Joe Isuzu on the Witness Stand and How to Examine Him (Her) (It)

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A. ROLE OF AN EXPERT WITNESS

1. Experts can enhance the credibility of your position.

    a. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to 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. *See* FED. R. EVID. 702.

    b. Is the expert's opinion one that improperly invades the province of the trial court by answering legal questions, or interpreting the terms of a contract?

2. They must confirm your story, conveying it in a way which can be understood by the trier of fact and retained until the ruling.

3. A good expert's testimony will be not only informative and persuasive; he should leave behind when he's gone a clear understanding of his testimony and the basis of his conviction.

4. The superior expert does not require a script.

5. The expert's credibility will be judged by the manner and logic with which his opinions were conveyed, and the degree to which they reflected a considered judgment, rather than a strident advocacy, of the issues at hand.

6. If the adversary's expert is not challenged by opposing expert opinions, would testimony from the adversary's expert likely be accepted by the judge.

7. Although the same information might be presented to the judge by a lay witness, would the testimony be more effective if an expert offers an opinion?

8. Rule 706 provides for court appointed experts. These can sometimes be useful if an objective opinion is needed.

9. The expert can assist in the identification and analysis of critical issues. However, once the expert is designated as a witness, all prior communications may be open to discovery. For this reason, it is often desirable to have two experts; one to act as and advisor and one to serve as the witness.

10. Expert testimony can be used to demonstrate that a payment must be made under the doctrine of necessity.

B. FINDING THE RIGHT EXPERT WITNESS

1. Develop multiple sources.

2. Pick at least two candidates and check them out thoroughly.

    a. Check their resumes.

    b. Get references.

    c. See samples of their work.

    d. Make sure your expert witness has worked on similar cases. Academic knowledge is seldom a substitute for firing line experience. Don't reinvent the wheel.

3. Let your expert witness completely understand your point of view. If she does not agree with you, find out why. Adjust your thinking or get another expert. When the expert does understand the entire picture, she will notice seemingly unimportant details that can make a big difference.

4. Your expert should:

    a. Be possessed of a probing intelligence.

    b. Be available to work.

    c. Be imaginative.

    d. Be knowledgeable in his field.

    e. Be able to communicate clearly.

    f. Have strong technical skills.

    g. Know the bankruptcy process and have relevant bankruptcy experience.

h. Have deposition and testimony experience. It is important for the expert to state his positions with confidence and authority without antagonizing the trier of fact.

i. Possess integrity and credibility.

j. Have the appropriate credentials.

C. WHERE DO EXPERTS COME FROM?

1. Referrals from other lawyers.

a. Advantages.

? Battle tested.

? Knows the do's and don'ts.

? Reduced learning curve because already generically familiar with pertinent issues.

? Helpful impressions from lawyers who have seen the expert in action.

? Availability (has an appreciation for the time commitments, the inconveniences, etc.).

b. Disadvantages.

? Viewed as a professional witness lacking objectivity.

? Has overextended oneself with the inability to give appropriate attention to your matter.

? May no longer be a practitioner, only a witness.

2. Academia.

a. Advantages.

? Leaders in the field.

- ? Generally not viewed as professional witnesses, often have superior knowledge.
- ? Sometimes are relatively inexpensive.
- ? Published on relevant issues.
- ? Views well recognized and known.
- ? May have more time than other possible experts.
- ? May meet standards of admissibility readily.

b. Disadvantages.

- ? Possible bent towards equivocation.
- ? Inexperienced testifiers and hence greater preparation needed (high maintenance).
- ? Big learning curve on certain issues and the judicial system in general.
- ? Unsophisticated with regard to differences between litigation and academia.
- ? Professorial (too theoretical, plodding, etc.).
- ? Suspicious of lawyers, industry, and insurance companies.
- ? Demeanor.
- ? Resistance to lawyers' advice and preparation.
- ? Prior publications may be used to contradict testimony.

3. Professional Experts.

a. Advantages.

- ? Knowledge of time constraints.
- ? Support staff.

- ? Availability may not be a problem.
- ? Access to specialist in related fields.
- ? Seasoned (low maintenance).

b. Disadvantages.

- ? The "hired gun" syndrome.
- ? Not cost-effective, often overpriced.
- ? Difficult to control.
- ? Track record (the other side may know more about him than you do).
- ? Over-committed (your case does not get the attention it needs).
- ? Prior testimony may prove embarrassing.

4. The client can often provide the names of experts.

a. Advantages.

- ? Knowledge of the industry.
- ? Knowledge of the client.

b. Disadvantages.

- ? Ties to the client may tarnish his appearance of objectivity.

5. The client can also be used as an expert under appropriate circumstances.

D. VALUATION EXPERTS

1. Who does valuations? Just about everybody.

CPAs	Engineers
Investment bankers	Consultants
Analysts	College professors
Economists	Commercial lenders

Note: Be careful when hiring CPAs or other professional from firms that also provide audit services for your client(s). In certain circumstances, Sarbanes-Oxley prohibits accountants (and accounting firms) from providing valuation services to audit clients. Ask plenty of questions before proceeding with the retention of a valuation expert from an accounting firm.

2. Generally, regarding valuation experts, there are no:

   a. Licensing requirements--state (unlike CPAs, attorneys).

   b. Widely recognized industry associations.

   c. Agreed upon ethics, rules or procedures.

   d. Due diligence requirements.

3. What type of expert do you want?

   a. A locally or nationally recognized expert:

      ? Who speaks English.

      ? Who is credible.

      ? Who can produce a written valuation report including:

         o Valuation considerations, scope and limitations.

         o Valuation approaches and methods.

         o Review of the conditions of the economic and financial markets at and around the valuation date.

- o Overview of the industry.
- o Overview of the company.
- o Earnings capacity.
- o Dividend-paying capacity.
- o Net assets.
- o Market price valuation and comparables.
- o Present value of future cash flow.
- o The valuation of the company and considerations/assumptions taken.

b. The report should consider:

- ? Capitalized earnings.
- ? Dividend-paying capacity.
- ? Net assets--market value; Real estate--valuations.
- ? Market price of stock, if public.
- ? Present value of future cash flows.

c. Determine if a report will be helpful or just provide information to the opposition. Rule 26 of the FRCP requires a written report and details its contents. Note that Rule 26 usually applies in Bankruptcy Court adversary proceedings, but it is often inapplicable in contested matters. Check your local rules carefully.

E. PRE TRIAL CONSIDERATIONS

1. The First Phone Call.

a. Who are parties (*e.g.*, who is related to parties).

b. Deadlines.

c. Expected time commitments.

d. Opposing experts, if known.

e. Issues, (*e.g.*, additional or different experts may be required, if so, get names from expert).

f. Areas he will be expected to address (*e.g.*, is he really expert in these areas, has he already formed opinions, if so, why and what are they).

g. Expert's curriculum vitae.

h. Expert's background (involvement with issues, related issues, publications, prior testimony).

2. Personal Visit.

a. Appearance.

b. Articulate.

c. Commitment.

d. Demeanor.

e. Confidence (particularly in your case).

f. The negatives the expert must know (*e.g.*, bad company documents).

g. Keep him/her current (*e.g.*, send information as it becomes available).

h. Index materials.

i. Whether to provide summaries (*e.g.*, may be a very good idea).

j. What does expert think he needs (*e.g.*, make it a two-way street).

3. Getting the Expert Ready.

a. What expert reviewed (or said) is likely to be discoverable, *including* attorney work product, according to some courts (there is a split of authority on this point among Federal Courts).

b. Provide the expert with all relevant materials and clear direction as to the specific areas in which expert testimony is desired.

c. Whatever opposition's expert has or at least is relying on.

d. What other side may not know but will probably learn.

4. Expert Generated Materials.

a. Notes (*e.g.*, to do or not to do, explaining it to the expert).

b. Reports:

? Are they necessary?

? Minimize drafts.

? State of expert preparation when drafts prepared.

? Role of attorney.

c. Investigation.

? Amount of attorney involvement (*e.g.*, expert should check with lawyer first).

? Oversight by lawyer.

? Always know what expert is doing, how he is doing it, and why he is doing it.

d. Gathering of Materials.

? Does the expert do it or does the lawyer (*e.g.*, what would expert's normal practice be).

? Coordinate.

5. What the Expert Should Provide You.

a. List of all publications.

b. Cases in which he has testified.

c. Problems:

? Ever not qualified.

? Conflicts.

d. Frequency of testimony and for which side.

e. Relationship with parties, lawyers, etc.

f. Time commitments and conflicts.

g. Schedule.

h. What he feels he needs.

i. Fees.

6. Mandatory disclosure.

a. Is the case subject to deadlines of court imposed pre-trial order mandating disclosure of expert at designated time?

b. Have parties reached agreement on disclosure of experts?

c. Don't forget FRCP 26 which contains provisions governing the timing and content of expert disclosures in those courts which utilize Rule 26 (see FRCP 26(a)(2)(A)-(C)).

7. Prepare for Depositions.

a. Do it early enough.

b. What has he reviewed? (*e.g.*, does he know facts and have all necessary information?).

? Has she reviewed the pleadings?

c. What does he still need to see?

d. What are his opinions?

e. What are they based on?

f. Are they logical?

g. Are they in his areas of expertise?

h. What do the opposition's experts say?

i. How does he deal with "the negatives?"

? Anything in the expert's past history is fair game at a deposition. Any gaps or embarrassments in his education or personal problems or lawsuits may be the subject of the questioning.

? Many expert opinions are educated guesses. Don't overstate the accuracy of the opinion.

j. What is in his notes, etc.? Do not take anything to the deposition unless the document must be produced at the deposition.

k. Prior articles, depositions, etc.

l. Can the expert react to the hard questions?

? Tell the truth.

? Be consistent. Respond in you own words and do not let opposing counsel lead you. She will try to create inconsistencies Use the questioning to again state your position.

? If you don't understand the question ask the opposing counsel to say it again until you do understand the question. **Don't guess.**

m. Does the expert know the applicable law?

n. Does the expert understand the theme?

o. Does the expert understand the issues?

? Can she explain the issues in understandable terms and not lapse into technical jargon?

? Be careful with synonyms and avoid pronouns.

p. Does the expert understand his role in the case and in contrast to the other experts?

q. How will he handle collateral issues if asked?

- ? The expert is not an expert on everything. If she doesn't know the answer to a question she should not try to fake it. The expert can go look up the answer later. There is nothing wrong with saying "I don't recall that information but is in my notes and I can check it if you want."

r. Review expected deposition examination, including pertinent documents, etc.

- ? Never volunteer.
- ? Never conceal anything if asked. Do not look sneaky.
- ? Listen to the question.
- ? Do not allow opposing counsel to convince you that you are wrong.
- ? Do not be intimidated.
- ? Don't worry about silence and pauses by opposing counsel. Sit quietly until the next question.
- ? Don't let opposing counsel phrase the answer for you. This is a typical lawyer/newscaster trick. Answer the question in your own words.
- ? Beware of the friendly opposing counsel. Don't try to help her. It is not your obligation to educate the opposition. Don't offer to produce a document unless it is requested.
- ? Don't feel required to answer questions with a yes or no answer if an explanation is necessary.
- ? Answer one question at a time. If opposing counsel asks multiple part questions you should respond by asking counsel to state them one at a time. It is appropriate to say "You have asked several questions, which would you like me to answer first".

? Beware of repeat questions. They are designed to create inconsistencies. It is a favorite trick of counsel to rephrase questions to try to get conflicting answers. It is human nature to try to help someone understand your answer and to rephrase the answer. This may result in an apparent conflict or ambiguity. It is best to just state your answer again.

? Do not agree to opposing counsel's description of documents unless you have reviewed the document and agree with the characterization.

? Don't try to be funny at the deposition. It can be misunderstood on a transcript or taken out of context.

s. Handling the incomplete hypothetical or "unscientific question."

? Do not accept silly assumptions.

? Watch for assumptions hidden in the questions.

? Be prepared to explain your assumptions.

? Don't be rattled by questions such as:

- "Have you been coached to say this."
- "Did your lawyer tell you to say this."
- "Why are you hesitating?"
- "So you don't know."
- "So you didn't consider the Mongolian exchange rate."
- "What procedures or methods were considered and eliminated?"
- "What assumptions did you use?"
- "What support is there for your assumptions?"
- "Have you talked to anyone about this case?"

t. Attorney communications with the expert are usually discoverable.

? Even attorney's opinion work product may be discoverable once provided to the expert, whether or not it was part of information that was relied on by expert to formulate an opinion.

u. Drafts of expert reports are discoverable.

v. Expert's preliminary notes are discoverable.

w. The expert can assist you in deposing the opposing experts and parties by identifying the documents which should be produced and assisting in drafting the relevant questions. Your expert should also be present to help you when the depositions are taken.

x. The deposition is like cross examination and the witness must always be on guard since the opposing counsel will use every trick in the book to make her look bad. The expert should respond to the question but not elaborate or try to convince the opposing counsel that the expert is correct. The expert should not try to explain further if the question has already been answered and the opposing counsel rephrases the question.

8. You can minimize the risks associated with free exchange of work product, documents, drafts, etc., with your expert(s) by entering into a stipulation with your opponent (*e.g.*, draft reports will not be produced). Both parties might have an incentive to protect draft reports. Addressing this issue in advance could minimize headaches later.

F. TRIAL PREPARATION

1. Familiarize the expert with all relevant facts.

   a. Prepare sufficiently in advance.

   b. Skimping on the development of a factual basis for your expert's opinion can be the surest way to bring on a devastating cross-examination.

   c. Go over exhibits to be used.

2. Familiarize the expert with legal principles.

a. Perhaps out of fear of losing the attorney-client privilege, lawyers often are reluctant to discuss their legal theories and those of their opponents with the expert. But your expert won't be testifying in a vacuum. In order to maximize its effect at trial, the expert's testimony must be shaped to fit with your legal theories and to counter those of the other side. For that reason, you should thoroughly familiarize your expert with the theme of the case and any legal issues in the case which might conceivably relate to the expert's testimony. This will assist the expert in avoiding traps on cross-examination.

b. Review admissibility standards.

3. Simplify technical concepts.

a. Expert witnesses tend to phrase their testimony in technical language readily understandable to their peers. Judges are more likely to be impressed by an expert who can explain to them-- in common sense terms--why the numbers work out the way that they do. When stripped of acronyms and jargon, auditing and accounting are relatively common-sense endeavors.

4. Carefully craft the expert's testimony before he takes the stand.

a. Because of all the time spent before trial discussing the case, it is tempting to assume you can have a casual conversation with your expert on the stand and thereby convey the expert's opinions convincingly to the judge. Counsel and the expert may have their own shorthand for communicating about the case, but this is not sufficient to convey opinions to the judge. In the tricky areas of testimony, the expert must be careful not to make a relatively accurate, but not quite precise, choice of words which could open the door to an effective cross-examination.

b. Go over hypothetical questions.

5. Have one or more dress rehearsals.

a. You should do at least one dry run of both the direct and the anticipated cross-examination. Try to treat these practice sessions as if they were the real thing. This helps the expert to overcome the nervousness and to work out the best phrasing of the testimony.

b. Consider having the rehearsal video taped.

6. Have your expert view the opposing expert's testimony.

a. The expert may be able to provide you with valuable insights into areas of cross-examination.

7. Anticipate cross-examination.

a. In anticipation of cross-examination, you and your expert should conduct a thorough review of the expert's published materials and testimony given in your case and elsewhere for possible areas of impeachment.

8. Have an agreed upon signal for your expert witness to stop talking and allow you to ask the next question.

9. Do not interrupt the judge. He is the person you have to convince. Listen carefully if he asks you a question and try to answer it as well as possible.

10. You should keep in mind that the entire time you are in the courthouse you could be under observation by opposing parties or the judge. Do not talk about the case in elevators or other public places.

G. ACCREDITING THE EXPERT WITNESS

1. To convince the judge that your expert is better qualified than the opposing expert, the accreditation process is important.

2. As a general rule, the accreditation process should be conducted as a question-and- answer session, not a monologue. Witnesses should appear to be too modest to go into great detail about their own credentials and accomplishments. An attorney asking frequent questions is more likely to produce a full recitation of the expert's qualifications without offending the judge. Also, you cannot assume the judge understands the significance of your expert's accomplishments. The expert should be allowed to explain where a particular award came from and the criteria used in making the award decisions.

3. The accreditation should be geared specifically to the opinions about to be offered. One effective way to do this is to start off the direct examination with a quick synopsis of the opinions your expert has formed before proceeding to accreditation. Your goal should always be to convince the judge not just that your expert is a better accountant or auditor than your opponent's, but that your expert knows more about the particular issues involved in your case because of his/her education and experience.

4. Finally, at the end of your accreditation, you should always ask the court to recognize your witness as an expert.

H. EXPLAINING WORK PERFORMED BY EXPERT

1. Federal Rule of Evidence 705 no longer requires a recitation of the underlying facts before an expert opinion is given. However, in the interests of persuasion, your expert should still detail the work he/she performed. This portion of direct should start with testimony about when the expert was contacted and what he/she was asked to do by counsel. If counsel has done a proper job, the expert will be able to testify that she was retained "to evaluate....," not to "testify for....." Counsel should be careful to avoid the appearance that the expert was biased from the moment of the first contact.

2. The witness should state the amount of time spent on the engagement, the nature of the documents and other evidence reviewed and others actions taken by the expert informing her opinion. If opposing counsel is a litigator who is used to performing before juries the amount of money paid to the witness should be elicited on direct examination.

I. PROTECTING YOUR EXPERT

1. Opposing counsel may challenge the expert's qualifications, scope or substance of testimony, or the degree of the expert's collaboration with counsel. Experts are regularly asked during their qualification whether or not they have ever been denied qualification as an expert in any area. If the answer is affirmative, the expert is dogged by it in future testimony. A good expert does not overextend his claim to expertise.

2. Your expert witness may lose some of his credibility if the judge detects too much advocacy on the part of the expert. The expert should be available to help you at the trial but should not appear to be too involved in the case.

3. If parts of the written report have been prepared by others under the supervision of the testifying expert this should be addressed in direct testimony and the testifying expert should be familiar with the underlying data.

J. AUDIENCE ATTENTION SPAN

1. Only so much detail can be presented with any reasonable hope of retention once the expert is absent from the room and unable to provide a running commentary on the meaning of his data. The more complex the issues, the greater the need to hone them down to those which are pivotal with regard to the key elements in the claim.

2. Nothing works like simplicity. Probably the most valuable skill for an expert is being able to identify critical issues in a case, and to reduce them to simple and memorable concepts.

3. Demonstrative exhibits should be used when helpful but overuse of exhibits can distract the court. A one page summary is often helpful.

K. DIRECT EXAMINATION

1. Federal Rule of Evidence 702 sets forth the requirements for admissibility of expert testimony. The approach set forth in Rule 702 is a flexible one with the district court serving as the gatekeeper said the Supreme Court in *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993).

   (a) In *Daubert*, the Supreme Court said that the Rules of Evidence and especially Rule 702 assigned to the trial judge "the task of insuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597.

      (1) In *Daubert,* the *C*ourt made some general observations to assist the trial court in evaluating scientific evidence. At the outset the trial judge must determine "... whether the expert is proposing to testify to (1) scientific knowledge that (2) would assist the trier of fact to understand or determine a fact in issue." *Id.* at 592.

      (2) In undertaking that process the Supreme Court made the following observations to assist in the determination of whether a theory or technique is scientific knowledge which will assist the trier of fact:

         (a) whether the theory or technique can be or has it been tested;

(b) whether the theory or technique has been subjected to peer review and publication;

(c) in the case of a particular scientific technique, the court should consider the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and

(d) general acceptance can have a bearing.

Id. at 593-594.

(b) The Supreme Court in *Daubert* made it abundantly clear that "general acceptance," as set forth in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) and as more commonly known as the *Frye* test will not be a necessary pre-condition to the admissibility of scientific evidence under the Federal Rules of Evidence.

2. Another requirement, not discussed in *Daubert*, is that the trial judge must make a preliminary determination that the proffered witness is qualified as an expert by knowledge, skill, experience, training or education. *See e.g., Moore v. Ashland Chemical, Inc.*, 126 F.3d 679 (5th Cir. 1997), *reh'g*, 151 F.3d 269 (1998), *cert. denied*, 526 U.S. 1064 (1999) *and Christophersen v. Allied Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991), *cert. denied,* 503 U.S. 912 (1992); *Lippe v. Bairnco Corp.*, 288 B.R. 678 (S.D.N.Y. 2003).

3. The Supreme Court has held that the "gatekeeping" function described in in *Daubert* applies not only to scientific testimony, but all expert testimony in Federal Courts. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999).

4. Note that the *Daubert* analysis has served as basis to reject valuation testimony in Bankruptcy Court. *See, e.g., In re Integrated Health Services, Inc.*, 289 B.R. 32, 36 (Bankr. D. Del. 2003) (the Court concluded that the expert's conclusion was not credible because [among other reasons] the expert's methodology was not used by other experts in the field, there was no literature endorsing the expert's approach, and the expert had departed from established HUD guidelines in reaching his conclusions). *See also In re Armstrong World Indus., Inc.*, 285 B.R. 864 (Bankr. D. Del. 2002) (Bankruptcy Court applied *Daubert* test to reject claimant's expert testimony regarding level of airborne asbestos).

L. CROSS-EXAMINATION

1. Preparation.

   a. Take the expert's deposition.

      ? A deposition with properly phrased questions can help control the expert. It gives you a reasonable certainty that if you ask the same questions you should get the same answers. You may get great answers if your opponents are not well prepared at the time the deposition is taken. Concessions can be gained in a deposition if the expert is unaware of the importance of the admission sought. The deposition is the appropriate time to take risks, investigate approaches, seek opinions and test positions without fear of adverse impact on the judge.

   b. Know your expert.

      ? You should investigate the expert's background to find out about his education and experience. For instance, you should confirm that the expert really got the degree he said he did, really took the courses he said he did, etc. What books does he consult regularly in his practice? What do the attorneys he has worked for say about his opinions and his expertise? What do the corporations who have used him as a consultant think about his work? Were any of his opinions rejected by an appellate court?

   c. Know your subject matter.

      ? You must know as much as the expert knows about the subject matter of his testimony. The attorney should become familiar with the literature in the field. He should take the time to discuss with experts in the field what the differing points of view might be on the questions presented by your case.

   d. Define your objectives.

      ? You need to have a clear picture of what you want to accomplish in your cross-examination. Most importantly, you must decide what interrogation will assist you in proving your version of the controversy. Only secondarily should you consider what examination will serve to diminish the appeal or credibility of that expert or his opinion. You should totally eliminate anything that

accomplishes neither objective. It is possible to utterly destroy highly qualified experts on cross-examination and have it go over the heads of the judge at the same time.

e. Stay in control.

? Do not let the witness respond at length in such a way as will make him appear to be teaching and in control. The judge may decide he his worth listening to. Never get into an argument with the witness. Ask the bench for assistance when you have an unruly witness. Never, never ask why. Do not give the expert the chance to explain an earlier statement.

f. Plan the sequence of examination.

? Start with something important or dramatic. The judge will know that there is something wrong with what he just heard. Try to end on a dramatic or effective point. Try not to begin the cross-examination right after lunch. Use a thematic flow so that the judge can put what he is hearing into categories that can be acted on and recalled. Do not start out the examination by repeating the things the witness testified to on direct; this is nothing but a bonus for the other side.

g. Use your own expert to prepare for the cross-examination.

2. Subjects for cross-examination.

a. Qualifications and inflated credentials.

? Gaps in experience.

b. Does the opinion qualify for admission?

? Is it relevant?

c. Obtaining agreement with your contentions.

? If the expert has good credibility, using him to enhance your case may be safer than attacking the witness. Get him to admit one or two facts which you will later use to demonstrate your case.

d. Find the variables.

- ? Get the expert to admit areas where there are variables or some element of uncertainty.

e. Prior inconsistent testimony.

f. Combating the talkative witness.

- ? Object to answers as non-responsive. Have the court reporter read back the questions to make it clear the expert is not responding to your questions. Don't get angry; trust the judge to see what the witness is doing.

g. Expanding the expert's testimony.

- ? Go into areas not specifically covered on direct when possible to get testimony that may be favorable to your case.

h. Common sense.

- ? Since judges occasionally exhibit some common sense, it is effective to demonstrate where the expert's opinions cross the boundaries of common sense and everyday experiences.

i. Ask for the work papers.

j. Depose the expert's assistants. This may be useful in cross examining the expert.

k. Check the math.

- ? Also expose any failure of the expert to do his homework. For example, point out that the expert did not interview the management or that she failed to personally inspect the manufacturing facility. The opinion of the expert will be questioned if she relied on marketing projections but did not test the validity of the assumptions used to arrive at the projections or compare past projections with actual results or industry averages.

l. "Strip search" the expert on the stand by asking for the contents of his briefcase and all papers he has in the courtroom.

m. Use voir dire when appropriate.

3. If the expert is cross-examined, he should respond concisely and directly to understandable questions. If the expert has been deposed in the case, he may have a reasonable idea of the questions he will be asked at trial. **Do not elaborate.**

4. If questions asked on cross-examination are not clear to the expert, he should ask for clarification and should not guess as to the question that is being asked.

5. The expert should always focus on the question being asked rather than the sometimes argumentative tone. Don't argue with opposing counsel. **HE IS NOT YOUR FRIEND.** His job is to make you look stupid or silly or dishonest.

6. If you make an error or give an incorrect response, correct it right away, if possible. If not, counsel will attempt to allow you to correct the misstatement on redirect.

M. CONTROLLING COSTS

1. Discuss Informal or Formal Budget for Expert.

    a. Identify and discuss each person who will be working on file to assist testifying expert.

    b. Does expert's engagement letter specify billing rates of each person who will be working on the file, and rates for out-of-pocket expenses included in expert's fee?

    c. Are there logical points at which to monitor the expert's performance of his work in accord with the budget?

2. Discuss Sequence of Work on the Project.

    a. Can the assignment be divided into discrete projects with fixed fee estimates for each project?

    b. Are there tasks that client can perform to reduce expert's fee without compromising integrity of expert's opinions?

    c. What projects can be deferred without harm to presentation of the expert's opinions at trial?

3. When a deposition is required by the opposing party the expert is entitled to reimbursement for travel expenses and a reasonable fee to be paid by the party requesting the deposition.

N. AUTOMATIC STAY/ADEQUATE PROTECTION/ DEBTOR IN POSSESSION FINANCING -- EXAMPLE

1. Testimony may be necessary regarding the necessity of the collateral for an effective reorganization and the probability of a successful reorganization within a reasonable period of time. *Sumitomo Trust & Banking Co., Ltd. v. Holly's, Inc. (In re Holly's, Inc.)*, 140 B.R. 643, 704 (Bankr. W.D. Mich. 1992).

2. The value of the collateral will often be a disputed issue. *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 138 L. Ed. 2d 143, 117 S. Ct. 1879 (1997).

3. The erosion or "burn rate" of cash collateral will need to be quantified to determine adequate protection. *In re Waste Conversion Technologies, Inc*., 205 B.R. 1004 (D. Conn. 1997).

4. Evaluate the need for DIP financing. *Thompson v. Margen (In re McConville)*, 110 F.3d 47 (9th Cir.), *cert. denied*, 522 U.S. 966 (1997).

5. Evaluate the financing structure -- amount, rate, terms, collateral, covenants. *Fin. Sec. Assurance, Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 800 (5th Cir. 1997).

6. Understand/testify concerning "priming lien" issues.

7. Benefit/detriment to debtor and/or affiliates.

8. Cross-collateralization.

9. Alternatives.

10. Financial and asset value projections. *Fin. Sec. Assurance, Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790 (5th Cir. 1997); *In re Showtime Farms, Inc.*, 267 B.R. 541 (Bankr. E.D. Tex. 2000).

11. Effective summaries as exhibits.

O. SALE OF ASSETS/BUSINESS SEGMENTS -- EXAMPLE

1. Evaluation of the need to sell assets or business segments. *In re United Healthcare Sys., Inc.,* No. 97-1159, 1997 WL 176574 (D.N.J. Mar. 26, 1997); *see In re Abbott Dairies of Pa., Inc.*, 788 F.2d 143 (3d Cir. 1986).

2. Valuation of the assets or business segments. *Olsen v. Floit*, 219 F.3d 655 (7th Cir. 2000); *In re LTV Steel Co., Inc.*, 285 B.R. 259 (Bankr. N.D. Ohio 2002).

3. Critique of the sale proposal and bidding process. *Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558 (8th Cir. 1997); *Brink v. Payless Cashways, Inc.* (*In re Payless Cashways, Inc.*), 281 B.R. 648 (B.A.P. 8th Cir. 2002).

4. Evaluation of the sales contract.

5. Evaluation of the sale of the debtor's reorganization prospects.

6. Related reports and testimony.

7. Breakup fees. *In re Bidermann Indus. U.S.A., Inc*., 203 B.R. 547 (Bankr. S.D.N.Y. 1997).

P. FRAUDULENT CONVEYANCES/PREFERENCES -- EXAMPLE

1. Identification of fraudulent conveyances/preferences activities. *Blatstein v. Blatstein* (*In re Main, Inc.*), 192 F.3d 88 (3d Cir. 1999); *Official Plan Committee v. United States (In re Valley Steel Prods. Co., Inc.),* 214 B.R. 202, 208 (E.D. Mo. 1997).

2. Tracing of proceeds/consideration.

3. Illustration of structure of transfer.

4. Value of transferred property. *WRT Creditors Liquidation Trust v. WRT Bankruptcy Master File Defendants (In re WRT Energy Corp.)*, 282 B.R. 343, 372-73 (Bankr. W.D. La. 2001).

5. Value of consideration.

6. Unreasonably small capital.

7. Facts that should have been known to the parties.

8. Use of experts in defenses.

   a. Solvency of transferor. *Travellers Int'l A.G. v. Trans World Airlines Inc. (In re Trans World Airlines, Inc.),* 134 F.3d 188 (3d Cir.), *cert. denied*, 523 U.S. 1138 (1998).

   b. New value.

   c. Ordinary course of business. *In re Tenn. Valley Steel Corp.*, 201 B.R. 927, 934 n. 15 (Bankr. E.D. Tenn. 1996).

   d. Liquidation dividend.

Q. PLAN CONFIRMATION PROCESS - EXAMPLE

1. Feasibility of plan of reorganization. *In re Crosscreek Apartments, Ltd.,* 213 B.R. 521 (Bankr. E.D. Tenn. 1997).

2. Liquidation analysis.

3. Best interest of creditors test.

4. Valuation of new debt or equity securities to be issued pursuant to the plan. *Gen. Motors Acceptance Corp. v. Valenti (In re Valenti)*, 105 F.3d 55 (2d Cir. 1997); *In re Smith*, 178 B.R. 946 (Bankr. D. Vt. 1995).

5. Evaluation of tax consequences. *In re Phar-Mor, Inc.,* 152 B.R. 924 (Bankr. N.D. Ohio 1993).

6. Certification of ballots.

7. Related reports and testimony.

8. Indubitable equivalent.

R. SETTLEMENT AND COMPROMISE -- EXAMPLE

1. Necessity of expert testimony.
2. Use of non-lawyer experts.
3. Damage of expert if settlement not authorized.