacco, candy or food.
13. Keep the hands away from the mouth, face, and head.
14. Do not exhibit nervous tendencies, such as arranging clothes, tie, etc.

D. The direct examination.

1. Personal identification questions will be asked first.
2. Next type of questions are preliminary to setting up the body of testimony.
3. The next or direct question will usually be, "Now begin right there and tell what you have seen or heard in connection with this matter." *ALWAYS TELL THE TRUTH* .
4. Try to give testimony in chronological order if possible.
    a. Reveal the first connection with the case.
    b. Then give facts in the order they occurred.
5. Do not give information that has not been asked for. This is particularly important with respect to previous criminal records, or other crimes of the defendant, now pending.
6. Do not give opinions or hearsay testimony.
7. Government Counsel will likely ask more questions to bring out details and other information to complete the analyst's testimony.
8. The analyst's testimony should not be memorized. Each item and event should be repeatedly mentally relived, visualized and understood. Make sure the government attorney knows when the analyst needs to rely on notes, and has

reviewed these documents.

9. The analyst may use notes to refresh his or her memory, and should do so in cases of complicated figures, dates, etc. The analyst asks permission from counsel/court to do so.

10. If the analyst does need to refresh his or her memory from notes, the defense has the right to examine them and make them an exhibit in the case. "Make sure the government attorney presenting the analyst's testimony knows when they need to rely on such materials, *and has reviewed the documents* the analyst intends to rely on. This means that the analyst and the government attorney discusses any such need well before the analyst testimony. The analyst does not carry any written material with them to the stand unless it has been precleared by the presenting attorney."

11. Do not unnecessarily try to "help" Government Counsel as he or she is likely to know just exactly what he or she is doing and we do not want the court to think that the analyst is overly eager to push the case.

12. If either counsel objects to a question, do not try to get in an answer before the judge has ruled whether the question is proper. Wait until the court resolves the dispute, then answer if the court permits.

13. Be able to identify the defendant.

E. The cross-examination.

1. In the face of a skillful defense attorney, the task of testifying is not simple or easy.

2. Do not be particularly afraid of the defense attorney. He, likely, is equally concerned about the analyst.

3. The defense attorney will not question the analyst, unless he or she hopes to gain something for his/her side.

4. Listen carefully to his questions, then reply only to the questions.

5. There are usually two types of cross-examiners:

   a. The aggressive examiner:

      i. This lawyer hopes to make the analyst angry and get their goat."

         a. By casting aspersions at the analyst's veracity, neutrality, integrity, etc.

         b. By uncomplimentary references to the analyst's service.

c. By magnifying any errors analyst has made.

ii. The analyst should not let the lawyer worry them. He or she likely is stalling and has nothing much to go on.

iii. The lawyer may ask rapid fire questions.

a. Give him or her deliberate and complete answers and don't let him or her speed the testimony up.

b. If analyst does not understand the question clearly, ask him or her to repeat or restate it.

c. Do not let the lawyer interrupt an unfavorable reply by cutting in with another question. Say: “Excuse me Counsel, I have not finished my answer to your question.”

d. If he or she asks a long and complicated question, ask that the question be restated into a shorter one.

iv. The lawyer may ask a double or two pronged question. Ask him or her to restate it or carefully answer each part separately.

v. Answer any question promptly and wholeheartedly which might reflect credit to the accused. It will enhance credibility and demonstrate the neutrality of the analyst.

vi. Beware of questions to which the lawyer demands "Yes" or No" answers. - If a defense attorney demands a "yes" or "no" answer and neither "yes" nor "no" is the proper answer, a witness on the stand cannot be required to answer "yes" or "no" and the judge will not compel him/her to do so. The lawyer can answer, "neither yes nor no", and usually the judge will let him or her explain why it is neither "yes" nor "no" or will request the attorney to reframe the question. *ILLUSTRATION:* "Have you quit beating wife? Answer "yes" or "no."

vii. He may misquote the witness or others.

viii. If the witness does not know the answer, the witness should say so.

ix. If the witness makes an error while testifying, he or she should correct it at the first opportunity.

x. The lawyer may attempt to try a prosecution witness. - Some defense attorneys try to make an issue of the actions of agents or other prosecution witnesses rather than the criminal actions of the defendant as charged in the indictment. The witness is not standing trial and insofar as he or she is concerned, his or her best demeanor is to display no emotion whatever.

The witness should calmly look at the jury and answer any questions asked.

b. The smooth type.

i. This lawyer tends to ask simple innocent appearing questions for a while, eliciting "yes" or "no" answers, then asks the complicated question, hoping that the witness is napping.

ii. The lawyer may appeal to the witness' vanity and try to get them to tell how good they are.

iii. If the witness is caught in an error, be frank to admit it, and explain it if possible.

5. PROPER CONDUCT AFTER VERDICT

A. If the defendant is acquitted.

1. Do not quarrel at or berate him or h r, claiming justice has been thwarted or miscarried.

2. Be courteous to the jurors, no matter what. They are citizens trying to do their job well.

3. After the analyst is back in the government office, they should inquire of the government attorney as to the jury's verdict and what caused it.

B. If the defendant is convicted.

1. Do not rush up to the jurors and shake hands with them. Check with the government attorney before any conversation with a juror.

2. Congratulate the district attorney, if indicated, and thank him or her for handling the ease. But, do not be gleeful in the court room or where the general public would see such action.

i. Do not make any public display of elation over the outcome of the case.

ii. Do not tell the convicted person the government finally "got him or her." Be courteous when talking to him or her. He or she may be upset and bitter toward government witnesses.