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From Greenhouse to Courthouse: The Agricultural Scientist as a Witness in the Administrative Hearing

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, provides that all pesticides used in the United States be registered with the Environmental Protection Agency (EPA). The EPA is responsible for assuring that use of registered pesticides does not constitute an unreasonable hazard to the environment.

An applicant for registration or reregistration of a pesticide must furnish the EPA with scientific information regarding the material to be registered, its proposed uses, and available facts about its effects on the environment. If the EPA determines that the proposed pesticide presents no unreasonable risks to the environment, the uses of the material are registered. If the EPA finds that the pesticide in question presents the possibility of unreasonable risk to the environment, however, a more elaborate procedure for assembling information, review, and decision making is initiated.

An early step in this procedure was known as Rebuttable Presumption Against Registration (RPAR) but is now known as Special Review. At this point, the applicant may be required to furnish additional information about the pesticide in question. Other interested persons may furnish information and, by agreement between the EPA and the U.S. Department of Agriculture (USDA), a "Pesticide Use and Impact Assessment Report" is prepared. Under the leadership of the USDA, these reports are prepared by teams of experienced agricultural scientists who may be employees of the USDA, the EPA, or state agricultural extension, research, or regulatory agencies. The reports become part of the body of information used by the EPA in determining whether to register, reregister, withdraw from registration, or place additional restrictions on the use of a pesticide.

If the EPA decides that the "presumption against registration" is rebutted, the pesticide is registered for its labeled uses. If the EPA determines that the presumption against registration is not rebutted (the pesticide is presumed to present an unreasonable risk to the environment), a formal administrative hearing may be convened to garner further evidence on the risks and benefits of the pesticide in question before a final determination is made.

Assessment team personnel and other agricultural scientists, such as plant pathologists, frequently are called to testify as expert witnesses in these formal administrative hearings. Scientists usually do not anticipate the adversary nature of the hearing process or the significance and impact of cross-examination and consequently are at a disadvantage in presenting data. This paper was written to inform agricultural scientists about the administrative hearing process so they may be better prepared to present credible written and oral testimony when called to appear as witnesses. Although the material concepts have been gathered from federal administrative hearing transcripts dealing specifically with pesticide registration, many of the concepts are applicable to formal administrative hearings encompassing a diversity of agricultural regulatory matters.

An Adversary Proceeding

Formal administrative hearings are presided over by an administrative law judge (ALJ) and are subject to the rules of the Administrative Procedure Act (APA) [5 United States Code §551, 1982] and the precepts of the Canons of Judicial Ethics of the American Bar Association [Model Code of Judicial Conduct, 1983].

It is especially important for agricultural scientists who become involved in an administrative hearing to realize that such a hearing is very much like a trial before a court of law—it is an *adversary* proceeding! Unlike a trial, however, administrative hearings do not adhere to strict rules of evidence and are generally less structured. Additionally, the ALJ plays a greater role in the hearing's organization and often questions witnesses. Hearing procedures differ among agencies according to the regulatory authority under which the agency is operating.

Parties to the proceeding may call witnesses and cross-examine adverse witnesses. Witnesses appearing before these administrative hearings are generally provided payment of reasonable fees and expenses, if subpoenaed [FIFRA 6(d), 7USC 136d(d), 1982: "The hearing examiner . . . shall order the payment of reasonable fees and expenses as a condition to requiring testimony of the witness."].

The ALJ is empowered to issue subpoenas [FIFRA 6(d), 7USC 136d(d), 1982: "Upon a showing of relevance and reasonable scope of evidence sought by any party to a public hearing, the hearing examiner shall issue a subpoena to compel testimony or production of documents from any person."]. As a practice, however, subpoenas are rarely issued. Subpoena power generally depends on an agency's regulations and the authority under which that agency is operating. When subpoenas are issued, administrative subpoena enforcement has been described as a "two-stage" proceeding [W. Gellhorn, C. Byse, and P. Strauss, *Administrative Law*, 7th ed., 1979; at 573]. Should the witness refuse to comply, the agency first seeks a trial judge's order directing compliance. If the agency's demand is found valid, com-

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The materials contained herein are current as of the date of publication. However, since the administrative rulings, court decisions, and laws on which they are based are subject to constant revision, portions of this publication could become outdated at any time. The author is not rendering a legal opinion. If legal advice is required, the services of an attorney should be sought.

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pliance is ordered. Continual refusal to comply results in commencement of yet another proceeding to adjudge the witness in contempt of court for disobeying the court's order. The recalcitrant witness does, however, have some legal recourse, for the judge's order to obey the subpoena is appealable. This differs somewhat from the judicial proceeding in which an order is not appealable until after the witness is held in contempt and punishment is ordered [Gellhorn et al; at 574].

Apart from the potential legal obligation to appear, agricultural scientists have a moral obligation to participate. Without expert scientific input, agriculture cannot provide credible scientific evidence so necessary to the equitable and factual resolve of issues critical to agriculture.

An administrative hearing is a strange environment for the scientist encountering one for the first time. An adversary proceeding differs significantly from an academic seminar. Agricultural scientists subjected to the adversary nature of the hearing frequently are frustrated, humbled, even enraged by the tactics of opposing attorneys, especially during cross-examination. Agriculturalists should not be personally offended by these tactics, for the cross-examining attorney is merely representing a client zealously within the bounds of the law [Model Code of Professional Responsibility EC 7-1(1983)].

A "record" is compiled throughout the course of the formal hearing. The ALJ has rather wide latitude in determining what information is admissible to the record. Except when an objection is made successfully to exclude any testimony or comments, the record contains all testimony submitted to every witness, all responses to cross-examining questions, and all comments made during the hearing as well as any orders or rulings issued by the ALJ. Additionally, the record may include other information or documents "stipulated" between the parties to be included or submitted as an attachment to the testimony by a witness. The ALJ must prepare a decision based solely on evidence in the record. Any appeals to appellate courts of law after the final administrative decision are decided on the *evidence of record* only. Since so much emphasis is placed on the hearing record, it is important for a witness to present clear, credible, adequately researched, and objective testimony.

An expert witness may testify either orally or through preparation of a written assessment, referred to as "written direct testimony." A written assessment is the best way to introduce into the record factual information (evidence) necessary to establish the witness's qualification as an expert and to present factual material concerning the issue(s) before the fact finder. The degree of consideration given to testimony (evidentiary weight) by the ALJ when reaching a decision after the hearing is determined by the perceived credibility of the testimony.

Cross-examination allows an "opponent" to question the qualifications of a witness and to determine the reliability (credibility) of direct (oral or written) testimony. The scope of allowable cross-examination is partly determined by direct written or oral testimony. Any matter to which a witness testifies on direct examination can be the subject of cross-examination. Following cross-examination, the attorney calling the witness may ask questions to clarify responses given to questions during cross-examination. This is called a redirect; depending on the ALJ's rules, the attorney may also be able to ask about any topic on redirect. Following this, the cross-examining attorney can requestion the witness on testimony presented on redirect examination.

Generally, the cross-examining attorney seeks to minimize the degree of consideration the ALJ will give to testimony in reaching a final decision. The cross-examining attorney may also try to use a witness's testimony to contribute to the other side's arguments, possibly through hypothetical questions or by using parts of submitted testimony to corroborate arguments made by the other side. If, under cross-examination, a witness appears confused and unsure, such testimony (evidence) may be accorded little evidentiary weight in the ALJ's decision and in any subsequent appeals.

The credibility of the expert witness's testimony may well depend on that scientist's performance during cross-examination.

Reliable Information

Frequently, the cross-examining attorney's strategy centers on discrediting the witness's testimony by establishing or implying that those who generated the data presented by the witness employed unsound scientific methodology, generated data of limited applicability, omitted relevant variables, or were biased.

When any of these conditions are established or implied, the witness's conclusions submitted as evidence may be rendered virtually worthless or at least suspect. Subsequently, less weight is given the witness's testimony. Additionally, the witness's credibility will be adversely affected.

Example. Through written direct testimony, the witness concluded that fatal poisoning incidents involving the pesticide under review were extremely rare.

Cross-examination:

Q: Did you in the course of your conclusion check with the HEW Poison Control Center in Atlanta?

A: No, I didn't.

Q: Did you ever check with EPA, which has a computer printout of pesticide injuries from all over the country?

A: No.

Q: Did you check with your state Department of Agriculture, which is primarily responsible for enforcing pesticide laws, for statistics on injuries to workers?

A: No.

It is usually the inference, not an actual demonstration of unreliability, that reduces the weight given the testimony. These problems can be avoided or mitigated and submitted testimony strengthened, however. In determining if the information to be presented in direct testimony is reliable, the witness should ask: Was the scientific methodology valid? Were all relevant factors considered in generating such information? Do the sources of information appear to be, or are they in fact, biased? Were the data verified by replication? Were the data reviewed and accepted by competent peers? Does the information represent conditions present in relevant crop production areas?

Multiple Sources of Information

Reliable information should be gathered from as many relevant sources as possible. Unless all sources are tapped, the evidentiary weight given the witness's conclusions may be adversely affected. Frequently, the cross-examining attorney seeks to show that the witness's conclusions are based on biased, inaccurate, irrelevant, or incomplete information. By establishing that information is available from more sources than were consulted, especially if untapped sources appear to be primary sources, the cross-examining attorney lowers the evidentiary weight given to conclusions. The implications are that: 1) the witness is not adequately prepared, 2) the witness's conclusions might have been altered had other relevant data been used, and 3) the witness's conclusions are of limited value.

Where information comes from, who generated it, when and why it was generated, and the methodology employed are all important considerations in assigning evidentiary weight to statements and conclusions based on such information. These same factors are important in determining the witness's credibility. Did the witness generate the information, estimate it, or extrapolate it out of context? When it is advantageous to soften the impact assigned to the conclusions, the cross-examining attorney will strive to establish or imply some of these factors.

Bridging the Terminology Gap

The scientist's use and understanding of terminology are not always similarly

perceived and understood by the witness's attorney, the cross-examining attorney, and the decision-maker.

The attorney's concern with the legal implications of terms differs from the scientist's concern in using terms to convey research results. The witness is working within a legal setting and must attempt to communicate clearly with the witness's attorney, the cross-examining attorney, and the decision-maker. This does not mean that the witness must thoroughly understand and use "legalese." Confusion or lack of clarity in terminology can, however, dilute the full impact of the witness's statements, lessen the credibility being accorded the witness's conclusion, and create an air of confusion among the witness's attorney, the cross-examining attorney, and the decision-maker.

Example: The witness testified to contamination of well water. During the testimony, the witness stated that a *substantial* portion of wells were contaminated with the pesticide under review.

Cross-examination:

Q: What do you mean by "substantial"?

A: It cannot really be quantified precisely.

Q: [But] what do you mean by "substantial"? 51%? 30%?

A: What I think is that it can only be used subjectively.

Q: I'm asking what your understanding is, what you mean by the term.

A: Let's put at least 70% under the range of substantial for the sake of a number to get by this issue.

Generalities should be avoided when possible and clarified when necessary. Such general terms as "substantial," "severe," "a few," and "widespread evidence" should be given a quantifiable percentage or range, and why this percentage or range is meaningful should be explained. When hard data for establishing such a quantitative statement are lacking, why such an assessment would be meaningless should be explained. The weight accorded a witness's testimony is enhanced when the scientist and the lawyer can communicate clearly.

The Field of Expertise

One of the most damaging areas encountered by the scientist/witness on the stand is that of testifying to matters outside the field of expertise. The witness is not qualified and generally not prepared to defend or discuss such matters at an expert level, and the credibility of the overall testimony, including that part supportable from within the area of expertise, is affected.

Confining conclusions to matters within the field of expertise means that cross-examination is limited to that field. Questions posed outside that field can be objected to successfully, and a witness has the right to respond: "I am not qualified as an expert in that field." This prevents misleading or possibly erroneous statements from becoming part of the record.

The cross-examining attorney's goal of minimizing the weight of the witness's testimony on the record is simplified when the witness "offers" opinions that cannot be defended. If the witness *must* make statements outside the area of expertise, those conclusions should be supported by sufficient scientific data that are fully understood by the witness.

Responding to Cross-Examination

The witness testifying because of expertise in a given field should always strive for clarity and accuracy in responding to cross-examination. Answers to the cross-examiner's questions affect the weight of clarified submitted testimony. Cross-examination should not be feared. True, the attorney will seek to diminish the evidentiary impact of some of the testimony, but the real purpose is to place the testimony in its "proper light." The attorney is seeking to determine if conclusional statements are accurate and firmly supported and if the witness means what the testimony appears to convey. Clarity and accuracy are paramount.

When questioned about statements made in submitted written direct testimony, the witness may request that the cross-examining attorney specifically cite the page and line from which the question was generated. The witness who answers without first examining the specific statement in written direct testimony runs the risk of making inconsistent statements and having the testimony mischaracterized. Additionally, the witness should seek clarification if the cross-examining attorney's question is unclear. If a witness answers without knowing the true nature of the question, misleading evidence may be placed on the record. The need to seek clarification arises when vague or misleading questions are posed.

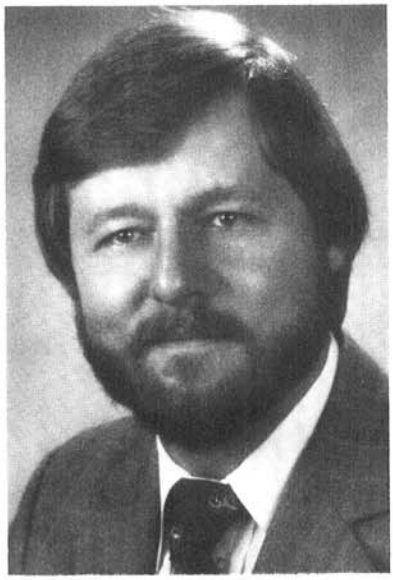
When the witness's attorney objects to a question during cross-examination, the witness should not answer until and unless the objection is overruled. Frequently, a proper foundation has not been laid for the question, the witness is not qualified to answer, irrelevant information is sought, or the question goes beyond the scope of direct examination. Grounds may exist for the ALJ to sustain the objection. If the witness answers before the ALJ rules, unnecessary testimony may be introduced and become part of the record. Such "volunteered" testimony may adversely affect the testimony and frustrate legitimate maneuvers of the witness's attorney.

Preparation

It is extremely important for the witness to be very familiar with the subject matter of submitted written testimony and other submitted materials. These should be *read, read, and reread.* Everything need not be memorized, but the witness must be familiar with the material and be prepared to defend it.

Credibility as a witness is directly affected by knowledge of submitted written direct testimony, especially when submitted testimony includes data generated by others and the witness's conclusions are based on those data. A witness unfamiliar with the submitted data or other materials submitted as written testimony conveys the impression of being inadequately prepared and possibly inconsistent.

The decision by an ALJ is made by weighing conflicting evidence. If agriculture's aim is to receive proper consideration, testimony must be presented effectively. The scientist/witness must be prepared.



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