

Day 2

- Discuss the Finish Reports

Evidence

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Elements & Evidence

- | | |
|---------------------------|-------------------------|
| 1. A person | 1. I saw Joe Citizen... |
| 2. Had a permit | 2. Gov't records... |
| 3. Permit required ... | 3. Gov't records |
| 4. Condition was violated | 4. I saw...photos... |
| 5. Date | 5. I saw on DATE |
| 6. Location | 6. I was at LOCATION |

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Evidence is.... "Stuff"

- Testimony
- Writings
- Materials
- Objects or
- Things offered to prove the existence or nonexistence of a fact.

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When do you need evidence?

- In court
- In an administrative hearing
- In an office hearing
- To settle an enforcement action
- To issue a Notice of Violation
- To check the box “non compliance” on an inspection report

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Typical Evidence

- Witness testimony
- Documents
- Photos
- Samples
- Piece of garbage? Piece of pipe?



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Where is the Evidence?

- In your report
- In your/your agency's files
- At the facility
- At a scene
- In other regulators' offices
- Other government agencies
- The internet

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Learning Point

- Evidence can be found in many different places.
- Regulators tend to focus in their own records and their own inspection

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Documents from the Facility

- Contracts
- SDS, labels, inventories,
- Process documents
- Bills of lading, purchase records
- Personnel, training records
- Correspondence to and from regulators
- Other permits, licenses
- Hazardous waste manifests



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AUTODESK SAFETY DATA SHEET Page 3 of 3
 P837 CMVW Resins
 Autodesk, Inc.
 According to OSHA 29 CFR 1910.1200
 Revised on 06/12/2016

Product Identifier:
 Product name: Autodesk Resin P837 Cyan, P837 Magenta, P837 Yellow, P837 Black, P837 White, P837 K-v-2 Black

Other means of identification:
 Synonyms: Autodesk Resin: P837-C, P837-M, P837-Y, P837-K, P837-W, P837-K-v-2
 Recommended use of the chemical and restrictions on use: Prototyping Resin.

Manufacturer/Supplier/Distributor information:
 Identified uses: Prototyping Resin.
 Manufacturer: Autodesk, Inc.
 Supplier: 211 Marina Parkway
 San Rafael, CA 94903
 USA

Emergency telephone: North American Safety Department: Anshu Bhatnagar 800-535-5053

Classification
 OSHA Regulatory Status: This material is considered Hazardous by the OSHA Hazard Communication Standard (29 CFR 1910.1200).

Physical Hazards: Not classified.

Health Hazards: Acute toxicity, Oral Category 4
 Skin corrosion/Irritation Category 2
 Serious eye damage/Eye irritation Category 2A
 Reproductive toxicity Category 1B
 Aquatic Chronic toxicity Category 2

Environmental Hazards: OSHA defined hazards: None known.

GHS label elements:

Signal word: Danger

Hazard statements:
 H302 Harmful if swallowed.
 H312 Causes skin irritation.
 H315 Causes serious eye irritation.
 H330 May damage fertility or the unborn child.
 H361D Toxic to aquatic life with long lasting effects.

Precautionary statements:
 P264 Wash hands thoroughly after handling.

Autodesk P837 CMVW Resin Last Revision Date: 06/12/2016

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PRODUCT IDENTIFIER:

SIGNAL WORD
 DANGER
 WARNING

HAZARD/PRECAUTIONARY INFO:

HMS

HEALTH

FLAMMABILITY

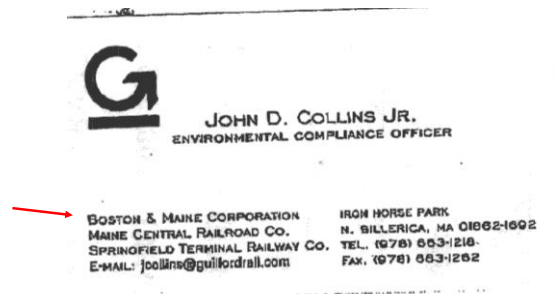
REACTIVITY

PERSONAL PROTECTION

www.16.com

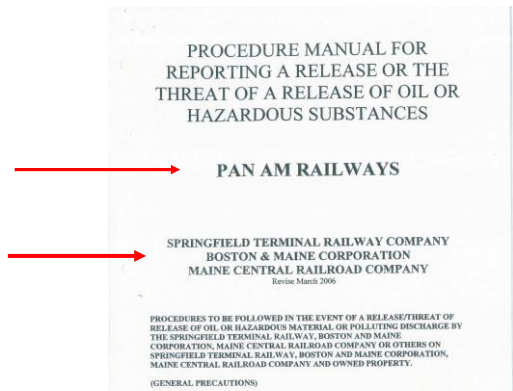
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Haz Mat response got this critical piece of evidence



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Their Haz Mat Plan



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All convicted at trial and upheld on appeal

- 1) Springfield Terminal Railway Company
- 2) Boston & Maine Corporation
- 3) Maine Central Railroad Company, and
- 4) Pan Am Railways, Inc.

Charged for failure to report the spill and for the attempted cover up.

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Evidence on the Net

Business License/

- Fictitious Business Name
- City/County Database
- Obtain Correct Business Ownership Information
- (i.e. Sole Proprietor, Inc., Corp., LLC, etc.)
- Identify Other Businesses owned by same person

Company/biz website

- Owner information
- Other locations
- Dead links can be a sign

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Other Agencies

Who inspects a gas station?

- Environmental programs (USTs, haz mat, haz waste, air)
- Weights & Measures
- Water (supply and waste)
- Fire
- Food
- Alcohol
- Lottery

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Who Owns the Property?

- Do they know about the violations?
- Does their insurance company know?

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Do Not Use Your Personal Social Media Account for Work Stuff

- Don't Ever
- Consider how much work info you put on your private social media accounts

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Free Aerial Photos Online

See list on USGS website:
<http://nationalmap.gov/gio/viewonline.html>

This site has links to several free sources.

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Find a Photo Online?

- Search for other places the photo is online.
- In a Chrome browser, hover over the image and right-click (or "control"-click on a Mac). Select "Search Google for Image" and you'll see all the places the photo shows up with descriptions.

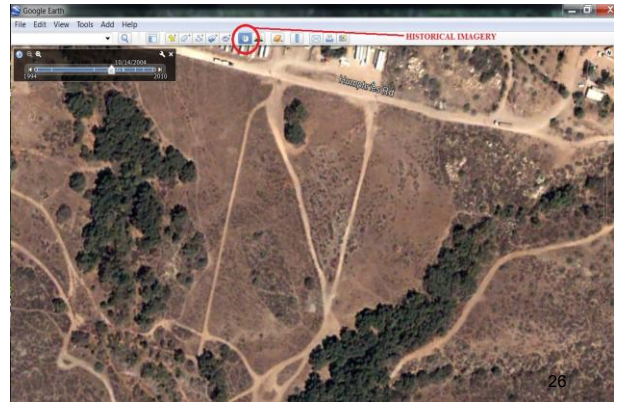
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10/14/04



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03/30/08



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09/15/10



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Maps and graphics



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Issues with Digital Video

- There are many **unworkable** digital video formats.
- Many of which are proprietary.
- Converting these videos from their proprietary format often creates problems.
- You don't find as many problems with photo formats.
- Saving and storing on LAN systems???

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Photos (remember yesterday session)

- Try to take photos on every inspection
- May be the only permanent record of what a person or location looked like at the time
- Where violations are found, photograph who was there (employees, witnesses, possible defendants)
- Take a photo from outside the facility
- Establishing shot, medium shot, close up

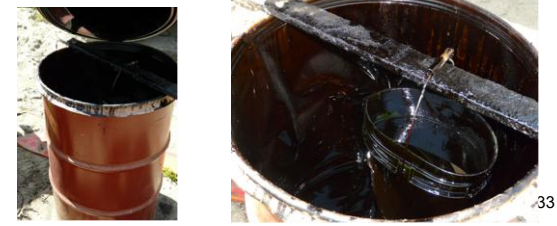
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Photos record information and illustrate testimony

- Equipment and settings (e.g., date/time) work properly
- Shoot different scales and angles for context
- Never delete pictures from a series
- Keep originals separate, with chain of custody
- Image enhancement (e.g., lightening shades to remove shadow) may be ok if explained and the originals exist

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Photo Worth 100+ words...



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Photos can illustrate results of tests



After placing dye into the toilet, I saw the dye emerge from a pipe and discharge into the creek

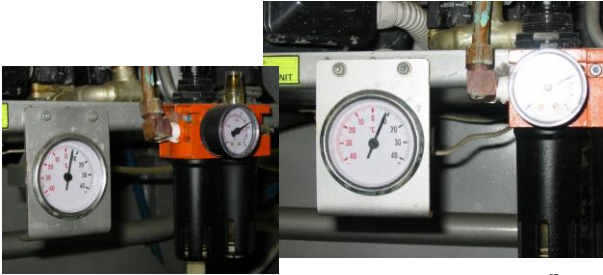
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Transient, no test, hard to describe, easy to photo: fugitive dust



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When photographing a glass covered dial or meter, window, mirror or other reflective object with a flash, move ~45 degrees to the side to avoid the flash in the photo.



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Other evidence: pieces of pipe



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How do you prove it is the same thing you saw before?

- Mark the item
- Statement from someone who observed the item during the timeframe
- Documents - manifests, shipping papers, invoices
- Photo comparison...
- All of the above

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Evidence of "Person": Who Did It?

- Who are these guys?
- Individual? Corporation?
- Documents
 - Evidence of ownership (permits, phone bills)
- Public Records (licenses, permits)
- Photo
- Their statements
- Ask for their cell phone #

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Who Did it? Why It's Important

- To make sure you are dealing with the right person/entity
- Administrative or civil case can name a person or any business entity as a defendant

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Witness Statements

- Potential witness statements
 - Defendant
 - Defendant's employees
 - Neighbors
 - Complainants
- Get Witness names, position, experience
 - “Paul Jones, supervisor of X Plating for 3 years, said “We always had Al’s Trucking pick up the plating waste.”

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Witness Statements

Ask the follow up question:

“How do you know?”

- Do they “know” directly or did they hear from someone else?
- Can lead you to other witnesses and/or documents

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What to Include in Statements:

Use quotes around critical statements made by individuals

Do not use quotes unless you are certain of the wording

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Exception to the Hearsay Rule: Statements by Respondent/Defendant

You can testify as to any statement made by someone who is later the defendant or a respondent in a hearing or trial

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Exception to the Hearsay Rule: Excited Utterance

You can testify as to

- a statement
- relating to a startling event or condition,
- made while the person was under the stress of excitement that it caused.

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Examples of “knowledge” evidence

- Prior inspection reports
- Compliance assistance
- Other permits and licenses
- Training records

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Evidence of “Hazardous” or “Pollutant” or “Detrimental”

- Test results (field tests, lab tests)
- Documents
 - SDS
 - Labels
 - Manifest/shipping documents
- Witness statements
- Circumstances where it was found
 - Ex: chrome in a plating facility
- PPE used
- Effects
 - dead fish, corroded barrel, physical injuries

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Evidence of When

- Documents
 - Rental agreement
 - Delivery records
- Statements (neighbors?)
- Photos
 - To prove/date prior condition of the site
 - Check on the web or other govt agencies for photos
 - Prior inspection photos

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When Should You Sample

- When you suspect a violation and need evidence the waste was hazardous
- When the facility is denying its haz, & what they tell you doesn't make sense
- To provide evidence that a waste was hazardous
 - Disposal cases
- A sample provides compelling evidence that a spill or discharge has occurred

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Chain of Custody

- Its not just for samples
- Refers to the chronological documentation, and/or paper trail, showing the seizure, custody, control,



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Chain of Custody Examples

- For things not easily altered (like an SDS) simply noting you collected it in your report and keeping it with your files may be sufficient
 - Put date and initials on the back
- Consider putting some sort of tag on items
- Samples need sample tags, tape and a form

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Chain-of-Custody

- Four ways to maintain custody
 - In person's physical possession
 - In physical view of person
 - Secured (seals) so that no one can tamper with it
 - Secured in area restricted to authorized personnel
- C-O-C documents possession from collection to final disposition (cradle to grave)
- Required for legally enforceable data



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Keeping Track of Evidence

- Photo Logs, Sample Logs
- Grids & Sketches:
- Putting an ID tag on physical evidence
- Keeping an evidence log or noting all evidence in your report

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“Elements and Evidence”

To organize, evaluate and present your case

| | | | |
|--------------------|--------------|----------------------|-----------|
| Defendant | Report p.2 | | |
| Had a Permit | Govt record | | |
| Permit Condition | Govt record | | |
| Condition Violated | Report p.4-5 | samples Photo 4-6 | inspector |
| Date | Report p. 2 | | inspector |
| Location | inspector | Photos 2-3 | records |

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How much evidence do you need?

- Usually “a preponderance”:
 - it's more likely than not that the violation occur
- For a criminal case the standard it's “beyond a reasonable doubt”
- How much do you need to convince the facility owner? At a settlement conference or office hearing?

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Questions?

Practical Exercise FOR INTERVIEWING

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Process: you have three(3) minutes to:
Look at the photo and write down who, what,
where, how and when

Your partner will ask you these questions
and you need to have answers.

CBI Notice During Inspections

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What is CBI?

Statutory: Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), protects two categories of information:

- 1) trade secrets; and
- 2) commercial or financial information obtained from a person [that is] privileged or confidential.

Regulatory: 40 C.F.R. 2.201(c)

- any information that pertains to the interests of a business,
- developed or acquired by that business
- received from any person, firm, partnership, association or other public or private organization, or legal entity (including a foreign, State or local government)
- which contains **trade secrets or commercial or financial information that is privileged or confidential**

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What Does Inspector Need to Know?

- Everything a company claims is CBI must be handled by the inspector as CBI
- Appropriate agency personnel will make determination as to what is and what is not CBI

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General Principles and Statements

Principle: Facilities should make every effort to make timely CBI claim to EPA or State Agency

Agency and States have an obligation to:

- notify inspected facilities of their right to claim CBI
- Address CBI as much as possible on the front end of the process
- Ensure proper handling of CBI
- Reduce potential for inadvertent release
- Identify false claims

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Hypothetical Inspection

During the Inspection

- An inspector visits a facility to conduct an inspection.
- An inspector completes the inspection and hands the CBI Notice Form to the facility representative without any explanation.
- The facility representative asks many questions that are unanswered. In response, he/she asserts a CBI claim over all of the information that was shared with the inspector.

After the Inspection

- The inspector is now required to handle all of the information as CBI-claimed information. In completing the inspection report, the inspector is finding it difficult to write the report without including the CBI-claimed information and cannot release much of the inspection report in Enforcement and Compliance History Online (ECHO).

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What is potential CBI generally:

- Sales or marketing strategies
- Formulas, processes, or devices
- Manufacturing or quality control processes
- Description of technology used at a facility
- Industrial process descriptions, plans, drawings or other schematics
- Production volumes of chemicals
- Importing or processing information
- Financial data
- Contractor information or other third-party information
- Customer and supplier lists
- Profit and loss data

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What is not CBI (generally)

- Information that is available to the public
- Information submitted to EPA without a CBI claim
- Information determined to be not entitled to confidential treatment

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When to Raise the CBI Issue?

Options:

- **Prior to an announced inspection, as appropriate**
 - Include a point of contact for questions about the form
 - Provide the Form in the written communication (if there is any)
- **During an opening conference (for announced or unannounced)**
 - You can use scripted language
 - You can provide the Form at the opening conference
- **During the closing conference (for announced or unannounced)**
 - If you haven't already, you must provide the form and answer questions no later than closing
 - Include the Q&A documents with the notice as appropriate
 - If you think that it would be information overload, then you can send that Q&A before or after the inspection or at the closing conference

New Technology

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An “Open Field” may not be really open or really a field

The Fourth Amendment protects “persons, houses, papers, and effects.”

Even if... fences, closed or locked gates, “No Trespassing” signs and/or an objecting owner, its still an “open field” *Oliver v. United States*, 466 U.S. 170, 183 (1984)

A fenced 2,000 acre industrial complex is an “open field” *Dow Chemical Co. v. US* 476 US 227 (1986); *Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp.* 416 U.S. 861 (1974)

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FAA Drone Rules

- Part 107
- Applies to UAS (unmanned aircraft)
- From 0.55 – 55 #
- Must keep drone within unaided sight
- 30 min. before sunrise – 30 min. after sunset
- Minimum visibility: 3 miles
- Max altitude: 400 ft above ground
- Max speed: 100 mph

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FAA Drone Rules (cont’d)

- Must register drone
- Must have remote pilot certificate
- Minimum age of operator: 16 years old
- Waivers available for restrictions
- Rules are for safety, NOT privacy
- Federal preemption applies

source: www.faa.gov

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Any other technology
being used by your
agency?

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QUESTIONS?



How to be an Effective Witness

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Testimony

- In systems of proof based on the English common law tradition, almost all evidence must be sponsored by a witness, who has sworn to tell the truth.
- Testimony is presented by question and answer; it is awkward and not the way we are used to communicating or learning.

It's Literal

Q: What gear were you in at the moment of the impact?

A: Gucci sweats and Reeboks.

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Where You May Testify

- Administrative hearings (enforcement, personnel, worker's comp)
- Civil cases
 - Depositions or Trial
- Obtaining inspection or search warrants
- Criminal trials
 - Preliminary hearings/ pre trial motions
 - Trial
 - Sentencing

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Keys to Success

- Patience
- Listening
- Preparation
- Tell the truth

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Preparation

- Know the evidence
- Know the facts
- Know your own documents
- Know your background and experience
- Know the questions that will probably be asked (on direct and cross)

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Its Your Tone.....

- Speak up
- Speak s..l..o..w..l..y
- Professional, prepared, objective
- No sarcasm
 - Does not work in person and
 - Really does not work in the cold transcript

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When Testifying You Are Making a Record

- Court Reporter or audio recording
- Gestures must be explained
- “Yes” or No” not “uhuh” or “yeah”
- Only one person at a time

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The Pace of Testimony

- Question....wait for the end of the question...
- Pause...
- Answer
- People ignore mistakes (questions are not evidence)— judges and juries remember witness mistakes in the **answers**



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IMPORTANT Question: What do you know and how do you know it?

- I saw it
- I heard it
- I smelled it
- I did it

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Example

Q: Who else was there?

A: Don Smith arrived at 10am

Q: How did you know he was there?

A: I saw him arrive

Q: How did you know it was 10am?

A: I looked at my cell phone and wrote it in my report

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Reports

- Know your reports, your previous reports and reports by others regarding the same matter.
- Be prepared to testify without referring to your report but for important details ask to refer to your report to refresh your recollection
- Do not take you report with you onto the witness stand

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Don't Try Too Hard

- Just tell the facts (the whole facts and nothing but the facts)
- If you make or made a mistake, just say so
- Be professional and objective

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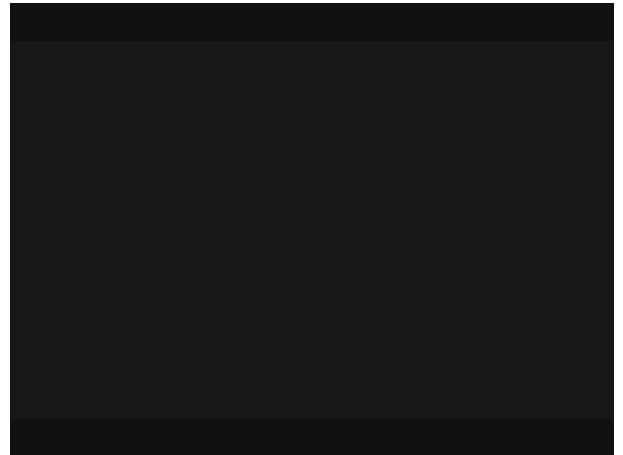
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Direct Examination

- Lays out the government's case
- First moment "an out of body experience"
- Relax; listen to questions carefully
- Tell your story; questions will be open-ended
- Use visual aids – integrate into story / refer to documents
- Educate jury / judge

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Direct Examination

- Witness qualifications / expertise
- Description / context of work
- Opinion testimony (only if an expert)
- Basis for opinion
- Facts of the Case

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Direct Examination–Witness Goals

- Convey depth of education / experience
- Educate jury / judge
- Place case (or your part of case) in proper context
- Establish credibility
- **PERSUADE**

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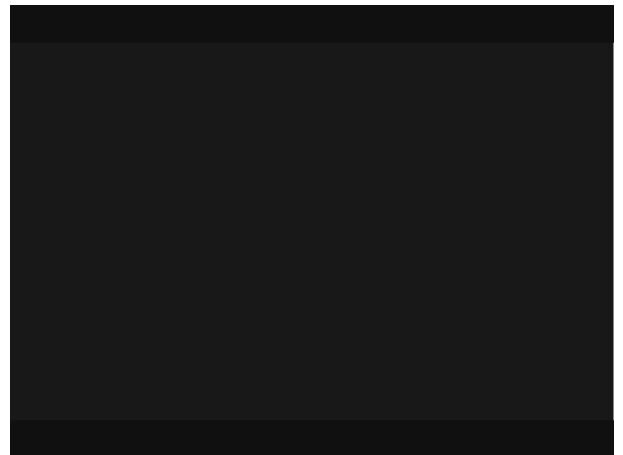
Objective of Testimony

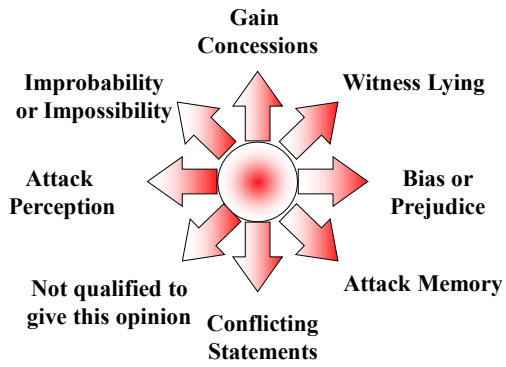
- Personnel were qualified
- Chain-of-custody was intact
- Appropriate sampling / analytical methods were used
- Data obtained were reliable
- Expert opinions were reliable

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Cross Examination Objectives

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Cross Exam: Looking for mistakes, holes and weaknesses

- Witnesses not interviewed
- Mishandling of evidence
- Incomplete reports
- Treating this defendant differently than others
- Having an "Agenda" (bias)



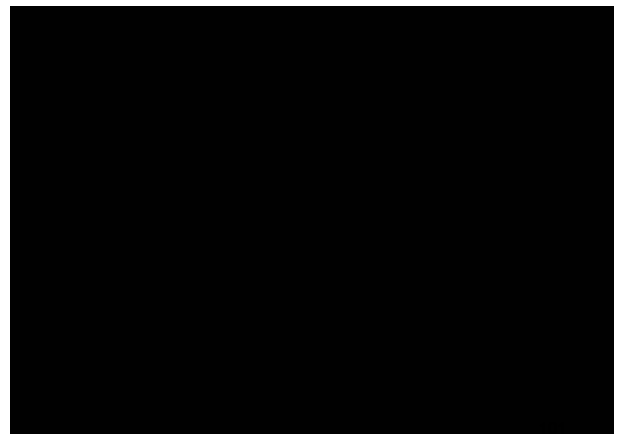
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Never Assume What the Lawyer Says is Correct

- Lawyers are NOT under oath
- They may misstate what another witness has said or what a report said



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Q: Did you include everything in your report?

- How would you answer this?

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Q: Did you include everything in your report?

Answer #1: No.

Answer #2: Everything that was important at the time.

Answer #3: Everything I had time to write.

Answer #4: My report is a summary, it does not include everything that occurred during the inspection.

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Q: You never told the defendant he could not use the bag house?

- What's the problem with this question?

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Q: You never told the defendant he could not use the bag house?

- If you answer "No"-- does it mean
 - No, I never told him or
 - No, this statement is not correct, I did tell him that?
- If you answer "Yes"
 - (meaning yes, you never told him)
- Best to explain "I never told the defendant he could not use the bag house"

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Beware of using defense characterizations

Q: What did you do after trespassing on my client's property?

A: I wasn't trespassing, I was conducting my inspection. After completing my inspection, I returned to my car.

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Q: Was one of the purposes in issuing the Notice of Violation to help educate the company?

A: I'd have to say no.

Q: So the purpose of issuing the NOV was simply to prosecute the company, correct?

A: I would not use the word prosecute. The NOV was to inform them that they had a violation that they needed to correct by a certain date.

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Cross Exam: Looking for Concessions

Isn't it true ...
Wouldn't it be fair to say
Would you agree...



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Be polite even when it hurts

Cross exam attacks your credibility
Don't take it personally, its the job
Anger clouds thought and lessens your credibility



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Do Not Answer a Question You Do Not Understand

Look to the Judge
If there is no
judge, just say you
do not understand



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Be Careful of Documents

- If asked about a document, asked to see it
- Read it, read all of it, then ask for the question to be repeated
- Are you sure its authentic? Current version?



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Its OK to Say You Don't Know

I don't know (and I never knew)
I don't recall (but maybe I used to know this)



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Trick Questions

- "Did you talk with your attorney (i.e. the government's attorney) before testifying?"
- "Have you ever made a mistake?"
- "Isn't it possible that . . . ?"

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Listen to Objections

- argumentative
- asked and answered
- calls for speculation
- calls for a conclusion
- compound question or narrative
- hearsay



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Listen to Objections

- irrelevant
- lack of foundation
- leading question
- privilege
- vague
- assumes facts not in evidence
- question misstates prior testimony

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Depositions are a little different

- Can be used in civil cases
- Part of pre-trial discovery

- Out-of-court oral testimony of a witness
- Done in offices not in a courtroom

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Depositions

- There is no judge
- Usually you have to answer questions even if there was an objection
- Scope is very broad, can be anything that might lead to relevant evidence

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Deposition: scope is very broad, whatever might lead to relevant evidence

- What grade did you get in chemistry?
- What facilities similar to the defendant's have you inspected?
- What did you do the morning before the inspection?

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At the End

- When you are done, leave
- Don't talk to other witnesses about your testimony
- You do not have to talk to the defense attorney or their investigator. If you do talk to them have a another witness there (like our investigator)

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Common Misconceptions

- "This case will never go to trial, so why worry about the details."
- "I know what I'm testifying on, so I don't need to prepare."
- "If I get into trouble, my lawyer will protect me."
- If I leave the agency I won't have to testify

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Keys to Effective Testimony

- Carefully document work during investigation
- From the outset - understand the case and your role
- Know the limits of your expertise
- Prepare for testimony
- Good presentation skills

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IMPORTANT: What do you know and how do you know it?

- I saw it
- I heard it
- I smelled it
- I did it

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Mock Trial

Acme Chemical Co. VS Plume Co. APCD

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Order of the afternoon – each group will pick the following roles: Witness, attorney for the prosecution, attorney for the defense and assistants for both sides

• **Prosecution**

- You represent Plume Co. APCD
- Need to pick who will be the “attorney” and who will ask the questions
- Prepare witness – which is either the sampler or the lead inspector
- Review the documents from the Tuesday inspection
- Prepare questions for the witness
- Handout of proposed questions
- You will ask questions first
- Have the option of redress

• **Defense**

- You represent Acme Chemical Company
- Need to pick who will be the “attorney” thus who will ask the questions
- You need to review the documents from the Tuesday inspection – looking for holes or mistakes the sampler or inspector made
- Prepare questions for the witness
- Handout of proposed questions
- You will ask questions second
- Have the option of redress

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