How to Be an Effective Expert Witness: A Tutorial

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On February 2, 2012, Robert Reilly presented a webinar on “How to Be an Effective Expert Witness” for the American Institute of Certified Public Accountants (AICPA). This webinar was the 17th and final presentation in the AICPA’s Business Valuation Webinar series.

At the conclusion of the webinar, several of the attendees submitted written questions for follow-up discussion. With minor modification and editing, this discussion presents these webinar questions—and the associated answers—related to “how to be an effective expert witness.”

1. Could you discuss the difference between a testifying expert and a consulting expert?

A testifying expert has to be designated as such by the litigant party retaining the CPA. As the name implies, the testifying expert is expected to provide expert witness testimony in the legal proceeding. A testifying expert is subject to the discovery procedures of the relevant jurisdiction, including being subject to deposition.

A consulting expert serves the research, investigation, and analysis (e.g., general consulting) needs of the litigation party retaining the CPA. However, the consulting expert CPA is not designated as an expert and will not provide expert witness testimony in the legal proceeding. The consulting expert is not subject to the discovery procedures of the relevant venue. For example, the consulting expert will not be deposed in the legal proceeding.

2. Should an engagement to critique an opposing valuation analyst’s report be a separate client engagement from the CPA’s business valuation engagement? Can this critique engagement be performed by the CPA as a consulting expert separate from the business valuation opinion prepared by the CPA as a testifying expert?

First, it is not required (either by legal authority or by AICPA professional standards) that (a) the analyst’s valuation and (b) the analyst’s review of an opposing expert’s valuation be two separate engagements. However, it is not a bad idea for the CPA to have two separate engagement letters with the client regarding these two professional services. That way, it may be easier for the CPA to distinguish the assignments as to (a) professional fees and expenses, (b) engagement work papers, and (c) etc.

Second, in the same litigation engagement, a CPA cannot be (a) a testifying expert for one service (e.g., to perform an independent valuation) and (b) a consulting expert for another service (e.g., a review of the opposing analyst’s valuation report). Once the CPA is designated as a testifying expert in the pending matter, he or she can be asked at deposition or at trial: “did you review the opposing expert’s valuation report?” and “tell me everything that you agree with or disagree with regarding that opposing expert’s valuation report.”
Third, it is not uncommon for two different CPAs within the same firm to have two different roles in the litigation engagement. In other words, CPA Alpha may be designated as the testifying expert, and CPA Beta could be the consulting expert to the client’s legal counsel. As long as these two CPAs maintain a so-called Chinese Wall within their firm, CPA opposing counsel cannot normally examine the testifying expert CPA Alpha about CPA Beta’s consulting expert work.

3. If the engagement is conducted directly with the litigant client, isn’t it the practice of law to advise the client as to “realistic expectations” regarding a possible litigation outcome?

First, a CPA (who is not also an attorney) should never engage in the practice of law. And, a CPA should not provide any client with advice that may be construed as legal advice.

Second, the client’s legal counsel (and not the CPA) should advise the client as to the probability of success in a litigation matter. The CPA should redirect any litigant client to ask that client’s legal counsel about “realistic expectations” regarding a litigation (or settlement, arbitration, etc.) potential outcome.

Third, after some preliminary analysis, a CPA can advise a litigant client—or the client’s legal counsel—about the CPA’s possible estimate of a business value, a royalty rate, an economic damages, etc. However, the CPA is not qualified to inform a litigant client with regard to the risks (and the expected outcomes) of litigation.

4. Can you please touch on the conflicts check process?

Prior to accepting a litigation-related engagement, the CPA should check for possible conflicts of interest. The most obvious conflict of interest is if the CPA is currently working for an adverse party in the subject litigation. A secondary conflict of interest is if the CPA recently (but not currently) worked for an adverse party in the subject litigation.

The CPA should disclose all actual or potential conflicts of interest to the client’s legal counsel. If the CPA can remain independent and objective, then the CPA does not have a conflict. However, the client’s legal counsel may not want to retain the CPA as a testifying expert if there is even the slightest appearance of a conflict.

5. If a CPA relies on the deposition of a fact witness, is it acceptable to also interview the subject individual to obtain clarification on the responses in his or her deposition?

This question implies that the CPA has access to the subject fact witness outside of the discovery process (i.e., outside of a deposition). For example, let’s assume that the subject fact witness is an employee of the litigant client. In such a case, the CPA can certainly interview a friendly fact witness before or after that witness’s deposition.

However, if the CPA relies on information obtained in an interview, then the entire contents of that interview may be subject to discovery. It is likely that the opposing counsel will ask the CPA about every statement that the fact witness made to clarify, explain, or expand on the witness’s sworn deposition testimony.

6. Is a CPA required to retain all e-mail correspondence with the attorney and with others, including internal e-mails between members of the engagement team?

CPAs should have, and should adhere to, a firm policy regarding the retention of e-mails (and other electronic communication). Depending on the contents of the e-mails, e-mails to or from legal counsel may (or may not) be protected by the attorney work product rule. However, e-mails to or from other (nonattorney) parties will not be considered privileged or confidential.

If the firm’s policy is to retain all e-mail correspondence (both internal and external) in the permanent work paper file, then the CPA should retain all e-mails related to the subject litigation matter.

However, if the firm’s policy is to not retain all e-mail correspondence (both internal and external) in the permanent work paper file, then the CPA should not retain the e-mails related to the specific litigation matter.

If the CPA does retain either internal or external e-mail correspondence in the
engagement work paper file, then that electronic correspondence will likely be the subject of discovery and cross examination.

7. If a CPA relies on a document that has already been filed with the court (e.g., an accounting for a power of attorney), does the CPA also need to include that document in the expert report?

Copies of documents that have already been filed with a court—or that have been otherwise produced in the litigation—do not need to be physically included in the expert report. Such documents can be referred to either by (a) name (and filing date) or (b) Bates number.

However, it may be useful for the CPA as the testifying expert witness to have all of the expert report source documents assembled (and readily available) as one expert report appendix.

The inclusion of actual copies of all source documents in an expert report appendix allows the CPA expert to quickly and easily retrieve that source document—whether at the deposition or at the trial. Also, the inclusion of the actual source documents in the CPA's expert report may make it more convenient for the judicial finder of fact to use the expert report (for example, in deliberations outside of the courtroom setting).

8. For engagements with voluminous files (e.g., thousands of pages), is it appropriate to produce the work paper file electronically (rather than bring boxes and boxes of work papers to the deposition)?

Unless there is some jurisdiction-specific prohibition, it is very common for an expert to produce work paper files in electronic format. The client’s legal counsel will have to inform the CPA of any jurisdiction-specific exception.

Of course, the expert’s electronic files may be produced in advance of the deposition. Or the client’s counsel may inform the opposing counsel that the expert’s work paper files will be produced electronically at the deposition. That way, the opposing counsel will be prepared to bring a laptop computer (and perhaps a printer) to the deposition.

9. Does the recommendation to include “sufficient exhibits to recreate your analyses” imply that the CPA would attach all relevant source documents? (Let’s assume hundreds or thousands of pages of bank statements, check copies, etc., in a forensic accounting engagement.)

In a typical business valuation litigation matter, the CPA expert is best served—and the finder of fact is best served—if all source documents are provided in order to allow the report reader to recreate the valuation analyses and the value conclusions. These source documents should allow the CPA expert to explain (during cross-examination) the important components of the subject valuation analysis.

In the typical fraud investigation, the CPA expert’s opinion often relates to a finite number of documents (e.g., cancelled checks, paid invoices, credit card statements, etc.). In such a forensic analysis, the expert report reader (including the finder of fact) is more interested in (say) the few dozen documents that demonstrate fraud than in the (say) few thousand documents that do not demonstrate fraud. Accordingly, in fraud reports, the CPA expert may decide to only include the few dozen “smoking gun” documents in the expert report appendix.

10. What is the impact on the CPA expert witness if the court excludes the testimony of a previous fact or other expert witness? For example, what happens if the CPA relies on the report or testimony of that previous fact or expert witness?

During trial testimony, the CPA expert witness will often rely (a) on the prior testimony of fact witnesses or (b) on the evidentiary inclusion of certain predicate documents. If the court does not accept the testimony of the fact witnesses or of a foundational expert witness, that may directly affect the CPA’s expert testimony and conclusion. Likewise, if foundational documents (e.g., business plans, offering memoranda, etc.) are not accepted into evidence by the court, that may directly affect the CPA’s expert testimony and conclusion.

It is the responsibility of the client’s legal counsel to “set the stage” for the CPA’s testimony. This “stage” may include prior
fact witness testimony and/or documentary evidence. Through no fault of his/her own, the CPA’s testimony may not be accepted if the client’s legal counsel cannot get the evidentiary foundation into the trial record. The CPA’s testimony regarding business value, economic damages, accounting fraud, etc., is often the last step in a staircase that is based on other evidence or testimony.

11. **What kind of noncomputer forensics could/would be subject to a Daubert challenge?**

Any expert testimony may be subject to a Daubert challenge. A Daubert challenge could include expert testimony regarding: business valuation, intangible asset valuation, lost profits, and other measures of economic damages, intercompany transfer price, fraud discovered/quantified by use of a computer, and fraud discovered/quantified not by use of a computer (e.g., by manual inspection of cancelled checks and paid invoices).

12. **Should a CPA maintain/retain paperless files, paper files, or both?**

The CPA’s engagement work papers should include all of the documents that he or she relied on. And, the work paper file documents should be in a retrievable form. If these documents are paper documents, then they can be filed as such. If these documents are in electronic form, then they can be filed as such. The electronic documents can be stored on a disk, a thumb drive, or on any other retrievable format.

13. **How should CPA experts educate legal counsel?**

First, all CPAs can educate the legal counsel they work with regarding to the AICPA professional standards and other organization professional standards that the CPA analysts work under.

Second, all CPAs can educate the legal counsel they work with regarding to the technical requirements and the professional standards related to the AICPA specialized credentials—that is, the accredited in business valuation (ABV) and the certified in financial forensic (CFF) credentials.

Third, all CPAs should attempt to educate legal counsel with regard to the generally accepted approaches, methods, and procedures used in business valuation, economic damages, transfer price, etc. analyses. If the legal counsel does not understand the CPA’s analysis, then he or she will be less effective both (1) in examining the CPA and (2) in cross-examining the opposing expert witness. Also, one of the most important phases of expert testimony is the redirect examination. The legal counsel who does not fundamentally understand the CPA’s analysis cannot conduct an effective redirect examination of the CPA expert witness.

14. **If there is a successful Daubert motion against the CPA, is the client given time to find another expert?**

If the judge disqualifies an expert witness before the trial starts, then the client may or may not be able to retain another expert. The answer to that question depends on the subject jurisdiction. Certainly, the opposing counsel will oppose the disclosure of a new expert witness if that occurs after the litigation discovery cut-off. Practically, it is unlikely that there will be enough time in the trial schedule to allow for the retention of a “fall back” or replacement expert witness.

If the judge disqualifies an expert witness at the trial, then the trial continues. In that case, the client goes forth without the benefit of the expert witness testimony. And, the client’s legal counsel does the best job he or she can do to cross-examine the opposing expert witness. This is because the opposing expert’s testimony may be the only expert testimony included in the trial record.

These questions and answers represent a follow-up to Robert Reilly’s AICPA Webinar presentation on “How to Be an Effective Expert Witness.” The editors of Insights are pleased to continue this discourse on expert witness best practices. If our readers have any additional questions, please send them to Insights editor Charlene Blalock at cmblalock@willamette.com.

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