

# Using Expert Witnesses in Trying Bankruptcy Cases

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## Agenda

- Initial Discussion – the Why, When and How
- What Makes a Good Expert
- Care & Feeding of Lawyers and Experts
- Expert Testimony
- Court Perspectives

## The Why, When and How

- Whether you should hire an expert witness?
- When should you hire an expert witness?
- Retaining an expert witness



## When Should You Hire an Expert?

- Forensic and Investigative
- Industry Expertise
- Valuations
  - Relief from Automatic Stay
  - Lack of Adequate Protection
  - Real Estate Value
  - Enterprise Value
- Adversary Proceedings
  - Preferences
  - Fraudulent Transfers
- Solvency
- Plan Feasibility and Confirmation Issues
- Industry Expertise

## Caring and Feeding of Lawyers and Experts

- Under Rule 26, an Expert is a Person who can assist the Court in understanding complex issues.
- True difference between an Expert and a Fact Witness.

**CAN TESTIFY  
TO  
AN OPINION**



## Caring and Feeding of Lawyers and Experts

- Give the Expert enough information to determine whether there are any potential conflicts.
- Make certain that any potential conflicts are discussed. What may not be a conflict from the expert viewpoint, may be one from your clients viewpoint.

## Caring and Feeding of Lawyers and Experts

- Engaging the Expert
  - Yes – You do want an engagement letter
    - Remember, the engagement is fluent and may require changes in the document.
  - Budgets are okay
    - Remember, they are budgets and they will change with the engagement.
  - Make certain you are both on the same page
  - Have a true meeting of the minds

## Caring and Feeding of Lawyers and Experts

- Who's in charge
  - The attorney is always the **BOSS**
    - You must be in charge of the overall engagement.
    - You set the deadlines, etc.
    - You must be involved with the discussions between the client and the expert.
    - You determine how you are going to use the experts work product.



## Caring and Feeding of Lawyers and Experts

- You're not in charge of -
  - The Expert's ultimate opinion
    - You cannot control the opinion!
  - The scope of information that the Expert will rely upon
    - Unless you have some very good reason – you cannot limit the information that the Expert will review for the purposes of coming to his opinion.

## Caring and Feeding of Lawyers and Experts

- Communicate, Communicate, Communicate
  - Stay in touch with your expert.
  - Make sure that you continue to communicate changes in the process.
  - It's okay to ask how the engagement is going.
  - On larger engagements, have milestones that require meetings between the client, the attorney and the expert.
  - Keep the client informed of what is happening.



## Caring and Feeding of Lawyers and Experts



- E-Mails, Faxes, Etc.
  - **RULE** – NEVER PUT ANYTHING IN WRITING THAT YOU DO NOT WANT READ IN THE COURTROOM!
    - Assume that everything that your expert looks at is discoverable.
    - Be careful about notes taken.
    - Remember Client Privilege – usually does not extend to the Expert.
    - Make certain that your expert understands this concept.

## Caring and Feeding of Lawyers and Experts

- Reports
  - Early in the process, discuss the type of reports that you will need for this matter.
  - I suggest full written reports, usually cheaper in the long run
    - “This case will settle” so I don’t need a full report. - When the case does not settle, it is more costly to now recreate the full report that you will need for the courtroom.
    - My view – The complete report assists in settlement.



## Caring and Feeding of Lawyers and Experts

- Drafts????
  - How should you handle “drafts” of reports?
    - Draft reports are okay, if handled properly.
    - Your and your clients input should consist only of factual and clerical information.
    - Do not try to change the “opinion” of the report to suit your purposes. The expert must believe in the opinion, or it will not survive.
    - Draft retention.



## Caring and Feeding of Lawyers and Experts

- Preparation
  - From the beginning of the engagement, you must make yourself available to help prepare the Expert.
    - Continuing Discovery
    - Depositions
    - Additional Filings
    - Answering Questions



## Caring and Feeding of Lawyers and Experts

- ...and more preparation
  - Be prepared to set aside significant preparation time for each of the following
    - Draft Reports
    - Prior to Deposition of Your Expert
    - Prior to Deposition of Opposing Expert
    - Prior to Trial

## What Makes a Good Expert? (High Level)

- Credibility (Trusted/Reliable)
- Communication (Teacher)
- Persuasiveness (Convincing)



VS.



## What Makes a Good Expert?

- What's the Problem?
- Opposing Counsel, Client, Friend
  - “A List”: Good Facts
  - “B List”: Bad Facts
    - Go Out On a Limb to
      - Even more aggressive positions
- What Experts Claim v. How They Practice
- “B List” In Practice
  - Ubiquitous
  - High Demand; Profitable
- Culture

## What Makes a Good Expert?

- Guidelines for Experts
  - Sources
    - Codes of Conduct (*e.g.*, independence, integrity, competence)
    - Rules of Evidence (*e.g.*, Rule 702)
    - Rules of Civil Procedure (*e.g.* Rule 26(a)(2), ...Expert Testimony)
    - Cases (*e.g.*, Daubert & Kumho)
  - Expert's Ultimate Objective is to “...help the trier of fact...” (FRE Rule 702(a))
  - Schulman Hypothesis: Intellectually Honest Analysis



## What Makes a Good Expert?

- Oral vs. Visual Presentations

- Oral
- Visual (Demonstrative Exhibits)
  - Timelines
  - Flowcharts
  - Bullet Lists (like this slide)
  - Quantitative Data (e.g. Solvency Analysis)
    - Spreadsheets
    - Tables
    - Graphs
      - » Poster Boards
      - » Electronic Presentation



## What Makes a Good Expert?

<u>After 3 Hours</u>		<u>After 3 Days</u>	
• Auditory	70%	• Auditory	10%
• Visual Only	72%	• Visual Only	20%
• Visual & Auditory	85%	• Visual & Auditory	65%

## What Makes a Good Expert?

What Business Are Expert In?



Analysis?  
Communication?  
Presentation?



## What Makes a Good Expert?

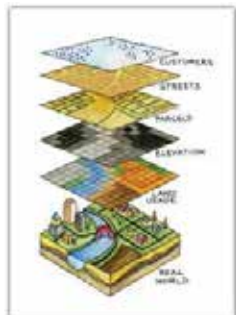
- Over-Arching Objectives of Demonstrative Exhibits
  - Communicate
    - Intuitive
    - Visceral
  - Make interesting what is often tedious
  - Synthesize diverging views
    - Overlays
    - Reverse engineer opposing expert's work

## What Makes a Good Expert?

- Suggestions for Demonstrative Exhibits
  - Recent Case Study (Solvency Analysis)
    - Kinkos
    - One exhibit split between two poster boards
    - Other exhibits distorted text (resizing - aspect ratios)
    - Poor quality
    - Type too small
    - Awkward presentation
  - Use printer that is equipped to prepare demonstrative exhibits suitable for trial
  - Graphs (cont.)

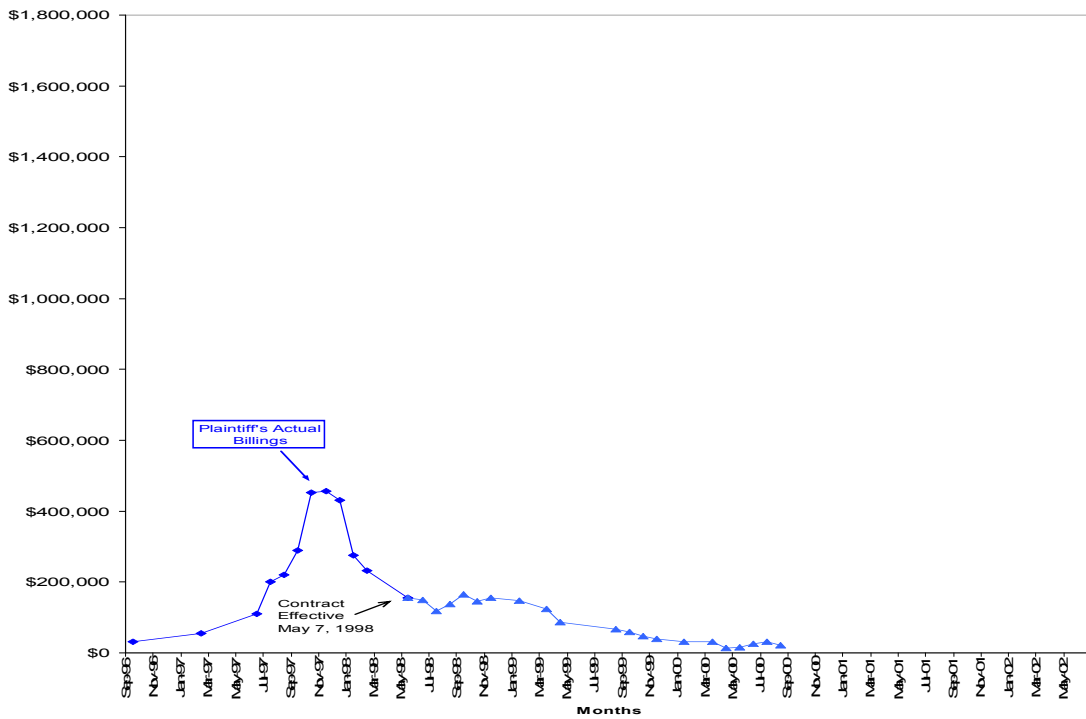
## What Makes a Good Expert?

- Graphs
  - Electronic
  - Poster Boards
  - Overlays



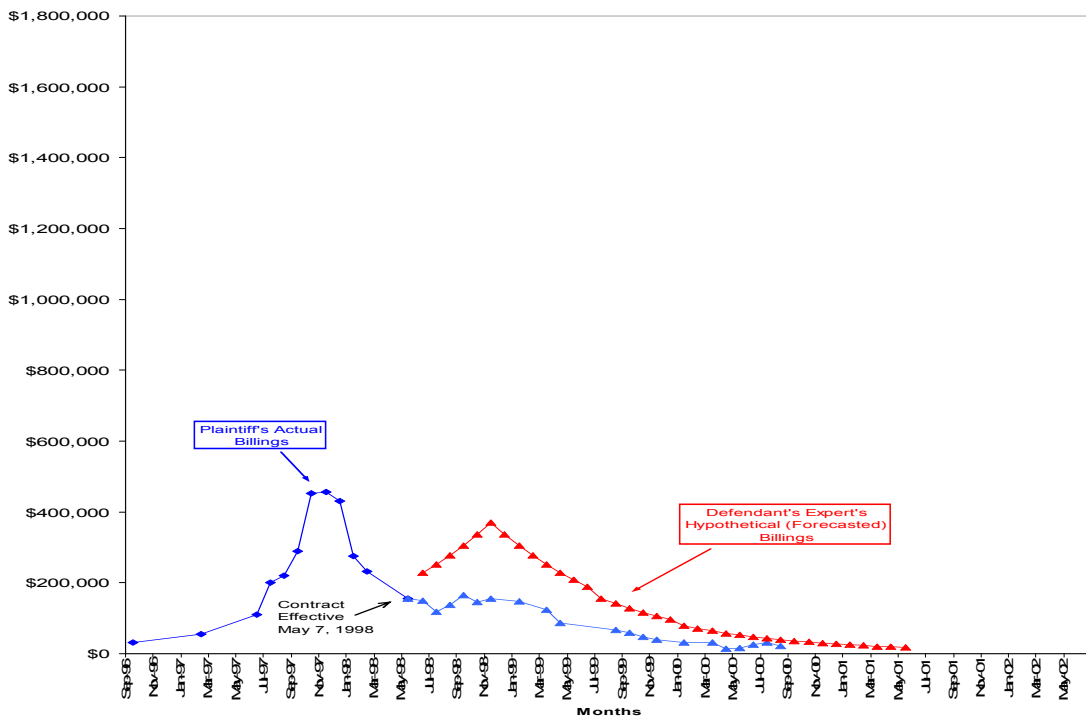
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## Gross Revenue Analysis - Long Distance Charges



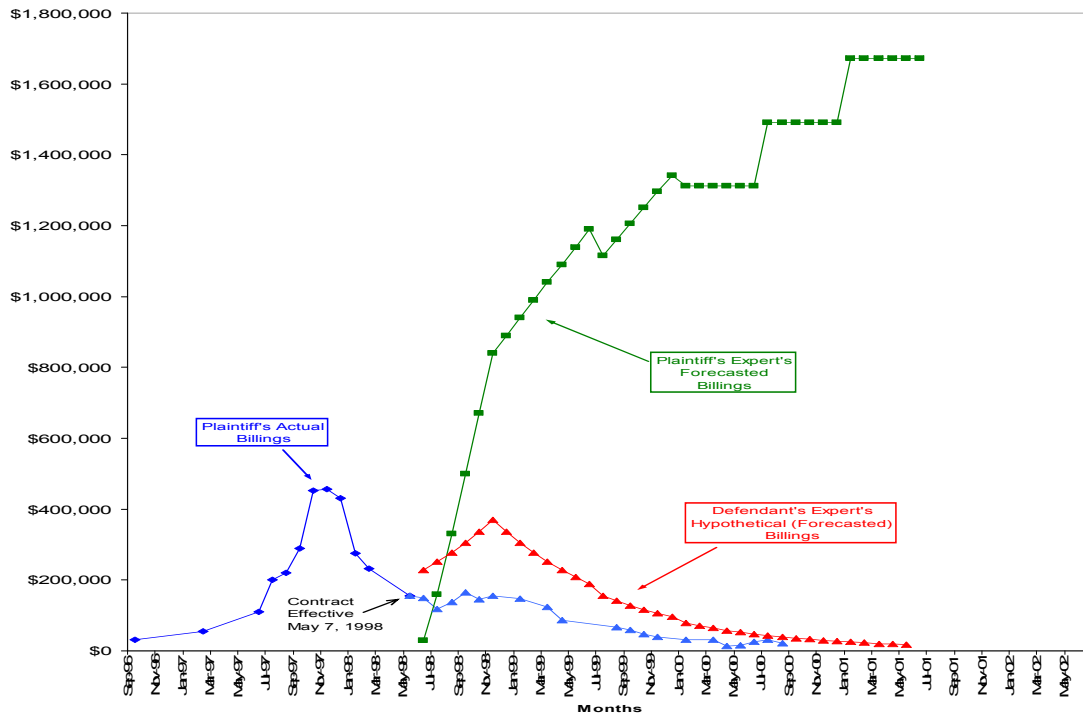
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## Gross Revenue Analysis - Long Distance Charges



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Gross Revenue Analysis - Long Distance Charges



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## Expert Testimony

- Counsel's Attitude Regarding Experts
  - Independent vs. advocate
  - Understand each other's style





## Expert Testimony

- Testimony Preparation With Counsel
  - When should you begin to prepare?
  - How much preparation is necessary?
  - Think through all aspects of the case and address possible areas of concern, possible questions, and how to effectively respond.
  - Review opinions and bases of opinions with counsel.
  - Make sure expert understands the current status and issues surround the litigation.
  - Share any prior contrary opinions rendered in other cases.
  - Review schedule, procedures, and parties that may be in attendance.

## Expert Testimony

- Deposition – Opposing Counsel’s Goals
  - Explore Expert’s qualifications
  - Learn and understand Expert’s opinions and basis of opinions
  - Lockdown the Expert
  - Evaluate an Expert’s credibility
  - Probe for bias
  - Gather Information
  - Obtain concessions
  - Intimidate the Expert



## Expert Testimony

- Deposition – Expert
  - Understand opposing counsel’s deposition goals and style.
  - Understand your counsel’s style of defending deposition.
  - Prepare, prepare, prepare!
  - Get plenty of rest
  - Stay calm-act naturally-don’t get defensive
  - Stick to the four corners of the expert report
  - Experts are advocates for their opinions not the case
  - Depositions are defensive exercises
  - Experts must tell the truth
  - It’s ok for an expert to say they don’t know or can’t remember
  - Expert should listen and understand the questions carefully and seek clarity when needed

## Expert Testimony

- Deposition – Opposing Expert
  - Your expert should be very involved in the deposition of the opposing expert.
  - Let the Expert provide you with questions for the opposing expert.
  - Discuss what issues are to be brought out in the deposition, and what issues will be left for trial.
  - Building the box.
  - Your expert should attend the opposing experts deposition.
  - What Role do you want your expert to play at the deposition.
    - Active – writing questions, notes, etc for you during your examination.
    - Semi Active – preparing notes to discuss with you at breaks.
    - Passive – just sitting there and being ready to discuss issues at breaks.

## Expert Testimony

Can your case be won or lost at deposition?



## Expert Testimony

- Direct Examination
  - Heart of the case
  - Prepare, prepare, prepare!
  - Time to teach and explain Expert's opinions in a clear and concise manner
  - Keep it simple and understandable (limit jargon or technical terms)
  - Use visual graphics whenever it helps an important point
  - Great Experts are confident and exude professionalism
  - Expert should appropriately engage and communicate with trier-of-fact – not counsel
  - Experts should appear unbiased
  - Counsel and experts should address problems head-on
  - Start strong and finish strong – proper pacing

## Expert Testimony

- Cross Examination – Counsel’s Goals for Trial
  - Lessen the **CREDIBILITY** of the Expert
  - **CONTROLLING** the information that the trier of fact hears using leading questions
  - Use Expert to bolster their case



## Expert Testimony

- Cross Examination – Expert’s Testimony
  - Prepare, prepare, and prepare! (Can’t be said enough)
  - Expert should stay with their true area of expertise
  - Do not exaggerate, speculate, or guess
  - Experts should assert themselves and not let counsel cut off their answers
  - If questioned about a document, Expert should ask to see it
  - Know the Expert report in extreme detail
  - Seize on mistakes made by opposing counsel
  - Good attorneys will land some punches and counsel should listen carefully and assist with any cleanup in redirect

## Expert Testimony

- Rebuttal Testimony
  - Cannot be offered in the party's case-in-chief
  - Cannot be used simply to bolster the testimony of the Expert whose testimony is offered during the case-in-chief
  - Scope of rebuttal testimony is limited to that which is directed to rebut new evidence or new theories proffered
  - Let your expert be the person that discusses the complex matters that are different between the experts.

## Court Perspectives

- Expectations of counsel and experts
- Daubert and Kumho Tire
  - *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
  - *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999)
- New rules
- What the Court does with expert reports, before, during and after hearing

