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At the Intersection of Extension and Litigation: What to Do When Lawyers Call

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Abstract

The reputation of Extension professionals as "impartial brokers" of factual information may generate requests for expert, third-party testimony in lawsuits. How should an Extension professional respond when Extension and litigation cross paths? My education at the "intersection of Extension and litigation" began in 2000. This brief introduction to the subpoena, discovery, and deposition process may prove helpful if/when lawyers call.

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Third Parties and Discovery

Among the legal definitions of a "third party" is someone who is not directly involved in a lawsuit, but may have pertinent information or expertise that benefits the prosecution, the defense, or perhaps both. Extension professionals often work in program areas that are not without controversy or lawsuits, and upon occasion, may be asked to give expert testimony under oath as third parties. My own experience arose from a situation whereby answers to a resource disaster were being simultaneously sought in universities and federal court, and I was served with a subpoena.

A subpoena is a "command to appear in court to testify as a witness" (Connecticut Judicial Branch, 2003a). In many cases, witnesses are deposed first, meaning that their "testimony is taken under oath, in response to another party's questions, outside of the courtroom" (Connecticut Judicial Branch, 2003a). A verbatim transcript is prepared, and the witness may repeat his or her testimony in court during the trial.

Appended to my subpoena was a request for documents, part of a process known as "discovery." Discovery is "a formal request by one party in a lawsuit to disclose information or facts known by other parties or witnesses" (Connecticut Judicial Branch, 2003a). In civil actions, once it is determined that evidence is needed beyond what can be provided by the prosecution or the defense, then either party can use discovery to obtain additional evidence, provided that it is not "privileged" (Connecticut Judicial Branch, 2003b, p. 160).

Privileged evidence, such as communications between a husband and wife or an attorney and his client, or government secrets, is "protected by law from forced disclosure" (Garner, 1999, p. 273). The unprivileged evidence must be "within the knowledge, possession or power of the party to whom the discovery is addressed" (Connecticut Judicial Branch, 2003b, p. 160). Discovery is permitted "if the materials sought will assist either the prosecution or the defense, and can be provided by the disclosing party much more easily than they could otherwise be obtained" (Connecticut Judicial Branch, 2003b, p. 160).

As third parties, Extension professionals may be required to produce documents, e-mails, reports, correspondence, and articles in their possession. If the lawyers know what they are looking for, discovery can be very specific. If they don't, it can be a veritable "fishing trip," casting a broad net

in the hopes of finding something useful.

Your Rights and Their Rules

As employees of a university, Extension professionals are represented by legal counsel. This is an important safeguard for both your interests and those of your university. Your testimony as a third party will be given under the guidance of people comfortable in the legal world who can make the process as painless as possible.

Lawyers are constrained as to the manner in which they deal with third parties. Since 1983, lawyers have adopted the ABA/BNA's *Lawyers' Manual on Professional Conduct* (Bennett et al., 2002). This manual contains rules that govern the ethical behavior of lawyers throughout the country and undergoes constant scrutiny and revision. Two of these rules are of particular interest to Extension professionals, as they specifically apply to third parties.

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order (Bennett et al., 2002, p. 1:166).

In short, if a lawyer contacts you directly to give testimony or for information that is not already in the public domain, you need to remind him or her that you are represented by counsel and refer him or her to your counsel.

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person (Bennett et al., 2002, p. 1:168).

My subpoena was broad in scope, seeking documents, e-mails, letters, press releases, reports, articles, faxes, and other materials (including copies of unfunded proposals and confidential peer reviews) for a period spanning 7 years. This would have been extremely burdensome. University counsel negotiated a narrowing of the scope of the subpoena and, in particular, kept the confidential reviews and unfunded proposals out of discovery.

"I Don't Remember, I Can't Recall"

Depositions can be intimidating to those unfamiliar with the process. They can also be humbling. Lawyers for both the prosecution and the defense are present. University counsel is present to ensure that ground rules are followed, but does not confer on individual answers. The deposed individual receives a copy of the verbatim transcript to review for accuracy and sign.

Preparation for testimony is important. Refresh your memory of the documents provided under discovery. Familiarize yourself with good witness behavior. The following basics were extremely helpful to me (Assistant Attorney General P. Shapiro, personal communication, July, 9, 2002).

- *Listen to the entire question* before formulating your answer. Be wary of questions with multiple parts.
- *Understand the question.* If unclear, ask that the question be repeated/rephrased. Pause and think before you begin your answer.
- *Tell the truth.* You are under oath to tell what you know to the best of your ability; this does not include hearsay and surmise.
- *Don't guess.* If you don't know or can't recollect the answer, say so. Guesses or speculations are not the truth.
- *Answer only the question that is asked.* Keep answers short; preferably "yes" and "no." Don't volunteer information or anticipate where the line of questioning is going.
- *Maintain your composure.* Be polite and civil. Don't lose your temper or argue. Don't joke.
- *If questioned about a document, first review it silently and completely before answering.*
- *Never say "never" or "always."*

These are general instructions. Anyone who testifies as a witness should receive thorough preparatory assistance from counsel.

Summation

Extension professionals may be called upon to give expert third-party testimony. For many, this may be the first experience with lawyers and litigation. As university employees, Extension professionals are represented by legal counsel. A basic understanding of the terminology and process will assist Extension staff in responding appropriately when contacted by lawyers.

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