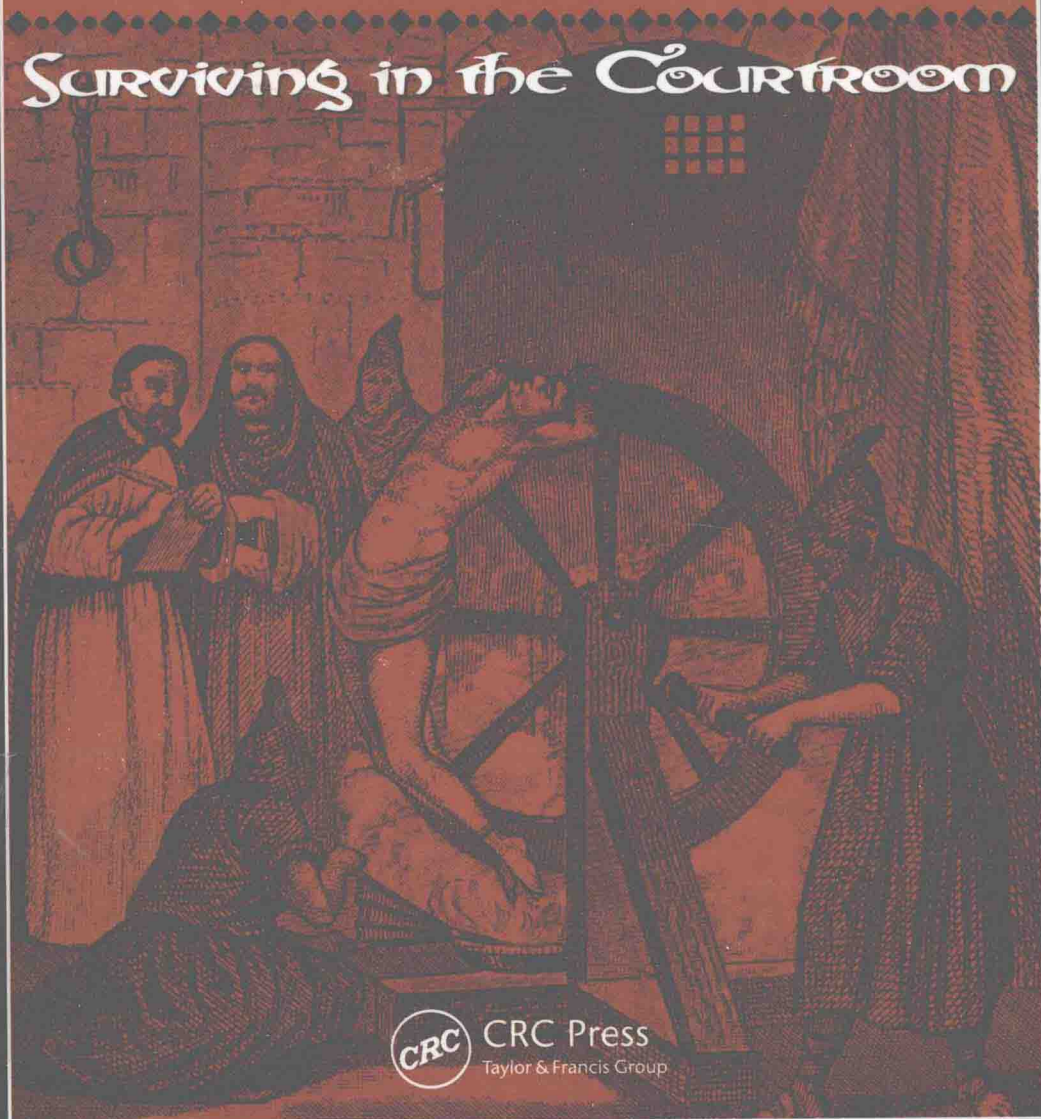


Kenneth S. Cohen

Expert Witnessing and Scientific Testimony

Surviving in the Courtroom



CRC Press
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Preface

I've been battered, I've been flattered, I've been bruised, I've been embarrassed, I've been bloodied, I've been thanked, I've been cajoled, I've been attacked, I've been befriended, I've been accused of acting, I've been called a charlatan, I've been called sneaky, I've been called a whore, but I've continued to survive as a paid expert witness.

Thirty years' experience in both part-time and full-time litigation-support activity has convinced me of the need to write this book. I've also run an active safety and industrial hygiene consulting practice that actually prompted the writing of this collection of helpful hints and observations. Also, this book can serve as a guide for those who are inadvertently dragged into the legal system or are professional expert witnesses. Although the preponderance of examples is drawn from an expert witness practice heavily weighted by asbestos cases, the information is applicable to other types of cases.

Involvement in legal issues, either as a percipient witness or expert witness,¹ has many virtues, and just as many negative aspects. These can only be learned by being involved and facing the challenges posed in actual cases that involve you, or into which you become entangled. Each new case can pose a learning experience regardless of how often the circumstance or incident has been examined previously. Finding and excavating that "smoking gun" piece of evidence after tedious hours of case review brings satisfaction far beyond any fees or hourly wage earned. Examining the actions—or inaction—of both professionals and nonprofessionals in residential, commercial, or industrial environments often serves as a lesson of *what not to do* in your own activities.

The negative aspects aren't the same for all those who have to be involved in litigation or engage in expert-witness work. A key aspect of being a witness is that you are fair game during cross-examination questioning. In a major case, when suing for "big dollar" amounts, you can expect to have your life history opened up like a road map, with all the detours and potholes pointed out vividly to the jury. Cross-examination is grueling to some, an enjoyable session of repartee to others. The tedium of long hours in deposition, during which your fundamental beliefs are attacked to a point of abstraction, can put off many professionals and nonprofessionals alike who would otherwise

be excellent witnesses for either side of a complex litigation. A physician I know who was tangentially involved in a medical-malpractice case referred to his experience as “having an enema tube inserted in one ear and my brains washed out of the other.”

The primary role of the expert witness is to make clear and simple, to the *trier of fact*, a complex technical or scientific issue that would be normally beyond their expected understanding. The primary role of a percipient witness is *to tell the truth!*

I’ve attempted to make this primer to the world of litigation an exercise in enjoyable reading, spiced with actual cases, experiences, and pitfalls so that some of the tension of not knowing will be dispersed. I hope it serves to educate and clarify the mysteries of litigation for any of you who are willingly or unwillingly drawn into it. If my weak attempts at humor fail to elicit even a modicum of mirth, keep on going, as the other material is worth reading.

Although I make numerous efforts to explain the legal environment, I am not an attorney, nor do I profess any legal skill beyond that which I have acquired through osmosis in my years of trial and deposition witnessing. This book is not intended to be a legal textbook nor to replace the advice of local counsel regarding any applicable statutes or procedures that may apply to you. The background I bring to the following observations and recommendations is solely from battling the legal wars for many years—in some cases losing, but most often winning. When you run with horses or swim with fish, you don’t instantly become one, but you do eventually learn how they move!

Throughout this book there will be legal or scientific words and phrases that may be somewhat foreign to you and may need an explanation. Please use the litigation glossary and/or notes at the back of the book to ferret out these unknowns.

Acknowledgments

I would like to acknowledge and thank the following contributors whose comments, encouragement, and work have made this book what it is.

First and foremost, I thank my wife Karen for her patience, prompting, endurance, and love, which have helped me to continue along the arduous path of writing toward a finished manuscript.

Thanks are also due to Christopher Andreas, Esq., for his chapter herein on the expert witnesses he has faced in a successful and active trial practice on asbestos toxic torts. Examples of his trial successes can be found in Appendix D.

I thank my daughter Cara Cohen Haberman, M.D.; my friend Jane Villarreal; and my sister Charlotte Meyers for their editorial patience in their reviews of the first draft of this book, and a special thanks goes to Colleen Mallen for her work on the polishing of my spelling and grammatical faux pas.

I owe my thanks to Mel Hovell, Ph.D.; Keith Liker, Esq.; and Enrique Medina, CIH, for their editorial skills, and the constructive criticism and encouragement that helped to prepare this guide for others who follow in my footsteps as a litigation witness or the subject of a lawsuit. And last, but not least, I thank the many other friends and relatives who read bits and pieces of the manuscript and offered constructive as well as critical commentary.

About the Author

Kenneth S. Cohen was born in 1937 and was raised and educated primarily in the Los Angeles, CA area before joining the U.S. Navy in 1959. The Navy sent him to pharmacy school, after which he worked as a dispensing and manufacturing pharmacist at San Diego's Balboa Naval Hospital for two and one half years. After being honorably discharged in 1963, he returned to San Diego State University to complete a bachelor's of science in microbiology in 1965. He entered a two-year master's program in biology, completed all the course work, did the required research, and wrote several drafts of a thesis, but had to withdraw before completing the degree due to work and family necessity. He sought closure on his education by seeking an off-campus degree, nine years later, from California Western University and was awarded the Ph.D. in occupational health in 1976.

He participated in clinical-pathology research work for the National Cancer Institute at the San Diego Zoo, followed by starting his own microbiological media and clinical chemical reagent manufacturing business. He subsequently developed an active 30-year-long consulting practice in the field of industrial safety and health. He has held numerous paramedical licenses with the state of California, registration as a California professional engineer in safety, and certification in the comprehensive practice of industrial hygiene from the American Board of Industrial Hygiene. He is semiretired from a 30-plus-year active practice of industrial safety and health and currently only performs litigation support work.

His last employment, and subsequent pensioned retirement, was with the state of California (Cal/OSHA) in 1998. He has been court qualified since 1974 as an expert witness in jurisdictions across the United States and has given testimony in nearly 1000 depositions and more than 500 court trials in jurisdictions scattered around the United States.

He is married and resides in the suburbs of San Diego County with his wife, and enjoys his four children and five grandchildren.

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Involvement in a Legal Action

1

Welcome to the World of Litigation!

What went wrong, or what did I do wrong? Why is there a lawsuit, and why am I being involved or sued? Why would I be called upon to be a witness in this or any other legal matter? Did I see something special that others didn't, or do I know something unique to this action? Do I know something about the disputed issue that I'm not aware of, but others are? These are all questions that run wildly through your mind when, on an otherwise calm Friday night, at home around 9:30 in the evening, the door bell rings, and a somewhat burly looking man is unrecognized through the peephole in the front door and is holding an official-looking sheaf of papers on a clipboard while sporting an even more official-looking sheriff's badge pinned to his chest. He identifies himself as an off-duty sheriff, "and I have something for you!" You cautiously open the door, and he hands you the papers and says, "You've been served; have a good evening!"

The night is young, but who can you call at ten o'clock on a Friday evening? You attempt to read what is contained on the papers, but all you see is **YOU ARE COMMANDED TO APPEAR**. The knot in your stomach begins to tighten, and your involvement in the litigation process has begun. You know a few attorneys, some as friends and a few in a professional sense, but you're not sure that one would be willing or able to offer suggestions as you approach the witching hour of midnight. You barely sleep that night, and the balance of the restless weekend is flawed by making lists for what actions will be taken the coming Monday morning. Welcome to the world of litigation!

The emotional response to receipt of a subpoena will change over time if you're not a percipient witness but are planning on a career as an expert witness. Eventually it will just become a rare but foreseeable indication of a forthcoming deposition or trial. It always surprises the local process servers when we greet them with a smile and a thank you.

A lawsuit can have meager beginnings, and yet blossom into something so engulfing as to have a life of its own. Once entangled in this web, any help laid out in the following chapters can hopefully serve as a flotation ring to your drowning self-confidence and partially fend off the legal demons who plague your dreams.

How Did I Get Into This?

To begin, let us explore how things can and will go wrong, potentially getting you into this elevated state of litigation anxiety. You believe you are a reasonably normal person with general awareness and conscience regarding the conditions at work, play, and home. Could you have missed something you should have seen that was interpreted to mean you were negligent in your duty to someone or something? Could you have sold or recommended something that failed and caused injury or damage to someone? Could you have failed to respond or make a call for help for someone in need, such that your omission would have made a major difference in their health or welfare? Or are you merely someone trained and experienced in a special area of expertise that would aid in the understanding of a complex incident that is now the subject of litigation?

We live in an ever-increasingly litigious world, surrounded by self-interests vying for a piece of us and some degree of retribution, and often we are totally unaware of what we could have, or should have, done differently. This fire is fanned by a burgeoning population of lawyers, cranked out of the law-school machine, in ratios of lawyer-to-population numbers beyond our imagination. We also train, study, and work in jobs that often give us a unique perspective on how something might have been done better, safer, or with the avoidance of the subject consequences. If so, we may be sought out to testify in the ever-intimidating environment of the courtroom.

I'm Not an Expert or a Witness

When performing your normal job—say, as a scientist, professional, or supervisor directed to perform routine audits of someone else's job, for whichever side of an issue you are working on—one of your primary tasks may be defined as a duty to anticipate, recognize, evaluate, document, advise, and

potentially control errors, processes, or omissions that might cause harm or injury to another. These conditions could be due to obvious or occult hazards, of your own design or the expectations of others. These hazards can lurk in a residential location, an industrial setting, or the general environment. When you function reasonably and do your job properly, you fulfill your designated and compensated “duty” but also an implied duty to protect your fellow workers, society, and the environment from reasonably foreseeable risk and hazard that are readily obvious or deviously occult.

When Recognizing Errors and Omissions Is Your Job

As you do your job and conduct your life, you typically absorb training and experience, and find yourself repeatedly called upon to express opinions on various situations or conditions. You cite your education, training, and experience, which should have prepared and alerted you to any conditions that potentially or actually could pose a threat to someone or to the environment. You may not consider yourself to be an “expert,” as the humble person you believe yourself to be, but others may not view you so lightly. The impact of this expert challenge is intensified in the workplace environment, where lies a statutory assumption of a safe and healthful workplace. But where you live and play can also carry obligations requiring moral duties established by society. Statutory regulations governing safety and health in the workplace have existed since the late 1930s and will be discussed in subsequent chapters in more detail.

For example, if you are an employer or in a supervisory position acting as an agent of the employer and you allow workers to cut furniture parts on unguarded table saws that handily remove worker fingers, you may be found negligent by breaching a recognized duty to assure those workers of a safe workplace free of potential injury. You may also be statutorily negligent by allowing those workers to perform their duties in noncompliance with statutory worker-safety laws. When and if an amputation takes place by that unforgiving table saw, you will find yourself answering the door and accepting papers accusing you of numerous and heinous acts.

Let’s say you have met an associate for lunch at a posh downtown restaurant, and during dessert you observe a waiter being attacked by an irate customer, and then you quietly continue finishing dessert. Two years later, the Friday-night subpoena calls you to deposition as a witness in an assault case being brought in superior court. You think back and wonder how anyone knew you were even there. It later becomes clear that the waiter collected all the credit-card receipts from the time of the attack and assumed all were witnesses to the incident. We seldom are aware of the trail of bread crumbs we leave during the course and interactions of our lives.

Expert Witnessing

As a recognized professional in your area of practice, you may desire to serve as an expert witness in those cases where your training and experience can make a difference. It should also be noted that expert witnesses do not work for free in most cases. It is somewhat of a surprise to academics, when they enter the world of litigation, to discover that their compensation as witnesses far exceeds their university salaries. (Fee structures are discussed in more detail in chapter 17). When the decision is made to offer yourself to legal community, or when you are sought out by a lawyer who is in need of your services, the following chapters should prepare you for your perilous but rewarding journey.

It serves well to remember that the expert witness is expected to be, and should always be, an objective party to the lawsuit and never function as an advocate for one side or the other. It becomes immediately transparent to the judge and jury, as well as everyone else within earshot, when the witness so wants to drive home his point as to begin arguing with cross-examining counsel; you are there to explain complicated scientific issues, not to influence the listener with your fervor! This concept of objectivity becomes clouded when your expertise is being paid for by the company you work for and owe your allegiance to. If you've been a trusted employee of XYZ Manufacturing for the last 30 years and are now receiving pension benefits, why would you jeopardize this relationship by revealing the company's dirty little secrets? Be careful how you are defined and who is looked upon as your "mentor." One of the advantages of being an independent consultant is the separation of allegiance from objectivity. Beware of your personal biases which may follow you!

As an expert witness you can be requested to evaluate potential problems, defects, deficiencies, or errors. This can only be accomplished when you are able to fully appreciate a process, product, or system. Any system or product with potentially damaging defects, deficiencies, errors, or omissions that could cause harm may only become understood by you as a professional or nonprofessional when armed with a thorough overview of the process or practice under investigation. If asked to opine on a case of pustular dermatitis in dairy workers, or multiple finger amputations at a manufacturing operation, it is incumbent on you as the investigator to either know or become familiar with the processes involved. You are obligated to study these process steps and interactions prior to beginning your survey, or postpone the assignment prior to potentially missing the target due to your own lack of understanding of specific conditions. *Process* means, simply, that when investigating a dairy or machining operation, you should understand the various aspects and components of that operation. When your actions are viewed through