

Part 635—ACTING AS AN EXPERT WITNESS

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Part 635—ACTING AS AN EXPERT WITNESS

635.00 Definition

A resource soil scientist may be asked to provide expert witness testimony. An expert witness is a witness who, by virtue of education, training, skill, or experience, is believed to have knowledge in a particular subject beyond that of the average person, sufficient that others may officially (and legally) rely upon the witness's specialized opinion about evidence or fact issues within the scope of his or her expertise, referred to as the expert opinion, as an assistance to the fact-finder. Expert witnesses may also deliver expert evidence about facts from the domain of their expertise.

635.01 When to provide expert testimony

If you as a technical soil specialist are approached to act as an expert witness or are served with a subpoena for a legal issue, the first step should be to contact your supervisor and the required State Office staff for guidance as to how to proceed. If served with a subpoena, you must accept it. However, the agency has the right to refuse to honor a subpoena on cases not in Federal court. In many cases it is not in the best interest of the agency for you to act as an expert witness. This includes being approached as a private consultant on matters where your professional credentials as an NRCS soil scientist would be used to qualify you as an expert and contribute to your testimony.

An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency per the Standards of Ethical Conduct for Employees of the Executive Branch codified in 5 C.F.R. Part 2635 (1/1/99 Edition), as amended at 64 FR 2421-2422 (Jan. 14, 1999) and 64 FR 13063-13064 (Mar. 17, 1999) § 2635.805 Service as an expert witness (<http://www.cdc.gov/maso/FACM/pdfs/LAWS/ethicsstandards.pdf>).

Nothing prohibits an employee from serving as a **fact witness** when subpoenaed by the appropriate authority; however, authorization is needed to provide **expert testimony**. After consultation with the agency representing the government in a proceeding, authorization may be given to an NRCS employee. If the government is not a party, the agency should consult with the Department of Justice and the agency with the most direct and substantial interest in the matter and with the designated agency ethics official to determine that the employee's service as an expert witness is in the interest of the government. Or, if the designated agency ethics official determines that the subject matter of the testimony does not relate to the employee's official duties, then authorization is not needed.

Acting in the capacity of an agency expert witness in an appeals hearing is a more likely scenario. These cases usually involve an appellant's request through the National Appeals Director (NAD) for a hearing regarding an adverse decision by the agency, such as a wetland determination. In many of these cases, the resource soil scientist will assist the agency representative in preparing the case and will assist in assembling exhibits for the administrative record. An agency lawyer is not present at these appeals hearings, and the agency representative acts on behalf of the agency before a hearing officer appointed by the National Appeals Director. The appellants

usually do have lawyers as well as expert witnesses acting on their behalf at these hearings (http://www.nad.usda.gov/hearing_guide.html).

635.02 Preparing to act as an expert witness

Approval to act as an expert witness does not necessarily mean that you will have to testify if a case goes to trial. Your expert opinion will be evaluated, and you may be asked to testify only if the information helps to clarify and support the case. If you are not asked to testify, the information provided may not be available through discovery to the opposing party. However, it is possible that they may obtain that information through the Freedom of Information Act (FOIA) (http://www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page2.htm).

When working on controversial or legal issues, it is important to remember to provide clear documentation and retain all information involved in the case because that information may be subject to discovery or FOIA. If the information is not clear, it can be used to argue against your testimony and findings. Anything documented for a case, including field sheets, reports, memos, and email, may be requested through discovery or FOIA.

Because of the nature of technical soil services, there is always the possibility that information gathered through a site investigation may be used for legal purposes. So, especially when contentious or enforcement issues are involved, it is imperative to always document your findings in a manner that can be used at a later date to support your conclusions. The cardinal rule in providing expert witness testimony is “the truth is your best friend.” If you have done your homework thoroughly and objectively and you tell the truth as you know it, your testimony will have the least potential of being successfully refuted. Your testimony should always hold together logically from beginning to end.

If your background work leads you to a conclusion contrary to what you are being asked to testify to, you have an ethical obligation to inform the attorney and withdraw from the case. It is your professional reputation, and it is up to you to protect it. You also have an obligation to help your client and the agency to avoid pursuing litigation that has no basis in fact or science. Do not ever let an attorney or others involved in a case coerce you into saying something you do not believe or that you cannot back up.

More importantly, you have set yourself up for a fall during cross examination if you do not strongly believe in the case, cannot thoroughly support your opinions, or have gone beyond your area of expertise. This will affect both your credibility and your future opportunities to testify.

Avoid becoming emotionally involved in a case. As an expert, you have an obligation to state your position in a scientific and objective manner. If you believe that your facts and analysis are correct and those of the opposition are not, do not hesitate to state your position. Just remember that your job is to objectively state the facts, not to support every proposition that an attorney might try to prove.

Make the attorney or agency representative aware of the limits of your expertise before you testify. If other expertise is needed to help build a case, make this clear early in the process.

The Supreme Court of the United States has spelled out the factors to be considered by lower courts when deciding whether to admit expert witness testimony:

- The expert's theory or technique must be derived from a scientific methodology that can be or has been tested;
- the theory or technique has been subjected to review by peer and publication;
- the technique's actual or potential rate of error; and
- the general acceptance of the theory or technique by the relevant scientific community.

"Professional judgment" won't carry much weight in a judicial proceeding if it isn't backed up by reproducible analysis that is based on recognized scientific principles. **Every fact you present will have to be backed up with the best data and analysis you can provide. Document and cross-reference everything.** Be sure you know the dates you were in the field, and be prepared to produce your field notes. You should expect the opposing attorney to go after your field notes, email, and phone records looking for inconsistencies. If you ultimately draw a conclusion that doesn't agree with something in your field notes, be prepared to explain the inconsistency. (Typically, you should not carry your field notes to court but should be prepared to produce them only when you are told to; however, they will be part of the administrative record at NAD hearings.)

Understand what the attorney or agency representative is trying to prove and why. You need to have a solid understanding of what the attorney or agency representative is trying to prove with your testimony. Ask him or her to explain the legal test(s) he or she is trying to meet with your testimony. This will help you to point out any weaknesses to counsel and may help you to understand when the opposing counsel is trying to blindside you with legal terms.

Also understand what the opposing attorney is trying to prove and why. Make sure you are present when the opposing expert in your area is testifying. Knowing the opposing expert's testimony can contribute to your own credibility since you can: (a) point out errors or weaknesses in the opposing expert's testimony (both before and during your testimony), (b) look reasonable by agreeing with any points made by the other expert that are consistent with your own testimony, and (c) gain advanced warning of weaknesses the other expert(s) may see in your testimony and the case. In NAD hearings the agency usually presents its testimony first; however, in rebuttal, errors or weaknesses of the opposing expert testimony can be pointed out.

635.03 Acting as an expert witness at a trial or hearing

Dress appropriately. While this may seem an obvious point, you should always wear formal business attire to testify. Dressing properly shows both your respect for the tribunal and your recognition of the serious nature of the proceedings. Equally important, participants in the proceeding often unconsciously accord more deference to the witness with the more professional appearance and demeanor.

Use any visual, tactile, or olfactory aids available. When testifying about soils, bring any properly labeled box of samples, pictures, or slides to illustrate your points. For example, when testifying about hydric soil identification, it is helpful to show a Munsell color page and the colors you are looking for to identify a hydric soil (i.e., chroma of 2 or less, high-chroma redoximorphic colors, black organic matter). It also is helpful to have pictures or, even better, labeled Powerpoint slides of soil profiles from the site that you can use to demonstrate what low-chroma colors are, what redoximorphic features are, what organic matter accumulation looks like, the difference in appearance of hydric versus nonhydric soils, etc. You can also use these photos to demonstrate thickness of fill and impacts of disturbance.

Give your attorney or agency representative ongoing input throughout the proceeding. Do not be afraid to jot him or her a note transmitted by a legal assistant or second chair during the testimony of another expert. If possible, discuss these thoughts with the attorney or agency representative during a natural break in the opposition's testimony. Do not take it personally if the attorney or agency representative does not act on your suggestions. There may be a strategic reason not to. Also, if the opposition raises new issues you had not considered, do not hesitate to collect new data or do additional analysis to facilitate your response. You can always collect new information as long as it falls within the scope of the examination that is underway.

635.04 Some points to remember when being deposed

- Listen carefully to the question asked, and make sure you hear and understand it. If you do not understand the question, do not answer it. It is the questioner's job to ask intelligible questions. Do not try to answer a question you think you are being asked if you feel the question is unclear.
- Think about your answer before answering. Pausing gives you time to think, controls the pace of questioning, and allows the lawyers or agency representative for the Department an opportunity to object to the question if appropriate.
- You can ask the attorney to repeat or rephrase or clarify the question if appropriate.
- Tell the truth, even if you believe that your answer may be harmful to the case. Of course, there is no need to volunteer harmful information. (See No. 5 below.)
- Just answer the question asked; do not volunteer anything or elaborate. Answer yes or no if that is sufficient. If the question cannot be answered in the way it was asked, say so.
- If you do not remember, or do not know, just say so.
- **Do not accept incorrect assumptions, including characterizations or summaries of earlier testimony, that may be made by the questioner.**
- If you are handed a document to testify about, read or review the whole document to be sure that you know what it contains. If you are asked simply to identify a document, you do not need to read the substance of the document.
- If one of the lawyers or agency representative for the Department makes an objection, do not answer the question to which an objection has been made unless the lawyer or agency representative for the Department instructs you that you can answer the question. Listen to the objection, since it may provide guidance on how you might answer the question.
- Do not argue with the lawyer asking you questions.
- Feel free to consult with the Department's lawyers or agency representative or to ask to take a break whenever you feel the need.
- Do not volunteer to obtain documents or information for the lawyers on the other side. It is the responsibility of the Department's lawyers or agency representative to respond to such requests.

- If you make a mistake, tell the Department's lawyers or agency representative so that it can be corrected.
- If you are an expert, stay within your area of expertise.
- If you are an expert, do not give an opinion unless you have all the pertinent facts.

A DVD of a training course by Jane Cornwell (OGC, Kansas City) is available. It includes instructions involving cases where the agency is not a party; subpoenas, pretrial preparation, and qualifying witnesses; giving testimony for depositions and trials; a top-10 list of courtroom bloopers; refinements for a witness; and a question and answer session. You can request a copy from the [NSSC Training Coordinator](#).

635.05 References

Office of General Counsel. Expert Witness Testimony. DVD. Request from [NSSC Training Coordinator](#)

U.S. Government. The Freedom of Information Act. 5 U.S.C. § 552, as amended by Public Law No. 104-231, 110 Stat. 3048. 1996.

http://www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page2.htm

U.S. Office of Government Ethics. Standards of Ethical Conduct for Employees of the Executive Branch. Final Regulation Issued by the U.S. Office of Government Ethics Codified in 5 C.F.R. Part 2635 (1/1/99 Edition), as amended at 64 FR 2421-2422 (Jan. 14, 1999) and 64 FR 13063-13064 (Mar. 17, 1999). 9/30/99.

<http://www.cdc.gov/maso/FACM/pdfs/LAWS/ethicsstandards.pdf>