

# The Prudent and Ethical Floodplain Manager: Minimize Your Exposure and Learn How to Conduct Yourself in Legal Matters

Presented by:

David T. Williams, Ph.D., P.E., P.H., CFM, D.WRE

Michael DePue, PE, CFM



# Now Hear This!

- This is not legal advice—it is a lecture on general principles of law. For legal advice see a lawyer licensed in your jurisdiction.



# Agenda

- Common Situations That Test the Prudent and Ethical Floodplain Manager
- How You Can Be Sued and For What Reasons
- An Ethical Framework for CFMs
- A Framework for Minimizing Exposure
- Conduct as a Witness

# Common Situations That Test the Prudent and Ethical Floodplain Manager

Michael DePue, PE, CFM  
Senior Group Manager  
Floodplain Management Division  
[mdepue@pbsj.com](mailto:mdepue@pbsj.com)

# Examples...

- Examples of Real-Life Situations On The Ground
  - LOMR-F
  - Preliminary Maps
  - Variances
  - National Flood Insurance Program Participation

# LOMR-F

- Background:
  - A Letter of Map Revision based on Fill (LOMR-F) removes the Federal requirement for flood insurance from a structure that has been built on fill in order to elevate it above flood level (the BFE).
  - In the past, FEMA required certain information, like low floor or proposed low floor elevations and certification of fill forms, to be submitted with the request. In 2001, the rules were changed to allow cases to be accepted and approved without that information.
  - In its place, the community is required to sign a statement that the existing or proposed structures are, and will continue to be, reasonably safe from flooding.

# LOMR-F

- Savvy developers may apply for LOMR-Fs for pieces of land without any structures.
- Once a piece of land is removed from the SFHA through the LOMR-F process, the community sometimes is not able to enforce floodplain development standards, like making sure that structures built on fill in the SFHA have their lowest floors at or above the BFE or be reasonably safe from flooding.

# Closing the Loop

- John Callen of the City of Lincoln, Nebraska Department of Building and Safety presented at ASFPM Biloxi in 2004 regarding this issue and what his community has done about it.



# Closing the Loop

- They developed a legal instrument called a *Building Restriction Agreement to Ensure Structures are Reasonably Safe From Flooding* that allow the City to sign the Community Acknowledgement Form for LOMR-f requests.
- It essentially allows for “once an SFHA, always an SFHA” when it comes to LOMR-Fs

**Building Restriction Agreement  
To Ensure Structures are Reasonably Safe From Flooding**

THIS BUILDING RESTRICTION AGREEMENT to Ensure Structures are Reasonably Safe From Flooding is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2002, by and between \_\_\_\_\_ (hereinafter referred to as "Owner") and the City of Lincoln, Nebraska, a municipal corporation (hereinafter referred to as "City").

**RECITALS**

I.  
Owner is the owner of \_\_\_\_\_ hereinafter referred to as the "Property."

II.  
The Property is located in an area shown on the Flood Insurance Rate Map (FIRM) for the City of Lincoln issued by the Federal Emergency Management Agency (FEMA) as a special flood hazard area (SFHA) and is a designated floodplain subject to the requirements of the City's floodplain ordinance (Chapter 27.55 of the Lincoln Municipal Code).

III.  
Lincoln Municipal Code § 27.55.030 provides in part that:  
(b) Residential Construction. All new construction and substantial improvements of residential structures within the designated floodplain shall have the lowest floor, including basement, elevated at least one foot above the base flood level. Garages and storage buildings used exclusively for the storage of motor vehicles, and storage of other items readily removable in the event of a flood warning may have their lowest floor below flood elevation, provided the building structure is capable of withstanding hydrostatic and hydrodynamic forces caused by the 100-year flood and, further, provided that no utilities are installed in the building except elevated or floodproofed electrical fixtures. If the building is converted to another use, it must be brought into full compliance with the requirements of this title governing such uses.

Approved by City Law  
3-4-02

# Preliminary Maps

- Most communities have either already received a Preliminary FIRM, or will be this year.
- Even if new H&H isn't used in the new mapping, the use of updated topography can increase the size of the SFHA; levees that are being decertified will also greatly increase the areas within the SFHA.

# Preliminary Maps

**NFIP**

**PANEL 0400C**

**FIRM**

**FLOOD INSURANCE RATE MAP**

**DOUGLAS COUNTY,  
MINNESOTA  
AND INCORPORATED AREAS**

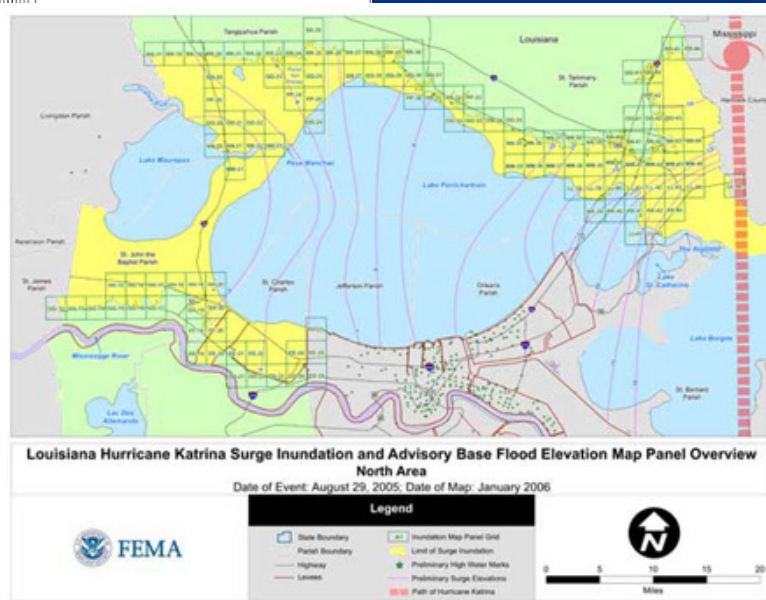
**PANEL 400 OF 450**

(SEE MAP INDEX FOR FIRM PANEL LAYOUT)

**CONTAINS:**

| COMMUNITY           | NUMBER | PANEL | SUFFIX |
|---------------------|--------|-------|--------|
| ALEXANDRIA, CITY OF | 270022 | 0400  | C      |
| DOUGLAS COUNTY      | 270623 | 0400  | C      |

**PRELIMINARY**



- Using the most conservative data as “best available data is always recommended.
- The same applies to ABFEs after a flooding event, and more conservative data from a State agency or other reliable source.
- In Lincoln, NE, the community was held liable for flood damages to homes that were built outside of the FEMA SFHA, but were identified as being in a floodprone area on a state study showing a BFE that was seven feet higher than that shown on the FIRM.

# Variances

- A floodplain variance allows someone to follow less restrictive rules in flood hazard areas.
- FEMA has strict rules for allowing variances (see 44CFR 60.6 if you're interested).



Image from: <http://swamplot.com>

# Possible Impacts of Variances

- If a variance is issued:
  - Higher insurance premiums will result (\$25 for \$100 of coverage!)
  - There is a greater risk to life and property
- Community should maintain detailed records of granted variances, which will assist the community in lawsuits after damage occurs to structure.

# Possible Impacts of Variances

- Variances are reported to FEMA in the community's Biennial Report. Your variance records will also be perused during Community Assistance Visits by FEMA and the your state NFIP Coordinator.
- A pattern of variances may impact your community's participation in the NFIP, which impacts
  - Flood insurance availability
  - Post-disaster assistance
  - Other ramifications

# Possible Impacts of Variances

- Unjustified variances can result in increased costs to the community for emergency response.
- Another consideration is the liability that a variance may place on the local community.
- Any building permitted below the BFE is subject to increased risk of damage from floods.
- Local communities should ask themselves what is the potential of future litigation for the community for issuing an unjustified variance.

# National Flood Insurance Program Participation

- The NFIP is a voluntary program
- Your community may choose not to join or not to stay in the program





# National Flood Insurance Program Participation

- Village of Lake Delton, WI
  - Dropped out of the NFIP in 2001 after disagreeing with their new Flood Insurance Rate Map.
  - Was in the process of working with FEMA to update this information.
  - Homes in areas that were shown on the 2001 map as being in an SFHA were damaged, destroyed, or swept away completely by the June 2008 floods.



FEMA Photo 36706 Robert Kaufmann

# National Flood Insurance Program Participation

- FEMA allows communities to rejoin the (Emergency Phase of the) program within 6-months after a disaster, the federal flood insurance that becomes available is not retro-active.
- Also, in this Phase, insurance limits are drastically lower than flood insurance limits in communities participating in the Regular Program of the NFIP.
- Victims will seek whatever sources available to them in order to rebuild their homes and lives, including litigation, as is the case with Lake Delton.

# National Flood Insurance Program Participation

- Some of the first news reports out of Lake Delton after the flood were of homeowners who had contacted lawyers to assist them in determining the cause of damage to their homes, what assistance was available to them from local, State, and federal sources, and to obtain information on taking legal action against the community for not participating in the NFIP.
- Initial papers have been filed in the possible suit, which includes both the community and the State's Department of Natural Resources.

# Discussion Questions

- How can you assure that existing or proposed structures are, and will continue to be, reasonably safe from flooding if your ordinance doesn't apply?
- What should you do when you get a permit application before the Preliminary maps are final?
- FEMA allows variances in certain situations, but what are the ramifications of allowing variances, even legal ones?
- What are the benefits and costs of non-participation?

Questions?

# How You Can Be Sued and For What Reasons

David T. Williams, Ph.D., P.E., P.H., CFM.  
D.WRE

Senior Technical Advisor, Water Resources  
[dtwilliams@pbsj.com](mailto:dtwilliams@pbsj.com)





# How You Can Be Sued and For What Reasons



- Flooding Damages.
  - By landowners, subdividers, builders, contractors, subcontractors, adjacent landowners, etc.
  - Courts have been using the Rule of Reasonable Use, which says that people may not “unreasonably” discharge surface waters onto other properties, block the flow of floodwaters, or increase flood heights and velocities.

Top, FEMA Photo 37593 Barry Bahler

Bottom, FEMA Photo 31793 Patsy Lynch

Compiled From: Jon Kusler, Esq., *Professional Liability For Construction in Flood Hazard Areas* Prepared for ASFPM With Funding Support From The ASFPM Foundation 2007.

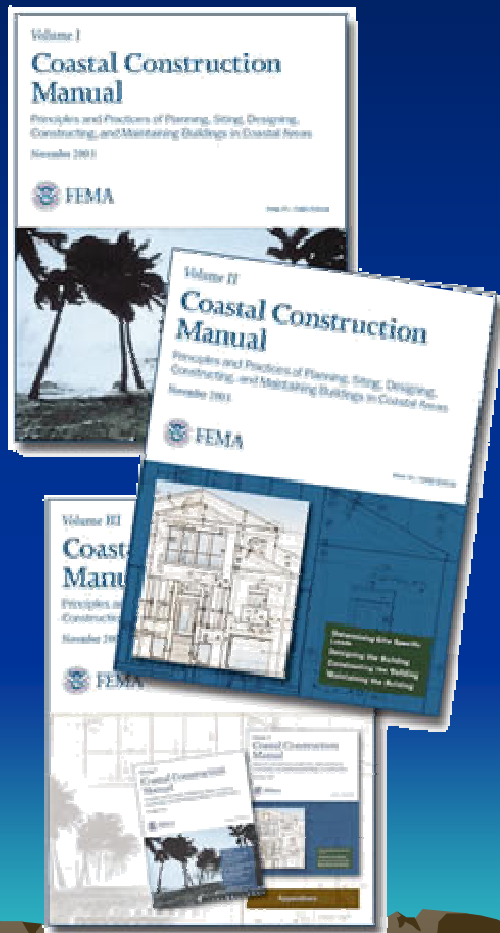
# How You Can Be Sued and For What Reasons

- Following (or not) Your Community's Regulations.
  - More than 20,000 communities are participating in the NFIP and have regulatory standards for floodplain development, including elevation or floodproofing, and other measures and protection of floodway capacity.
  - Failure to comply with these standards may constitute a breach of contract or establish a case of negligence if damage results from such a failure.





# How You Can Be Sued and For What Reasons



- Availability of Design Guidance.
  - Many flood-related design manuals have been published with recommended flood-proofing and construction practices. Because these materials are widely used and available, design professionals can no longer claim ignorance or lack of information concerning floodproofing and other flood loss reduction design techniques.

# How You Can Be Sued and For What Reasons

- Enhanced Standard of Care.
  - As design professionals apply increasingly sophisticated techniques to reduce flood damage to structures and to determine flood heights and velocities, these measures become the established standard of care. In States and communities with higher regulatory standards, an enhanced standard of care is established.



# How You Can Be Sued and For What Reasons



- Implied Warranty.
  - There is an expectation for new residential structures that the home will be both habitable and suitable. Courts have recognized this implied warranty in most states.

Questions?

# An Ethical Framework for CFMs

Michael DePue, PE, CFM  
Senior Group Manager  
Floodplain Management Division  
[mdepue@pbsj.com](mailto:mdepue@pbsj.com)

# CFM Code Of Conduct

- The ASFPM Certified Floodplain Manager Program Code of Professional Conduct
- A copy of this signed document must be submitted with the Certified Floodplain Manager application
- Certified Floodplain Managers agree to follow this Code

# CFM Code Of Conduct

- As a CFM, I agree to abide by the following tenets of the Code of Professional Conduct in all of my professional responsibilities. I will:
  - Practice honesty and integrity in all of my professional relationships with the public, peers, and employer;
  - Be truthful and accurate in my professional communications;
  - Be fair and considerate of all persons;
  - Foster excellence in floodplain management by staying abreast of pertinent issues;
  - Enhance individual performance by attention to continuing education and technology;

# CFM Code Of Conduct

- As a CFM, I agree to abide by the following tenets of the Code of Professional Conduct in all of my professional responsibilities. I will:
  - Avoid conflicts of interest resulting in personal gain or advantage;
  - Be economical in the utilization of the nation's resources through the effective use of funds, accurate assessment of flood-related hazards, and timely decision-making;
  - Maintain the confidentiality of privileged information;
  - Promote public awareness and understanding of flood-related hazards, floodplain resources, and flood hazard response; and



# CFM Code Of Conduct

- As a CFM, I agree to abide by the following tenets of the Code of Professional Conduct in all of my professional responsibilities. I will:
  - Be dedicated to serving the profession of floodplain management and to improving the quality of life.
  - Promote public awareness and understanding of flood-related hazards, floodplain resources, and flood hazard response

# A Framework for Minimizing Exposure

Michael DePue, PE, CFM  
Senior Group Manager  
Floodplain Management Division  
[mdepue@pbsj.com](mailto:mdepue@pbsj.com)

# Minimizing Exposure

- No Adverse Impact
  - ASFPM Defines it as “...an approach that ensures the action of any property owner, public or private, does not adversely impact the property and rights of others”
    1. Identify all of the Impacts of a proposed development
    2. Determine if other properties will be adversely impacted
    3. Notify impacted property owners
    4. Design or re-design the project to avoid such impacts
    5. Require appropriate mitigation measures that are acceptable to the community and the affected persons

# Minimizing Exposure

- Participate, and continue participation in the NFIP
- Follow your community's floodplain management ordinance
- Adopt stricter standards than those of the NFIP
  - Remember, the minimum NFIP standards allow for a one-foot increase in flood heights
- Use information from other sources if it is more conservative (larger SFHA, higher BFEs) than the FIRM
- Issue variances carefully, if at all

# Minimizing Exposure

- Be aware that the law is behind you
- Several papers and presentations have reviewed the legal implications of NAI strategies. Read them. They come to the same conclusion:
- When public safety is concerned, be prudent and ethical. See:
  - *A Comparative Look at Public Liability for Flood Hazard Mitigation* by Dr. Jon A. Kusler, Esq.
  - *Protecting the Property Rights of All: No Adverse Impact Floodplain and Stormwater Management* by Edward A. Thomas, Esq.
  - And others, all on ASFPM's website.

Questions?

# Conduct as a Witness

David T. Williams, Ph.D., P.E., P.H., CFM. D.WRE

Senior Technical Advisor, Water Resources

[dtwilliams@pbsj.com](mailto:dtwilliams@pbsj.com)

# Experience in Expert Testimony

- Went to Trial – Three cases
  - Flooding Problems and Resulting Slope Failure, Unnamed Creek, Los Angeles, CA, for private client, for plaintiff
  - Flooding Potential and Analysis of Coconut Grove, Kailua, Oahu, HI, for private client, for plaintiff
  - San Luis Obispo Creek Flooding, San Luis Obispo, CA, for private client, for defendant



# Experience in Expert Testimony

- Went to Arbitration – Four cases
  - Scour Evaluation of Grading Plan Changes for Cyrus Wash, for Kern County, CA, for plaintiff
  - Flood Problems at Carlton Oaks Country Club, Santee, CA, for private client, for plaintiff
  - Pecos Road Pipeline Scour, Phoenix, AZ, for El Paso Natural Gas Company, for plaintiff
  - San Diego Creek Revetment Failure, Irvine, CA, for private client, for plaintiff

# Experience in Expert Testimony

- Other Side Withdrew – Five cases
  - Subdivision Flooding, for City of Reno, NV, for defendant
  - Deposition of Erosion Material at a Golf Course, San Marcos, CA, for defendant
  - Agua Fria River Streambank Scour Analyses, Phoenix, AZ, for Flood Control District of Maricopa Co., AZ, for defendant
  - Subdivision Flooding Problems and Floodplain Mapping Procedures, Dayton, OH, for private client, for defendant
  - Murrieta Creek Flooding, Riverside County, CA, for Riverside Co. Flood Control District, for defendant

# Experience in Expert Testimony

- Settled Out of Court – Seven cases
  - U.S. Forest Service vs. State of ID, water rights issues, through the Dept. of Justice , for plaintiff
  - Environmental Protection Agency through the Dept. of Justice vs. unnamed defendant, HI, for plaintiff
  - River Effects of Sand Mining Operations, San Luis Rey River, CA, for private client, for defendant
  - Erosion and Drainage, Newport Beach, CA, for private client, for defendant
  - Subdivision Flooding Problems, Waialae Iki V, Oahu, HI, for private client, for plaintiff
  - Alpine Mobile Home Park Flooding, Alpine, CA, for private client, for defendant
  - Desert Greenbelt, Scottsdale, AZ, for private client, for defendant

# Experience in Expert Testimony

- Non-Judicial Expert Testimony/Opinion – Five cases
  - Analysis of Milltown Dam Removal and Potential Deposition at Thompson Falls Reservoir, MT, for Pennsylvania Power and Light
  - FERC relicensing, NC, for Alcoa Power Generating Corporation
  - Baker River FERC relicensing, WA, for Puget Sound Energy
  - Blackfoot and Clark Fork River Restoration Plan, MT, for unnamed client
  - Evaluation of Pipeline Rupture, Arroyo Pasajero, CA, for unnamed client

# Summary of Experience

- Went to Trial - 2 Plaintiffs, 1 Defendant
- Went to Arbitration - 4 Plaintiffs
- Other Side Withdrew - 5 Defendants
- Settled Out of Court – 3 Plaintiffs, 4 Defendants
- Summary
  - 9 Plaintiffs, 10 Defendants
  - 3 out of 19 went to trial – about 16%

# Scenario I

- The lawyer asks the expert to use a difference word/phrase in his/her report.
- The expert is reluctant but the lawyer insists.
- What should the expert do?

## Scenario II

- During trial/deposition, the lawyer poses an open type of question that could be interpreted difference ways.
- How is the expert to respond?

## Scenario III

- An prospective expert is called on the phone to listen to the lawyer's case and asked to make an opinion right there.
- What should the expert do?



## Scenario IV

- The expert is a friend of the other side's expert and knows that he/she had a professional licensing disciplinary action that was settled with a fine.
- Should he/she tell the lawyer?

# Scenario V

- A lawyer who has a hydraulic expert asks him to form an opinion on a hydrologic issue.
- What she he/she do?

## Scenario VI

- An expert is on the stand and the opposing attorney starts making what he considers personal attacks on his integrity and qualifications.
- What should he do?

# Scenario VII

- An expert is promised a big bonus if his side wins.
- Should the expert do or say anything?

# Close Encounters of the First Kind

- Watch out for pre-emptive strikes
  - Attorneys may contact you and try to get you on retainer to take you “out of the game”
  - Ask who else is on their team and if they will be covering the same expertise you would be
- Briefly get case background
  - Are they in the right or wrong? Can you enthusiastically support their position? Who are their other experts? Any conflicts?
  - Do not give an opinion if you are declining the case

# Close Encounters of the Second Kind

- Don't take the case if you feel that they are wrong
- If you see a possibility you will take the case, meet with the attorney first before committing
- Resume
  - Update your resume
  - Take out all embellishments
  - Submit a short summary and full resume to your attorney to give out as appropriate

# Close Encounters of the Second Kind

- Questions to ask yourself
  - Are you comfortable with the lead attorney?
  - Are the attorneys straight forth answering your questions?
  - Can you work with their other experts?
  - Can you keep emotions out of the case?
  - Can you be objective about the case?
  - Can you objectively deal with the other side's experts?

# Close Encounters of the Third Kind: Discovery

- Discovery is pre-trial phase in which each party through civil procedures can request documents and other evidence from other parties
- You should work with the attorney to help in this process
- Your emails or other correspondence is discoverable, so make sure that preliminary opinions, personal comments, strategies, etc. are not written down
- Your publications and presentations are discoverable so make sure that they are not in contradiction to your opinions in the case



# Affidavits

- Affidavits are written declarations made under oath usually certified by a notary public
- You would normally be asked to write an affidavit stating your opinions on the case and the reasons for your opinions
- Make sure to put “Draft” on all preliminary affidavits
- Your attorney will look at your drafts and make suggestions on improvements
- Don’t change your statements if you feel they are correct, even though your attorney may ask you to change them or even “bend” them

# General Comments on Discovery and Affidavits

- Talk to or meet with the other experts on your side
- Get a copy of everything that your client and the other experts on your side presents under discovery that touches your area of expertise
- If there are overlaps in expertise, decide who is the most competent on the subject to write in their affidavit
- Review each others draft affidavit for consistency
- Make sure that your attorney understands the scientific and engineering basis of your testimony before you present it

# Comments for Time Up to Trial or Arbitration

- Don't talk about the case to your colleagues
- Tell your staff that is working on the case not to talk about it to their colleagues
- Keep all information in one reasonably secure place
- Be careful with emails – e.g., double check forwarding, cc:s, etc. to the right people!
- Try to keep everything in your head and don't write down notes if you can – all is discoverable!

# Close Encounters of the Fourth Kind - Contact!

- Deposition (not sediment deposition!) is witness testimony given under oath and recorded by a court reporter for use in court at a later date
- It is usually taken at a mutually agreed upon location
- The person being deposed (questioned) is the deponent
- Attorneys from all sides can be in attendance and ask questions
- Copies of the deposition are made available to everyone after you have made corrections to the transcripts

# Depositions

- Check draft deposition to reassure that your facts, assertions and conclusions are correct
- The other side's experts may be present and feed questions to the attorney
- There are two types of objections by your attorney to the questions posed to you
  - Privilege
  - Object to the form of the question asked – note that this generally means your attorney is warning you to be careful!
- If you need time to think, don't feel shy in taking a breather (e.g., bathroom, early lunch, need water)

# Depositions – General Comments

- Both side's experts are generally deposed – try to get the other side's experts to be deposed first
- You may be asked to help with questioning of the other side's experts
- Information from each side's experts' depositions is often used to predict the outcome of a trial and therefore the basis for a settlement
- If the other side's attorney ask you questions outside your area of expertise, say that you have not been asked to address those topics

# Depositions – Some Suggestions

- If you do not fully understand the question, ask for it to be repeated
- If the question is ambiguous, ask to repeat the questions using different phrasing or words
- If the question is still ambiguous, rephrase it yourself so that you can answer it with no misinterpretation
- Use short phrases, answer directly to the question and do not expound or give opinions voluntarily
- Give opinions only when directly asked to and for specific topics
- Don't be evasive, but use every opportunity to make your own points

# Depositions – Some More Suggestions

- If for the first time, practice with your attorney
- Critique what you will say and imagine what the other side may ask you and prepare a good answer
- Read up on the other side's experts to anticipate their questions
- Take only the documents you will need for the deposition – they will enter in the records what you bring
- Have support documents handy and indexed so you can go straight to the information



# Trial!!

- Two types of trial – Jury and Bench (solely before a judge)
- This is serious stuff because usually, only 1 in 10 cases get to this point
- Civil suits do not have to have unanimous decisions
- Remember that the judge and jury are not engineers, but they are also not dumb
- You are not allowed in the trial room when your case is in session

# Trial!! Some more stuff

- If asked an unfair/misleading question, it is perfectly alright to use your answer as an opportunity to fully explain your own position and opinions
- If the attorney isn't satisfied with your answer, it's up to him/her to ask the question in a way that makes sense
- If the opposing attorney tries to limit your answer to a "yes or no", and you feel an explanation is necessary, ask "May I explain?"
- Some judges will allow explanations by the witness, but if the judge stops you from explaining, you will have alerted your own lawyer that this is an area that needs follow-up

# Trial!! Some more stuff

- Dress like a professional – don't wear a Hawaii shirt unless you are in Hawaii and a native; don't wear a bolo tie in New Mexico unless that is your natural way to dress. Otherwise, you will appear appeasing.
- Review the other experts' and your depositions just before the trial
- Work with your attorney on your exhibits
- Rehearse with your attorney
- If the court takes a break during your testimony, use this time to talk to your lawyer about any trouble spots that have come up

# Trial!! Even more stuff

- Stay away from professional jargon but if you do use it, make sure to define it
- Like in deposition –
  - If you do not fully understand the question, ask for it to be repeated
  - If the question is ambiguous, ask to repeat the questions using different phrasing or words
  - If the question is still ambiguous, rephrase it yourself so that you can answer it with no misinterpretation
  - Use short phrases, answer directly to the question and do not expound or give opinions voluntarily
  - Give opinions only when directly asked to and for specific topics

# General Overall Comments

- I generally ask for double my usual fee for deposition and trial – Why?
- Have a thick skin and don't take things personally
- Maintain your dignity at all times
- If you are being treated disrespectfully, have your attorney step in
- Don't argue with the other side's attorney – that is your attorney's job

# More General Overall Comments

- Don't trash the other side's experts – treat them with respect
- Look at the jury (scan the people) or judge when answering the question – not at the attorney
- If there is a microphone, place it so that you can sit erect while answering questions
- Answer in a audible and confident voice
- You cannot be sued for your opinions, right or wrong, but you can be sanctioned or have criminal charges if you make false statements, forge documents, etc.

# Now lets go over the scenarios again!

## Scenario I

- The lawyer asks the expert to use a difference word/phrase in his/her report.
- The expert is reluctant but the lawyer insists.
- What should the expert do?

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- During trial/deposition, the lawyer poses an open type of question that could be interpreted difference ways.
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Questions?