

Being an Expert Witness — It's Not Like TV

By Matthew English, CTP-D, Managing Director, Arch + Beam Global, Inc.

For those of us who watch “Law and Order” perhaps a bit too often, it may be tempting to assume that the job of expert witnesses is to exude guru-like confidence on the witness stand while sending witty zingers back at opposing counsel when they dare to cross-examine them. In reality, that can't be further from the truth.

Last month, a group of Certified Turnaround Professionals (CTPs) gathered for an Expert Witness workshop in Madison, Wisconsin. Graciously hosted by U.S. Bankruptcy Judge Robert D. Martin, my fellow CTPs and I were put through simulated courtroom experiences. Our task was to testify as expert witnesses in a company valuation dispute.

Based on the fact pattern of a real case, one expert witness was to support the debtor and another was to testify on behalf of the bank. Both sides had problems with their valuation approach — so it was predetermined to be a lively court experience.

When we arrived at the workshop, Jim Seward, an associate professor of finance at the University of Wisconsin – Madison and faculty dean of the CTP program, gave us an overview of the fact pattern and the valuation approaches and assumptions made by

the experts in the case. Then, a team of lawyers walked us through the do's and don'ts of being an expert witness. We chose sides, and the evening concluded with a fun beer and brats dinner at Martin's home on Lake Mendota.

One of the workshop's first take-aways: Know how the court defines an “expert,” and be ready to defend your experience, if required.

The next morning, we walked to the federal courthouse, where we were woodshedded with our attorneys. Volunteering their time for the workshop were Valerie Bailey-Rihn and Roy L. Prange Jr., partners with Quarles & Brady LLP; Jane F. (Ginger) Zimmerman, a shareholder and board member with Murphy Desmond S.C.; and Daniel J. McGarry of Whyte Hirschboeck Dudek S.C. Volunteers who served as mentors were David M. Bagley, CTP, managing director with MorrisAnderson; David Bonington, CTP,

managing director with Societe Generale; David C. Finkbiner, CTP, of Finkbiner Duffy & Clapp S.C.; and William J. Wildern, CTP, CEO of Hydra Professionals LLC.

Woodshedding is the process of preparing testimony with your attorney. We learned how to answer questions put to us on direct examination by our attorneys and also how to handle questions under cross-examination by opposing counsel. With that, it was time to go to work.

U.S. Bankruptcy Judge Pamela Pepper joined Martin on the bench as the pair proceeded to hear four trials on the valuation matter. Immediately, the judges and attorneys went into character, adopting their usual courtroom demeanor.

Stipulations were made that we were indeed “expert witnesses.” We learned that being designated as an expert is not automatic. Such witnesses must pass a series of tests (e.g., *Daubert*, 509 U.S. 579, 597 (1993)) before they can be considered to be experts. Under the Federal Rules of Evidence, we could not offer testimony based on our knowledge, skill, or experience without first being deemed experts in the court's eyes.

This was one of the workshop's first take-aways: *Know how the court defines an “expert,” and be ready to defend your experience, if required.*

Next, the real fun began. The debtor expert witness went first with direct examination by their attorneys, followed by cross-examination by the opposing attorney, and ending with redirect (or “clean-up,” as the lawyers called it). The bank's expert witness went second and followed the same direct/cross-examination/redirect process.

The case involved lots of numbers, valuation approaches, and some not-so-standard industry practices by both sides, so it made for some interesting dilemmas for the expert witnesses and therefore some entertaining cross-examination. At the conclusion of testimony by each pair of witnesses, the

(Continued on page 2)



Frank Wojtowicz, CTP, (left) watches action in the courtroom with attorneys Daniel J. McGarry and Valerie Bailey-Rihn, while Randall Wright Patterson, CTP, looks on.

judges and attorneys provided feedback, and then the mentors left with their slightly humbled charges to discuss their techniques, presentation, and persuasion.

I found my heart racing as I consulted with my attorneys while awaiting my turn to testify. Once I took the witness stand, my attorneys did a great job of giving me some softball questions to help me calm down before going into the technical details of the valuation. Being cross-examined was tough, and I realized just how skillful the attorneys are. This led to a second take-away: *Don't try to out-think or outsmart the lawyer — just answer the questions truthfully.*

Other important lessons we learned included:

1. An expert's overriding goal is to persuade the decision maker (in most cases, the judge). Being persuasive as a witness is based on credibility, logic, and conveying the right amount of emotion.
2. The job of an expert witness is not to be an aggressor — that's his or her attorney's job. The expert's job

is to answer the questions asked by the attorney.

3. An expert — or any witness, for that matter — must listen carefully and answer only the questions asked. Witnesses should not volunteer information. For me, this was particularly important, as I love to add additional commentary to embellish an answer. This works fine at networking events but not in the courtroom.
4. An expert must educate trial participants as well as persuade them. Without sounding condescending, the expert must make sure that everyone understands the point he or she is trying to make. While technical jargon may sound impressive, it can't help persuade anyone if no one understands what the witness is talking about.
5. An expert witness must always, always be truthful. If the expert doesn't know the answer, he or she should say so. If an expert makes a mistake, he or she should correct it.

An expert must trust his or her lawyer. Remember, they don't have clean-up — redirect — for nothing!

All the CTPs who attended the workshop came away feeling that this was a very educational and unique experience. We again want to thank all the judges, attorneys, mentors, and educators who put so much effort into making this workshop a success. Doing a mock trial at a law firm or school is helpful, but the chance to sit in a real courtroom and be heard by real U.S. Bankruptcy judges is an experience that none of us will soon forget. And it's an experience we all will put to good use. •

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