

# ACEC INSIGHTS

American Council of Engineering Companies of Massachusetts

January 2011

## President's Message

By Lisa A. Brothers, PE, President and CEO, Nitsch Engineering



Happy Holidays and Happy New Year! For many, December is a favorite time of the year. I count myself among that group. I enjoy spending quality time with friends and family. For me, the holidays and the new year bring an opportunity to reflect on the past year and on the changes I want or need to make for the future. The end of the year is also a good time for businesses to reflect on the progress over the past year and to plan for the next year. What steps will you take to improve on the operations of your business? Resolutions can be made in one day, and then accomplished with many tiny steps throughout the year.

This year, the sluggish economy continued to impact our industry. We are facing challenges that we haven't experienced in decades. Changing market conditions have caused our industry to quickly adapt and to engineer solutions to the challenges presented. To keep our members informed on the market conditions and industry trends, the ACEC/MA Board has placed more emphasis on communication—both internally and

externally—in our organization. Through our updated website (check *In the News* on the home page for current activities), quarterly *Insights* newsletter (with a “What have we done for you lately?” article), new monthly email newsletter **ACEC/MAtters** and periodic “alerts” for when we need to get a message out quickly, we hope you find the resources needed to keep you informed, motivated and engaged.

We had a very successful new event this fall: the first annual **ACEC/MA Education Corporation (ACEC/MA EC) Golf Tournament** held on September 20, 2010 at the Marshfield Country Club. The proceeds from this tournament went directly into the ACEC/MA EC 501(c)3 Presidents' Scholarship Fund. ACEC/MA EC established its Presidents' Scholarship last year to commemorate our 50th anniversary and create a scholarship fund for college students studying engineering or land surveying. We all know it is important to give back to the community. Establishing this scholarship program was a step in that direction.

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## Effective Communication for Project Delivery, Project Management and Team Development

### Part 1: Business Development

By Paul Weisman, PE, CPCC, President/CEO, Weisman Consulting, LLC and Michele Simos, President, Simos Consulting



*This is the first installment in a series of three articles on effective communication as a component of a Project Delivery and Management (PDM) system.*

Successful projects represent the lifeblood of the engineering community. They build reputations, create loyal clients and keep project financials in the black. From project conception to closeout, opportunities to misunderstand, misinterpret, jump to conclusions, make assumptions and

develop negative relationships can have a major impact on whether a project makes it or breaks it. “It,” of course, can be a timeline, a budget, engineering issues or client relationships.

Miscommunication starts wars, feeds conflict and ends relationships. It erodes trust and respect between people and nations, and stalls progress on organizational and business initiatives. Therefore, it stands to reason that clear, concise communication opens opportunities and conversations that build relationships and create positive outcomes. Effective communication practices offer the potential to foster synergistic results that prove the whole is greater than the sum of its parts.

As a core part of the Project Delivery and Management (PDM) system, Phase 1: Business Development (BD) relies on a specific communications skill set that underlies all of the phases of the PDM system.

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## So You're Going to Be an Expert Witness ... Part III — Cross-Examination

By Joseph A. Barra, Esq., *Robinson & Cole LLP* and  
Lawrence Feldman, PhD, LSP, *GZA GeoEnvironmental, Inc.*



### Introduction

*The Socratic manner is not a game at which two can play. Please answer my question, to the best of your ability.*  
—Sir Max Beerbohm,  
Zuleika Dobson



In the first two installments of this series (see *Insights*, March and June 2010) we discussed pre-trial issues for an expert witness and the direct examination phase during trial. In this last installment, we'll discuss that aspect of being an expert witness that is most feared by those of us who grew up watching *Perry Mason*, *Ironsides* and *LA Law*: the cross-examination.

### The Role of Opposing Counsel

*When the queen of Sheba heard of the fame of Solomon... she came to prove him with hard questions.*  
—II Samuel, 10:1

During direct examination, your client's attorney will encourage you to "teach" the judge or jury the reasons for your opinion. As a teacher, you should be expansive in your answers; during cross-examination, however, you may not get that chance. The last thing opposing counsel wants to do is give you an opportunity to explain anything. She will want to control your responses by asking you leading questions—that is, questions that suggest the answer and only permit you a "yes" or "no" response. For example, "Dr. Expert, you were not at the scene at the time the building collapsed, were you?"

A skilled trial attorney will reduce your cross-examination to a series of small incremental questions, with little room for disagreement at each step. These questions will seem harmless at first, but as you continue to respond, you will find yourself becoming increasingly uncomfortable as you get a sense of where these leading questions are actually leading. This is the time to look for opportunities to explain yourself in more detail. For example, you may find it appropriate to respond to a leading question with "That's not exactly true..." or "Your question suggests an answer that requires

an explanation and cannot be responded to with a simple yes or no."

As the opposing counsel leads you down the cross-examination path towards her ultimate objective, don't be surprised if her questions bring you right up to the goal line, but simply leave you there. Oftentimes, the most effective cross-examination allows the jury to connect the final dots for themselves. While this may seem strangely incomplete to you, the lawyer knows that by asking the final question, she may be giving you a forum in which to explain or backtrack on your previous answers. By not asking the final question, counsel makes her point through implication.

### The Expert Witness' Role

*What is the answer? [I was silent.] In that case, what is the question?*  
—Alice B. Toklas' last words, from Gertrude Stein, *Alice B. Toklas, What Is Remembered*

The cross-examination is as much a part of our justice system as the direct examination, and you must not take this questioning personally. Because your opinion—and thus your credibility—is paramount, you need to always respond professionally, no matter how hot the seat gets! This is especially true if counsel attempts to cut you off mid-sentence as you try to explain your response. Don't let this tactic get to you; your client's attorney is there to address this circumstance by objection and, despite what you see on television, judges have little tolerance for oppressive lawyer behavior. Nevertheless, it is sometimes helpful to recognize that if opposing counsel is rude or deceptive, she will have the entire balance of the trial to rehabilitate her boorish behavior. You, on the other hand, will only be in front of the jury for a limited period of time.

Carefully worded argumentative questions may sometimes be permitted and, thus, are more difficult to address. Here, the questioner is suggesting—by the phrasing of the question, by the tone of voice, or through some physical gesture—that only a raving lunatic would agree with a particular proposition. Once again, responding to the question in such a way as to

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telegraph that an explanation is required will signal to your client's attorney that he will need to go back over that point on re-direct.

### Traps for the Unwary

*Matthew Harrison Brady: I do not think about things I do not think about.*

*Henry Drummond: Do you ever think about things that you do think about?*

—Stanley Cramer's *Inherit the Wind*

A thorough discussion of all the nuances and techniques of cross-examination is clearly beyond the scope of this paper. Nevertheless, we'll take this opportunity to address a few circumstances that you may encounter.

### 1. "It's just a friendly little procedure."

In the movie *Inherit the Wind*, Spencer Tracy doesn't immediately go for Fredric March's jugular, although he certainly ends up there. Like most attorneys, Tracy's character is initially friendly, approaching the adverse witness as if he were having a friendly chat. The skilled attorney will often start her questioning with "constructive" cross-examination—that is, by innocently establishing areas of agreement between opposing experts, by having you acknowledge her expert's credentials or authorities, or, if appropriate, by having you acknowledge the reliability of her expert's data or assumptions.

The cross-examiner may also seek to elicit an admission that your client is not completely blameless. In advance of your testimony, you should review as many of these points with your client's attorney as possible so that he will be prepared to address them on redirect. In the absence of any such plan, you should honestly acknowledge such shortcomings, if they exist, and explain why these items do not adversely affect your ultimate opinion.

### 2. "Gotcha!!!"

Impeachment is generally defined as the process of calling testimony into question, usually, but not always, on the basis of a prior inconsistent statement. It is intended, of course, to discredit you as a reliable source of opinion, preferably by demonstrating that your testimony at trial is at odds with previous statements you made during your deposition, at another trial, or in published literature. The skilled trial attorney will begin by getting you to reaffirm your current testimony, and then get you to validate the prior conflicting statement or opinion. It is the attorney's goal to confront you with the inconsistency and not give you the chance to explain the reasons for the inconsistency.

### 3. "You're just a hired gun."

Despite what you may have heard, expert witnesses are meant to be impartial analysts, not advocates for one side or another. Thus, the presence of bias—that your opinion was formulated to meet your client's needs—can significantly undermine your credibility. The bias attack typically takes one or more of three forms: fees, relationships and past positions.

*Show me the money...* Opposing counsel will sometimes focus on the fact that you are being paid for your opinion, as though that alone is enough to define your conclusions. However, the judge—and even the members of a jury—will understand that in most cases experts do not work for free. More likely than not, the opposing expert is also being paid, so there's little to be gained by this argument unless your fees are particularly large, or unless there's a large balance outstanding at the time of trial (another reason for your client to keep her payments timely!).

If the question is unclear, ambiguous, vague or convoluted, don't be afraid to say so and ask for clarification. You're halfway to a great response if you can force the cross-examiner to rephrase her question in a way that makes sense to you.

*A friend is a friend...* Your long-standing relationship with your client or her attorney may also be cited as a basis for your alleged lack of impartiality. This also applies to in-house experts or employees who are even more dependent on your client for their livelihood. While long-term professional relationships are not uncommon and are not necessarily indicative of bias, a skilled cross-examination may nevertheless insinuate that such a relationship may in fact be coloring your opinion.

*I know what I said before, but...* Some experts consistently take the same opinions, or favor certain industries, or certain types of clients (i.e., working largely for plaintiffs or defendants). Whether there is a pattern or not, counsel will explore any real or perceived inflexibility during discovery and may raise this point during cross-examination at trial.

### Coping with Cross

*This is the law of the Yukon, that only the Strong shall thrive;*

*That surely the Weak shall perish, and only the Fit survive.*

—Robert W. Service, *The Law of the Yukon*

Cross-examination is not rocket science, but it does rely on the same intellectual and emotional characteristics that led you to be a scientist or

engineer to begin with. So here are some tips to keep in mind:

### 1. Stay calm.

Maintaining your usual calm, professional demeanor is your best defense against attack on cross. Hopefully opposing counsel will also act professionally and not harass you. In any case, make it a point not to lose your composure.

### 2. Cooperate.

This is just business and not a personal battle between you and opposing counsel. Defend and explain your position, but don't let professional assertiveness morph into intransigence.

### 3. Make sure you understand the question.

If the question is unclear, ambiguous, vague or convoluted, don't be afraid to say so and ask for clarification. You're halfway to a great response if you can force the cross-examiner to rephrase her question in a way that makes sense to you.

### 4. Think before answering.

This should go without saying. Nevertheless, if you find yourself requiring a moment to think while you compose an answer, don't be afraid to address that awkward "dead air" by saying something like, "Give me a minute to think about that" so that your audience understands that's what's going on.

### 5. Remember there's always redirect.

Keep in mind that your initial round of cross-examination is always followed by redirect. During cross examination, you were probably prevented from explaining your short answers. During redirect, your client's attorney will give you the opportunity to provide these explanations, fill in any gaps and explain any apparent inconsistencies.

### Conclusion

*There are two sides to every question.*

—Protagoras

In this series of three articles we have attempted to provide an overview of what's involved in being an expert witness. While this work involves certain challenges that go beyond the purely technical, addressing these challenges can be just as intellectually stimulating, and maybe—at least sometimes—just as rewarding.

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