



AMERICAN
BANKRUPTCY
INSTITUTE

2019 Southeast Bankruptcy Workshop

Skills Track

Evidentiary Focus on Deposition, Cross-Examination & Testimony Prep

Matthew R. Brooks, Moderator

Troutman Sanders LLP; Atlanta

Hon. Paul M. Black

U.S. Bankruptcy Court (W.D. Va.); Roanoke

Katherine R. Catanese

Foley & Lardner LLP; New York

Matthew T. Faga

Markus Williams Young & Hunsicker LLC; Denver

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Hon. Paul M. Black – US Bankruptcy Court, WDVA

Matthew Brooks – Troutman Sanders, Atlanta, GA

Katherine Catanese – Foley & Lardner, New York, NY

Matthew Faga – Markus Williams Young & Hunsicker, Denver, CO

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**TOP 10 TIPS FOR EFFECTIVE CROSS EXAMINATIONS AT TRIAL
(ESPECIALLY OF DIFFICULT OR EVASIVE WITNESSES)¹**

- 1. USE ONLY LEADING QUESTIONS (I.E. THESE ARE QUESTIONS THAT SUGGEST THE ANSWER, USUALLY A “YES” OR “NO”).**
- 2. LIMIT YOUR QUESTIONING. AVOID THE ONE QUESTION TOO MANY. WHEN YOU HAVE WHAT YOU NEED, DON’T ASK ANY MORE.**
- 3. BE PROFESSIONAL, BUT ASSERTIVE (NOT ARGUMENTATIVE OR OVERLY AGGRESSIVE).**
- 4. KEEP THE FOCUS ON YOU (NOT THE WITNESS).**
- 5. SAVE THE CONCLUSIONS YOU CAN DRAW FROM THE WITNESS’S STATEMENTS FOR YOUR CLOSING ARGUMENT—DO NOT TRY TO MAKE THE POINT THROUGH THE WITNESS.**

¹Adapted from Mastering the Masters training series by Mark D. McCurdy and Suellen Wideman

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**TOP 10 TIPS FOR EFFECTIVE CROSS EXAMINATIONS AT TRIAL
(ESPECIALLY OF DIFFICULT OR EVASIVE WITNESSES) (continued)**

- 6. BE BRIEF, BE BRIEF, BE BRIEF.**
- 7. LISTEN TO THE WITNESS (RATHER THAN WORRYING ABOUT YOUR NEXT QUESTION).**
- 8. AVOID USING ADJECTIVES.**
- 9. FOCUS ON ONE NEW FACT PER QUESTION.**
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TOP 10 TIPS FOR DIRECT EXAMINATIONS AT TRIAL (continued)

6. KEEP IT CONVERSATIONAL.
7. USE THE WITNESS'S PRIOR ANSWER TO FORM FOLLOW UP QUESTIONS.
8. DO NOT ASK QUESTIONS YOU DO NOT KNOW THE ANSWERS TO.
9. USE SHORT, SIMPLE QUESTIONS.
10. WHERE POSSIBLE, ASK THE WITNESS TO EXPLAIN, IF HELPFUL FOR THE JUDGE.

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TOP 10 TIPS FOR ADMITTING EVIDENCE¹

1. KNOW THE RULES OF CIVIL PROCEDURE AND HOW THEY ARE INCORPORATED INTO THE BANKRUPTCY RULES.
2. ASK THE WITNESS ABOUT FIRST HAND KNOWLEDGE THAT HE OR SHE HAS REGARDING THE EXHIBIT.
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4. DO NOT USE THE EXHIBIT UNTIL IT HAS BEEN OFFERED AND ADMITTED INTO EVIDENCE.
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6. UNDERSTAND THAT THE COURT CAN ALLOW THE OTHER SIDE TO “VOIR DIRE” THE WITNESS IF THEY OBJECT TO ITS ADMISSION—I.E. ASK THE WITNESS QUESTIONS TO ESTABLISH WHETHER THE EXHIBIT IS ADMISSIBLE.
7. YOU CAN USE THE EXHIBIT SUBJECT TO “CONNECTION UP” IN MOST COURTS—I.E. YOU MAY NOT BE ABLE TO LAY A FULL FOUNDATION WITH THIS WITNESS BUT MAY BE ABLE TO ADMIT THE EXHIBIT SUBJECT TO THE TESTIMONY OF A FUTURE WITNESS.

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8. LAY A FOUNDATION—USE “MAGIC WORDS” FOR LAYING THE PROPER FOUNDATION:
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 - D) DO YOU RECOGNIZE THE DOCUMENT?
 - E) HOW DO YOU KNOW?
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 - J) PUBLISH IT TO THE FACTFINDER.
9. IF YOU ARE TRYING TO USE A DOCUMENT FOR AN ILLUSTRATIVE PURPOSE, ASK—WILL THIS BE HELPFUL TO YOU IN EXPLAINING YOUR TESTIMONY?
10. IF USING PHOTOGRAPHS—ASK, DOES THIS PICTURE ACCURATELY AND FAIRLY PORTRAY THE SCENE?

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TOP 10 TIPS FOR AN EFFECTIVE DEPOSITION OF AN EXPERT WITNESS¹

1. FOCUS ON LEARNING NEW INFORMATION AND DECONSTRUCTING AND RECONSTRUCTING THE EXPERT'S REPORT.
2. ASK OPEN ENDED QUESTIONS, CONCENTRATING ON "WHY", "DESCRIBE" AND "EXPLAIN".
3. AVOID ASKING "DID YOU. . ."
4. ASK "WHAT ELSE" OFTEN AND "CAN YOU EXPLAIN THAT TO ME"—FOLLOW UP IS THE KEY.
5. SUMMARIZE THE EXPERT'S TESTIMONY DURING THE DEPOSITION TO MAKE SURE YOU UNDERSTAND.

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TOP 10 TIPS FOR AN EFFECTIVE DEPOSITION OF AN EXPERT WITNESS (continued)

6. FILL IN GAPS IN THE EXPERT'S KNOWLEDGE---USE THIS TIME TO PROBE WHAT YOUR EXPERT THINKS ABOUT THE OTHER EXPERT'S REPORT.
7. LOOK FOR A BIAS—FEE, RELATIONSHIP WITH COUNSEL, PERCENTAGE OF INCOME FROM TESTIFYING ON A PARTICULAR SIDE ETC.
8. ASK ABOUT HIS OR HER ASSUMPTIONS—WHAT WAS THE BASIS FOR THAT ASSUMPTION, WHAT HAPPENS TO YOUR OPINION IF THE ASSUMPTION IS WRONG?
9. FIND OUT AND ASK ABOUT WHAT THE EXPERT DID NOT DO.
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TOP 10 TIPS FOR IMPEACHMENT AT TRIAL¹

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2. LISTEN DURING DIRECT EXAMINATION AND WRITE DOWN ANY TESTIMONY THAT MAY BE USED TO IMPEACH.
3. DO NOT ASK A QUESTION IF YOU DO NOT KNOW THE ANSWER.
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5. COMMIT: DO YOU REMEMBER SITTING FOR A DEPOSITION ON X DATE?
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TOP 10 TIPS FOR IMPEACHMENT AT TRIAL (continued)

7. CONFRONT: AND DURING THAT DEPOSITION YOU TESTIFIED THAT.... BUT IN YOUR TESTIMONY TODAY YOU TESTIFIED THAT
8. WITH CAUTION: SOMETIMES YOU CAN ASK ONE FINAL QUESTION TO CLOSE THE LOOP - “YOUR TESTIMONY IS DIRECTLY CONTRARY TO YOUR DEPOSITION ISN’T IT?” BUT DON’T ALLOW THE WITNESS TO EXPLAIN. ALSO KNOW YOUR AUDIENCE AND WHAT YOU CAN PLAUSIBLY GET AWAY WITHOUT SOUNDING SNARKY OR ANGERING THE FACT FINDER.
9. IF YOU ARE CONDUCTING THE CROSS EXAMINATION OF AN EXPERT, IMPEACH HIM OR HER ANY TIME HE OR SHE DEVIATES FROM THE REPORT, BUT BE CAREFUL WHAT YOU CHOOSE TO IMPEACH—MAKE SURE IT IS A FACT THAT MAKES A DIFFERENCE IN THE CASE.
10. PREPARE, PREPARE, PREPARE FOR THE DEPOSITION BECAUSE IT TELLS THE OTHER SIDE (I) HOW WELL YOU ARE PREPARED FOR TRIAL AND (II) HOW WELL YOU KNOW THE ISSUES. A CLEAN, CLEAR TRANSCRIPT CAN MAKE YOUR CASE AGAINST A WITNESS

FACT PATTERN

Your client, Artic Mist Inn ("AMI"), is a publicly-traded company that owns and operates a portfolio of whimsical hotels (each with a different theme) based upon various historical events. Part of the allure of AMI's portfolio is that each of its hotels contains numerous genuine antiques from the era or historical event to which it relates. For example, AMI owns and operates the "Industrial RevolutINN," a hotel located in Lowell, Massachusetts, that contains, among other things, textile machinery developed and constructed by Samuel Slater. Although AMI owns the antiques and all other property located in each of its hotels, it does not own the brick-and-mortar buildings themselves; rather, it leases existing structures and negotiates a build-out sufficient to accommodate the hotels.

Several of AMI's hotels have been a runaway success; however, the Industrial RevolutINN was a dismal failure and, shortly after opening, became a dire drain on AMI's viability as a whole. After negotiations with the landlord failed, AMI filed a petition for relief under Chapter 11 of the Bankruptcy Code to reject the Industrial RevolutINN lease and reorganize. The Debtor's chapter 11 case has been plagued with setbacks, which, cumulatively, have resulted in a best-case scenario of selling substantially all of the Debtor's assets via Bankruptcy Code section 363 and then liquidating.

After an extensive marketing process conducted by the Debtor's financial advisor, the Debtor has received only three (3) offers: (i) \$20 million, cash-in-hand, for the Debtor's assets from Stalking Horse B&B LLC; (ii) \$30 million, with a complete financing-out, for the Debtor's assets from Slater, Ltd., an up and coming group based in the Slovenia; and (iii) a forward triangular merger with Hüber, Inc., a little-known competitor of AirBnB.

The Debtor's financial advisor has calculated that the Stalking Horse B&B offer will result in a distribution of approximately 40% to general unsecureds (and will extinguish equity). The Slater offer – if consummated – will result in a distribution of approximately 60% to general unsecureds (and will extinguish equity), and the Hüber offer is difficult, if not impossible, to value. On these facts, the Debtor's financial advisor has opined that the Stalking Horse B&B offer – facially the lowest – is the best offer for the Debtor and its estate. Accordingly, the Debtor moved for a 363 sale and auction with the Stalking Horse B&B offer as the floor. The Debtor's proposed bidding procedures disallow financing contingencies, so Slater will be unable to bid. The Creditors' Committee and Equity Committee couldn't disagree more with this proposed course of action. Each are considering supporting one of the other offers and have indicated that they intend to vehemently contest the Debtor's motion and proposal sale to the stalking horse.

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 10. WHERE POSSIBLE, ASK THE WITNESS TO EXPLAIN "FOR THE JURY" IF IT IS A JURY TRIAL—THIS WILL REMIND THE WITNESS TO ADDRESS THE JURY DIRECTLY, WHICH CAN BE PERSUASIVE AND ADD CREDIBILITY TO THE WITNESS.
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