

**THE CPA AS EXPERT WITNESS:
A CPA'S GUIDE FOR TRIAL PREPARATION**

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by Thomas A. French
and Cory A. Iannacone*

*"Lawyers will always want an expert CPA witness who possesses the wisdom of Alan Greenspan, the litigation skills of Clarence Darrow, the charisma of John F. Kennedy, and the technical skills of Bill Gates."*¹

I. INTRODUCTION

Expert witnesses have always played a critical role in the litigation process. Modern litigation uses experts with unparalleled frequency in order to explain how and why things happened the way they did, or didn't happen the way they were supposed to.² Today's litigation has expanded to complex commercial trials where certified public accountants ("CPAs") and other economic experts have become an essential feature.³ Commercial disputes often involve commercial issues, which require both parties to hire CPAs to serve as litigation support consultants and provide expert testimony.⁴ According to the membership data provided by the American Institute of Certified Public Accountants ("AICPA"), "Approximately 12% of all AICPA members in public practice either serve as expert witnesses or have expressed an interest in this consulting area. Litigation support services were among the top ten CPA growth niches in the 1990s."⁵ As such, having the "ideal expert"⁶ is an invaluable asset for either party's case, with the witness explaining to the jury why one party should win and the party's opponent should lose.⁷

* Thomas A. French, J.D. is a senior partner, and Cory A. Iannacone, J.D. is an associate with the law firm of Rhoads & Sinon LLP in Harrisburg, Pennsylvania. Mr. French can be reached at tfrench@rhoads-sinon.com. Mr. Iannacone can be reached at ciannacone@rhoads-sinon.com.

¹ Thomas A. French, *What Attorneys Look for When Seeking CPA Experts*, PA. CPA J., Summer 2004, at 19.

² THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 117-18 (3d ed. 1992).

³ French, *supra* note 1, at 18; MAUET, *supra* note 2, at 117-18.

⁴ George L. Johnson & Cynthia Waller Vallario, *An Expert Witness Can Make or Break a Case*, J. OF ACCOUNTANCY, Aug. 2001, at <http://www.aicpa.org/pubs/jofa/aug2001/johnson.htm>.

⁵ *Id.*

⁶ According to some authors, the ideal expert has the following characteristics: likeable; great credentials; local connections; subject matter experience; litigation experience; service oriented; strong teaching skills; credibility; thoroughness; and support of opinion. DAVID J.F. GROSS & CHARLES F. WEBER, *THE POWER TRIAL METHOD* 154-55 (2003).

⁷ Johnson & Vallario, *supra* note 4; GROSS & WEBER, *supra* note 6, at 155; Tracy L. Coenen, *Making the Most of an Expert Witness*, WIS. L.J., Feb. 22, 2006, at <http://www.wislawjournal.com/archive/2006/0222/coenen-022206.html>. For a discussion on how attorneys go about selecting a CPA expert witness and what attributes attorneys consider in selecting a CPA expert witness, see French, *supra* note 1:

Attorneys begin their search for CPA experts by: looking at existing relationships or word of mouth referrals; looking at articles written by CPAs for legal journals; looking to CPAs who have arranged to speak at bar association functions and professional education sessions; and searching the Internet for possible CPA expert witnesses. Ten important attributes that attorneys will consider when selecting a CPA expert are: credentials; experiences meaningful to the fact finder; experience in the relevant industries; ability to handle cross examination and to help the jury

This article explores CPAs as expert witnesses for trial attorneys. Initially, Part II contains a discussion on the contents and organization of the actual expert report itself and a discussion of the evidentiary rules as a backdrop to admissibility of expert testimony. Then, Part III delves into the various roles played by experts in the litigation process, beginning with the expert's pretrial assistance to counsel. Part IV discusses the direct examination of the CPA at trial, explaining what an effective direct examination entails, and Part V discusses the preparation for becoming an effective witness. Part VI contains a discussion on how to avoid the pitfalls of cross examination. Finally, a brief conclusion of the article is found in Part VII.

II. ORGANIZATION AND CONTENT OF EXPERT REPORT

A. *Expert Report*

1. Contents

Under the Federal Rules of Civil Procedure, reports from experts are due from every witness "who is retained or specially employed to provide expert testimony in the case."⁸ There are three main purposes of the expert report: (1) to reveal all of the expert's bases and opinions; (2) to serve as a vehicle for pretrial discovery; and (3) to provide a basis for the court's ruling on admissibility of the expert's testimony.⁹ Unless otherwise agreed to or directed by the court, the Federal Rules of Civil Procedure require both parties to provide a written report signed by the experts.¹⁰ The report is submitted at least ninety days before the case is set for trial or thirty days if it is a rebuttal report.¹¹ The expert's report must contain the following:

1. a complete statement of all the opinions to be expressed and the basis and reasons for them;
2. the data or other information considered by the witness in forming the opinions;
3. any exhibits to be used as a summary of or support for the opinions;
4. the qualifications of the witnesses, including a list of all publications authored by the witness within the proceeding ten years;
5. the compensation to be paid for the study and testimony; and

understand complex issues; ability to litigate; knowledge of litigation process pitfalls; detail oriented; advanced computer skills; independence; and knowledge of the rules of admissibility of expert testimony. "Lawyers will always want an expert CPA witness who possesses the wisdom of Alan Greenspan, the litigating skills of Clarence Darrow, the charisma of John F. Kennedy, and the technical skills of Bill Gates. But short of that ideal, this list of ten attributes is a good place to start if you wish to hone your skills as an expert witness."

⁸ FED. R. CIV. P. 26(a)(2)(B); *see also* NAT'L INST. FOR TRIAL ADVOCACY, EFFECTIVE EXPERT TESTIMONY ch. 4 (2000) [hereinafter EFFECTIVE EXPERT TESTIMONY].

⁹ EFFECTIVE EXPERT TESTIMONY, *supra* note 8, at ch. 10.

¹⁰ FED. R. CIV. P. 26(a)(2)(B).

¹¹ FED. R. CIV. P. 26(a)(2)(C).

6. a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the proceeding four years.¹²

Experts are not permitted to testify beyond the fair scope of their report; the report must be direct, clear, and concise. It must be complete, but not so detailed that it can be used as a blueprint for effective cross examination by the adversary.¹³ A well-reasoned authoritative opinion can be an invaluable asset to the attorney. It can provide the attorney with a strong position in settlement discussions with opposing counsel and can help the attorney in organizing his own case—analyzing the strengths and weaknesses of the case and ensuring the attorney is “on the same page” as the witness.¹⁴

It is also important to keep in mind the evidentiary rules surrounding the expert’s analysis and his report. Under the Federal Rules of Civil Procedure, “anything considered by an expert” may be produced to the opposition, including all communications between the expert and counsel or clients. Drafts of reports can be discoverable, and as such, issues can arise when the expert’s research, preparation, and, not to mention, note-taking produce different information than that contained in the actual expert report.¹⁵ It is essential to discuss opinions with counsel first, to ensure there are no misunderstandings.

2. Format

The Federal Rules of Evidence do not specify a certain format that must be utilized in organizing the expert report. While an expert may be free to organize the report in any manner he deems appropriate, a “narrative” style report can prove to be very effective.¹⁶ A narrative style report essentially is a format whereby the expert gives his opinion through telling a story so as to make the report readily understandable as possible for the lawyers, the judge, and jury, if there is one.¹⁷

The report should begin with an introduction containing a brief summary of the expert’s qualifications and then give a clear, comprehensive statement of the expert’s opinion without delving into great details or discrete components of the case.¹⁸ After giving his statement of opinion, an overview of the theory or process which underlies the expert’s opinion should be provided.¹⁹ Then, the expert should explain his analysis, which should be the longest portion of

¹² EFFECTIVE EXPERT TESTIMONY, *supra* note 8, at ch. 4.

¹³ French, *supra* note 1, at 18.

¹⁴ STEVEN LUBET, EXPERT TESTIMONY: A GUIDE FOR EXPERT WITNESSES AND THE LAWYERS WHO EXAMINE THEM 47 (1998); *see also infra* Part VI (discussing “avoiding the pitfalls of cross examination”).

¹⁵ *See id.*

¹⁶ *Id.* at 48.

¹⁷ *Id.*

¹⁸ *Id.* One example of a statement of opinion by a financial expert in a cost overrun case would be: “It is my opinion that the changes requested by the general contractor resulted in significant additional work by the electrical subcontractor that was not covered by the original contract. I have calculated the cost of that work as \$340,000.”

¹⁹ Continuing from the above example,

I reached my opinion by examining all of the subcontractor’s direct and indirect costs on this project, including labor, materials, and overhead. Relying upon the job site records and the report of a consulting engineer, I determined which costs were attributable to the original contract and

the report—explaining the analysis or thought processes used by the expert to reach his opinion and why the expert chose such an approach.²⁰ Lastly, a list of any supporting data or documents should be provided at the end of the report in a separate section. Because these materials can be difficult for the lay person to comprehend, it is good to separate them from the rest of the report.²¹

3. Filing Timeline

Although it may seem advantageous to file an expert report early in the litigation process—filing triggers the obligation of opposing counsel to prepare a rebuttal report within thirty days or be forever precluded—several problems exist with such an early filing.²² First, this may cause the expert to rush in preparing a formal report where the expert was not ready to do so because he was without the benefit of all material produced in discovery.²³ Second, the opposing attorney is only obligated to provide a rebuttal report within thirty days if said report “‘is intended solely to contradict or rebut’ the other party’s report—it is a simple matter to create a report which does more than ‘solely rebut.’”²⁴ Therefore, any potential advantage to an early filing of an expert report appears to be substantially outweighed by its disadvantages.

In the complex case with a two-year pre-trial period, it is normal and logical for the experts to file their reports after all other discovery has been completed, and then to be deposed as the final act in the discovery process.²⁵ In the complex case where a two-year pretrial period would not be unusual, these expert activities can nevertheless fill the time as the attorney works with the consulting expert to structure his affirmative discovery, to respond to his opponent’s discovery, and to analyze the documents received and the documents on hand to find support.²⁶

B. Admissibility of Expert Testimony

1. Federal Rules of Evidence

Pursuant to the Federal Rules of Evidence,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and

which were attributable to “change orders.” I then calculated the proportion of labor and materials devoted to the change orders and I used that ratio to allocate overhead.

Id.

²⁰ *Id.*

²¹ *Id.* at 49.

²² EFFECTIVE EXPERT TESTIMONY, *supra* note 8, at ch. 4.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.²⁷

There has been a series of precedent-setting Supreme Court cases involving expert witnesses, the most precedential one, serving as the catalyst for the series which followed, being *Daubert v. Merrell Dow Pharmaceuticals*.²⁸ The *Daubert* Court explained how, in applying Federal Rule of Evidence 702, a district judge assumes a “gatekeeping” role to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”²⁹ As a result of *Daubert*, a trial judge is required to make a preliminary finding regarding whether the reasoning and methodology employed by an expert is scientifically valid and whether it can be applied to the facts of the particular dispute.³⁰ There are five factors for determining whether expert testimony is admissible under *Daubert*:

- (1) whether the theory or technique used by the accounting expert can be or has been tested;
- (2) whether the theory or technique has been subjected to peer review and publication;
- (3) the known or potential rate of error of the method used;
- (4) the degree to which the method or conclusion has been accepted within the relevant community; and
- (5) whether the theory existed before litigation began.³¹

Six years later, in *Kumho Tire Co. v. Carmichael*,³² the United States Supreme Court extended *Daubert* to all expert testimony, regardless of the subject matter.³³ As a result, the court’s gatekeeping function applies not only to proffered scientific expert testimony, but also to “testimony based on ‘technical’ and ‘other specialized knowledge.’”³⁴ The trial judge’s gatekeeping function gives the judge broad discretionary authority “to determine [the] reliability [of an expert’s testimony] in light of the particular facts and circumstances of the particular case.”³⁵

Although no consensus exists as on how the evidentiary rules and *Daubert* should be applied to CPAs and other financial experts, the two primary issues that courts have focused on

²⁷ FED. R. EVID. 702.

²⁸ 509 U.S. 579 (1993).

²⁹ *Id.* at 589.

³⁰ D. Larry Crumbley & Keith A. Russell, *So You Want to Be an Expert Witness*, J. OF ACCOUNTANCY, Oct. 2004, at <http://www.aicpa.org/PUBS/jofa/oct2004/crumbley.htm>.

³¹ *Id.*

³² 526 U.S. 137 (1999).

³³ Crumbley & Russell, *supra* note 30.

³⁴ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

³⁵ *Id.* at 158.

in evaluating expert testimony are qualifications and acceptance of methodology.³⁶ As made clear by case law, “qualifications alone are not enough.”³⁷

2. Pennsylvania Rules of Evidence

Pursuant to Pennsylvania Rule of Evidence 702,

If scientific, technical or other specialized knowledge beyond that possessed by a lay person will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.³⁸

In *Grady v. Frito-Lay, Inc.*, the Pennsylvania Supreme Court held that the *Frye* test, along with the other elements of Pennsylvania Rule of Civil Procedure, continues to be the standard for expert evidence in Pennsylvania. The “*Frye* test” was adopted by the Pennsylvania Supreme Court in *Commonwealth v. Topa*.³⁹ The *Frye* test directs “admissibility of the evidence depends upon the general acceptance of its validity by those scientists active in the field to which the evidence belongs.”⁴⁰ The *Topa* court explained the underlying rationale for this standard:

The requirement of general acceptance in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice. Additionally, the *Frye* test protects prosecution and defense alike by assuring that a minimal reserve of experts exists who can critically examine the validity of a scientific determination in a particular case. Since scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen, the ability to produce rebuttal experts, equally conversant with the mechanics and methods of a particular technique, may prove to be essential.⁴¹

Thus, in order for testimony to be considered admissible, CPAs who testify as expert witnesses must describe what CPA certification requires and why they should be considered experts in a particular case; and state what methodology they’ve used, whether it is reliable and why.⁴² It is important that the expert put this evidence in the trial record in every case.⁴³

III. PRETRIAL ASSISTANCE TO COUNSEL

Because most commercial disputes involve an accounting issue—such as valuation of a business for a change in ownership, amortization of intangible assets, calculating earnings to define a business’s net profits—CPAs often are hired by plaintiff and defense lawyers to provide

³⁶ Sofia Adroque & Alan Ratliff, *Kicking the Tires After Kumho: The Bottom Line on Admitting Financial Expert Testimony*, 37 HOUS. L. REV. 431, 454 (2000).

³⁷ *Id.* at 457.

³⁸ Pa. R. Evid. 702.

³⁹ 369 A.2d 1277 (Pa. 1977).

⁴⁰ *Topa*, 369 A.2d at 1281.

⁴¹ *Id.* at 1282 (quoting *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974)).

⁴² Crumbley & Russell, *supra* note 30.

⁴³ *Id.*

expert testimony and to serve as litigation support consultants. The CPA expert witness can play a variety of roles in business valuation cases—from performing simple damage calculations to orchestrating complex research and analysis and creating case strategies. To do this, the CPA expert witness must choose an approach in the pretrial planning phase that will help him develop and integrate facts and legal theories presented later in the trial testimony.⁴⁴

An expert who is brought in early in a case can become integrated with case at the beginning and can better assist counsel for preparing for trial.⁴⁵ It is important for an expert to fully comprehend the case. Initially, an expert should find out what happened in the case by reading all documents submitted to date in the case, beginning with the complaint, then any motions and related documents relevant to the opinion the expert was retained to give; and also reviewing a chronology, if prepared by the attorney.⁴⁶

A. *Pretrial Planning*

In order to be most beneficial to the attorney, an expert must be brought into the case in the early stages to become associated with the facts of the case.⁴⁷ The litigation process with the expert is most effective and beneficial when the expert and the attorney collaborate with one another.⁴⁸ It is a relationship where the expert educates the attorney in the expert's field, and the attorney, in turn, uses what he has been taught by the expert to educate the judge and the jury.⁴⁹ In essence, the expert makes the attorney an expert through teaching the attorney to the point that the attorney knows as much as the expert about this one area of the expert's profession.⁵⁰

The expert will complete the work assigned by the attorney, while at the same time advising the attorney about the alternatives and opinions.⁵¹ As such, an expert's job is not limited to the courtroom; rather, it begins far prior to the actual trial. This is why an expert must begin working on the case as early as possible.⁵² By getting involved early in the case and having the attorney being fully willing to utilize the expert, the expert can assist the attorney with formulation of a strategy with respect to the expert's area of specialty, pointing out the strengths and weaknesses in the strategies as they relate to his area of expertise.⁵³

In the pretrial planning phase, the expert is able to develop and integrate facts and legal theories presented later in the trial testimony.⁵⁴ Because the expert report often serves as the basis of a party's case, an expert can be a valuable asset to an attorney throughout the entire litigation process: commencing the suit; assisting in discovery; critiquing an opposing expert's report; assisting in preparing for cross examination; assisting trial counsel in the preparation of

⁴⁴ Johnson & Vallario, *supra* note 4.

⁴⁵ Coenen, *supra* note 7.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ EFFECTIVE EXPERT TESTIMONY, *supra* note 8, at ch. 1.

⁵⁰ French, *supra* note 1, at 18.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Coenen, *supra* note 7.

⁵⁴ Johnson & Vallario, *supra* note 4.

the case-in-chief so that evidence supports the expert's theory; preparing the expert's report; and testifying at trial.

1. Identification of Issues

Once the expert is retained by the lawyer, the first order of business is to identify the issues of the case.⁵⁵ Identification of issues for the CPA expert can range from extremely general terms—e.g., What were the decedent's expected lifetime earnings?—to more detailed questions—e.g., What discount rate should be used in reducing damages to present value?⁵⁶ It must be noted that the expert has considerable knowledge which the attorney does not, and as such, should not hesitate to raise additional issues not initially raised by the attorney.⁵⁷ Some issues which are easily recognizable by the skilled expert are often overlooked by the attorney.⁵⁸

While the expert provides a valuable asset to the attorney in identifying issues overlooked by the attorney, the expert must also realize that there are other legal aspects to the case which may make certain issues irrelevant.⁵⁹ As such, the expert and the lawyer must have a reciprocal relationship whereby the expert takes initial direction from the attorney, assuming there is more to be learned than that recognized by the attorney.⁶⁰ The expert, at the same time, recognizes his or her own limitations and does not presume to appreciate all of the legal aspects of the case.⁶¹ This reciprocal relationship will help the expert utilize his expertise in the most efficient manner—allowing the attorney to see issues initially overlooked and preventing the expert from wasting his time, energy and funds, addressing irrelevant issues.

2. Communication

The foundation of a good relationship between the lawyer and the expert is communication.⁶² Communication is a constant process whereby the expert regularly informs the lawyer of his or her findings and inquiries, and the lawyer matches the expert's work to the issues in the case.⁶³ While both the expert and the attorney must be open to input from one another, eventually the attorney will have to focus the expert's opinion by determining which subjects are in and which subjects are out.⁶⁴

Ultimately, a definite statement of the issues to be addressed must be reached and agreed to by both the attorney and the expert. After all, it is the expert who is going to testify and must be prepared to withstand questioning at a deposition or during cross-examination at trial.⁶⁵ Aside from the obvious damage to the attorney's case that could occur, the expert must also recognize

⁵⁵ LUBET, *supra* note 14, at 32.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 33.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

that his professional integrity may be challenged, and potentially result in his reputation suffering in the event his work turns out to be incomplete, inadequate, or legally irrelevant.⁶⁶

B. Discovery

Experts can also offer assistance throughout the discovery process.⁶⁷ The discovery process naturally flows from issue identification.⁶⁸ The attorney begins by giving the expert an outline of the facts of the case—either orally or through providing the expert with pleadings and other relevant documents for review.⁶⁹ Depending on the availability of time and resources, the attorney may choose to provide the expert with “everything”—which would require the expert to sort through voluminous amounts of materials in order to identify the salient facts—or simply provide the expert with more selective material—which is the more usual case where the attorney first determines the most useful materials and the expert subsequently requests whatever is appears necessary or helpful.⁷⁰ Often attorneys err on the side of providing the expert with excessive paper work, with the attorney being afraid that he might fail to provide the expert with an important document that may prove to be the “veritable key to the case.”⁷¹ The expert, however, at a minimum, should be provided with a “guided tour” of these documents by the attorney.⁷²

Situations do exist where the expert receives too little documentation from the attorney.⁷³ There are various explanations for these situations occurring: the attorney may simply have erred; the papers may have been excluded inadvertently; or the attorney may be attempting to avoid overburdening the expert.⁷⁴ In these situations, the expert should be encouraged to ask for more documents, especially when the expert believes that such documents should exist.⁷⁵ In addition, the expert should look for any gaps or obvious omissions in the records.⁷⁶

After the CPA expert becomes familiarized with the case, he can then identify the damages being sought by the parties, as outlined in the pleadings.⁷⁷ The pleadings are basically made up by the complaint filed by the plaintiff and the answer filed by the defendant, which either admits or denies each of the specific allegations made by the plaintiff in the complaint.⁷⁸ In commercial litigation, other complementary documents to the pleadings should also be reviewed, including for example: correspondence between the parties, a series of contracts and

⁶⁶ *Id.*

⁶⁷ Coenen, *supra* note 7.

⁶⁸ LUBET, *supra* note 14, at 33.

⁶⁹ *Id.*

⁷⁰ *Id.* at 34.

⁷¹ *Id.* at 36.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 37.

⁷⁷ Johnson & Vallario, *supra* note 4,

⁷⁸ LUBET, *supra* note 14, at 34.

amendments, notes of meetings, bills of lading, shipping records, warehouse reports, e-mail printouts, photographs, and page after page of other papers and records.⁷⁹

1. Production of Documents

Based upon the damages identified in the pleadings, the CPA expert can then decide what data or documents will be necessary in order for counsel to prevail at trial. This is done through production of document requests and includes collecting documents pertaining to: historical and prospective company data; other potential experts' testimony; industry, market and regulatory information and data regarding causation and potential or actual mitigation of damages.⁸⁰ Because of the technical nature of these financial matters, having someone familiar with the accounting process is a valuable asset to the attorney in working with these documents.⁸¹ Forensic accounts can be an extremely valuable resource to the attorney in dealing with accounting records.⁸² After documents and interrogatory responses are produced and then reviewed by the expert, the expert can suggest follow-up requests based upon the responses already given.⁸³

2. Depositions

In addition to requests for production of documents, the expert can also assist with depositions.⁸⁴ A deposition is an oral statement, given under oath, as part of the pretrial discovery process.⁸⁵ Attorneys utilize depositions to determine what a witnesses will be testifying to at trial.⁸⁶ Deposition testimony is broader and more expansive than the actual testimony which the witness is going to give at trial, and as such, deposition transcripts tend to be voluminous—hundreds of pages in length and covering anything that is even potentially relevant to a case.⁸⁷

Deposition transcripts are a good source of what certain witnesses believe the facts of a particular case to be, and, as such, experts should review those deposition transcripts which are potentially germane to the expert's opinion.⁸⁸ Because of the voluminous nature of these transcripts, the expert should work closely with the attorney in determining which depositions, and which portions of transcripts the expert should be reviewing.⁸⁹ This will assist in reducing the burden placed upon the expert and at the same time will help in ensuring that an important deposition or significant testimony is not overlooked by the expert.⁹⁰

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Coenen, *supra* note 7.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ LUBET, *supra* note 14, at 38.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

After having a good understanding of a case, the expert can spot the important issues which will need to be addressed at trial and make suggestions as to what witnesses should be deposed in order to further develop the facts which will ultimately address those issues at trial. An attorney may even take his expert with him to a preliminary hearing or a deposition to offer the attorney assistance with the questioning right there on the spot.⁹¹ Financial matters are often highly technical, with the attorney “shooting in the dark” when taking the deposition.⁹² An expert who participates in the actual taking of the deposition can help the attorney organize an effective deposition.⁹³ The expert is able to suggest lines of questioning or specific questions that should be asked of the person being deposed.⁹⁴

In addition to assisting the attorney in conducting his own discovery, the expert can also assist the attorney in responding to discovery being conducted by the opposing attorney.⁹⁵ This is especially true for the financial expert. While discovery responses are, for the most part, drafted by the attorney, the financial expert can prove to be a valuable resource in responding to discovery requests which seek objective information in the form of statistics or data compilations.⁹⁶

C. Expert Analysis

Experts also can assist the attorney in establishing priorities of the claims and responsibilities of key parties on both sides of the case, as well as how factual events and theories of damages are related.⁹⁷ In order to accomplish this, the expert must organize all of the information which he has collected in order to develop his analysis. Organization of the information begins with creating a chronology of the events of a case.⁹⁸ Because this can prove to be a tedious task, requiring repetitive review of all the pleadings and other documents, the attorney and expert should sit down together to draw this time line.⁹⁹ The expert should also organize the cast of characters, both parties and witnesses, in addition to the prior dealings and past involvement of those persons for background information.¹⁰⁰ Then, the expert should be provided with all prior statements made by witnesses whose testimony is germane to the expert’s opinion.¹⁰¹ These statements also include any statements made by opposing counsel’s expert, in addition to the data and information used by the expert, the assumption that were made, and the methods which were used.¹⁰²

In connection with opposing counsel’s expert witness’s testimony, the expert’s analysis should also take into consideration who opposing counsel is and the position opposing counsel

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Coenen, *supra* note 7.

⁹⁵ See LUBET, *supra* note 14, at 40.

⁹⁶ *Id.*

⁹⁷ Johnson & Vallario, *supra* note 4.

⁹⁸ LUBET, *supra* note 14, at 43.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 44.

¹⁰² *Id.*

has taken in the case.¹⁰³ There may be the something notable about the opposing counsel that the expert ought to know.¹⁰⁴ In addition, the expert's analysis must include what facts serve as the basis for the opposing party's claim; what facts have the potential to undermine and detract from the expert's opinion; what contrary assumptions might the expert be asked about at deposition or on cross-examination.¹⁰⁵

In connection with establishing these priorities of claims and responsibilities of key parties, the expert can define any alternative theories of damages that may exist and how to measure them.¹⁰⁶ This would include deciding who the damaged party really is; how and when the damages occurred; what the damages consist of; and when and how alternative damages should be measured.¹⁰⁷

IV. DIRECT EXAMINATION

A. Background

Direct examination is all about the attorney fading into the background, and allowing the expert to talk to the jury without any interference.¹⁰⁸ "CPAs deliver value by . . . translating complex information into critical knowledge."¹⁰⁹ The purpose behind expert testimony is to help the jurors in understanding "a process"—as one author explains, "like the conversion of gasoline into energy to move a car, a relationship like that between that between a tainted vaccine and the disease it causes, or a phenomenon like an avalanche in the Rocky Mountains."¹¹⁰ As such, the expert's communication skills are essential. An engaging personality, the ability to connect on a personal level through eye contact, and smiling at appropriate times is important.¹¹¹ The expert must be able to connect with the many types of people who will sit on the jury.¹¹² Handling pressure, adequate preparation, and an ability to quickly bring information together to handle cross-examination are essential in an expert.¹¹³ In order to be deemed an effective witness by the jury, the jury must find the expert to be credible and must understand at least the structure of the methodology the expert has employed.¹¹⁴ As an expert witness, a CPA should apply a creative yet professional approach that conveys complex accounting matters in a clear, concise manner.¹¹⁵

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Johnson & Vallario, *supra* note 4.

¹⁰⁷ *Id.*

¹⁰⁸ GROSS & WEBER, *supra* note 6, at 155.

¹⁰⁹ Michael G. Ueltzen & Robert H. Johnson, *Expert Testimony: The CPA's Responsibilities*, THE PRACTICING CPA Sept. 2001, at <http://www.aicpa.org/pubs/tpcpa/sep2001/expert.htm>.

¹¹⁰ EFFECTIVE EXPERT TESTIMONY, *supra* note 8, at ch. 10.

¹¹¹ French, *supra* note 1, at 18.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ EFFECTIVE EXPERT TESTIMONY, *supra* note 8, at ch. 10.

¹¹⁵ Robert W. Berliner, *Expert Witness Engagements*, CPA J., Aug. 1991, at <http://www.nysscpa.org/cpajournal/old/11287194.htm>.

Most attorneys consider the direct and cross-examination of experts to be the most rewarding part of their craft.¹¹⁶ At trial, the attorney essentially has to also be an expert himself so that he is on equal footing with the expert, but at the same time, not so much of an expert as to lose his ability to communicate with the jury.¹¹⁷ The key for expert testimony is to ensure that the expert has communicated his point to the jury so that the jury understands it.¹¹⁸

B. Visual Aids

Even when an expert is well prepared, his testimony can be complex and difficult for the jury to understand.¹¹⁹ Because of the complexity of a CPA expert's testimony at trial, visual aids can prove to be an effective tool in assisting an expert to communicate in the courtroom.¹²⁰ Visual aids, as a general matter, enhance the presentation of the expert's opinion.¹²¹ At trial, these visual aids assist in explaining salient points and educating the trier of facts.¹²² The use of visual aids allows the CPA expert to make the case simple for the trier of facts by completely integrating the case on a single page document by: showing what happened; identifying both the expert's and opponent's claims; highlighting relevant data; identifying missing data; identifying key areas and responsibilities of the client, counsel and experts; creating a damages model; providing a way to challenge and test the other expert's case to achieve optimal results.¹²³ These documents serve as an outline to the expert's more complicated, technical testimony at trial, and establish "a simple and understandable path for the jury, arbitrator or trier of fact to follow and . . . provide[] the basis for the details."¹²⁴

Not only can visual aids help the trier of facts in understanding one party's position, but they can also help in highlighting the opposing party's mistakes and illustrating weaknesses in the opposing party's theory:

A court case in which an emerging technology company filed suit against its auditor illustrates the application of the visual approach and some "land mines" facing a CPA expert witness. The technology company claimed it would have successfully gone public and raised a significant amount of funds if its auditor had returned audited financial statements on time. The company hired a business valuation expert to determine damages based on the allegations, but this particular expert did not look at the big picture and focused solely on lost business value.

¹¹⁶ EFFECTIVE EXPERT TESTIMONY, *supra* note 8, at ch. 10.

¹¹⁷ *Id.*; *see also* French, *supra* note 1, at 18.

¹¹⁸ EFFECTIVE EXPERT TESTIMONY, *supra* note 8, at ch. 1. A great example of a trial attorney losing his ability to communicate with the jury comes from Michael Tigar,

who describe[s] one of his first cases that dealt with an expert accountant who was detailing the distinction between ordinary income and capital gains. During the trial, the bailiff reported to him that he had heard one juror say to another, "Who is this Capital Gains?" and the other juror replied, "I don't know; I think we'll hear from him tomorrow."

Id.

¹¹⁹ MAUET, *supra* note 2, at 120.

¹²⁰ Berliner, *supra* note 115.

¹²¹ LUBET, *supra* note 14, at 50.

¹²² Johnson & Vallario, *supra* note 4.

¹²³ *Id.*

¹²⁴ *Id.*

Plaintiff's counsel ultimately declined to call the business valuation expert at trial. A second expert witness who testified for the plaintiff on lost profit calculations likewise responded unsuccessfully to the scope of the issues.

Because the plaintiff company could not prove the sequence of alleged events and assumptions relating to its claim, the plaintiff, in fact, had no financial damages and its case failed.

On the other hand, the defense expert used a visual approach to plan and present his testimony, highlighting the other party's mistakes and illustrating that the plaintiff's lost business value claim was an inappropriate theory of damages. . . .

...

In this case, the CPA expert for the defense, instead of testifying about an alternative business valuation, created the visual graphic to accompany his courtroom testimony which identified several weaknesses he had seen in the plaintiff's strategy and valuation of the claims. The graphic showed that lost business value was not a valid theory to support a claim for damages because the lost value primarily affected the shareholders, not the plaintiff company. The plaintiff's expert had measured damages for the wrong party. The theory on which a claim for damages is based must fit the facts of the case.

Contrary to the plaintiff's allegations, the defense's expert said other reasons that had nothing to do with the auditor prevented the IPO from going forward. The product was not ready for the marketplace or investors and the company didn't have a qualified underwriter. In addition, the defense's analysis demonstrated the IPO would have encountered significant regulatory obstacles. The net result showed the plaintiff's theories and assumptions were weak, unsupported by the facts or inappropriate.¹²⁵

C. *Six stages of Direct Examination*

Direct examination has six basic stages: (1) introduction; (2) qualifications; (3) investigation; (4) opinions; (5) bases; and (6) summary.¹²⁶ All six stages are critical for an effective direct examination. Because direct examination is the expert's opportunity to explain to the jury his opinion, the attorney's role is minimal, and usually consists of open-ended questions which allow the expert to speak to the jury with minimal talk or interference from the attorney.

1. Introduction

The introductory stage is self explanatory. It gives the expert an opportunity to introduce himself to the jury.¹²⁷ It is important that the jury take away three pieces of information from

¹²⁵ *Id.*

¹²⁶ GROSS & WEBER, *supra* note 6, at 153-68.

¹²⁷ *Id.* at 156.

this stage: (1) the name of the expert; (2) the expert's job; and (3) why the expert is testifying on the witness stand.¹²⁸ While the questions from the attorney are open-ended for the most part,¹²⁹ it may be important that the final question with regard to why the expert is testifying, to be a leading question by the attorney.¹³⁰ Attorneys must be cautious about phrasing questions with regard to the expert's specific opinion.¹³¹ The introduction should be completed early enough so that the jury has enough patience to listen to the expert's background and qualifications.¹³²

2. Qualifications

The qualifications stage can prove to be the most critical stage of an expert's direct examination. It is in the qualifications stage that expert truly makes his first impression to the jury. The jury will decide whether they (1) like the expert as a person and (2) find the expert to be knowledgeable in his field so as to deem his later testimony credible.

Expert credibility depends significantly on the experts professional credentials and experience; as such, it is important to thoroughly, yet efficiently, develop the expert's background.¹³³ Questions in the qualifications stage often begin with background questions about the expert's educational degrees, licenses, and employment history.¹³⁴ Although a minimum of qualifications are acceptable, credibility is often gained by also delving into the expert's more specific background, including, special training, publications, and particular work experiences that directly bear on the situation about which the expert is testifying.¹³⁵ Emphasizing the specific experience in the area which is directly before the court usually lends greater credibility weight with the jury.¹³⁶

Effective direct examination will integrate this background into the case before the jury, keeping the jury entertained, while at the same time educating the jury as to the basis of the expert's opinion. One way to gain "likeability" from the jury is to establish a local connection, showing the jury the expert's involvement with the community:

ATTORNEY: Please describe your background.

¹²⁸ *Id.*

¹²⁹ The majority of introductions begin with the attorney asking the expert: "Please state your name for the record" and "What's your job?" *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* For example, instead of asking the open-ended question of "Why are you here today?," the attorney should use the leading question of "Are you here today to give us your opinion as to whether . . . ?"

¹³² *Id.*

¹³³ MAUET, *supra* note 2, at 121.

¹³⁴ *Id.* Experts who quantify damages come from a variety of backgrounds. Damages experts with business or accounting backgrounds often have MBA degrees or CPA credentials, or both. Because damages estimation often makes use of accounting records, most damages experts need to be able to interpret materials prepared by professional accountants. Some damages issues may require assistance from a professional accountant. Robert E. Hall, & Victoria A. Lazear, *Reference Guide on Estimation of Economic Losses in Damages Awards*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 277 (2d. ed. 2000).

¹³⁵ MAUET, *supra* note 2, at 121; *see also* French, *supra* note 1, at 18.

¹³⁶ MAUET, *supra* note 2, at 121.

CPA: I'm actually from this very local town. I grew up here and now live here with my wife and two daughters, aged 10 and 12. I've been a CPA since 1985.

ATTORNEY: Are you involved in the local community?

CPA: Yes. I'm on the local community's planning board and am active with the parent/teacher association at my daughter's school.

It is important not to linger over establishing the connection. Once some ground work had been laid, the qualifications stage should then shift over to the expert's education. This is the transition phase where the expert should move from attaining "likeability" from the jury to gaining credibility from the jury. The expert can boast about where he attended school and the honors he received while at school. In addition, the expert can then once again transition into the reason he is testifying in court. For example, in a case where the expert is testifying to corporate business valuation, such transitioning could be like such:

ATTORNEY: Please tell the jury about your educational background.

CPA: I went to the local university and received a B.B.A. in Accounting in 1983 and a Masters in 1985. I became a CPA in 1985.

ATTORNEY: Did you receive any honors?

CPA: Yes. I graduated both undergrad and my Masters with highest distinction.

ATTORNEY: Did you study corporate business valuation in any of your accounting classes?

CPA: Yes. I actually took three classes that involved corporate business valuation and various models utilized by financial analysts.

Initially, the CPA uses the fact that he attended a local university in order to reinforce his local connection with the jury, while at the same time, establishing credibility through his education. Then, after accenting a few of the expert's honors, the testimony then shifted to the areas studied by the expert while in school, specifically those areas which are at issue before the court, and are the very topics that the CPA intends to testify to. The testimony should continue along this line with transitioning to the CPA's work experience. Emphasizing working for a prestigious local business, working on a notorious case, or interesting government work can convince a jury that the CPA must be very good to have gotten such important assignments.¹³⁷

After a quick overview of the expert's prior work experience, the testimony should focus on those specific jobs where the expert gained experience in areas which are the very issue to

¹³⁷ French, *supra* note 1, at 18 ("Having appropriate credentials alone is not enough to be a valuable litigation team member. A background full of interesting experiences is important.").

which the CPA is testifying. After all, if a witness is to offer opinion on a given field, he or she should have experience in that industry¹³⁸.

ATTORNEY: Have any of your jobs involved corporate business valuation?

CPA: Yes. I had to apply principles of corporate business valuation in every project I worked on at PricewaterhouseCoopers, one of the largest accounting firms in the nation, and on many of the projects I worked on at Ernst & Young, another one of the larger accounting firms. In my consulting work I often have to apply corporate business valuation as well.

ATTORNEY: What professional organizations are you a member of?

CPA: The American Institute of Public Accountants and the Pennsylvania Institute of Public Accountants.

ATTORNEY: Do you talk to others in your field about corporate business valuation?

CPA: Yes. At the annual convention for both of the professional organizations I just mentioned, I'll talk to other accountants and financial analysts about various theories and applications of corporate business valuation. I also talk with my fellow consultants about projects, including projects involving corporate business valuation.

ATTORNEY: Do you read the literature on corporate business valuation?

CPA: Yes. There are two major journals that publish articles on corporate business valuation from time to time, and I subscribe to both journals.

ATTORNEY: Have you given any speeches on corporate business valuation?

CPA: Yes. I spoke on the subject three or four times at our firm and I spoke on the topic at a meeting of my professional organizations a few years ago.

ATTORNEY: Have you written about corporate business valuation?

CPA: Yes. I am the co-author of two papers on business model valuation, both of which were published in the *Pennsylvania CPA Journal*.

¹³⁸ *Id.*

Hopefully, the expert has explained to the jury that the expert knows a lot about corporate business valuation. With enough background laid, the expert can now explain to the jury about the expert's investigation into the particular case before it.

3. Investigation

It is important to keep the investigation stage simple. After laying all of the important ground work in the introduction and qualifications, the expert does not want to know lose the jury with extraneous and complex facts explaining the investigation completed by the expert. Rather, keep it simple enough so that the jury can follow it:

ATTORNEY: Did you conduct an investigation into the corporate business valuation being utilized by Plaintiff Business in this case?

CPA: Yes.

ATTORNEY: And what did you do?

CPA: The first thing I did was to gather all of the Plaintiff Business's records for the past ten years, which is standard practice for valuation of any business. I broke down those records into loss and profit charts for each year and charts analyzing the business's assets and liabilities for each respective year. Based upon this information, I was able to track Plaintiff Business's cash flow in connection with its assets and liabilities.

4. Opinion

The opinion stage is even easier than the investigation stage. The important thing to remember is that all of the important ground work had already been laid. Now that the expert has credibility and has gained likeability from the jury, the expert can simply give a one or two sentence synopsis as to his opinion.

ATTORNEY: Based upon your years of experience and your investigation in this case, do you have an opinion as to whether Plaintiff Business was undervalued?

CPA: Yes.

ATTORNEY: What is your opinion?

CPA: Plaintiff Business was undervalued because under the corporate business valuation, the prior valuation failed to take into account the high account receivables which were building up over the past two years and resulting in a decrease of cash flow to Plaintiff Business.

5. Bases

Now the expert needs to explain to the jury how he reached his opinion. This is when the attorney truly fades into the background, and allows the expert to talk to the jury without any interference. The expert becomes the teacher, and the jury his students. As previously explained, a very effective way to be an effective teacher to the jury is through the use of visual aids.¹³⁹

6. Summary

As one may guess, the summary concludes the direct examination with the expert briefly recapping to the jury his opinion and how he reached it. Brevity is key. This is the expert's opportunity to make his point stick with the jury.

V. PREPARING TO BE AN EFFECTIVE WITNESS

Preparing an expert early for his testimony at trial is beneficial not only to the attorney and his client's case, but is also beneficial to the expert.¹⁴⁰ Early preparation allows the expert time to review notes several times and become comfortable with his testimony, all before taking the witness stand.¹⁴¹ After reviewing his notes, it is also beneficial for the expert to meet with the attorney immediately prior to the trial to finalize the preparation.¹⁴²

On the stand, counsel and witness must be able to anticipate what the other is thinking, which requires thorough preparation.¹⁴³ A well prepared, well supported CPA expert can be decisive in proving or disproving claims made in civil litigation.¹⁴⁴ Experts, because of the specialized nature of their testimony, require even more preparation than lay witnesses. In preparing to be an effective witness, an expert must always keep in mind the objective of his testimony: to maintain credibility with the jury and to convincingly explain his opinion to the jury.

Witness credibility is an essential for any witness, be it an expert or even a lay witness. However, the expert undergoes a different type of scrutiny than that of the lay witness—with the jury trying to determine whether the expert truly *is* an expert in the field he is testifying. As such, it is important that the expert be able to spell and accurately define the technical terms he will be using during his testimony.¹⁴⁵ It is easy for a cross-examiner to undercut the expert's testimony by pointing out these mistakes to the jury. Aside from the sheer embarrassment that the expert feels, the jury will question whether the expert truly knows the subject matter to which he is testifying. The expert should ensure that the definitions he is utilizing is consistent with the technical dictionaries and encyclopedias, and that he has read those definitions in advance.¹⁴⁶

¹³⁹ See *supra* Part IV.B.

¹⁴⁰ Coenen, *supra* note 7.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ French, *supra* note 1, at 18.

¹⁴⁴ *Id.* at 18-19.

¹⁴⁵ MAUET, *supra* note 2, at 119.

¹⁴⁶ *Id.*

Along the same lines of knowing how to spell and define technical terms which will be used during the expert's testimony, the expert should also familiarize himself with the most recent editions of standard treatises on his subject, as well as his own related publications.¹⁴⁷ Just as misspelled words and inaccurate definitions undermine an expert's testimony, the same is true for lack of knowledge of the above mentioned sources. This is another tool utilized by cross examiners to undercut the expert's testimony, with the cross examiner using treatises and the expert's own publications to impeach the testimony given on direct examination.¹⁴⁸ It is important for the expert to familiarize himself with these sources so as to make sure he can explain any inconsistencies that exist between his testimony and the source.

Just because an expert knows the definitions of these technical terms does not mean that he should be encouraged to use them. To the contrary, the expert should avoid using these technical terms whenever possible.¹⁴⁹ The expert must remember that he is the expert, and the jury is not. It is the job of the expert to explain to the jury his opinion so that the jury can understand it and hopefully side with the expert. Using simple language to explain the complex is a difficult task which the expert should work on in his preparation in taking the witness stand.

That being the case, it is essential for the expert to prepare by simplifying technical testimony prior to taking the witness stand in order to assist the jury in determining the ultimate issues of the case.¹⁵⁰ It is difficult enough for a CPA to communicate technical accounting issues with even executive clients who are very experienced in business matters.¹⁵¹ Thus, communicating with the lay juror exponentially compounds the difficulty level for the CPA, especially when the CPA is educating the judge and jury on GAAP, GAAS, financial, and business matters. According to one author, "Experts should bend over backwards to use layman's language and avoid technical terms."¹⁵²

One way to connect with the jurors is through the use of analogies to household and everyday situations.¹⁵³ For example, explaining the "first in, first out" method of inventory, the CPA could prepare, in advance, an analogy with the attorney to be used during the direct examination:

ATTORNEY: And what method of inventory did Milk Co. use?

CPA: FIFO.

ATTORNEY: What does FIFO stand for?

CPA: First in, first out.

ATTORNEY: What exactly does that mean?

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Berliner, *supra* note 115.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

CPA: It means that the first inventory that comes into the store is the first inventory which is sold. It is like when the grocery store stocks its refrigerator section with milk. The milk gets stocked from the back, that way, the older milk, *i.e.*, the milk that first went in, is the first to go out because it slides to the front for the customer to pick up. The newer milk remains stocked behind it.

Along the same line of simplifying complex testimony, the expert should prepare for *how* he is going to testify, making sure that he does not end up sounding demeaning to the jury. Because the expert is essentially trying to “dumb down” his testimony for the jury to understand, often the expert ends up testifying in a professionally arrogant or obviously condescending fashion that fails to respect the jury’s intelligence.¹⁵⁴ Remember, being a credible witness is only one aspect to convincing a jury to side with you; it is also important for the jury to like you as a witness.¹⁵⁵ The witness needs to find a way to reach a happy medium of using layman’s terms and language without sounding demeaning or arrogant.¹⁵⁶ This can only be done through adequate preparation—practicing the testimony out loud in front of others, most likely in front of the attorney who will be conducting the direct examination.

After completing all of his preparation work to testify, it is also beneficial for the expert to “run through” the presentation he will be giving on the stand with the lawyer asking the same questions which will be asked in court.¹⁵⁷ Practice sessions help even those expert witnesses who are “on top of their game.”¹⁵⁸ Experts know how to talk, but don’t know how to communicate effectively in the environment of the courtroom.¹⁵⁹

Practicing the direct examination pays off just as it does with any other witness.¹⁶⁰ When uncomfortable on the witness stand, even experts who are on top of their game can become disorganized, groping for a starting point, stumped with questions the lawyer is asking, not knowing where the lawyer is coming from or what kind of an answer he is looking for.¹⁶¹ Running through the presentation before actually testifying helps the expert to be more comfortable with what to expect by anticipating any glitches that would arise through the lawyer’s questioning.

VI. AVOIDING PITFALLS OF CROSS EXAMINATION

Cross examination is the most difficult part to being a witness, and can also prove to be a difficult job for the attorney performing the cross examination. While direct examinations are often scripted with the witness already being familiar with what questions the attorney will be asking, cross examination is often filled with both unexpected questions and unexpected

¹⁵⁴ MAUET, *supra* note 2, at 120.

¹⁵⁵ *See supra* Part IV.C.ii.

¹⁵⁶ MAUET, *supra* note 2, at 120.

¹⁵⁷ Berliner, *supra* note 115.

¹⁵⁸ *Id.*

¹⁵⁹ MAUET, *supra* note 2, at 121.

¹⁶⁰ *Id.*

¹⁶¹ Berliner, *supra* note 115.

answers. Being able to deal with the unexpected is a key part of performing well as an expert witness and a challenge that some CPAs find exhilarating.¹⁶²

Cross examination of an expert witness is a battle of wits. The attorney performing the cross examination tries to pin the expert down to specific answers which demonstrate to the jury the fallacy in his testimony on direct examination, while the expert tries to maintain whatever credibility he has gained with the jury on direct examination by presenting an explanation to his answers in response to the attorney's specific questions.

The expert undoubtedly is smarter in the specific area being discussed than the attorney; that is why the cross-examining attorney only tends to ask the expert questions that are so specific, and so focused on a particular fact, that the only proper answer is a specific and focused answer—"yes" or "no."¹⁶³ That, however, does not preclude the expert from qualifying a "yes" or "no" answer or providing a further explanation for the answer. However, an expert must be careful with volunteering too much of a response. Volunteering too much of a response opens the door to additional follow-up questions from the cross examining attorney. An expert must remember to keep his cool in responding to cross examination questions and convey his responses in a concise, cogent manner.¹⁶⁴

The best way, and probably the only way, to "avoid the pitfalls of cross examination" is through adequate preparation as previously discussed.¹⁶⁵ Adequate preparation accomplishes two items which are essential to withstanding a cross examination. First, the witness is more likely to be able to anticipate what questions will be asked on cross examination. Second, as a direct result of knowing what questions are going to be asked on the cross examination, the witness will be more comfortable on the witness stand.

On the other hand, lack of preparation, which is evident through mistakes made on direct examination, invites cross examination questions. For example, as previously explained, a witness who misspells or inaccurately defines technical terms on direct examination is susceptible to being questioned about such errors on cross examination.¹⁶⁶ The only way to avoid this pitfall is through adequate preparation in order to familiarize one's self with the material and technical terms that are being discussed in the trial.

Also, as previously discussed, the easiest way for an attorney to pin down an expert on cross examination is by impeachment through recent editions of standard treatises on the expert's subject, as well as the expert's own related publications. The cross examining attorney will use these sources to point out any inconsistencies which exist between the sources and the testimony which the expert gave on direct examination. The expert should be familiar with these sources before testifying and recognize any inconsistencies which exist in advance. This will allow the expert to present an explanation as to these consistencies if the issue is raised on cross examination. In the event the expert's testimony conflicts with one of his own publications, the expert better have a very good explanation—that being the easiest way to impeach the expert's

¹⁶² Crumbley & Russell, *supra* note 30.

¹⁶³ GROSS & WEBER, *supra* note 6, at 164.

¹⁶⁴ See Crumbley & Russell, *supra* note 30.

¹⁶⁵ See *supra* Part V.

¹⁶⁶ *Id.*

testimony, and lose complete credibility with the jury, and ultimately the case for the attorney and client.

VII. CONCLUSION

Today's complex commercial litigation often comes down to a battle between the opinions of each party's CPA expert witness, and how well the CPA communicates those opinions to the jury. As such, CPAs as expert witnesses have become an invaluable asset to all attorneys who work in the field of complex commercial litigation—with the CPA having the ability to make or break any case. The roles these experts play expand much further than the trial itself, with the CPA proving to be most valuable when brought into the case at its earliest stages. As such, it is important to understand the CPAs role as an expert witness and how to become an effective witness for the attorney.