



Forensic Linguistics: Session III

13 July

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- **Disclaimer:** Nothing in these slides should be taken as legal advice. If you need legal advice, seek the assistance of an attorney.



QUICK REVIEW FROM MONDAY

- 1) Legal terms attorneys will just expect you to know
 - 2) Some background on the US legal system
 - 3) The things forensic linguists do
 - 4) How the courts see the role of experts
 - 5) Ethical issues in serving as an expert
 - 6) Handling inquiries from attorneys
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PLAN FOR TODAY

- 1) Business: Assignments for Monday
 - 2) The process of be(coming) an expert witness
 - 3) What we can learn from looking at a retainer
 - 4) Opinions/declarations as a genre
 - 5) Advice on writing declarations/opinions
 - 6) Some background on Austin & speech acts
 - 7) Preparing for the deposition
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THE UNFOLDING PROCESS (ADAPTED FROM FINEGAN, 2009)

- 1) Initial discussions in which the attorney
 - a) explores possible conflicts of interest for expert,
 - b) narrates their version of the case,
 - c) identifies (often vaguely) the expert's task,
 - d) invites a preliminary assessment of interest,
 - e) inquires into the expert's credentials and fees, and
 - f) addresses the logistics of schedule & communication.
- 2) If the attorney doesn't raise the issue of discoverability, the expert witness does.
- 3) The expert examines materials provided by the attorney and forms a preliminary opinion.
- 4) The expert discusses the opinion and its bases with the attorneys.



5) The expert prepares a written report or declaration.

6) The expert assesses any written rebuttal from an opposing expert, discusses it with the attorney, and occasionally may be asked to respond formally.

7) The attorneys may prepare the witness for the deposition but usually not until one is scheduled and then probably just a day or two beforehand.

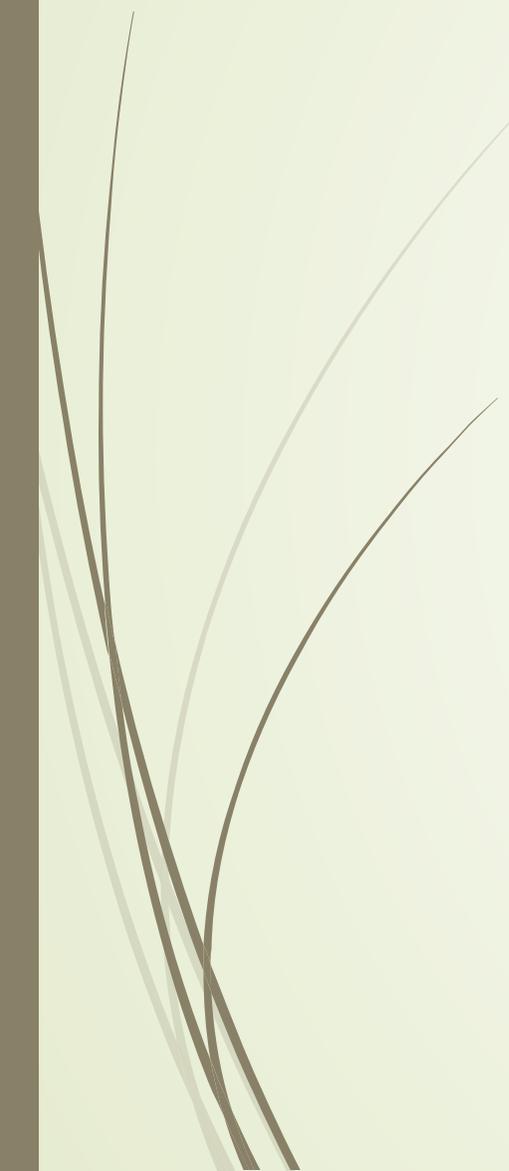
8) The expert's deposition may be taken.

9) The expert may be asked to assist the attorney in the deposition of an opposing expert.

10) Trial.

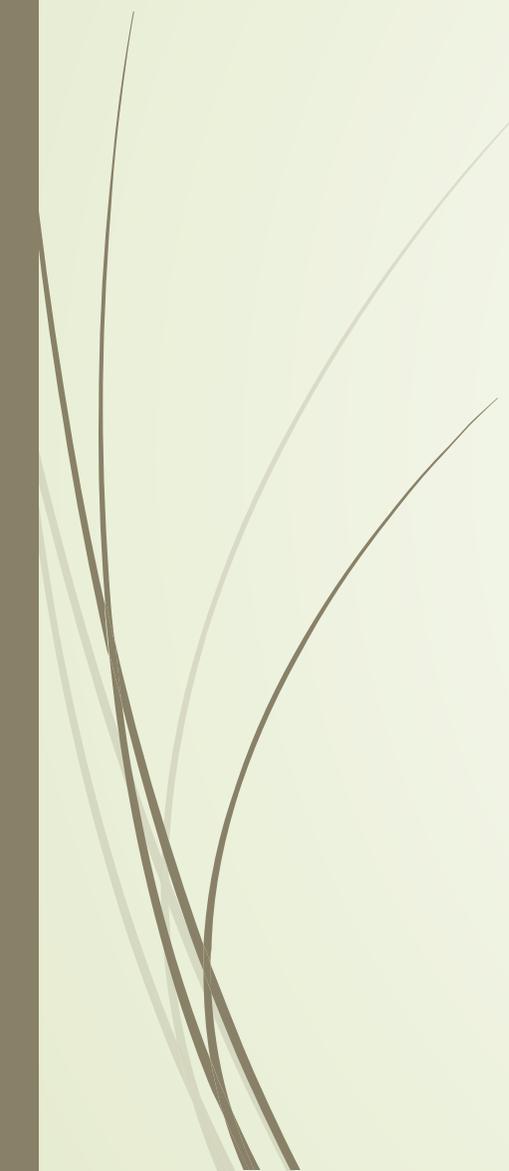


EARLY CONTACT: THE SAMPLE RETAINER

- 1) What did you learn from reading the sample retainer?
 - 2) Did it raise any issues you hadn't considered before? If so, which ones?
 - 3) What questions do you have or what topics do you need more information about?
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QUICK COMMENTS ON BOOKKEEPING

- An Excel spreadsheet listing
 - Date
 - Time Started
 - Time Finished
 - Task(s) Completed
 - Hours Billed
 - Total Cost (Hours x Rate)
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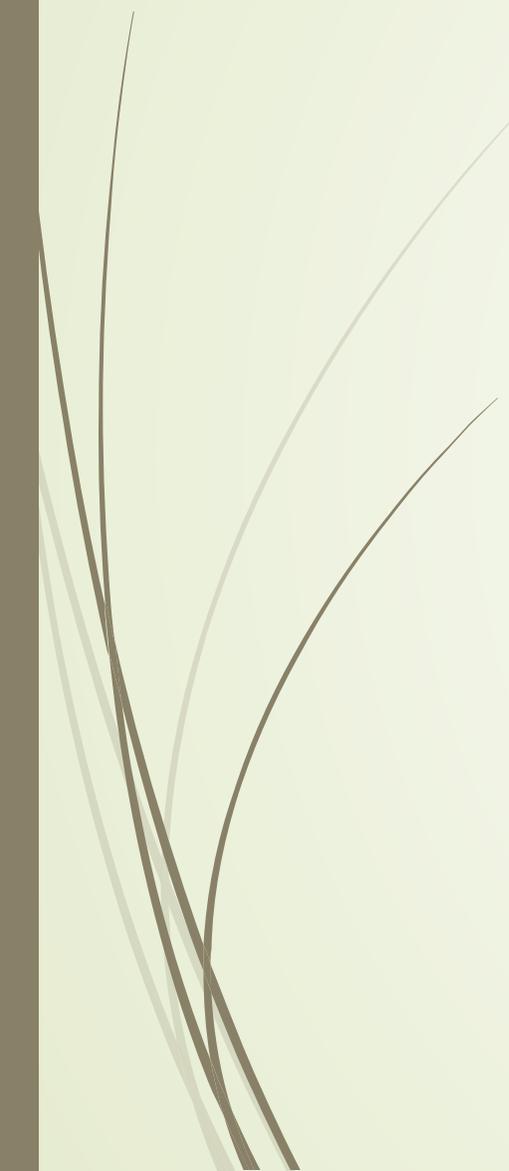


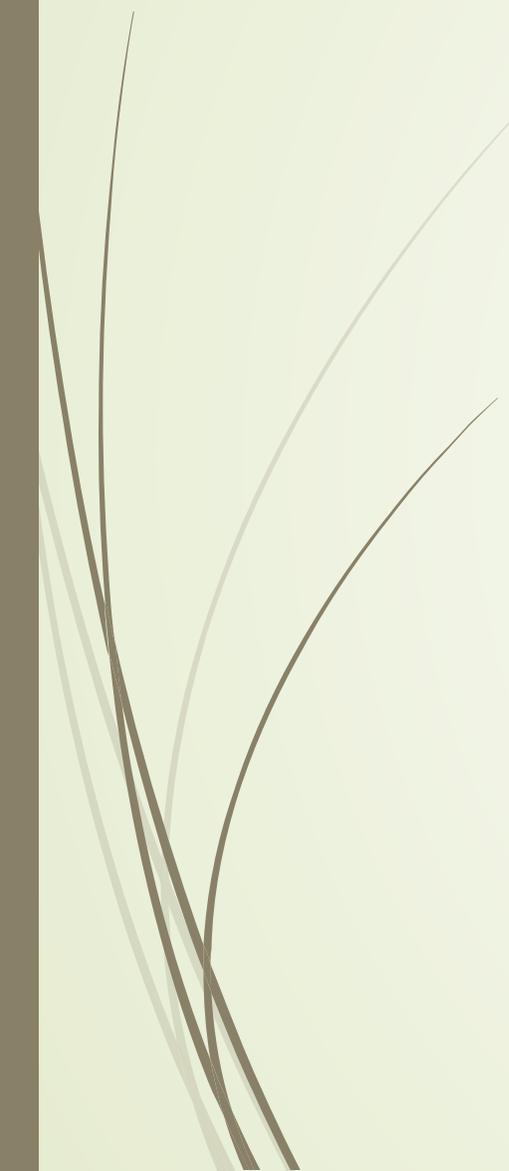
EXPERT OPINIONS AS A GENRE

- ▶ Here, I offer examples of some opinions—in the narrow sense—I've given in various cases (anonymized and altered a bit).
 - ▶ These opinions came in response to specific questions I was asked by the attorneys who retained me as an expert witness. In some cases, I had input into the formulation of the questions; in others, I did not.
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- A bilingual's primary language can be thought of as immutable because bilingualism is a "spectrum of abilities in a second language ranging from minimal ability to communicate to nearly equal facility in two languages."
 - The impact on bilingual employees whose co-workers share a language other than English of what X Company refers to as its English-only policy indeed differs significantly from its impact on monolingual speakers of English.

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- Language, as it reflects national origin or ethnicity, is a component of identity in the X community in the US. (KW: X was a specific ethnic community.)
 - Requiring a bilingual individual to limit him- or herself to only one of his languages when dealing with bilingual peers is analogous to “forcing a right-handed person to write left-handed” or “forcing an able-bodied person to swim with one arm.”

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- ▶ Language, as it reflects **national origin or ethnicity**, is a component of identity in the X community in the US. (KW: X was a specific ethnic community.)
 - ▶ Requiring a bilingual individual **to limit him- or herself to only one of his or her languages** when dealing with bilingual peers is analogous to “forcing a right-handed person to write left-handed” or “forcing an able-bodied person to swim with one arm.”

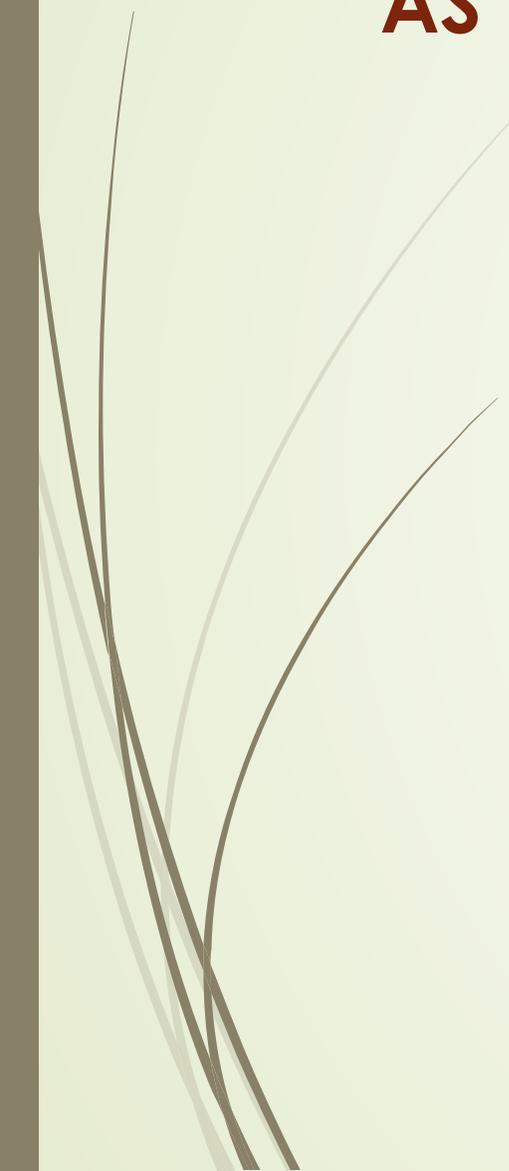
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- During the period of time relevant to this case, Company Y did not have a clear, consistent, or unambiguous English-only policy. Further, the policy, as such, does not appear to have been consistently enforced, a fact whose consequences were borne by the Z employees. [Z indicated the national origin of the employees.]
 - Rather than being seen as a letter of apology, Dr. X's letter of [date] is best seen as a letter of non-apology.

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- Each of these opinions was followed by a detailed explanation of what the opinion meant, citing research to support my claims.
 - These explanations ran anywhere from several pages to 15 or 20 pages.
 - They linked the opinions directly to the matters in the case.



EXPERT DECLARATIONS/REPORTS/OPINIONS AS A GENRE

- 1) Comparing the two declaration you read for today, what similarities did you see with regard to genre?
 - 2) With regard to those same declarations, what differences did you see?
 - 3) What conclusions might we draw from this comparison?
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ADVICE ABOUT CONSTRUCTING OPINIONS/ DECLARATIONS (IN THE BROAD SENSE)

- 1) When needed, explain things. Teach, but work to avoid being didactic or condescending. Concrete examples and comparisons often help.
- 2) When you use a technical term, be sure to explain it and use it consistently.
- 3) If you're using information from depositions to support your claims, quote (amply) from them. (Rhetoricians label this trope or strategy *copia*.)

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- 4) Be explicit and methodical in explaining any procedures you used in arriving at your conclusions.
 - 5) Reference the secondary literature to demonstrate that your claims are based on widely accepted principles, research, and facts in the field and subfield(s) you're writing about. Legal writing often involves citing sources for (nearly) every claim made.
 - 6) Ask the attorneys how they want the opinion formatted and how they want information arranged (e.g., when to discuss credentials). Judges, courts, and law firms differ.



8) Proofread, proofread, proofread.



TWO GOOD “BAD EXAMPLES” OF EXPERT OPINIONS

- 1) An opinion in which a sociologist had clearly had a grad student (and perhaps one employed on a grant) run statistical analyses about labor markets and issues related to race. During the deposition, the expert witness couldn't answer some fairly basic questions about stats he'd used and the results in his own report.
- 2) A report written by someone in educational linguistics that relied heavily on appeals to emotion rather than facts, data, or logic.

COMMENTS FROM A RETAINING ATTORNEY'S LETTER TO ME

- “I anticipate adducing your expert opinion evidence at trial. It is, therefore, important for me to flag the following duties of an expert in providing evidence to a court:

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- “1. The duty to provide opinion evidence that is fair, objective, and non-partisan, which duty prevails over any obligation owed by you to the party by whom or on whose behalf you are engaged (*i.e.*, our client);
 - 2) The duty to provide opinion evidence that is related only to matters that are within your area of expertise;
 - 3) The duty to provide such additional assistance as the court may reasonably require to determine a matter in issue.”

AUSTIN, SPEECH ACTS, & WHY THEY MATTER



- J.L. Austin (1911-1960), British philosopher of language focusing on “ordinary language philosophy”
- Best known among linguists for *How to Do Things with Words* (1962), the 1955 William James Lectures delivered at Harvard.



SPEECH ACTS

Promising, ordering, warning, threatening, greeting, congratulating, cursing, blessing, commanding, firing, adjourning, sentencing, begging, admonishing, asking, apologizing, etc.



A LITTLE TRUTH-CONDITIONAL SEMANTICS

- 1) It is raining outside. TRUE FALSE
- 2) Today is Wednesday. TRUE FALSE



A LITTLE TRUTH-CONDITIONAL SEMANTICS

- 1) It is raining outside. TRUE FALSE
- 2) Today is Wednesday. TRUE FALSE
- 3) I bet you \$5. TRUE FALSE
- 4) I sentence you to
five years hard labor. TRUE FALSE

PERFORMATIVES (OR PERFORMATIVE UTTERANCES)

- 3) and 4) are different from 1) and 2).
- 3) and 4) represent **actions** that (under certain conditions) alter reality in some way.
- They can't be T/F; instead, we say they are *felicitous* or *infelicitous*. (felicitous='suited to the circumstances' <L. 'lucky')
- The act of saying is part of the action.
- Tests: 1st person singular, present indicative, *hereby*
- Austin noted explicit and implicit ("It won't happen again") performatives.

THE 3 LEVELS OF ACTION IN A PERFORMATIVE

Act	Kind of action	Level of focus
Locutionary	The act of saying something	What is literally said
Illocutionary	What one does in saying it	What is meant or done
Perlocutionary	What one does by saying it	Listener's interpretation/uptake

Assumption: The appropriate felicity conditions are met.

	“By the authority invested in me by the state of ..., I now pronounce you married.”
Locutionary	“I now pronounce you...”
Illocutionary— What is done	Marrying a couple (how the action gets reported)
Perlocutionary— What is accomplished; how reality is changed	The couple understands they are now legally married, have all the rights associated with legal marriage, and will have to file for divorce to end the marriage (unless one dies before the other).

CATEGORIES OF SPEECH ACTS

(BACH & HARNISH, IN BACH (n.d.))

Constatives	Directives	Commissives	Acknowledgments
affirming	advising	agreeing	apologizing
alleging	admonishing	guaranteeing	condoling
announcing	asking	inviting	congratulating
answering	begging	offering	greeting
attributing	dismissing	promising	thanking
claiming	excusing	swearing	accepting
classifying	forbidding	volunteering	...
...	

WE CAN PERFORM SPEECH ACTS...

- 1) directly or indirectly (Indirect: “My, but it’s warm in here”)
- 2) literally or nonliterally (Nonliteral: “My mind got derailed.”)
- 3) Explicitly or implicitly (how specific are we?) (Implicit: “I’ll be home later,” meaning ‘later that evening’ not some some unspecified future ‘later’)
- Indirection and nonliterality rely on conversational implicature (Grice)

(Bach, n.d.)



MOST SPEECH ACTS (AT LEAST IN ENGLISH) ARE INDIRECT

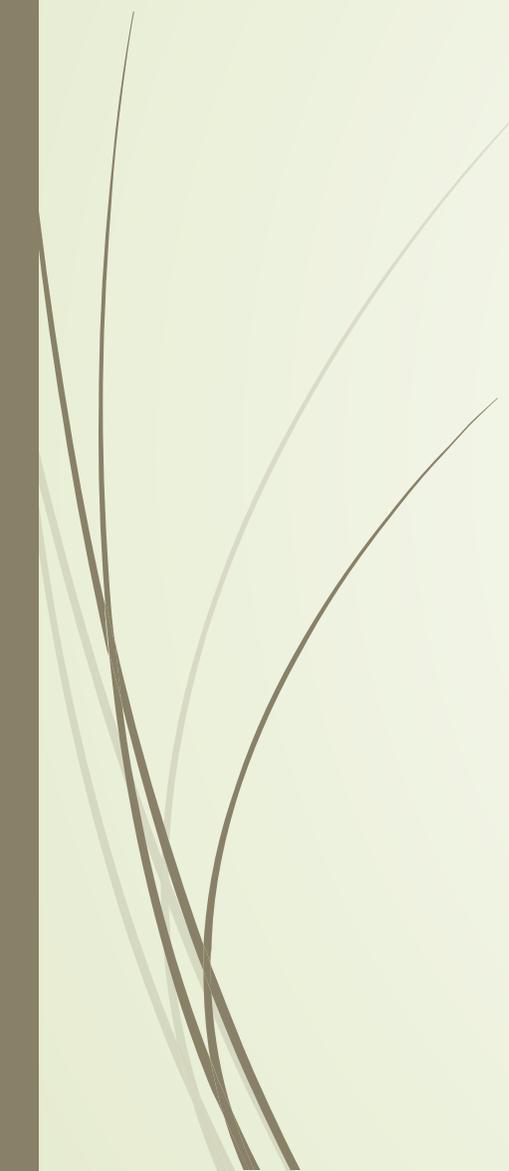
- “My but it’s warm in here.”
- “Looks like you’ve been getting a lot of exercise.”

And much of what native Anglophones think of as politeness involves conventionalized indirect speech acts:

- ❖ “Could you pass the salt?”
- ❖ “Would you mind moving down a bit?”
- ❖ “Could I borrow a sheet of paper?”



WHY THIS MATTERS...

- Frequently, experts in our field will be concerned with what are ultimately indirect speech acts.
 - When was the last time you heard someone say, “I hereby threaten you” or “I hereby defame you”?
 - As we noted in class, speech in context is always language in action, that is, speech acts.
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A SPECIFIC EXAMPLE

- Context: Speak English Only in the Workplace rule
- Supervisor called a meeting of all the employees of a particular national origin (itself illegal)
- Rather than easing the situation, it caused offense.
- The supervisor sent what he termed “a letter of apology” to all the relevant employees.
- The employees became even more upset.
- During the depositions of the employees, opposing counsel repeatedly sought to portray them as uncooperative or hostile because they dismissed the letter of apology as insufficient or insincere.

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- I read the employee depositions before I saw a copy of the letter.
 - When I saw a copy of the letter, I understood immediately: the letter was a letter of non-apology or a sham apology.
 - At first the attorneys didn't understand why I thought this issue was important.
 - Using information from dictionaries (*apology* as 'justification' vs. 'acknowledgment of offense') and research in speech acts, I was able to demonstrate why the supervisor's letter should not be seen as an apology but as a non-apology.
 - 😊 attorneys; my analysis strengthened their arguments

STRUCTURE OF EXHIBIT 3 IN SUPPORT OF OPINION 3

- 1. Introduction and summary
- 2. *Apology*: Some definitions
- 3. Apologies as speech acts
- 4. Components of apologies and strategies for apologizing
- 5. Analysis of Dr. X's letter
- 6. Dr. X's letter as a non-apology
- 7. Conclusion
- 8. References
- Appendix I: Annotated letter of [date] from Dr. X to Employee Y



A LATER DOCUMENT: SUBPOENA TO TESTIFY IN A DEPOSITION

- Ed's subpoena to testify
 - Note that there is a space where the attorney can list all the materials the witness is to bring. (You'll recall a discussion of this in the subpoena excerpt from last week.)
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DEPOSITIONS



PREPARATION FOR THE DEPOSITION

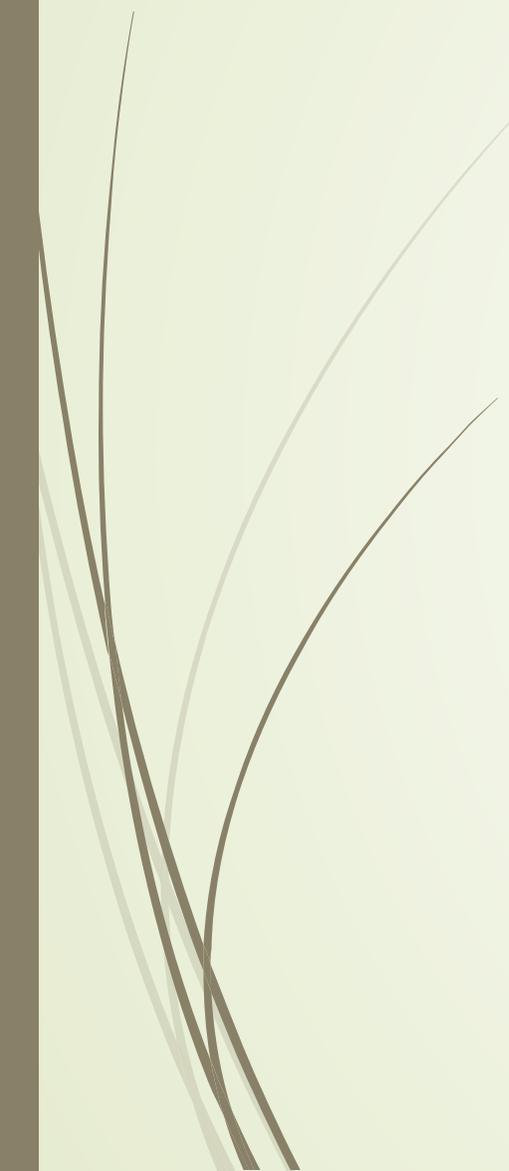
- 1) In many cases, especially important ones, the attorneys will spend time helping you get ready.
- 2) They should not and will not coach you about what to say—the opinions expressed have to be yours—but they can help you get into a good mental space for thinking about the deposition.
- 3) If it isn't made clear during the preparation for the deposition but you are concerned about it, discuss with the attorney what they would advise you to do if you need to go to the bathroom, take a break, etc. (Usually these topics are addressed explicitly at the beginning of a deposition.)

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- 4) Reread everything you've written and any crucial documents in the case. Don't make new notes, which could be discoverable.
 - 5) Get a good night's sleep.
 - 6) Think about it as a chess game: if I respond with X, what are all the possible ways it could come back to haunt me later in the depo?

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- 7) Be prepared to explain what linguistics is in lay terms and why and how it is more than just common sense about language. (Examples like Ed's observation that (almost) anyone can eat a hamburger and digest it, but not everyone can explain how the digestive system works can be useful in situations like this.)
 - 8) Don't be surprised if the opposing counsel claims you're trying to usurp the role of the jury, the attorney, or the judge. Be ready to explain why you're not.

“BEST ANSWERS” TO DEPO QUESTIONS

- 1) “Yes.”
- 2) “No.”
- 3) “I don’t know.”
- 4) “I don’t recall.”

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- A major take away: Answer the questions asked briefly and directly. In some situations, the retaining attorney may ask to you answer as briefly as possible. In others, they may suggest you be more loquacious. Discuss the situation with the retaining attorney.
 - **ADMIT IT:** We academics like to hear ourselves talk, but it may not be the best course in a deposition.



IF WE HAVE TIME...

- Apply Blum-Kukla & Olshtain's (1984) criteria for apologies to the Jet Blue letter of apology.
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REFERENCES

- Austin, J.L. (1962). *How to Do Things with Words: The William James Lectures delivered at Harvard University in 1955*. Oxford: Clarendon Press
- Bach, Kent. (n.d.) Speech acts. In *Routledge encyclopedia of philosophy*. <http://online.sfsu.edu/kbach/spchacts.html>
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- Keating, Elizabeth & Jarvenpaa, S. (2016.) *Words matter: Communicating effectively in the new global office*. Berkely: UC Press.