

Being an Expert Witness 101

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To Your Own Self Be True

- We are scientists
- We speak the truth as we see it, as scientists
- We are not advocates for our employers
- Our opinions cannot be bought
- Now, how to be an expert witness

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Introductory Presentation

- Meant for new experts
 - But much more than an introduction
- Many important topics, but not exhaustive
- Feedback and other topics welcome

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Four Topics of Presentation

1. Practical topics (e.g., engagement letter)
2. Legal topics
 - legal jargon (e.g. deposition, interrogatory)
3. Professional topics
 - Writing an expert report
 - Facing a more qualified expert
4. Tips

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1. Practical Topics

- Initial contact
- Fee structure
- Written agreement (e.g., engagement letter)
- Billing
- Inventory of documents reviewed
- Your questions

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Initial Contact

- Be sure there is no conflict of interest
 - Worked for either side before
- Tell attorney of anything that could affect your credibility concerning the case or topic
 - Know your limitations

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Fee Structure

- Range of options
- Hourly rate(s)
 - Reading documents
 - Waiting
 - Testifying
 - Travel
- Out of pocket

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My Fee Structure

- One hourly rate for all work and waiting
 - Considerable waiting time in courtrooms
- 1/2 of the above hourly rate for travel
 - Unless I work while traveling
- Out of pocket expenses billed at cost
- Support staff usually part of my overhead

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Written Agreement

- How to know you are hired as an expert
 - Letter of engagement
 - Verbal agreement
- Risks to consider
 - Not getting paid for work done
 - Having the attorney use your name for free
- I have done work with no written agreement

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My Letter of Engagement

- “This letter confirms that you are retaining me as an expert in connection with the above referenced legal matter involving a claim of employment discrimination based on age and sex. This retention agreement will be valid when signed by both you and me, and when I have received the retainer fee described below.”

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My Letter of Engagement

- “Pursuant to our agreement, I will provide services to you as an independent professional. Payment to me for the services I provide is not dependent upon my findings, nor on the outcome of any legal ... I do not know of any conflict of interest with respect to this work... You will inform me of all litigation-related due dates ...”

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My Letter of Engagement

- “I charge At this time, it is not possible for me to estimate the total number of hours I will need to work on this matter. None of the time I have spent on the matter so far will be billed. I will issue monthly invoices for services rendered and expenses incurred. ”

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My Letter of Engagement

- “Your signature below represents your agreement with the terms set forth herein. Please return a signed copy of this letter to my office, along with the required retainer.”
- Closing and Signature

My Letter of Engagement

- “I accept the terms of this agreement:

Date: _____

Attorney: _____

First name last name, Esq.

Address”

Sample Invoice

- Summary
- Supporting details

Invoice Memorandum

Date

To: Attorney
Re: Invoice Number xxx

Below is a detailed invoice for all services provided this past month in connection with the xyz matter [or Plaintiff v. Defendant].

Detailed Invoice

Summary of Work Performed

Preliminary, brief review of files and emails provided by ...; related email and telephone communication with attorneys.

Personnel	Billing Rate	Time Billed	Cost
Joel P. Wiesen, Ph.D.	\$ xxx/hour	9.85 hours	\$0.00
Expenses			
None			\$0.00
		Total	\$0.00

Signed: _____

Joel P. Wiesen, Ph.D.
Tax ID: xx-xxx xxxx

Billing Details

- Time spent each day by topic
 - Date
 - Time spent
 - Activity
- I bill in .1 hour (6 minute) increments
- Detail for each expense
 - e.g., travel, printing (when sizable)
 - Receipt when possible

Inventory of Documents Reviewed

- You will be asked what you reviewed
- Will need to provide a list:
 - Date of document
 - Name or description of document
- I keep additional information for my use
 - Number of pages
 - When received
 - Keep on top of this (in real time)

Your Practical Questions?

2. Legal Topics

- Jargon
- Steps in a legal proceeding
- Emphasis on steps relevant to an expert
- What is meant by expert
 - Do you qualify
 - Is your testimony scientific

Legal Terms

- Complaint
 - This is very important. **Always get a copy.**
 - What the attorney seeks to prove
- Deposition
 - Other side gets to ask expert most anything
 - Basically the same as testimony in courtroom
 - Sit in on depo of opposing expert
 - Feed attorney questions

Legal Terms

- Plaintiff/Defendant
 - Court case
- Complainant/Respondent
 - Administrative proceeding
- Opinion
 - Your professional view of the facts and details
 - Often put in writing

Legal Terms

- Discovery period
 - Time period during which attorneys can request information from the other side that only that side knows or has access to.

Legal Terms

- Interrogatories
 - Questions attorneys ask other side
 - Plaintiff might ask for list of all people hired between two dates, with DOB, race, sex, etc.
 - Used extensively by plaintiffs

Interrogatories

- Major way to get data and information
 - Provide a list of the test scores of all people who took X test, with indication of ethnic group
 - Provide copies of the career ladder for XYZ
 - Provide copies of all documents relied on to support the validity of the selection test used
 - Provide a list of all employees terminated with dates of hire, termination, and birth

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Legal Terms

- Motion
 - Request of court
- Affidavit
 - A statement made under oath
 - Usually narrow in focus
 - Perhaps in support of a motion

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Motion

- A request made by an attorney of a judge
- Requests a specific ruling or order
 - certify class
 - summary judgement
- Reasons or grounds for the request

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Sample Affidavit Topics

- Earliest point in time an adversely affected minority applicant for promotion could notice and evaluate the overall level of adverse impact of the exam.
- Possible alternative approaches to evaluating the ability of an employee to perform the job of...
- Flaws in the statistical analyses of Dr. X

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Legal Terms

- Plaintiff's expert report
- Defendant's expert report
- Supplemental report
 - "I reserve the right to supplement my report if and when additional hiring data become available."
- Rebuttal report

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Legal Terms

- Direct examination
 - Your side asks you questions
- Cross examination
 - Other side asks you questions about direct
- Redirect examination
 - Your side clarifies what other side asked
- Recross (other side, on redirect testimony)

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Legal Terms

- Court
 - Often used synonymously with judge
 - The court ruled

Burden of Proof

- Title VII adverse impact
 - Show that adverse impact exists: Plaintiff
 - Show that there is a business necessity: Defense
 - Critique that showing: Plaintiff
 - Show there are alternative selection procedures with less adverse impact: Plaintiff

Deposition

- **Opposing** attorney asks questions of expert
- Saves time in court
- Counts as court testimony
 - Can be quoted by attorney in motion or brief
- Proof the transcript of your depo carefully and promptly
 - Correct typos and misstatements

Deposition

- Attorney may use you to learn about field
- Attorney may appear simpleminded
 - Beware. Attorneys are not simpletons.
- Attorney may ask you outrageous questions
 - Are you on any medications?
 - How much are you getting paid?
 - In general, you must answer.

Deposition

- Never lie
 - I was asked: How important is weighting with respect to validity of the exam score
 - Weighting was being challenged by my side
 - I answered honestly
 - Attorney then pulled out an affidavit I wrote years earlier
 - My answer agreed with what I had said in my affidavit
- Can change opinion over time, for reason

Brief

- A summary written by an attorney
- Topics
 - Issues
 - Facts
 - Relevant laws
 - Arguments for a specific position

Types of Witnesses

- Fact witness
 - What happened
- Expert witness
 - Explain the meaning of data or other facts

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What is Meant by Expert

- Your qualifications
- Support for your opinions

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Competence

- Attorneys on both sides will check you out
- Degree, Experience
- Publications/presentations
 - refereed publications, invited presentations
- Licensure
 - Often not considered
- You need not be the top expert in the world

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What Opinions are Acceptable

- Standards can vary by court
 - Federal court
 - State courts

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Daubert Standard

- 1993 decision by the US Supreme court
- Is opinion “Scientific”
- Daubert standard has 4 criteria
 - peer reviewed approach
 - generally accepted approach
 - falsifiable approach (relates to acceptance)
 - error rates of the approach

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Daubert Standard

- Admissibility of expert evidence
 - Governed by Federal Rule of Evidence 702
- Expert testimony must
 - Be "relevant to the task at hand"
 - Rest "on a reliable foundation"
 - Another expert could replicate your analysis

(Quotes from Daubert, 1993)

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Rule 702, Testimony by Experts

- Federal Rule of Evidence 702
- “If ... specialized knowledge will assist the trier ... to understand the evidence ... an expert ... may testify... in the form of an opinion ... if”

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Rule 702, Testimony by Experts

- “(1) the testimony is based upon sufficient facts or data
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably”

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Frye Standard

- Less common, but used in some state courts
- Based on 1923 case
- Generally accepted by the relevant scientific community

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Your Attorney Knows Best

- Attorney decides what issues are relevant
 - Don’t spend time on issues your attorney tells you are irrelevant
- Push back if you disagree about relevance
- Example: 60,000 job analysis ratings and not one instance of disagreement
 - Attorney said this was not important!

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Our Vision is Limited

- Listen to your attorney
- Remember, we are not lawyers
 - We do not understand most aspects and intricacies of legal proceedings
- Trust your attorney
- But also voice your ideas
 - **Early on is best**

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Ask Your Attorney

- What are the legally important questions that I should address?
- Which of the topics I have raised are not legally important?

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Your Legal Questions?

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3. Professional Topics

- Communication with non-psychologists
- Facing a better (or worse) qualified expert
- Disclosing test questions
- Writing an affidavit
- Writing an expert report or affidavit
- Pitfalls

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Communication with Non-Psychologists

- Courts may know none of our jargon
- Courts may know no probability
- Courts may know no statistics
- Opposing attorney may try to exploit this lack of knowledge
- Both attorneys may know no more than judge

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Reliable and Valid

- Other fields use these terms differently than we do
 - Reliable may be a synonym for valid
- Be clear what you mean each time you use these terms

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Opposing Experts

- Opposing experts need not be considered foes
- We should all be searching for truth

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Facing a Better Qualified Expert

- First, be sure you are competent
- Second, the case is about the facts, not about the level of prestige of the experts
 - Be sure that what you say about the facts is correct
- Be happy if you face a competent expert

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Facing an Incompetent Expert

- Can say outrageous things
 - Hard for a court to know who is competent
 - Court may give equal weight to nonsense

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Facing an Unethical Expert

- Happens all too often
- Experts sometimes twist facts
- Sometimes misstate competent professional practice
 - By omission (imply that what is described is proper)
 - By commission

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Facing an Unethical Expert

- Example
 - Practical exercise graded by SMEs
 - Candidates could appeal
 - Large changes in scores that were appealed
 - Expert calculated score-rescore correlation and assumed all non-appealed scores were identical
 - Inflated test “reliability”
 - Many reasons for not appealing, incl. low score

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Disclosing Test Questions

- Ask your attorney for a protective order
- Prohibit revealing questions to anyone other than attorneys and experts
- APA statement on Disclosure of Test Data

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Writing an Affidavit

- Topic will be limited
- Format may be important
 - Ask your attorney for a format template
- May contain topics of a report
 - Especially if no expert report

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Sample Affidavit

- Ask attorney for sample format
- Search the web (not easy)
- One sample affidavit here
http://www.adversity.net/c21_jacobsaffidavit.htm
- DOJ likes to use numbered paragraphs
- I often use numbered sections with headings

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Writing an Expert Report

- Federal & state courts may differ
- Topics to cover
- Format
- Length
- Audience
- Level of detail

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Federal or State Court

- One Federal standard for reports
 - Rule 26, Federal Rules Of Civil Procedure
- State courts standards for reports vary

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Rule 26, Federal Rules Of Civil Procedure

- Opinions you will testify to and their basis
- The facts or data considered
- Exhibits that will be used
- Your qualifications
 - list of publications authored in the past 10 years
- Cases you testified in (trial or deposition)
- Your compensation for work on the case

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Audience

- Judge, lawyers, and support staff ignorant
 - No courses in testing, statistics, etc.
- However, very intelligent and motivated
- TIP: Present information clearly but do not assume any prior knowledge

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Topics to Cover

- TIP: Ask your attorney what topics to cover
 - But **YOU** decide what to say
- Order of topics not legally important
 - Make it easy for the reader to grasp your points

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Plaintiff's Expert Report

- Usually wide ranging
- Define issues
 - Set forth all the shortcomings

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Defendant's Expert Report

- Usually focused on rebutting plaintiff's expert
 - Address all issues raised by opposing expert

Topics to Cover

- Go beyond your views of the data or issue
- Introduce your field (I/O is obscure!)
 - Why is your training is pertinent to this case
- Describe & **sell** the professional standards
 - *APA Standards*
 - *SIOP Principles*
 - *UGESP*

Topics to Cover

- Define terms
- Explain logic of statistical testing
 - If relevant
- Summarize the facts of the case
 - Uncontested facts as backdrop for your opinion
- Explain your opinion

Format of Report

- Some attorneys have formats they prefer
 - For example, numbering each paragraph
- Some attorneys have no preference on format
- Some attorneys want a closing paragraph where you sign your report
- Tip: Ask your attorney for guidance on format

Format of Report

- Get format from lawyer. It may include
 - Cover page
 - Table of contents
 - Signature page
 - Page numbering
- What word processor does attorney use?
 - Many (most?) filings are electronic nowadays

Report Format

- Ask attorney for format/style guidance
- Write/speak for an intelligent lay audience
- Use a table of contents for longer reports
- Can use footnotes
- Number sections, perhaps even paragraphs
- Expert report is not a scientific paper

Report Format I Usually Use

- Table of contents
- Sections to promote readability
- Footnotes as needed (unlike APA format)
- Appendices with relevant information

Appendices

- List of all documents and computer files you reviewed
- Long tables (etc.) that would detract from readability if in the body of report

Attachments as Needed

- Make it easy for court to read relevant, long material
- Document your statements
 - short quotes in footnotes
 - long quotes in attachments or appendices

Length

- Some attorneys like short reports
- I prefer meaty, detailed reports
- Reports help drive settlement discussions

Level of Detail

- Federal courts
 - I put in all detail to support my opinions
- State courts
 - Some states follow the federal rules
 - Some states have quite different rules
 - TIP: Be guided by your attorney

Help Your Reader Agree

- Readers have read many deceptive reports!
- Show your report is reasonable
 - Overstatements indicate lack of objectivity
- Present your reasoning
 - Analogies sometimes help
- Support your reasoning with lit. citations and quotes from depositions and documents

What Issues to Address?

- Clarify with attorney topics/issues for you to address
 - What are the legally important issues you need to address?
 - Understand the **legally important** issues you need to address
 - What exact issues does your attorney want you to address?

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Talk to Your Attorney First

- **BEFORE** you put anything in writing
 - E-mail and drafts may be discoverable
 - Discrepancies in drafts may be focused on
- Different attorneys have different preferences/styles
 - Format
 - Length

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Expert Report is Not a Scientific Paper

- Write for an intelligent lay audience
 - Minimize jargon
 - Use jargon correctly
 - Define jargon and terms
 - Define all abbreviations
- Be succinct

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Write for an Intelligent Audience

- Cite page numbers in the material referenced, so reader can check what you say.
- Explain all complicated concepts
- Explain seemingly simple concepts

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Your Opinion

- Objective
- Thorough
- Grounded in good science
- Clear/understandable
- Not wishy-washy
- Jargon only if defined
- What if not sure?

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Objective

- To a reasonable degree of scientific certainty
- Honest and forthright
- Not biased in favor of client
- Formed **after** reviewing relevant literature
 - Best if consistent with your published views

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Thorough

- Read every page of material you are given
- Ask for more information as needed
- Review literature as needed
- Check and re-check all your work
- Proofread carefully

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Grounded in Good Science

- Opinions must be grounded in generally (well) accepted scientific findings
- Avoid unsupported theories
- Your own professional experiences may not be accepted as scientific findings

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Clear/Understandable

- Use jargon sparingly
- Speak for an intelligent lay audience
- Be organized

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Not Wishy-Washy

- If you don't believe it, why should court?
- "It maybe that..." can be phrased as:
 - "It is my professional opinion that..."
 - "The facts just described indicate..."
- Avoid superlatives like very, extremely, unless they are clearly warranted

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What If I Am Not Sure?

- If you are not confident, tell your attorney
 - May lead to settlement

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Basic Facts and Background

- Clarify case for Judge
 - Test components
 - Ranked eligible list
 - Selection rules (e.g., 2N+1)
- Professional standards
 - "APA" Standards
 - SIOP Principles
 - UGESP

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Your Analysis

- What you set out to evaluate
- Your general approach
- Details of your efforts
- Your findings

Avoid All Errors

- NO TYPOS
 - Typos impugn quality of report
- Be careful with statements about the professional literature
 - Expect your statements to be challenged
 - Be prepared to defend them
- Give attorney copies of all papers cited
 - Highlight the relevant portions

Be Professional

- Be respectful of opposing expert
 - Point out errors politely

Sample Outline and Opinion

Final Report on Adverse Impact Validity and Fairness of Four Professional Examinations for Police Sergeants Administered Pursuant to MGL Chapter 31

Joel P. Wiesen, Ph.D.
October 3, 2008 (revised October 6, 2008)

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Section Five: Summary of My Opinions
 The HRD exams resulted in severe and statistically significant adverse impact in hiring ...
 <SNIP>... on average.

As an experienced test developer who realizes that there is no such thing as a perfect test, I opine that the HRD Sergeant exams are without even basely adequate validation support. The documentation of the HRD validation efforts is grossly incomplete.

There are major, serious flaws in the design and implementation of major aspects of the challenged exams, including but not limited to the following:

- A. The HRD exams are too narrow in focus, leaving out important abilities.
- B. Test questions were poorly constructed, heightening test anxiety and over-emphasizing reading ability.
- C. The passing score bears no relationship to job performance.
- D. Absent professionally acceptable validation support for the written tests or the E&E, there is no professionally sound reason to conclude that people higher on an Eligible List will do the job better than people lower on the list.

Based on a detailed review of materials provided by HRD, it is my professional opinion that the Defendant has not provided any professionally acceptable support for the validity of the exams for promotion to Sergeant.

Alternative selection procedures are available that could increase validity and decrease adverse impact of the exam for Sergeants. Many jurisdictions nationwide use such procedures in their exams for Police Sergeant.

One Outline of a Good Report

- Title page
- Table of contents
- Starts with clear summary of opinions
- Basis for opinions clear
- Methodology clear
- Tables/charts understandable
- Citations to professional literature

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Possible Pitfalls

- Missing deadlines
- Messy data (can cause you delay)
- Missing data (can cause you delay)
- Typos in reports
- Misstatements in testimony

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Missing Deadlines

- Plan ahead, time-wise
- Missing court deadlines can be deadly
- Can take weeks to get information you need to understand data
- TIP: Keep your attorney apprised of any deadline that you may miss

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Messy Data

- Try to get data from hiring organization
 - Put onus on them to provide accurate data
- Be careful about making assumptions about data
 - Can be used to impugn your whole report

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Missing data

- Ask for any data/information you need
 - Make requests as soon as possible
 - Review data files as soon as you get them
- Be very prompt
 - Do not think that you can be slow because there are delays in the case

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Typos in Reports

- May be able to submit a revised report
 - TIP: Tell your attorney immediately

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Misstatements

- In affidavit
- In testimony
- TIP: Tell your attorney immediately

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Your Professional Questions?

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4. Some Tips

- Lessons learned from the trenches
- Not exhaustive
- Not in priority order

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Most Important Tip

- Be honest and thorough

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Legal and Scientific Issues

- Legal issues and scientific issues may be different
 - e.g., Adverse impact of exam versus adverse impact of selections

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Tips for Giving Testimony

- Depositions
 - Yours
 - Opposing expert
- Courtroom

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Your Deposition

- Topics
- Preparation
- On the day of the deposition
- After the deposition - proofread
- Billing

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General Depo Topics

- Opposing attorney can ask almost anything
- Your education/experience
- Questions to clarify your report
- Questions to learn the basics of testing
- Hypothetical questions to make a point
- **Be careful** if opposing lawyer summarizes what you said and asks you to agree

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Preparation for Depo

- Be prepared
- May not be able to testify in court to facts/opinions not raised in your report or depo
 - You have little control over topics of your depo

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Deposition of Opposing Expert

- Help attorney prepare
 - Suggest topics for depo
 - Suggest questions for depo
- Ask to be present at depo
 - Real time help framing follow-up questions
 - Help you understand position of opposing expert

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On the Day of the Deposition

- Arrive early
- Speak up; speak clearly
- Ask for break, if needed
- May not be allowed to talk w attorney during breaks
- No “private” notes allowed!
 - Even in you write them in front of lawyer

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On the Day of the Deposition

- Lunch is often late (1 pm or later)
 - I ask to break for lunch at noon.
 - Ask at start of day, or before
- Answer exact question asked, but talk w your attorney in advance about whether to answer more than asked, or how much more

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After the Deposition: Proofread

- Correct transcription errors
- Correct substantive errors

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Courtroom Testimony Tips

- Direct examination
- Cross examination
- Redirect
- Recross

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Direct Examination

- No “private” notes allowed!
- Prepare with attorney who hired you
- No tricky questions
- May get unclear questions
 - Ask for clarification
- NOT talk w your attorney during breaks
- Conservative dress (on east coast only?)

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Cross Examination

- No “private” notes allowed!
- Be prepared for tricky questions
 - Misquoting one of your previous answers
 - Subtle shift in noun (“You said ...”
 - Complex/compound/confusing questions.
- Pause a second before answering
 - Gives your attorney time to object

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Redirect

- No notes!
- Your attorney will follow up on some topics
- Very brief

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Recross

- No notes!
- Opposing attorney will follow up on some topics
- Very brief

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General Courtroom Tips

- Before you answer the question asked leave a moment for your attorney to object
- Don't leave a false impression
- Answer yes or no only when appropriate
 - “It depends on several factors.”
 - “It is more complex than that.”
- Ask for breaks as needed

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On the Day of the Testimony

- Bring hard candy, band aids, etc.
- Tylenol (can take on empty stomach)
- Ask for breaks as needed
 - Ask for break before you really need it
 - Ask between questions
- Answer questions asked, but talk w attorney about if or when to answer more than asked

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Interacting with Lawyers

- Learn about case
- Educate attorneys
- Clarify/create structure/timelines
- Keep attorney informed
- Ask questions to clarify, as needed

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Learn About Case

- Ask Even Obvious Questions
- Read Complaint
- Is there a format you prefer for reports?
- May I send you email or should I call?
- By when do you want this?
- How long a report do you envision?
- What will the opposing attorney ask me?

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Educate Attorneys

- Relevant Title VII cases
- Relevant psychometric issues
- Statistics and statistical inference
- Attorney will examine opposing expert

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Suggest Areas Where You Can Help

- Provide list/copies of publications of opposing expert, with comments
- Suggest areas/questions for interrogatories
- Suggest areas/questions for deposition of opposing expert

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Keep Attorney Informed

- Your opinions/publications that might be hurtful to the case
- Possible delays
- Vacation plans
- Hours worked
 - So not surprised by your invoice

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Q & A's

- Questions/comments from the attendees
- Other tips you might like to suggest

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Best of luck as expert witnesses!

Copies of this presentation are available at
<http://ipacweb.org> and from the author at jpw@apropsych.com

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Case Cited

- Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993).

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