

Using Expert Witnesses in Trying Bankruptcy Cases

Gil A. Miller, Moderator

Rocky Mountain Advisory, LLC; Salt Lake City

Robert E. Kleeman, Jr.

OnPointe Valuation, LLC; Englewood, Colo.

Hon. Michael E. Romero

U.S. Bankruptcy Court (D. Colo.); Denver

Peter Schulman

RubinBrown LLP; Denver

D. Ray Strong

Berkeley Research Group, LLC; Salt Lake City

Hon. Gregg W. Zive

U.S. Bankruptcy Court (D. Nev.); Reno



AMERICAN
BANKRUPTCY
INSTITUTE

DISCOVER



**interactive
code&rules**

law.abi.org

Start Your Research Here






***Your Interactive Tool
Wherever You Go!***

With ABI's Code & Rules:

- **Search for a specific provision of the Bankruptcy Code and related Rules**
- **Access links to relevant case law by section (provided by site partner, LexisNexis®)**
- **Retrieve a Code section or case summary – even on your mobile device**
- **Personalize it with bookmarks and notes**
- **Receive it FREE as an ABI member**

Current, Personalized, Portable
law.abi.org

66 Canal Center Plaza • Suite 600 • Alexandria, VA 22314-1583 • phone: 703.739.0800 • abi.org

Join our networks to expand yours:   

© 2015 American Bankruptcy Institute All Rights Reserved.



Using Expert Witnesses in Trying Bankruptcy Cases

Gil A. Miller, Moderator
CPA, CFE, CIRA
Rocky Mountain Advisory, LLC
Salt Lake City

Hon. Michael E. Romero
U.S. Bankruptcy Court (D. Colo.)
Denver

Peter Schulman,
CPA, CIRA, CDBV
RubinBrown LLP
Denver

D. Ray Strong
CPA, CFE, CIRA
Berkeley Research Group, LLC
Salt Lake City

Hon. Gregg W. Zive
U.S. Bankruptcy Court (D. Nev.)
Reno

Robert E. Kleeman, Jr.,
CPA/ABV, ASA
OnPointe Valuation, LLC
Englewood, Colo.

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?

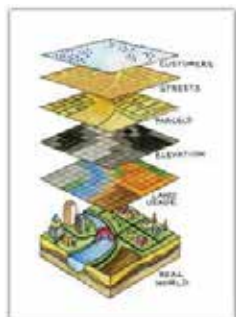
- Over-Arching Objectives of Demonstrative Exhibits
 - Communicate
 - Intuitive
 - Visceral
 - Make interesting what is often tedious
 - Synthesize diverging views
 - Overlays
 - Reverse engineer opposing expert's work

What Makes a Good Expert?

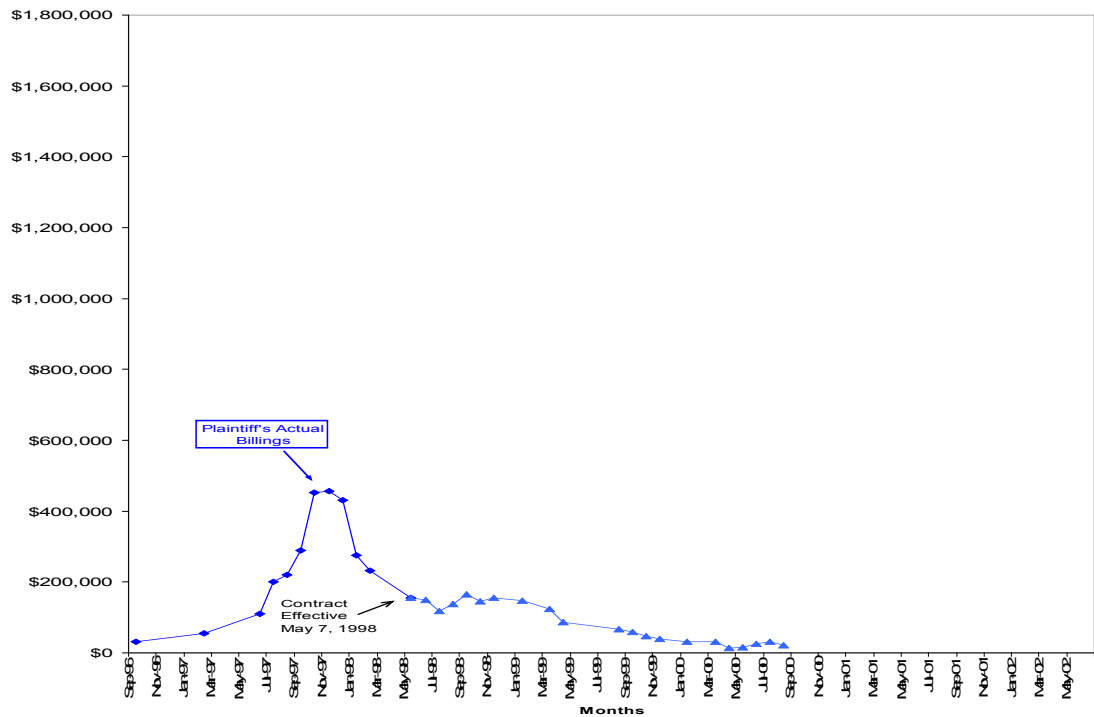
- Suggestions for Demonstrative Exhibits
 - Recent Case Study (Solvency Analysis)
 - Kinkos
 - One exhibit split between two poster boards
 - Other exhibits distorted text (resizing - aspect ratios)
 - Poor quality
 - Type too small
 - Awkward presentation
 - Use printer that is equipped to prepare demonstrative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

What Makes a Good Expert?

- Graphs
 - Electronic
 - Poster Boards
 - Overlays

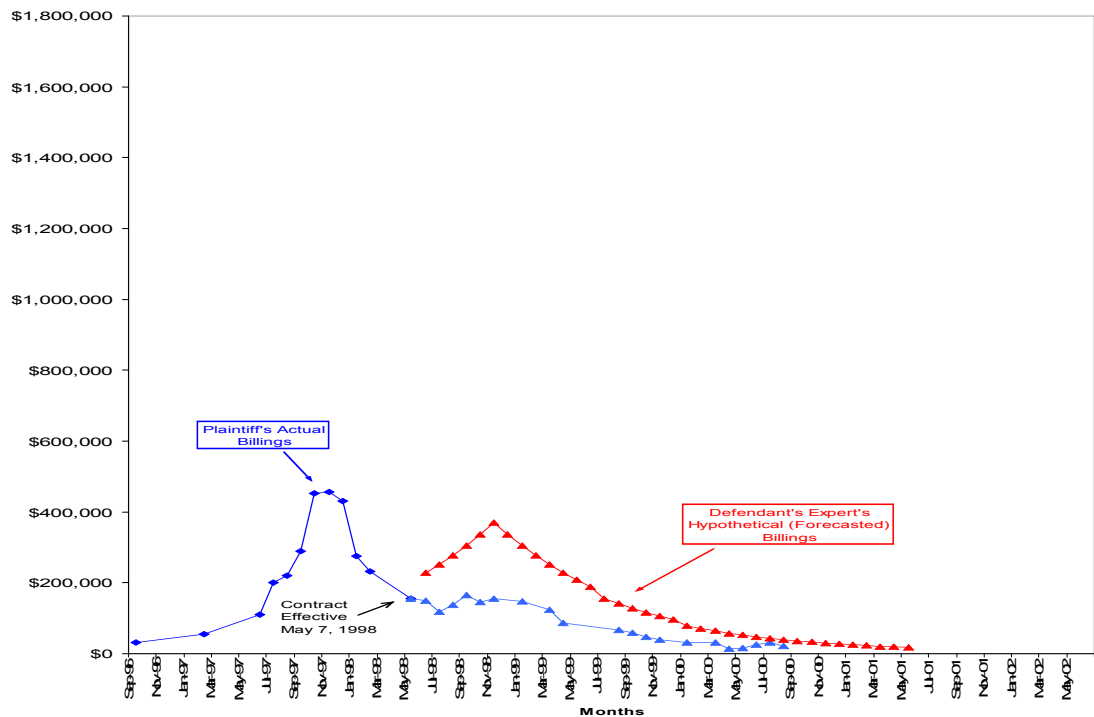


Gross Revenue Analysis - Long Distance Charges



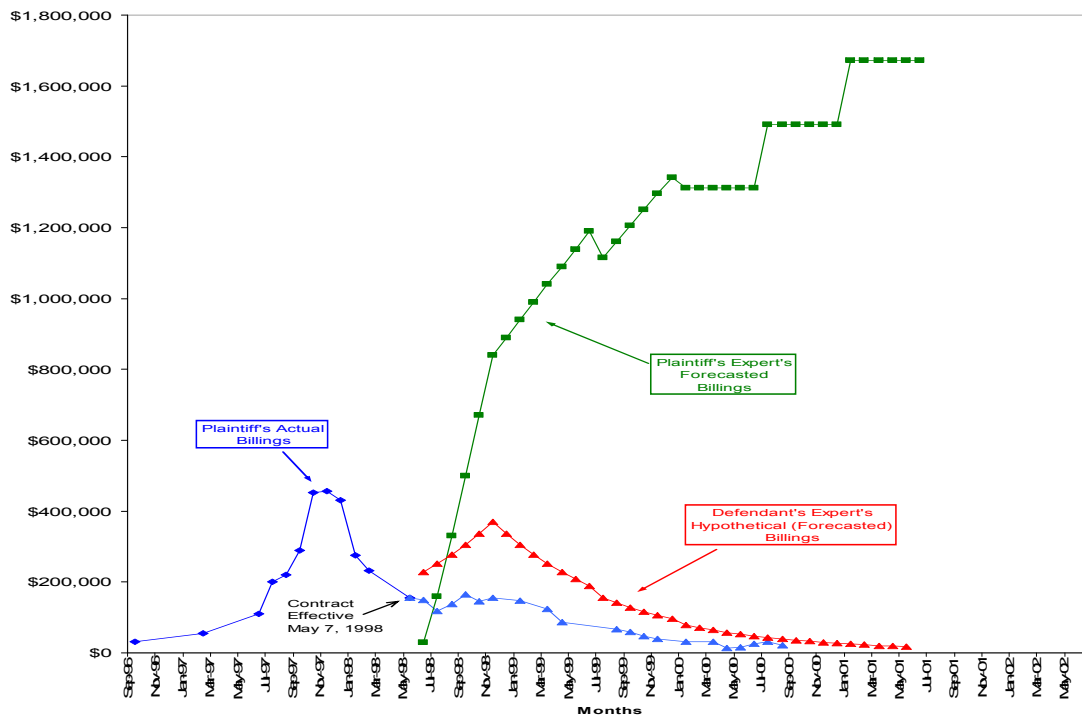
© Peter Schulman, 2015, All Rights Reserved

Gross Revenue Analysis - Long Distance Charges



© Peter Schulman, 2015, All Rights Reserved

Gross Revenue Analysis - Long Distance Charges



© Peter Schulman, 2015, All Rights Reserved

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

