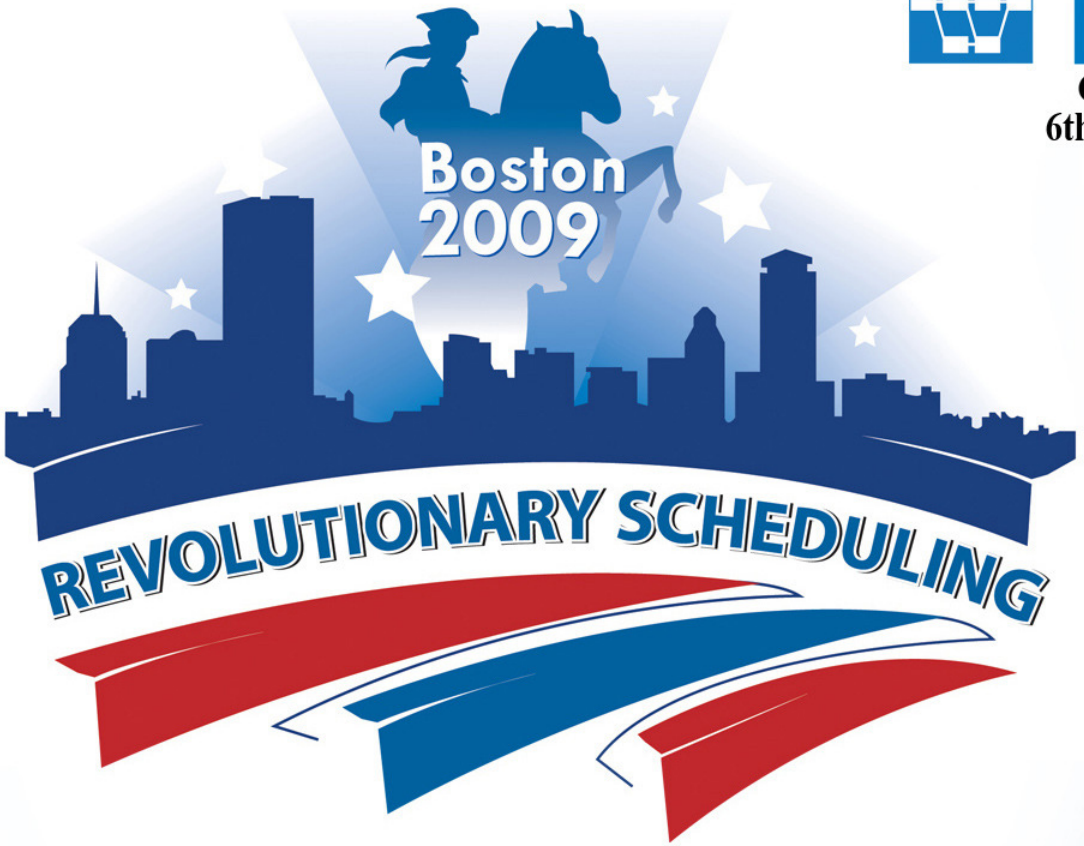
College of Scheduling
6th Annual Conference
www.pmicos.org



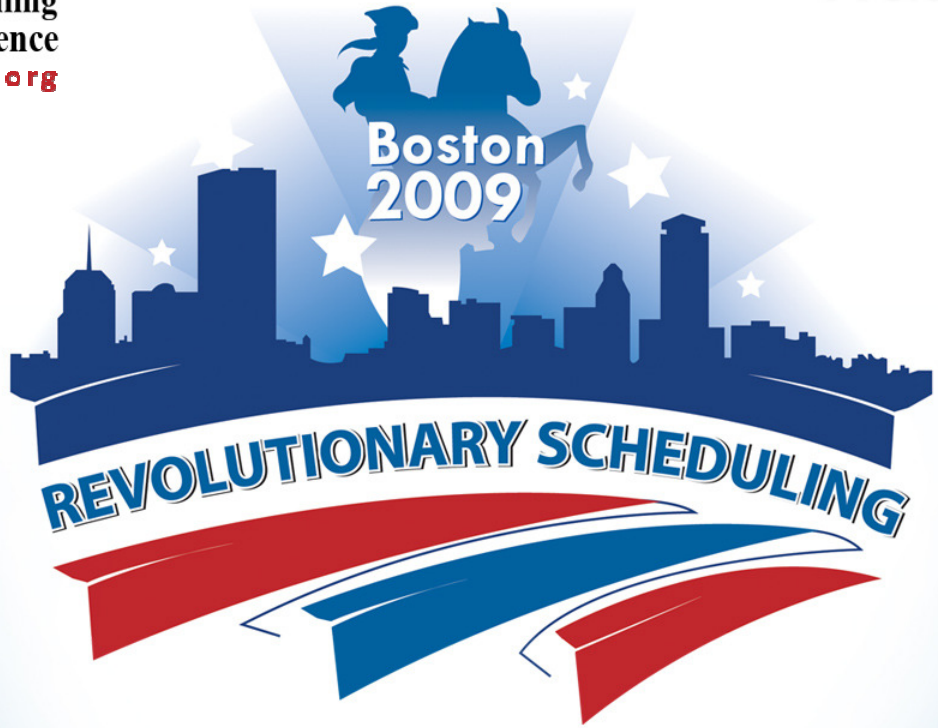
Renaissance Boston Waterfront Hotel

Boston, MA

May 17-20, 2009

College of Scheduling
6th Annual Conference
www.pmicos.org

Renaissance Boston
Waterfront Hotel
Boston, MA
May 17-20, 2009



Minimizing Expert Witness Mistakes

Chris Carson, PSP, CCM
Corporate Director of Project Controls
Alpha Corporation

Mark Boe, P.E., PSP
Vice President
Capital Project Management, Inc.

Phil Apprill
President
Apprill Resources, Inc.

Fred Plotnick, P.E., Esq.
President, RDCM

1. Attorney: "Please take a look at this Exhibit, the January 2002 update schedule."
    1. "According to your previous testimony, you provided update schedules on this project. Were you responsible for the accuracy of as-built dates?"
        A. *"To be honest, I met with the project management team and they gave me the dates."*
    2. "So as the official project scheduler, you did not verify any as-built dates?"
        A. *"I looked at the dates as they gave them to me and did the best I could to check them."*
    3. "So, is it your testimony that you did meet with the team but did NOT verify dates?"
        A. *"I did the best I could under the conditions"*
    4. "So if your efforts did not result in accurate dates, your analysis is flawed."
    5. **Characterizing testimony. This testimony is destined to be brought up again and used to discredit the expert's honesty and professional expertise.**
        A. **"To be honest." Never use qualifiers like this, it indicates that other times you are not being honest and this might be used against you with a jury**
        B. **"Did the best I could." This also undermines credibility as an expert; the "best you could" should mean operating at the level of industry experts, which is high.**
        C. **More appropriate response, "The project management team was responsible for the as-built dates, and we ran a spot-check to validate those dates."**

2. Attorney: "You testified that you did not review the baseline schedule."
    1. "If you had reviewed the schedule, would you have expected it to show 40 days of Total Float?"
        A. *"I would expect a schedule to complete on the contract completion date."*
    2. "So are you saying that it is wrong to show Total Float in a baseline schedule and you would have rejected the baseline schedule with TF?"
        A. *"It's not wrong, but I wouldn't do it."*
    3. "How many days of Total Float would you have approved?"
        A. *"That's hard to say, it depends on the exact circumstances."*
    4. "So are you saying that there is no right answer to a simple issue like Total Float?"
    5. **Answering open-ended, hypothetical, or speculative questions. This testimony is dangerous because almost any answer can be elicited with speculative questions.**
        A. The more appropriate response would be, "I did not review the schedule, and speculation about hypothetical situations is not relevant or useful".

3. Attorney: "Looking at your report for the March 2002 period, this period shows the delays are all due to problems with permits and you assign those delays to my client."
    1. "Since it was your client's responsibility to coordinate the right-of-way work, the delays this period due to the state's failure to issue permits for the right-of-way work should be your client's responsibility. So, why would you charge this delay to my client?"
        A. *"Our contractor client did their best to procure the permits and it was not successful, but it was not within their control."*
    2. "There is no documentation that shows that your contractor ever made the owner aware of the problems with the right-of-way permit and your client did not provide any notification of the delay. That places the blame for the delay squarely in your contractor's lap."
        A. *"Our side did everything within their power to get the permit."*
    3. "So the bottom line is that your client failed to procure the permit, which all agree caused the delay. This makes the delay the contractor's responsibility."
    4. **Answering false fact or assumption questions. This discussion ignored the question, was it the contractor's responsibility to coordinate right-of-way work, and the expert quickly was forced into defending his client's actions.**
        A. Procuring the permit was not the contractor's responsibility.
        B. Informing the owner was not the contractor's responsibility.
        C. The attorney will quickly jump to the conclusions he wants to draw
        D. A better answer would have been, "I'm sorry, but it was not the contractor's responsibility to coordinate the permit process. And it follows that delay due to this is not the contractor's fault.

4. Attorney: "We recently went through a formal Mediation session, although it was not successful. "
    1. "Did you provide any analysis in support of that Mediation?"
        A. "Expert's Attorney: *"Objection, Mediation information is confidential"*. Expert, *"Yes, I did"*.
    2. "What was that analysis?"
        A. "I provided an As-Planned vs. As-Built analysis with a PowerPoint presentation at Mediation."
    3. "What were the conclusions from that analysis?"
        A. "We determined that the split in responsibility for delay was 60% your client, 40% our client."
    4. "But your analysis submitted to this court shows 70% my client, and only 30% for your client. Which is right?"
        A. "This analysis is right."
    5. **Not listening carefully to objections. Your attorney needs to voice objections during a deposition in order to protect you against unclear or incorrect questions that might cause you to testify differently once in court. This gets to be routine, and it is easy for you as the expert to ignore these objections. However, your attorney may actually want you to refuse to answer the question, so you should listen to the objections and only move on to the answer after your attorney gives you the nod. In this case, any expert work product provided in support of Mediation is confidential, and should not be subject to discovery. The more information that is released in testimony about the Mediation work product, however, the more likely it will be accepted as part of the case.**
        A. Appropriate response, "I need a minute to confer with our attorney."

5. Attorney: "Again, based on the previous Mediation, I have another question."
    1. "According to the information from the Mediation records, you were willing to accept a lower award of delay damages. How can you reconcile that analysis with your conclusions from this final litigation analysis?"
        A. *"We took more time with this analysis and are comfortable that these results are accurate."*
    2. "So, your work in the Mediation partnering session was done in haste, or you were not concerned about accuracy?
        A. *"I didn't say that, it was a different venue."*
    3. "Apparently, you are saying that not all your analyses are done to the same level of accuracy. I wonder which level of accuracy you have attained in this analysis?"
    4. **Allowing the attorney to put words in your mouth. Attorneys are always positioning for the future string of questions. Never embark on a line of questioning where the attorney attempts to paraphrase or interpret your words. Even if he rephrases your comment, you should either repeat your comments or carefully evaluate his interpretation.**
        A. Appropriate response, "we performed all necessary research with this analysis and are comfortable that these results are accurate."

6. Attorney: "In your report, you note that the analysis is subject to any new documents or information that may be discovered."
    1. "Did you review every single document in the contractor's files?"
        A. "We reviewed all relevant documents."
    2. "So, there is no document, existing in electronic or paper form, in the contractor's files or the owner's files, which has relevancy to the analysis, or could provide any insight to the delays identified in your report, that you have not seen, reviewed, and analyzed, yourself?"
        A. "Yes."
    3. "So, there is some document that might be relevant that you missed in the owner's or contractor's files that might change the conclusions of your report if you had seen that document?"
    4. **Not asking to have convoluted questions re-phrased. These questions often contain double negatives or other confusing phraseology and are akin to the "when did you stop beating your dog?" question, which has no right answer. Never hesitate to ask the attorney to rephrase the question.**
        A. Appropriate response, "I do not understand the question."

7. Attorney: Exhibit 112 lists documents that you used in your research for the analysis.
    1. "Isn't it true that if you spent more time in research, you would have found more documents and those documents would change the conclusions in your report?
        A. *"No."*
    2. "How can you make that statement? Don't you agree that more research would yield more documents?"
        A. *"Yes, but....."*
    3. **Answering to questions that begin, "don't you agree" or "isn't it true". This is a tactic that does two things; first, it allows the attorney to, in advance, convince the jury that you are in agreement with the next statement, and, second, it advances his efforts to make you like him and thus let your guard down.**
        A. The right answer would be to ask for the statement to be restated in the form of a question.

8. Attorney: "You are here in your capacity as a schedule analysis expert, not as a construction expert."
    1. "Did you visit the project and review manpower?"
        A. *"Yes, but the project was so far along that there was only a punch out crew on the site."*
    2. "You offer conclusions in your report about the level of staffing and manpower on the project. Since you did not visit the job during this time, did you review the documentation concerning manpower?"
        A. *Yes, as much as I could. I interviewed the project management personnel and they showed me notes that the superintendent kept during the project. They felt strongly about the production problems being related to owner changes only."*
    3. **Not stopping when question is answered, or volunteering information. Learn to limit your responses to only the questions that the attorney asks, do not provide any more information, even if you think the new information may help resolve the case. If you know of additional helpful information, discuss that information with your attorney outside of the testimony process. You can ask for a recess or wait for the next recess to discuss it. Every new piece of information that you offer opens another door for that attorney to go through, and his interpretation of the new information may be radically different from yours.**
        A. **Appropriate response, "Yes."**

9. Attorney: "Please see this exhibit, the November, 2003 update schedule."
    1. "Your analysis indicates that the 8 days of delay this period are the responsibility of the owner, but your analysis does not seem to take into account the contractor's serious accident that happened during this period. Why isn't this delay merely concurrent delay?"
        A. *"The contractor performed an analysis at the time that showed the work affected by the OSHA shutdown was non-critical, so it is not concurrent."*
    2. "Was that analysis in the discovery documents?""
        A. *"No, we found it when we researched the project records. Other documentation proves this was non-critical."*
    3. "What other documentation was there?"
        A. *"There were memos, photos, and field reports."*
    4. **Tipping off the attorney about existence of documents he doesn't have. This is similar to volunteering information. Always discuss this with your attorney; litigation is all about limiting the other's access to information, and getting all the information you can. Any time you let the opposing counsel know about new information, you open the door to another interpretation. This will also lead to new discovery motions and delay resolution of the case.**
        A. Appropriate response, "Based on our analysis, the work affected by the accident was Non-Critical path work."

10. Attorney: "Take a look at Exhibit 285; this is an email from the owner's representative to the contractor's project manager."
    1. "This email references the baseline schedule and indicates that the contractor had still not corrected open-ended activities and that was why the baseline schedule was rejected. Was this discrepancy fixed?"
        A. *"Actually, the problem with the baseline was not open-ends, but rather that progress had happened during the review process, and the owner's representative was worried that progress could allow for claims positioning by the contractor, according to the contractor's scheduler. When the schedule was re-submitted, there were no further comments."*
    2. "So, what claims positioning was the owner's representative worried about?"
        A. *"I think the owner's representative believed that the adjustments made to the re-submitted schedule masked lack of progress, but they didn't reject the schedule for that reason."*
    3. "What part of your analysis takes this legitimate concern into account?"
        A. *"We didn't see anything related to this issue in our analysis."*
    4. **Fixing the attorney's question, or correcting his question and then answering. It is human nature to want to help or straighten out the opposing attorney when he makes a inaccurate or false statement. But when you adjust his question you help him navigate through the complicated claims and analysis, and likely create opportunities for different interpretations.**
        A. **Appropriate answer would be simply, "The schedule was approved with this submission."**

11. Attorney: "Here is Exhibit 322, an email to the contractor about their low level of resources."
    1. "Did you take this information into account, and how does it affect your analysis?"
        A. *"This email was not relevant."*
    2. "But this document specifically addresses the issue of lack of production at the time period when you have concluded that production was not a concurrent delay.
        A. *"As far as I remember, lack of production was not raised as a specific issue."*
    3. "So, doesn't this undermine your conclusions from this time period?"
    4. **Answering questions about a document without reading it thoroughly. Cases are normally litigated or experts deposed months or even years after the project and the documents produced during that project. No matter how sure you are that you remember any document, always read them completely front to back and ensure you understand them in the context of the case before taking questions.**
        A. **Appropriate response, after reading the email carefully, "This email does not indicate any problem with production."**

12. Attorney: "Now referencing the email from the previous question."
    1. "If your analysis didn't take this email into account, how accurate can your conclusions be?"
        A. *"My conclusions are valid and as I told you, lack of production was not raised as a specific issue."*
    2. "But just because it wasn't raised as a specific issue, that doesn't mean it didn't affect the project. What analysis have you done to determine what the effects of this lack of production really were?"
        A. *"Again, as I told you, I didn't need to do any other analysis because it was not an issue."*
    3. **Arguing instead of just standing on your position. Getting into arguments with the attorney is a waste of time as well as dangerous because you might accidentally expose a weakness in your analysis or testimony.**
    4. **The more appropriate answer would be "My previous answer stands".**

13. Attorney: "Here is an analysis by our client's consultant."
    1. "Please read page 14 of the report, and tell me if you agree with the conclusions."
        A. *"I haven't seen this report before, so I'll have to spend some time to review and analyze it. I'll need a week to do this analysis and review and then I can get back to you."*
    2. **Agreeing or offering to do analysis or research or collect documents. When you offer to do additional work or find documents that the attorney doesn't have, you open the door to delay of the deposition or case, and potential for more discovery motions, as well as provide the attorney with more ammunition for further questions. Remember the goal is not necessarily to completely explain the entire project, but rather to give clear, convincing testimony that explains the cogent parts of your analysis. Your role is to be persuasive and demonstrate expertise. Being uncertain or agreeing that there is more work to be done undermines the work you've done to date, as well as indicating that you might have done less than a professional job.**
        A. Proper response would be, "I cannot comment on this report since it is the first time I've seen it."

Checklist - Expert Witness Mistakes

1. Not taking time to think before speaking
2. Not telling the truth, simply and directly
3. Answering without understanding the question
4. Not correcting attorney's restatements of previous testimony
5. Characterizing testimony, using "in all candor", "honestly", "doing the best I can"
6. Not avoiding superlatives such as "I never" or "I always" unless appropriate
7. Answering open-ended, hypothetical, or speculative questions
8. Guessing or estimating instead of saying "I don't know"
9. Explaining the thought process in reaching answers
10. Not listening to introductory clauses preceding the question

Checklist - Expert Witness Mistakes

11. Answering false fact or assumption questions
12. Not avoiding non-verbal answers
13. Not stopping and waiting until the attorneys are finished
14. Not listening carefully to objections
15. Allowing the attorney to put words in your mouth
16. Playing lawyer
17. Not asking to have convoluted questions re-phrased
18. Answering to questions that begin, “don’t you agree?” or “isn’t it true?”
19. Not resisting the temptation to be helpful or attempting to educate the attorney
20. Not stopping when question is answered, volunteering information

Checklist - Expert Witness Mistakes

21. Tipping off the attorney about existence of documents he doesn't have
22. Fixing the attorney's question, or correcting his question and then answering
23. Answering questions about a document without reading it t horoughly
24. Attempting to analyze newly produced documents or those generated by others
25. Making comments about a document outside of answering the question
26. Not continuing to refer to the document when answering any questions
27. Answering a question about a document without the document in hand

Minimizing Expert Witness Mistakes

28. Listening to the tone and not the question
29. Thinking the attorney is being friendly
30. Agreeing or offering to do analysis or research or collect documents
31. Getting uncomfortable and feeling a need to speak during long silences
32. Getting angry
33. Arguing instead of just standing on your position
34. Giving a different answer to the same question when repeated
35. Not testifying only from your own knowledge, no hearsay
36. Being tired in deposition
37. Being imprecise
38. Being a know-it-all or cocky
39. Contradicting yourself

Minimizing Expert Witness Mistakes

40. Failing to take breaks when expert gets tired
41. Bringing documents to deposition without the attorney's knowledge
42. Waiving right to read the deposition transcript before agreeing/signing
43. Discussing issues with others in the room (be prepared for questioning about the conversation)
44. Having any discussions with the opposing counsel except the weather and sports
45. Failing to review issues with counsel
    1. Types of questions likely to be asked
    2. Pertinent legal standards
    3. Identification of privileged information
    4. Update on status of pleadings and litigation

Minimizing Expert Witness Mistakes

46. Failing to review work product just before deposition
47. Inaccurate CVs
48. Removing documents from official file
49. Stating opinions without
    1. Support of the facts and assumptions on which opinions are based
    2. Reviewing methodology employed in deriving opinion
    3. Recognizing when opinions were first formed
    4. Reviewing documents used to form opinion
    5. Recognizing the degree of flexibility in forming the opinion
    6. Recognizing how the opinion compares to previous answers given

Minimizing Expert Witness Mistakes

1. Not practicing for video taped depositions
    1. Learn techniques by practice
    2. Dress conservatively
    3. Learn to look directly in the camera
    4. Avoid long pauses
    5. Handle exhibits so they are visible
    6. Shave closely/use makeup for women
    7. Avoid eating, chewing gum, chewing on pens/pencils
    8. Turn off pagers/phones

Questions/Comments

Contact Information

Chris Carson, PSP, CCM
Corporate Director of Project Controls
Alpha Corporation
Chris.carson@alphacorporation.com

Mark Boe, P.E., PSP
Vice President
Capital Project Management, Inc.
mboe@cpmi.com

Phil Apprill
President
Aprill Resources, Inc.
papprill@aol.com