The Reluctant Witness

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Accountants, due to their conservative nature and fear of being ineffective (or worse) as a courtroom witness, are often reluctant to involve themselves as expert witnesses in the dispute process, even when they are qualified by training and experience. This article discusses why such instincts are understandable but explains why such instincts should be overcome and the rewards for doing so. What can be done to deal with issues leading up to and including testimony, should the CPA decide to venture forth as an expert witness?

A practicing accountant or professor may be contacted by an attorney who values the wide range of experience and specialized knowledge accumulated over the years in public practice or teaching/researching. In most cases, the accountant/professor is busy with his or her "day job." Although reasonably substantial fees are often available if the assignment is taken, the accountant might be concerned that he or she does not have sufficient time to devote to the dispute or investigation. An experienced accountant should know that a weak expert report or testimony will subject him to a painful experience by the other side's attorney. Worse still, any mistakes or holes in his understanding of the facts or in the expert’s report will create an embarrassment that will result in a written record that will live on long past the trial.

Depending on the size of the matter, a middle course can be pursued that minimizes the risk of error while reducing the amount of time the expert needs to come up to speed, reaching a conclusion on the aspects of the case on which he will opine, and writing a report. Many mid-sized accounting firms have Litigation Support groups with reasonable billing rates and personnel who are ready and willing to assist the testifying expert in every aspect of his work from discovery through preparation of portions of the expert report. Since this kind of assistance is the day to day business of these Litigation Support groups, they often have excellent and

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experienced personnel who have been through the dispute process for years. They are also aware of the many pitfalls and can advise the expert accordingly.

After working for a number of years in both public and private accounting, I (Yasmine Misuraca) have worked for the past ten years in the litigation support field. I have had the pleasure of working with many eminent experts, including my co-author, Ed Weinstein for many of those years. I have been the "back office" for several other experts, some of whom were in the top tier of accounting experts. What I, and the other members of our Litigation Support group, bring to the table are organization, accounting expertise, research capabilities, back office staff, and generally accepted accounting principles (GAAP) and generally accepted auditing standards (GAAS) knowledge. Ed and I have worked together on some of the major cases of the last decade, and I like to think that I have supplied all that I've discussed below as well as course corrections to both him and the retaining attorneys when I thought they were wrong in terms of facts or interpretations. Our continued collegial association testifies to the effectiveness of the support we provide to the other experts with whom we work.

**Duplicitous Attorney**

Ed was a practitioner who was a partner with a major CPA firm. Ed's first experience as a witness affected his outlook throughout his professional career as a CPA, and ultimately his decision to become an expert witness. This experience occurred during his first year as an audit partner with a large accounting firm, when he was responsible for the audit of a clothing retailer. Through a consultation with another accounting firm, Ed realized that the financial statements of the client were incorrect after providing an unqualified opinion several weeks earlier. He immediately informed the appropriate partners and the United States Securities and Exchange Commission, and the firm withdrew its independent auditors’ report. However, the client brought suit against the firm, alleging that accounting firm should have discovered the error before issuance of the report, and that the firm was responsible for damages caused by late discovery of the error. Ed was deposed.

Conservative in nature, Ed was anxious about being deposed, as this was his first time giving testimony. Facing the unknown can be daunting. During his deposition, Ed was presented with a
small file of price adjustment forms, taken (or, so said the plaintiff attorney) at random, from a much larger pile of similar forms. He was asked to review these forms. In earlier testimony, Ed had stated that the vast majority of price adjustment forms were mark-up cancellations, with some mark-downs in the mix.

To his surprise, Ed quickly realized that the forms he was now looking at were all mark-downs. This fact was a complete contradiction to his previous testimony. Ed's answers to the next series of questions from plaintiff’s attorney were fuzzy and added to Ed’s distress. Ed's attorney, noticing that something was wrong, demanded that Ed be allowed to review the entire pile of forms. Upon doing so, Ed realized that he was being duped. The small file of documents originally presented to him for review by plaintiff’s attorney, had been selected to mislead him in testimony. Apparently, those documents had been culled from the larger universe by the attorney in order to impeach Ed's previous testimony. (It was later discovered that this duplicity by the attorney echoed an even greater deceit by the company's CEO.)

The basic “error” in accounting for the price change forms had been caused by the president of the retailer to deliberately inflate company profitability. This falsification of financial results had occurred because the president had instructed the company controller to incorrectly account for merchandise price changes as markup cancellations, which did not properly reflect lower of cost or market value.

Ed came out of this experience unblemished, as did his accounting firm. His preparation before testifying proved extremely vital to the success. He also discovered that testimony could be antagonistic and that opposing counsel had his own agenda, which could be perilous to the witness. Ed overcame his distress and remained calm and focused. These latter attributes served him well when he became the testifying partner in a litigation defense matter for his Big-4 firm, as well as when he began a second career many years later as a testifying expert accounting witness, after his retirement. He also realized the importance of having an intelligent, focused, well prepared and observant attorney at his side. In a second career he did not have the support of a large staff to support him, and he realized that he needed Litigation Support so he could be as effective as possible. It was then that Ed and I formed a team.
Attributes of an Expert Witness

Being an expert witness means being independent and objective, having an understanding of the facts of the case, having a firm knowledge of the subject matter, being able to think and react quickly, working closely with attorneys and, at times, being their teacher and challenging their assumptions. It also means ultimately being alone on the witness stand. An expert witness also must have good communication skills (oral and written), a willingness to reason with the other side’s point of view, and a capability to withstand pressure. Even if the expert’s professional knowledge is complete and his or her comprehension of the facts is thorough, the challenges of the environment are considerable, both during deposition and court testimony. The work is often done under time pressure. Also, there are times when the expert may disagree with her own client (counsel). In that respect, this situation is really no different from the auditor - client relationship. We are reminded of the adage: “If you can’t stand the heat, stay out of the kitchen.” So, then, why get involved?

Expert witnessing can be a rewarding and an intellectually stimulating activity. An expert witness is in many respects a problem solver for the client, even helping to solve problems which have not been considered by the client. Rewards include the knowledge that, if the expert has done his job well, he has helped the trier of fact (judge or jury) to understand complex issues (sometimes even opposing counsel), and reach an appropriate conclusions.

Litigation Support Role in More Detail

Most expert witnessing assignments dealing with GAAP and GAAS require that the witness be assisted by a competent litigation support assistant, or sometimes by a team of assistants. The legal discovery process often yields voluminous documents. These documents can consist of electronic documents, memos, letters, emails, accountants’ work papers, charts and graphs, and other material.

In addition to organizing documents obtained in discovery, Litigation Support also needs to have considerable skills in document management and organization. Documents and other case related materials are frequently received electronically. Thus, Litigation Support must have the necessary computer skills to extract and organize this voluminous information.
Since these documents are largely of an accounting nature, the team must include experienced CPAs. Sometimes the documents are disorganized. Litigation Support must read, maintain, and organize the information. This review and organization of materials received will help in enabling an expert to review the materials in an organized manner and to identify and find key documents later in the process. Invariably, the CPA expert will also have to review testimony transcripts of other witnesses. Litigation Support also will read the testimonies and prepare testimony summaries. These summaries are used by the expert in writing his or her report and during testimony preparation. The summaries also may be used by the attorney when taking deposition of others parties and preparing for trial.

An expert accounting witness must be well versed in both the accounting and auditing literature, and the expert will have to research these matters, or delegate a portion of that work to Litigation Support. Since accounting principles and auditing standards are constantly evolving, only the principles or guidance in effect at the time of the contested issue should be referenced. So, prior rules and standards must be understood. It is helpful if both the expert and Litigation Support have significant practice experience. This is essential for certain cases.

Both the expert witness and Litigation Support may assist their client in preparing materials for use in questioning the opposing side’s expert, both in deposition and at trial, especially when dealing with GAAP or GAAS issues. This help can be useful to counsel.

Litigation Support also plays an important role in protecting the expert. We have both known of instances in which experts crossed the line between objectivity and advocacy. This over-identification with the client’s position is dangerous, even if the client’s position is correct. The expert must always retain an objective attitude. Litigation Support needs to monitor the development of the expert’s position (as set forth in the expert’s report) and be alert to circumstances in which the expert may stray beyond the facts or develop internal inconsistencies. Thus, in order to be effective, Litigation Support must be confident and assertive enough to set forth a position at odds with the expert being supported. The authors have, on several occasions,
disagreed as to how strong an opinion could be formulated (or whether an opinion could be given at all) based on the available evidence.

**Working Together**

Although there may be times when the expert and Litigation Support may disagree, they always work together as a team. But the expert has the last word. After all, it is his or her reputation on the line. There are different models as to how the work is divided. Some experts like to write reports from scratch and read all case documents. Other experts have Litigation Support draft sections of the report. In either event, both the expert and Litigation Support edit report drafts as they are prepared. In addition, they work together in preparing for testimony to be given at both deposition and trial. When done well, this effort is truly a collaborative.

**Guiding the Attorney**

The attorney may retain both the testifying expert and support team, albeit with separate engagement letters. This separation ensures that Litigation Support is objective with respect to the expert. Before being engaged, the expert is typically presented with the attorney’s point of view regarding the matter being litigated. This process may be done orally, or, more likely, the expert is given certain materials to review and then questioned by counsel.

At this initial stage the expert must be comfortable that the position being advocated by counsel is one with which the expert agrees. While an accounting expert may choose to take a case that he or she knows to be weak, this acceptance can cause problems because of the differing roles and ethics of the accounting and legal professions. The best the accountant can do in a case with major weaknesses is to clarify the depth of the problem from an accounting perspective for the attorney.

Unless the attorney can repair the weakness (for example, by providing additional documentation or evidence), one should acknowledge the weakness in the case, provide that information to the attorney, and walk away. Ultimately, the weakness will show up and no one’s interest will be served by false advocacy, which is both unethical and bad business.
We have been involved in disputes where we accepted our attorney's initial description of the issues, but after assembling and reviewing the evidence we found we could not agree with our attorney's interpretation and argument. We informed the attorney and defended our position based upon the evidence we had reviewed. We then learned that there also was disagreement within the attorney team retaining us. In order to diffuse the situation, Ed agreed to write his report going to the limit of what the evidence permitted him to opine about. He then challenged the attorneys to find additional evidence in certain specific areas. We agreed that if such evidence could be obtained, the report’s conclusions would be extended. When no further evidence supporting the attorney's position was found, they settled case.

In other circumstances, we have found alternative courses of action that enabled our client to proceed with the case using their strongest arguments and discarding peripheral ones. It is always advisable when considering whether to take on an assignment that the potential expert inform the retaining attorney that the expert opinion will be based on only the facts and that an accountant's job is to bring light and objectivity to the situation.

**Testimony**

In preparation for testimony, sufficient time must be budgeted to prepare the expert for testimony. Litigation Support works with counsel and the expert in this preparation. Litigation Support will "grill" the expert in all relevant aspects of the case anticipating questions likely to be asked by opposing counsel. Litigation Support also may be tasked with developing exhibits to be used by the expert at trial.

Although we could direct an entire article to our recommendations with respect to best practices for testifying at trial, here are some suggestions drawn from our experiences that we have found helpful:

- Expert witnesses should keep answers as concise and simple as possible. Remember, the purpose of the expert’s report and testimony is for the use and benefit of the judge and/or jury. Communication should be focused accordingly. Expert witnesses may find it useful to use analogies to explain accounting concepts. For example, Ed likes to use
musical notes to illustrate that if incorrect notes are played, disharmony results. Similarly, if different accounting principles or numbers are used in financial statements, a different financial picture is portrayed. Consideration should be given to using analogies taken from everyday experiences to which non-accountants can relate, such as sports rules to explain GAAP rules. Whatever works in helping lay people to understand the ins and outs of accounting is the reason the expert was retained.

- The expert should expect examining counsel to attempt to impeach his or her testimony. One tactic is to use the expert's own words or prior opinions against his testimony in the current matter. The expert should not be surprised by this tactic and can counter the lawyer by stating that the prior writing was fact specific and not relevant to the current matter. Whenever the expert publishes anything for trade journals or in any medium that becomes part of the public record, he should be aware that his opinions can be used against him in a future proceeding.

- Another effective tactic used by opposing counsel is to be extremely solicitous of the witness at deposition and then attack him ferociously at trial. Alternatively, at trial through a series of “softball” questions and a generally friendly demeanor, the opposing counsel creates a false sense of security in the testifying witness setting up the expert for more difficult, challenging or even harassing questions.

- Opposing counsel may attempt to harass or unnerve the expert by asking questions about matters not relevant to the dispute. Although, a judge will usually sustain an objection, this approach is done for its effect on both the witness and jury. Our advice is to look for an opportunity to refute the insinuation offered by the offending question.

- Some attorneys use hypothetical questions or examples in an attempt to confuse both the expert and the jury members. The hypothetical questions can become increasingly complicated and vague in such a way as to appear as factual evidence. In answering the sequence of hypothetical questions, an expert should repeatedly point out that her answers are based on hypothetical and not real facts. At an appropriate point the expert
can point out that the line of questioning regarding the hypothetical example has strayed too far from the real facts of the case to have any usefulness.

- Common in cases involving corporate executives, who have allegedly created erroneous financial statements, is a defense of: “I relied upon my auditors.” A CPA expert must know how to deal with this situation before becoming a trial witness. A useful approach is to anticipate this defense, review the auditors’ work papers and other data, and proactively address (in the expert report) the role of auditors and management.

**Conclusion**

Being an expert witness can be challenging and stimulating. Properly prepared, accounting and auditing professionals can be much more confident about taking on the responsibility of an expert witness assignment, assuming time is spent to really understand the facts of the dispute. Just remember these words of Shakespeare: “To thine own self be true.” Consider those words in contemplating whether to accept an expert witness assignment. A CPA contemplating accepting an expert witness assignment must evaluate his or her own temperament and knowledge of the subject matter and determine whether she is the right person for the challenge. The prospective expert witness should not overreach and accept an engagement which exceeds professional or emotional capabilities. As long as this advice is followed, an expert witness assignment is rewarding and interesting work and beneficial to both the legal and economic systems.