

	<b>ORA LABORATORY MANUAL</b> Food and Drug Administration	Document #: <b>III-08</b>	Version #: 1.1
			Page 1 of 10
Title: <p style="text-align: center;"><b>Attachment</b></p>		Effective Date: 10-01-03	

**“DEPARTMENT IN THE COURTROOM – A GUIDE TO THE WITNESS AND THOSE WHO AID IN COURT CASES”**

**I**

Court contests are usually won by the side presenting the most effective witnesses. These are witnesses who in testifying impress judge and jury with their honesty, straightforwardness, knowledge and truthfulness.

By enunciating some of the principles growing out of cumulative experiences in the courtroom, help can be provided to the analyst to become more comfortable as a witness and therefore a better witness. Some of these principles the analyst has heard before and some are so obvious as to be almost unnecessary. But people can all benefit by their restatement.

A witness, to be effective, makes statements that are understandable to and accepted as truth by the judge and jury. It is not enough that he or she tell the truth; he or she also gives the impression of telling the truth. The testimony is to be clear and the witness credible.

The credibility of a witness is the product of a multitude of factors, not the least important of which are seemingly insignificant personal traits of the witness. Whether a witness is to be believed is a personal determination for the judge and each of the twelve on the jury, all of whom try to achieve that perfection in objectivity and fairness which is the goal of our courts. It is not surprising, therefore, that intangible elements often shape their appraisal of witnesses. Often these elements have their origin in the appearance and general demeanor of the witness; the attire, the walk, the posture, how he or she sits on the stand, how he or she answers questions, the inflection to the voice, the emphasis in speech, facial expressions, and gestures. These and other qualities begin to operate in subtle ways in shaping the jury's appraisal of the witness. The effect and weight of the witness testimony may be affected by that appraisal.

Besides being truthful and honest, making a favorable impression upon the judge and jury should be the next aim of the witness. It is axiomatic that the analyst can not please everyone. It is equally true that the analyst does not have much control over certain attributes such as face, figure, quality of voice, etc., that nature has bestowed upon a person. But there are things we can all do, and many which we should not do, to enable us to make a better impression. The principles enumerated below, are the results of our observation in court of some of the things that witnesses, in our opinion, could have done to make more effective their appearance on the stand and presentation of their testimony.

1. While sitting in the courtroom, either as a prospective witness or as an assistant to one of the members of the Administration, United States Attorney, or Office of Chief Counsel, do not engage in conspicuous behavior. Facial grimaces at testimony thought adverse to Government's case, or nods of approbation or approval at testimony particularly favoring the case should be avoided. They could result in public censure from the court if observed. Likewise, attracting attention to the self by talking in the courtroom during the proceedings; reading reports, newspapers, and the like; passing notes; rustling papers; passing comments, jokes, or remarks about the judge or this or that juryperson, or witness. Do not sit in groups. Spread out in the courtroom.

	<b>ORA LABORATORY MANUAL</b> Food and Drug Administration	Document #: <b>III-08</b>	Version #: 1.1
			Page 2 of 10
Title: <p style="text-align: center;"><b>Attachment</b></p>		Effective Date: 10-01-03	

2. Dress is important. Dress neatly and conservatively.
3. Don't be an "impetuous prompter". An impetuous prompter is a person who sits in the courtroom and hears testimony which he or she believes erroneous and refutable and who rushes to the United States Attorney, the Office of Chief Counsel's representative, or Food and Drug representative to convey his or her thoughts on the erroneous testimony. While the analyst may have a contribution to make, hold suggestions until recess or for some other better time to transmit them. Even at recess, wait until the judge and jury have left before approaching counsel. Remember that, if the analyst has found flaws in the opposing case, our lawyers most likely have found them too. It is disconcerting to those at counsel table to have interruptions by witnesses and others in the courtroom who bombard them with suggestions on strategy. In addition to making the analyst conspicuous, it shows the analyst is strongly partisan, and does not contribute to the building of a good impression. Jot ideas down so they are not forgotten when an opportunity presents itself to confer with the U.S. Attorney, member of Office of Chief Counsel, or others who are directing the case.
4. Avoid conversations with principles of or witnesses for the opposing side during trial. The analyst never can predict when statements will be distorted to analyst's disadvantage and perhaps the Government too. If the analyst cannot avoid conversation with them, confine remarks to matters other than the trial.
5. During periods of recess, do not engage in horseplay, wisecracking, or loud conversation, especially about the case. The analyst never knows when he or she is under the observation of the judge or members of the jury. Many government witnesses have found themselves embarrassed after making indiscreet remarks in the halls of the courthouse, or in the elevator, or in a nearby lunchroom, or restroom, to learn that the judge or a juryperson or opposing counsel has been in the same hall, elevator, or lunchroom and had seen and heard them. Do not hold loud conversations of any kind in the corridor outside of the courtroom while court is in session.
6. Do not rush up to congratulate a government witness when that person steps down from the witness stand. Wait until court has adjourned. Avoid expressing any approval or disapproval of the testimony by glance, nod, or otherwise until leaving the courtroom. If designated to transport a witness to and from the courtroom, be especially careful to meet the witness outside the courtroom, not as the witness leaves the stand.
7. Avoid arguments with government counsel. Save suggestions on legal points involved until they can be informally discussed first with Office of Chief Counsel's representative or with the United States Attorney if no Office of Chief Counsel representative is on the case.
8. The analyst should not lose patience or temper while testifying. A cross-examining attorney may try to deliberately bait a witness to anger the person. Don't let it happen. Keep calm and unruffled. Neither thinking nor appearance of the analyst improves with rising ire. Be polite and courteous to everyone, including opposing counsel even if he or she is insulting.
9. Attorneys questioning the analyst on cross-examination will often try to force a categorical answer out

	<b>ORA LABORATORY MANUAL</b> Food and Drug Administration	Document #: <b>III-08</b>	Version #: 1.1
			Page 3 of 10
Title: <p style="text-align: center;"><b>Attachment</b></p>		Effective Date: 10-01-03	

of the witness, i.e., a "yes" or "no" answer. There is some justification for such attempts because the cross examiner is permitted to ask "leading questions." If a simple "yes" or "no" answer does not bring out the whole truth, it is the analyst's duty to inform the cross-examiner and the judge that the question can't be answered "yes" or "no." If the analyst does this, the court may insist on a "yes" or "no" but invariably will allow the witness to make any needed explanation. The analyst is sworn to give the truth and the whole truth and if a "yes" or "no" answer doesn't do just that, the court will afford protection when it understands the situation because it would not have the witness violate their oath.

10. The analyst should not be afraid to admit discussing testimony with representatives of the United States Attorney's Office, the Office of Chief Counsel, or the Food and Drug Administration. If asked that question, or any other, simply state the truth. There is nothing improper in a discussion of the analyst's testimony with counsel or FDA personnel. Remember that the opposing attorney ordinarily asks the question hoping to catch the witness swearing falsely.
11. Don't spar with the questioning attorney. Answer his questions frankly, factually, and confidently. Don't engage in a wit-matching contest. Sparring by a witness may suggest person is evading the question and often detracts from his/her credibility.
12. Wait for the question to be asked in its entirety before making a reply. The analyst should make certain that he or she understands it, never attempt to answer a question that is not fully understood. To do otherwise may lead to trouble and embarrassment. If a witness does not understand all or any part of a question, he or she may do one or both of the following:
  - a. I am sorry, but I do not understand [or, I am not sure that I understand] the question, could you rephrase it? or
  - b. If you mean [state what you think the question is], then my answer is . . . or combine (a) and (b) as
  - c. I am sorry, but I am not sure that I understand the question, but if you mean . . . then my answer is . . .
13. Don't be afraid or ashamed to admit "I don't know." If the analyst doesn't know the answer to a question, then he or she should say so. Don't try to cover up ignorance of some fact or set of facts. If analyst does, it may suggest evasion on the witness' part. Always tell the truth.
14. Wait several seconds before answering a question during cross-examination in order to give Government Counsel an opportunity to object if he or she regards the question as improper. On the other hand, on long delay, particularly with side glances at Government Counsel, may give the impression that the witness is being evasive. Try to speak with the same speed and use the same phraseology on cross-examination as on direct examination.
15. Don't answer any question objected to by either side until the court has ruled on the objection. If the

	<b>ORA LABORATORY MANUAL</b> Food and Drug Administration	Document #: <b>III-08</b>	Version #: 1.1
			Page 4 of 10
Title: <p style="text-align: center;"><b>Attachment</b></p>		Effective Date: 10-01-03	

witness has started the answer, he or she is to stop if any objection is raised by either side and is not to continue until the judge or either counsel indicates that it is proper to continue. If the witness has forgotten the question the witness should ask that the question be repeated.

16. Don't chew gum, eat food, or suck candy while testifying. It tends to detract from the otherwise professional attitude analyst displays as an FDA witness.
17. Answer each question by spoken words. Don't nod assent or shake one's head in dissent. The record of the analyst's testimony may be incomplete unless he or she answers each question with spoken words.
18. Speak clearly and distinctly. Use simple language. Remember the witness defeats their purpose if not understood, so don't try to impress anyone with vocabulary of infrequently used words. If the subject is technical and scientific, reduce the terminology used to an understandable level. If technical words are to be used for any reason, the witness should define them as he uses them.
19. Don't hesitate to ask permission to refer to notes to refresh one's recollection in testifying provided the notes were made at the time of or immediately after the event about testifying. The fact that the witness cannot recall exact details without notes is entirely understandable and, in fact, can be used to the advantage of the Government when it is shown that the opposing party does not have a written record of the transaction.
20. Come into the courtroom prepared. Know the facts. All pertinent dates and time should be checked. Arrange all documents and exhibits in order so that the testimony will be presented without fumbling.
21. The analyst should testify only as to facts about which they have first-hand knowledge. In most instances the witness cannot testify about what someone told him or her because it would be hearsay. The witness can testify about what the defendant told him or her, if what he told was connected to the case.
22. In testifying, keep the voice up. Too often judges have to admonish witnesses to speak up. Strive to have the judge and the whole jury hear what has to be said.
23. Answer only the question asked, but answer it fully and to the point. Don't volunteer unnecessary information. Remember the more said unnecessarily, the more is suggested to opposing counsel for cross-examination.
24. Unless the analyst is testifying as an expert, don't express opinions or conclusions. State only facts. An analyst should not assume expert knowledge in a field unless he or she is in fact an expert by reason of training and experience. Reading an article on a subject does not make an analyst an expert in that subject. For example, an investigator is on the stand discoursing on the pharmacological effects of drugs, a field which he or she has only superficial knowledge. He or she could save himself or herself a lot of trouble by admitting, at the first pertinent question, that the pharmacology of drugs was outside of his or her field.

 <p style="text-align: center;">ORA LABORATORY MANUAL Food and Drug Administration</p>	Document #: <b>III-08</b>	Version #: 1.1
		Page 5 of 10
Title: <p style="text-align: center;"><b>Attachment</b></p>		Effective Date: 10-01-03

25. Don't exaggerate. State the facts accurately and don't embellish them. The court and jury are interested only in getting the unvarnished truth, so give them only that.
26. Be careful when the opposing lawyer reads from a book or document and questions the witness about what he or she read. Before answering, ask to see the document the lawyer has read from, in case he or she is misquoting or only partially quoting.
27. Never bring to the stand notes, files, or other material for help in testifying unless willing to have the opposing side see them. If they are used, opposing counsel has a right to see them.
28. In cross-examination opposing counsel may ask the witness whether he or she regards certain persons in the field about which they are testifying as recognized authorities. This is preparatory to asking the witness whether he or she agrees with certain statements which those authorities made in writings, etc. If the answer is no--that they don't recognize them as authorities, that line of cross examination cannot be pursued. Unless the witness definitely have heard of the named persons and are familiar with their works and do recognize them as authorities, that analyst should not expose him or herself by saying that they recognize them.

## II

### 1. PREPARATION FOR GOOD PERSONAL APPEARANCE

Look and dress neatly and conservatively.

### 2. DISCUSSION WITH GOVERNMENT ATTORNEY

The witness will discuss his/her testimony with the government attorney prior to trial. Make sure that the government attorney fully understands the testimony and any problems, such as, for example, the age of the defendant or poor sample integrity. This discussion may be informal but do not take it lightly, The analyst is *NOT TO CHANGE THEIR ANSWERS*.

### 3. GENERAL CONDUCT IN COURT ROOM AND VICINITY

- A. Don't be noisy in the halls in greeting colleagues or old friends.
- B. Don't talk to the defendant or his/her attorney in or near the court room.
- C. Do not whisper or cause disturbances in the court room.
- D. Do not talk to the jurors or discuss the case within their hearing.
- E. Do not sit within the enclosure unless invited.

 <p style="text-align: center;">ORA LABORATORY MANUAL Food and Drug Administration</p>	Document #: <b>III-08</b>	Version #: 1.1
		Page 6 of 10
Title: <p style="text-align: center;"><b>Attachment</b></p>		Effective Date: 10-01-03

- F. Do not bring magazines or newspapers into the court room.
- G. Show no incredulity or surprise at any testimony given from the witness stand or at statements by the defense attorney.
- H. Be on time when court opens and be ready when called to testify.

#### 4. PROPER TECHNIQUE ON THE WITNESS STAND

- A. When called to the witness stand, unless previously sworn, go directly to the desk of the clerk of the court to be sworn.
- B. Take the oath in a reverent manner. Then proceed to the witness chair. If the analyst has a long or difficult name, he or she gives a card or paper with the correct spelling to the court stenographer.
- C. Assume proper posture, bearing and demeanor.
  - 1. Sit erectly, but don't appear stiff or tense.
  - 2. Always be courteous, say "Yes Ma'am", "Yes Sir" and "No Ma'am", "No Sir", and "Your Honor."
  - 3. Speak in a clear, distinct and well modulated voice.
  - 4. Look at and speak distinctly to the jury. Speak plainly enough so the farthest juror can hear.
  - 5. Do not speak to the judge unless he or she asks a question.
  - 6. Do not appear eager to convict.
  - 7. Do not show hostility toward the defendant.
  - 8. Do not use idioms or language peculiar to the enforcement profession.
  - 9. Be well poised and under self control.
  - 10. In the analyst's effort to appear impartial and unbiased, he or she should not become listless or "dead pan." Be natural, candid, frank, and "alive."
  - 11. Do not appear impatient or overly anxious to testify.
  - 12. Do not have anything in the mouth. This includes gum, toothpick, tobacco, candy or food.
  - 13. Keep the hands away from the mouth, face, and head.
  - 14. Do not exhibit nervous tendencies, such as arranging clothes, tie, etc.
- D. The direct examination.

	<b>ORA LABORATORY MANUAL</b> Food and Drug Administration	Document #: <b>III-08</b>	Version #: 1.1
			Page 7 of 10
Title: <p style="text-align: center;"><b>Attachment</b></p>		Effective Date: 10-01-03	

Personal identification questions will be asked first.

Next type of questions are preliminary to setting up the body of testimony.

1. The next or direct question will usually be, "Now begin right there and tell what you have seen or heard in connection with this matter." *ALWAYS TELL THE TRUTH* .
  2. Try to give testimony in chronological order if possible.
    - a. Reveal the first connection with the case.
    - b. Then give facts in the order they occurred.
  3. Do not give information that has not been asked for. This is particularly important with respect to previous criminal records, or other crimes of the defendant, now pending.
  4. Do not give opinions or hearsay testimony.
  5. Government Counsel will likely ask more questions to bring out details and other information to complete the analyst's testimony.
  6. The analyst's testimony should not be memorized. Each item and event should be repeatedly mentally relived, visualized and understood. Make sure the government attorney knows when the analyst needs to rely on notes, and has reviewed these documents.
  7. The analyst may use notes to refresh his or her memory, and should do so in cases of complicated figures, dates, etc. The analyst asks permission from counsel/court to do so.
  8. If the analyst does need to refresh his or her memory from notes, the defense has the right to examine them and make them an exhibit in the case. "Make sure the government attorney presenting the analyst's testimony knows when they need to rely on such materials, *and has reviewed the documents* the analyst intends to rely on. This means that the analyst and the government attorney discusses any such need well before the analyst testimony. The analyst does not carry any written material with them to the stand unless it has been precleared by the presenting attorney."
  9. Do not unnecessarily try to "help" Government Counsel as he or she is likely to know just exactly what he or she is doing and we do not want the court to think that the analyst is overly eager to push the case.
  10. If either counsel objects to a question, do not try to get in an answer before the judge has ruled whether the question is proper. Wait until the court resolves the dispute, then answer if the court permits.
  11. Be able to identify the defendant.
- E. The cross-examination.

	<b>ORA LABORATORY MANUAL</b> Food and Drug Administration	Document #: <b>III-08</b>	Version #: 1.1
		Page 8 of 10	
Title: <p style="text-align: center;"><b>Attachment</b></p>			Effective Date: 10-01-03

15. 1. In the face of a skillful defense attorney, the task of testifying is not simple or easy.
16. 2. Do not be particularly afraid of the defense attorney. He, likely, is equally concerned about the analyst.
17. 3. The defense attorney will not question the analyst, unless he or she hopes to gain something for his/her side.
18. 4. Listen carefully to his questions, then reply only to the questions.
19. 5. There are usually two types of cross-examiners:
20. a. The aggressive examiner:
21. i. This lawyer hopes to make the analyst angry and get their goat."
22. a. By casting aspersions at the analyst's veracity, neutrality, integrity, etc.
23. b. By uncomplimentary references to the analyst's service.
24. c. By magnifying any errors analyst has made.
25. ii. The analyst should not let the lawyer worry them. He or she likely is stalling and has nothing much to go on.
26. iii. The lawyer may ask rapid fire questions.
27. a. Give him or her deliberate and complete answers and don't let him or her speed the testimony up.
28. b. If analyst does not understand the question clearly, ask him or her to repeat or restate it.
29. c. Do not let the lawyer interrupt an unfavorable reply by cutting in with another question. Say: "Excuse me Counsel, I have not finished my answer to your question."
30. d. If he or she asks a long and complicated question, ask that the question be restated into a shorter one.
31. iv. The lawyer may ask a double or two pronged question. Ask him or her to restate it or carefully answer each part separately.
32. v. Answer any question promptly and wholeheartedly which might reflect credit to the accused. It will enhance credibility and demonstrate the neutrality of the analyst.
33. vi. Beware of questions to which the lawyer demands "Yes" or "No" answers. - If a defense attorney demands a "yes" or "no" answer and neither "yes" nor "no" is the proper answer, a

	<b>ORA LABORATORY MANUAL</b> Food and Drug Administration	Document #: <b>III-08</b>	Version #: 1.1
			Page 9 of 10
Title: <p style="text-align: center;"><b>Attachment</b></p>		Effective Date: 10-01-03	

witness on the stand cannot be required to answer "yes" or "no" and the judge will not compel him/her to do so. The lawyer can answer, "neither yes nor no", and usually the judge will let him or her explain why it is neither "yes" nor "no" or will request the attorney to reframe the question. *ILLUSTRATION*: "Have you quit beating wife? Answer "yes" or "no."

34. vii. He may misquote the witness or others.
35. viii. If the witness does not know the answer, the witness should say so.
36. ix. If the witness makes an error while testifying, he or she should correct it at the first opportunity.
37. x. The lawyer may attempt to try a prosecution witness. - Some defense attorneys try to make an issue of the actions of agents or other prosecution witnesses rather than the criminal actions of the defendant as charged in the indictment. The witness is not standing trial and insofar as he or she is concerned, his or her best demeanor is to display no emotion whatever. The witness should calmly look at the jury and answer any questions asked.
38. b. The smooth type.
39. i. This lawyer tends to ask simple innocent appearing questions for a while, eliciting "yes" or "no" answers, then asks the complicated question, hoping that the witness is napping.
40. ii. The lawyer may appeal to the witness' vanity and try to get them to tell how good they are.
41. iii. If the witness is caught in an error, be frank to admit it, and explain it if possible.

## 5. 5. PROPER CONDUCT AFTER VERDICT

1. A. If the defendant is acquitted.
  2. Do not quarrel at or berate him or her, claiming justice has been thwarted or miscarried.
  3. Be courteous to the jurors, no matter what. They are citizens trying to do their job well.
  4. 3. After the analyst is back in the government office, they should inquire of the government attorney as to the jury's verdict and what caused it.
5. B. If the defendant is convicted.
  1. Do not rush up to the jurors and shake hands with them. Check with the government attorney before any conversation with a juror.
  6. 2. Congratulate the district attorney, if indicated, and thank him or her for handling the ease. But, do not be gleeful in the court room or where the general public would see such action.

	<b>ORA LABORATORY MANUAL</b> Food and Drug Administration	Document #: <b>III-08</b>	Version #: 1.1
			Page 10 of 10
Title: <b>Attachment</b>		Effective Date: 10-01-03	

7. i. Do not make any public display of elation over the outcome of the case.
8. ii. Do not tell the convicted person the government finally "got him or her." Be courteous when talking to him or her. He or she may be upset and bitter toward government witnesses.