

Accountant Takes The Stand, Steps For The Expert Witness

By Albert S. Frank, LL.B.

I see your future...

The mists of time are parting and I see... you, in a courtroom... under oath. You might never have expected it but there you are – a witness.

Financial professionals, particularly accountants, have become common as expert witnesses. They testify about the value of businesses, complex damages calculations, and many other issues.

Even if you never testify as an expert, you still might have to be a witness. Suppose you discover a concealed fraud. The victim would need your testimony about what you learned and how you learned it.

If there is a court in your future – which is certainly possible – the following pointers can help you. Welcome to an exotic world where the rules are strange, but ultimately logical.

One: Don't be Coy

Lawyer: Based on your review of the financial statements and other documentation, have you formed an expert opinion about Mr. Y's conduct?

Witness: Yes, I have.

Lawyer: What is your opinion?

Witness: Well, it's all set out in my report.

You have something to say and you should say it. Even if you wrote a report, your report cannot testify for you.

Nor is it the job of the direct examiner, whose witness you are, to coax you to say the things you have come to say.

In a good direct examination the lawyer asks fairly general questions and then it is up to you to give real answers. The lawyer should **NOT** make exact statements, leaving you merely to agree.

So the lawyer will not say "Is it your opinion that Mr. Y misappropriated funds?" That would be a "leading question," because the question itself suggests the answer to you. The question leads you to the answer.

Leading questions in a direct examination are generally improper, so the lawyer usually cannot ask them. Another problem is that the answers would be much less persuasive than if you had come up with the same information in response to general questions. You, not the lawyer, are supposed to be the witness.

Two: Do Your Homework

Assuming you are honest in your testimony, the main way you could get into trouble would be a lack of preparation.

Do not assume that because you are a knowledgeable professional who has thoughtfully considered the whole matter you are prepared to testify. You are not.

To do your homework, meet with the lawyer who wants you to testify. This is not just to review any expert reports but also to discuss the competing theories in

the case, the types of questions you should expect from the various lawyers, problem areas to be aware of, and so on.

The lawyer should arrange one or more long meetings to cover such matters. If not, you should.

Three: Translate to Everyday Language

Testimony that is not understood is not persuasive.

Lawyer: In your expert opinion, what is the shape of the Earth?

Witness: It's an oblate spheroid.

Lawyer: Umhn... so is it flat or round?

Witness: Neither. I've already told you, it's an oblate spheroid.

The above witness, though technically accurate, leaves the listener uninformed and unimpressed. At best, such a witness is irritating. At worst, the witness seems deliberately evasive.

As part of your homework, you and the lawyer should translate your knowledge

into everyday language, as has been done for the following testimony.

Lawyer: In your expert opinion, what is the shape of the Earth?

Witness: It's round, not flat. But it's not a perfect ball shape: it's flattened a bit at the poles, like a basketball that's lost some air. Experts call that shape an "oblate spheroid."

Four: Answer the Question Asked

Especially when a witness is being cross-examined, there is a strong temptation not to answer the precise question being asked, but instead to answer what the question is implying or leading to. This makes the witness look bad.

One classic cross-examination trick is based on the tendency of witnesses to answer what they think is being implied.

Cross-Examiner: You met with the plaintiff's lawyers and discussed your testimony, didn't you?

Witness: (feeling accused of agreeing to falsify testimony) No! No!

Of course, everyone in the courtroom knows that the witness must have met and discussed the testimony. The cross-examiner will argue that the witness lied about that and so cannot be trusted.

The better way is as follows.

Cross-Examiner: You met with the plaintiff's lawyers and discussed your testimony, didn't you?

Witness: Yes, of course.

Cross-Examiner: (insinuating tone of voice) What did they tell you to say?

Witness: They said I should just tell the truth.

Five: Don't Panic

Contrary to the courtroom dramas, you are unlikely to be yelled at, insulted, or otherwise abused. The judge will almost certainly be pleasant to you. Also, the judge is likely to protect you if a cross-examiner gets too nasty.

I'll see you in court.

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The above article originally appeared in the March, 2001 issue of ***The Bottom Line***.

Research has NOT been done to see if this article is still good law. Also, this is general information that might not apply to your particular situation.

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