

## Answering Questions about Your Income as an Expert Witness

A recent email to our newsletter subscribers addressed how an expert should respond when asked by an attorney about their income. We received so much feedback from our readers that I have compiled the answers to share with all of you. Below you will find the original article followed by the input from other experts.

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*Expert:*

When asked the question in a deposition -- "How much income do you derive from your work as an expert witness?" -- what is the best way to answer?

*Rosalie:*

I consulted former attorney Steve Babitsky, founder of SEAK, Inc., who advises the following:

The best way to answer this question is simply and directly:

"My forensic income last year was approximately \$120,000."

It is a mistake to ask about gross, net, corporations, etc. It is also a mistake to try and say you do not know, as even if this is true, it is not believable. The key is a simple, direct, non-defensive reply, which does not open any additional areas of inquiry.

There are a lot more gems in a chapter called "How to Answer Trick and Difficult Questions" in the book **Cross-Examination: The Comprehensive Guide for Experts** available on our website at <http://tiny.cc/4revr> .

I hope this helps,

Rosalie

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### RESPONSES:

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I do not agree with the analysis of the "I don't know" answer. I REALLY do not know, since there is no breakdown of earnings between clinical and forensic in my accounting, and don't plan to start one. And if counsel does not believe me it seems like a personal problem to me.

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The correct response would be expressed as a percentage of total income, 100% or less as appropriate. It is none of the attorney's business how much income an expert makes, especially if expert witness work is their only source of income. Do attorneys share that information about themselves?

An attorney has the right to know your billing rate and fees charged for the engagement for which you are testifying, and the percentage of your time or income you get from expert work; that's all.

A six figure income will be thrown in the jury's face by an attorney who has that information about an opposing expert in an attempt to bias the jury whose average income may be half as much.

I have been asked that question or a variation of it a number of times in the past 23 years, and I have never answered it, nor have I been forced to.

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I always say it varies year to year but typically 60% is engineering 40% equipment sales. Engineering is 50/50, systems design work and litigation.

I do not just do litigation work. I think if you know the \$\$ value you would also know the %.

I have noticed they don't like it when they find out that only a part of my income is derived from expert work.

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I get this question a lot. We purposely diversified our business to avoid having all of our eggs in one basket. So our work is divided between expert witnessing (about 30%), Federal government (about 40%), and commercial sector (about 30%). When I get this question, my answer is "about 30%, with the rest coming from government and private sector work" - that also tends to end the discussion. It's simple, direct, non-defensive, and puts everyone on notice that I'm not a hired gun who only lives for the next case to come along.

While you advise your clients on expert witnessing, have you thought about advising them to diversify so they can weather adverse conditions and also look like they're invested in the area in which they are consulting? Being a full-time witness is fraught with peril - one ruling against you, and your income becomes iffy.

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I am surprised that you consider this a trick or difficult question. I am a trial attorney who teaches trial attorneys and witnesses how to perform in trial. The question about fees is fair and relevant. An expert who derives a large percentage of her income from testifying is likely practicing her expertise less and may be biased toward those who provide that income; an expert who derives only a small percentage of her income from testifying may be more seriously involved in her field and more independent from those who occasionally pay for her expert testimony.

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I have never been asked how much \$ I receive for expert witness consulting. I am always asked what % of my income is derived from that work. I would not disclose the amount of money.

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I have found that the question is typically asked during the deposition, but in a slightly different way. The question is usually in two parts: "What is your hourly rate for this assignment?; and How much time or fees have you spent on this project?" The first answer is easy. For the second one, I usually indicate that I don't know (unless I am prepared, having reviewed my billing file with our Controller, beforehand). I have never been asked "the amount of income I derive as an expert witness". I also point out that our professional fees are not contingent on the outcome of the case, and my role it to be totally objective and unbiased. Hope this helps.

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Some further thoughts on the question re income derived from work as expert witness: Having been bedeviled by this question many times, in many forms, and having given all possible answers, including "I don't know," the way I handle this now is to have the retaining attorney bring this subject up first, during direct examination. I give a general estimate, after making it clear I do not keep separate accounts for medical income and expert witness income. I estimate both the percentage of my total income represented by expert witness fees, and an estimated dollar figure. The retaining attorney asks all the pertinent questions, of course, in a friendly and non-antagonistic manner, unlike the opposing attorney, who will try to imply - if not frankly state - that my opinions are directly related to - and a result of - what I am paid.

The retaining attorney will ask questions in a way that I can testify, in advance, that I am paid for my time, and not for my opinions. Of course, that's what I would reply to any opposing attorney, but it sounds better when it is said under direct and friendly examination. This tends to take the wind out of the opposing attorney's sails.

One time when I answered "I don't know" to an opposing attorney, his response was: "Doctor, do you mean to sit there and insult this jury's intelligence that you don't know what your income is?" I look forward to the day when I meet this attorney again in front of jury, and have the opportunity to say: "My income is \_\_\_\_\_. I hope you don't intend to stand there and insult this jury's intelligence by suggesting there is any relationship between my income and my opinion in this, or any other case." And if he takes the bait, I will not hesitate to call him a liar.

Most attorneys I have worked for do not think that juries pay much attention to this kind of collateral attack.

Even Bill O'Reilly has gone on record against expert witnesses as "the best testimony money can buy."

The experts for both sides are equally vulnerable, and if the attorney for one side gets carried away with *ad hominem*s, the other side can always retaliate against their experts in the same

manner, so it should even out. Other than for theatrics and posturing, why do they even bother? I guess because that's what they're paid to do, and expected to do.

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I disagree with full disclosure.that is an invasion of my privacy. If they want to check me for bias, then grill me for my opinions based on my knowledge experience education and training. Also let the defense make full economic disclosure if they will. If you want bias, then make it even. I will guesstimate, but will not give that information voluntarily

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I have been asked that question a dozen times, but more so in terms of the percentage of work compared in my office as Architects and builders vs. expert witness work. The purpose of the attorney asking that question really is to establish if you are primarily "a hired gun" for either the defense or defendant.

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I usually give a range versus and approximation of a single dollar amount...and if it's unusually high or low, I note why...all payables hit in the following year, I have larger financing commissions, etc...

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I have wondered if it wouldn't be worthwhile to turn to the judge and ask, "Why is my income relevant to my opinion in this case?"

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In my experience, that question is often phrased as "what portion of your income .." which in my case is more complicated.

Since I often team with colleagues who subcontract, the net is key. Also, my corporation includes income from my daughter who has very little expert work but does have some in her separate specialty but contributes roughly half of corporate gross income in her other contracts.

As you can see, the answer in my example is much less simple as each of these points has to be defined. Rough percentages are usually acceptable.

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