Presenters:
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Presentation & Notes:
Becoming an Expert Witness

“Forensic” – for courtroom use

What I learned in 30 years as an expert witness
- Managing Director of CBIZ MHM, in SD (27 years)
- Audit partner, representing people in tax audits (public accounting for 40 years)
- Teaches at USD, on Executive Committee (SDSU) for the Accounting Department
- Masters in accounting at SDSU

Forensic accountants typically work in the litigation area.
It is a continuous and unforgiving environment.
- Experts have a high mortality rate (closer to 90%)
- 80 out of 200 have served as an expert witness
- Only 3 or 4 of those will be 2nd timers
  o Such a bad experience, no one wants to continue on

How to survive as an expert witness
- Must tell the truth – be an expert, not an advocate
  o Biggest mistake: they become an advocate to the client

Tell the truth in its purist forms
- Most effective expert testimony is factual supported by logic, not emotion

Don’t overstate your credentials (nobody cares)
- Juries are not impressed by credentials
- Separating yourself from the jury
- Common sense – looking to form a bond & present information in a logical manner
  o Spent time drinking as an undergrad (commonality) and then in MBA program started getting good grades – 2nd in class (professional)
  o Will yield a much better result
- Don’t exaggerate and you’ll be okay
  o Case against IRS: didn’t know the expert – checked him out – called State Board of Accountancy – wasn’t a CPA, lost his license in May (no continuing education) – not entitled to be called a CPA – tried to overstate his credentials – paid for it
An ounce of common sense is worth a ton of credentials
Contact the State Board of Accountancy or other appropriate agency to confirm the expert’s credentials to ensure they are not overstating them (not farfetched)

Get all the facts
Look at both sides of the situation
Never let attorneys feed you selective information that screens out info that may be adverse to your client (should be the same facts)
  o Be sure you get all the facts that are pertinent to your testimony
  o NEVER write notes in the file – will look for the one “error” or fault or out of context piece (“danger in using audit guys”)
  o Request that Counsel Bates Stamp and index all documents before giving them to you – use it as a reference (important to reference info location) – must be sustainable for later years

Keep track of every little thing
Bring out the weak points in your testimony in direct exam
  Discussing the weakness in your case gives you a chance to explain their significance and put them into perspective
  It is always better to steal the other side’s thunder in the context of your own testimony

Get the dirt out in your direct testimony; it may hurt you in your own argument
Never personally attack an opposition expert
Remember it is the expert’s opinion that you have to attack – try to discredit the guys personality (presidential debate)
When personally attacking the opposition, you’re more likely to create sympathy for him or her and animosity toward you and your client than to help your case
  o If you win a case, the opposition will want you as their guy
  o “If you’re a you-know-what, then they won’t want you”

Cheap shots are okay, but keep them out of your visual testimony
  85% of all people learn visually
    o Should have a board or a display – blow up charts and teach the charts to jury
  Visual displays are very, very important
    o Ex. mushrooms growing out of carpet (very important) – should always have a picture when you testify
Dress appropriately
- Blue suit, white shirt, red white & blue tie – first impressions are very, very important
- Will not be seen as an authority expert (dress appropriately, nothing low cut, pink, etc.)
  - Don’t want to appear overly feminine, want to appear business like
- Never lost when fighting a guy with a brown suit

Never take notes!
- They will only be seen in trial if they are ambiguous – can be used against you
- May need to reference source data (4-5 years) after

Be selective in the cases you take
- If you don’t believe in their situation (opposition, before) – lets them know that they should settle because it’s a “bad” case
- Your reputation is the most important asset; don’t accept a litigation you don’t believe in
- Don’t like the morality of it – some people sue all the time, for every little thing

Case law involving expert testimony
- Frye vs. US – convicted of murder, psychological test, can’t tell if it’s true or not
  - If you’re talking about income, must talk about GAAP – generally accepted in the community – if you don’t, could get thrown out
- Daubert v. Merrell Dow
  - Didn’t meet the applicable standards (general acceptance standard)
  - Four factors: testing, peer review, error rates, & acceptability in the relevant scientific community (Daubert factors)
  - Daubert challenge – must meet the Daubert challenge – must be accepted in the relevant community and must have been peer reviewed
  - Never want to say that it hasn’t been peer reviewed and been accepted by the relevant community
  - Never, ever want to use the “s word” – speculation
- Kumho Tire Co. v. Carmichael
  - Experience testimony – car blew up, tires were charred – no one could have determined the cause – court made a motion to exclude this fellow – failed to satisfy the methodology – initially doubted his methodology, felt that he could not determine it because there was not sufficient evidence
    - Non-scientific expert testimony, not just scientific
- Mattco Forge c. Arthur young
  - Gave reconstructed profitability data – not based on actual data
  - Arthur young kicked out, Matto forge lost, turned around and sued Arthur Young
- Two types of lawsuits (verified, unverified)
Verified – true under perjury
Unverified complaint – worst crimes and you can’t sue because of unverified complaint protected against privilege – very little likelihood that its true (unverified) – make litigation so difficult and arduous that people don’t want to continue (no truth) – used to make it undesirable so they settle
If you share notes – completely discoverable by the other side (expert witness given the documents)

SOX – be fined or imprisoned for up to 20 years for altering, destroying, concealing, or falsifying any record, with the intent to impair the use of the record in a governmental investigation or preceding

- Grand jury subpoena (TORF)
- It is important to have attorneys hire consultants.
  - If the company had hired, the report could have been very damaging for the company

Trigon Insurance Company vs. US
- Rough drafts of reports – must keep rough drafts if not admissible to other side – experts were terrified – no one wants to keep rough drafts

Federal rules of civil procedure
- Disclosure of expert testimony
- Rule 26 B. witness must provide a written report – must state your qualifications – should be in your report
- Rule 26 C
  - Deposition of an expert who may testify – if new in the field, want you to look unprofessional if on camera – if you’re old, they want you out – don’t want to try to rattle you unsuccessfully (seasoned veteran)
- Protection for communications between a party’s attorney and expert witnesses
- Rules 26b3a and B – 3 things expert must disclose – more strict

Characteristics of a good forensic expert
- The opposing lawyer’s job is to make a hamburger out of your testimony – want you to blurt something out to ruin your testimony
  - Want to discredit you

New classes for forensic accounting
- Embezzled 80k from firm – bank gave her cash to pay back someone she had embezzled from – contributory negligence
  - Collected $160K – embezzlement gain
Meeting Minutes
CBIZ
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- A little paranoia can be a healthy thing – try to think what they’re going to attack you on – get your opinions – but find the weak points in your opinions and be ready to defend them
- The forensic accounting business is not for everybody – must be thick skinned

Snarling at counsel is not usually a good idea – be calm
- “The nastier they get, the calmer I become”
- Gets them so upset – smiling at the opposition
- Be dignified!
  - Don’t strike back, don’t give them anything they can use in trial because you blurted something out

Closing Remarks
- In order to be successful, you must be alert – get your sleep
- Do your homework! – must be thoroughly & completely prepared for anything
- Don’t be timid – state your facts
- Don’t be combative (don’t get nasty back – cost Dana a lot of business)

Very unforgiving area – no 2nd place in court – win or lose – all it takes in one misstatement, best expert witnesses are paranoid schizophrenics – ready to be attacked on every account – doesn’t hurt them – expensive game and very unforgiving

Do not want to go into litigation – like war – should be the last resort (lawyers win the most money – some go to attorney’s fees, taxes, expert fees – not deductible) – those in court have their intelligence insulted and questioned

Question & Answer:
Q: How did your experience in audit help you going into forensic accounting?
A: Invaluable – never recommend going right into forensic accounting – should have some body of knowledge that you’re an expert about – need credibility – could help to have a law degree (or at least take a course in evidence) – judges want to shorten trial (& exclude you, if possible)
A: Having an audit and tax background makes you strong, important to have a tax background and an audit background

Q: Expert on accounting knowledge, as career has progressed, how important has it become?
A: Very important, interesting case – national audit defense network – basically was a one-time legitimate tax firm – mafia group took over – had a front guy to hide identity – will prepare tax return 5 years in advance and get paid now – must prove insolvency (proved solvent) – certified audit use – Basney looked at revenue recognition – prepaid fees 5 years in advance for tax returns and audits
(revenue recognition – only recognized as you use the fees) – didn’t set up a deferred liability – the front guy was out in Vegas (dead son with bullet in head in a black Mercedes-Benz in the desert – car was leased)