

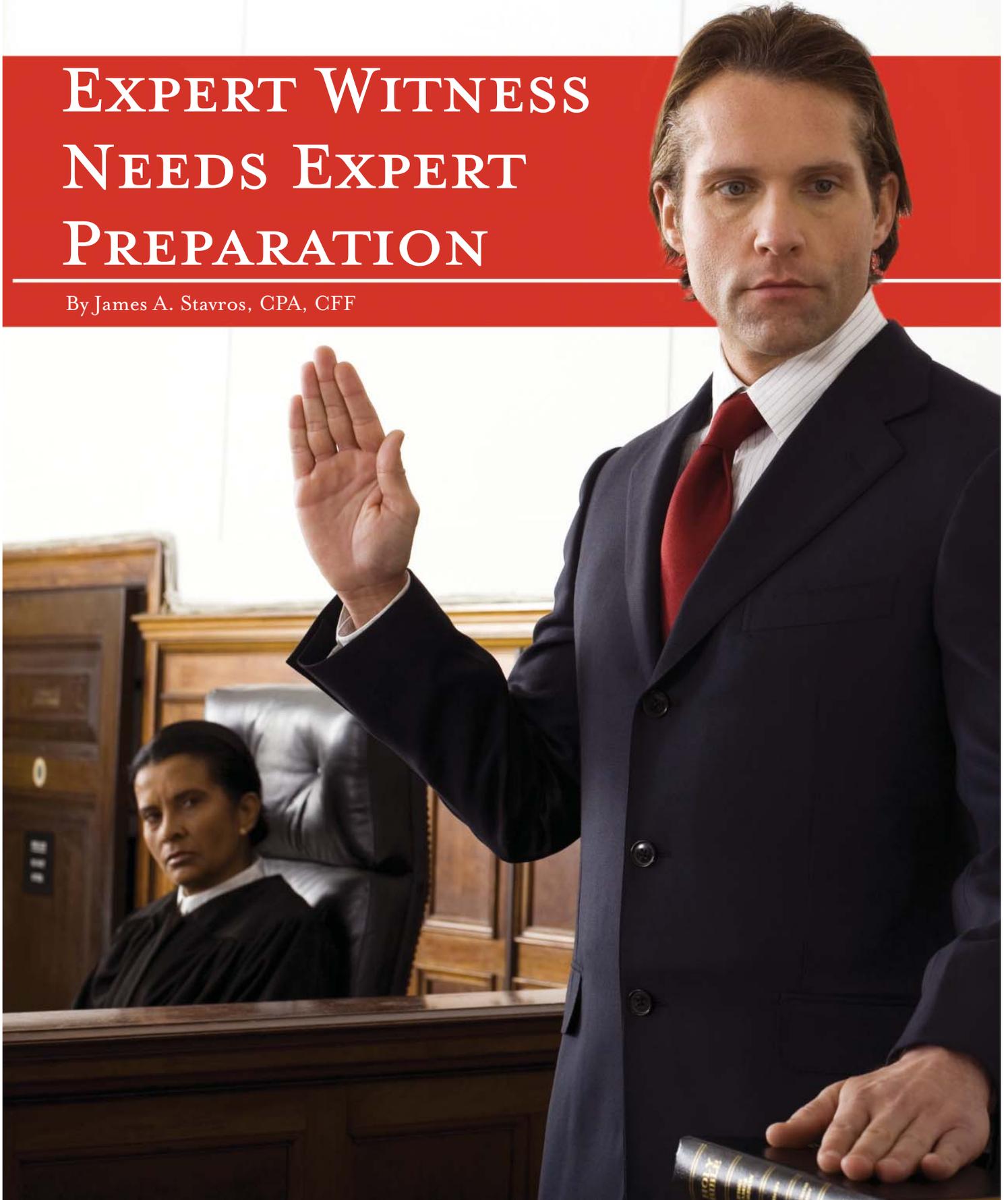
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EXPERT WITNESS NEEDS EXPERT PREPARATION

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Legendary football coach Bum Phillips once said, “An expert is an ordinary fella away from home.”

Let us assume your “home” in recent years has been in the area of providing tax and accounting services. A client you have had for the past 20 years has a business dispute with a competitor, files a lawsuit, and asks you to calculate lost profit damages; or maybe this client is going through a divorce and asks you to “put some numbers together.” Although you have never provided formal “consulting” or “expert” services before, nobody knows the client’s company better than you, and the financial issues seem easy enough.

Should you do it?

CPAs who provide tax and accounting services may find themselves in this situation from time to time. Be careful. Once you start providing consulting or expert witness services, even informally, you become subject to Statement on Standards for Consulting Services (SSCS) Rule 201, as well as other AICPA standards. A CPA engaged in expert accounting services must also comply with relevant statutes and case law established by the state in which the case has venue. These rules can be specific and unique to each state. There are also federal rules governing experts. So, what had seemed like a benign request to help a good client with additional financial computations can take you far from home and put you into a completely new world of different accounting standards and state rules. It will also put a level of scrutiny on both your work and your background that you’ve never encountered or are accustomed to, based on the services you already provide to your client.

What Does Forensic Mean?

When providing consulting or expert services, you are serving as a forensic accountant. The term “forensic” identifies something to be used in, or to be pertinent to, a court of law or other public forum. It is used to define an even higher level of standard with respect to your work. Your work must sustain the scrutiny of the court of law. This means it will be examined by an opposing expert, CPA or not, and an attorney who will question your professional standards and look at every nook and cranny of your report, the documents used, and the methods you relied on or considered. This scrutiny will be done in a public forum – in court. While the preparation of tax returns and financial statements is not an adversarial process, serving as an expert is. Your work will be held to a “forensic” standard, and you will need to be prepared.

Experts and Consultants

There is a difference between serving as an expert witness or as a consultant in a case; however, you have to follow the same AICPA standards in both roles. One difference between the roles is that consultants do not express an affirmative opinion in a written report, which will be used in court. A consultant is behind the scenes, providing advice and input; you will not be deposed or testify. Consultants and experts may assist legal counsel at the beginning of a case by doing the following:

- Assisting with case strategy by identifying key economic issues, such as period of loss, areas of damages, and remedies

available.

- Assisting in discovery by helping counsel with questions in depositions (of fact witnesses and opposing experts) and requesting the documents you know will be needed to prove the case. In some instances, experts are brought into a case at the end or after discovery is closed. If brought in early, CPAs can get to the bottom of financial issues sooner rather than later by using their own specialized skills in finance and accounting. Unfortunately, many lawyers do not take advantage of this.
- Providing an opinion in a written report, if an expert. The CPA expert must comply with all state and federal rules of evidence in order to be presented at trial.
- Assisting the trier of fact through testimony (more below) as well as providing detailed questions and issues for counsel's cross examination of the opposing expert. CPAs can be helpful in "speaking the language" of the opposing expert and presenting cross questions and exhibits that counsel can use in the cross-examination of the opposing expert.

For those testifying as an expert, whether it's your first time or your 101st time, you will feel butterflies. This is not necessarily bad: it will keep you focused and on your toes. Those who are overconfident and "too cool" on the stand are sometimes viewed unfavorably by juries. Remember this advice from Abraham Lincoln: "Give me six hours to chop down a tree, and I will spend the first four sharpening the axe." You need to overprepare, know all the facts and issues of your report, and meet with your lawyer. Testifying is both form and substance.

Be ready for surprises. You will receive out-of-left-field questions, and you will believe some are unfair. Opposition counsel will do what they can to make you look bad – inexperienced, untrustworthy, unprepared, an advocate, and so on. It is part of their job.

Testimony in court will focus on two things. The first will be your qualifications as an expert. You will be challenged by the opposition attorney and perhaps the judge about whether you are qualified to testify. The second, once qualification is established, will focus on your report, the documents reviewed, things considered or not considered, among other questions.

Your curriculum vitae (CV) must include several parts required by federal rules, including your education, work experience, professional designations, licensure and affiliations, publications authored, presentations delivered, and court and deposition testimony history. Novices may be asked a lot of questions about their experience in these types of cases and their relevant background to test and rattle them. If opposition counsel can get you barred from testifying, they could post an easy win on damages. Early in my career, when I began testifying, I got a lot of education and experience type of questions; I was asked several times about how many times it took me to pass the CPA Exam, how much I am being paid to testify today, and how many times I served as an expert

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in calculating damages in "these types" of cases. If you don't have testimony experience, it is critical that you bolster your CV by joining professional organizations, having positions of leadership in these organizations, writing articles, and making public presentations. In short, demonstrate to the jury that you are an expert in your field, even if you have not testified before. Everybody has to start sometime.

When it comes to your report, make it bulletproof. Know all the applicable federal, state, and AICPA standards, as well as those of other professional designations you list on your CV. You will be asked. Personally do the work: know every source in your report, fact check it, and do a quality review of the report. Don't give the opposition any typos or "immaterial" math errors to catch you on – it harms your credibility. Know the hours that you and others put into the report, as this is often asked. As an expert, you need to be an advocate for your report, not an advocate for the client – that is the lawyer's job.

Before you take the stand, make sure you know and understand all the relevant rules and standards. For instance, know the federal rules governing expert witnesses, especially rules 26, 702, 703, and 705. Most states adopt the federal rules. As previously discussed, also know the AICPA standards pertaining to providing consulting and expert witness services, as contained in Practice Aid 10-1, *Serving as an Expert Witness or Consultant*, and other related AICPA practice aids pertinent to your financial issue, such as lost profits, fraud investigations, business valuation, among others. Pay particular attention to Rule 201. This practice aid includes the relevant federal rules as well. I have seen many CPA experts fail to either know or follow these standards. Don't be one of them.

If you actually take the stand and testify – which happens a small percent of the time (less than 5 percent, depending on your practice) – prepare your own cross-examination questions, areas where you think you will be crossed, by having a partner or colleague in your office role-play and try to trip you up. This is good practice for the real thing, especially if you don't have a lot of experience testifying.

View from the Bench

Judges provide great insight as to what is important for them and the juries in expert testimony – essentially what works and what

does not. You may think you have the best report in the world – everything is supported and cross-referenced – and have the best intentions to provide unbiased, objective testimony. You may be confident that you have the best sustainable report in all facets. Substance over form, right? Not necessarily.

No one takes the witness stand entitled to be believed. With respect to any expert's testimony in court, a judge's typical charge to a jury may be as follows:¹

You are the only judges of the credibility of the witnesses and their testimony. This means you must judge the truthfulness and accuracy of each witness's testimony and decide whether to believe all, or part, or none of the testimony.

Factors you should consider when judging credibility include the following:

- Did the witness testify in a convincing matter?
- How did the witness look, act, and speak while testifying?
- Was the testimony uncertain, confused, or self-contradictory?
- Was the testimony presented in any kind of evasive manner?
- Did the witness have any interest in the outcome of the case, or any bias, or any other motive that might have affected the testimony?
- Does the testimony make sense to you?

Many jurors have preconceived notions of what an expert is supposed to be, what their roles are in court. They may have watched TV shows that present some experts in less favorable terms, as hired guns that will say anything they are paid to say. Accept this misconception as reality, and then, as an expert, convince the jury to the contrary. A good expert witness will display the following traits:

- Professionalism – Look the part and sound the part
- Knowledge – Know your report, CV, surrounding facts, and the industry, and have good answers
- Fairness and honesty
- Thoroughness – Review a lot of records, do a lot of research, and put the time in
- Sincerity
- Clarity – Be a good communicator by making the complex easy to understand
- Personality and authenticity
- Trustworthiness

By contrast, some characteristics of poor experts include the following:²

- Willing to exaggerate – Over-reaching or aggressive assumptions leave a bad taste.
- Factually mistaken – Mathematical errors in reports or exhibits are poison.
- Selective use of facts – Using facts that suit one side rather than being objective and considering other facts and scenarios causes suspicion.
- Professional expert witness – When an expert testifies weekly or monthly, some may wonder when they do their work if always testifying.
- Ideologues – Those who overlook real-world facts and adhere to ideology and theory may be doubted by jurors who live in the real world.
- Advocates – This is the lawyer's job, not the expert's.

Aristotle said, "Persuasion is achieved by the speaker's personal character.... This is true generally ... and absolutely true where ex-

act certainty is impossible and opinions are divided.... His character may almost be called the most effective means of persuasion he possesses."

Character is critical when testifying. It is not only what you say, but how you say it. You can be the smartest person in the room, but if you don't come across as sincere, authentic, and trustworthy, the hard work you put into your report will go out the window. You must effectively communicate your opinion in an unbiased way to persuade a jury.

Remember, too, that when you testify you need to boil down your report so the jury can digest it. You can't lose the jury by overuse of professional jargon and detail. Your report may have been written at a college level, but you need to orally present it on a high school level – or less, depending on the venue and makeup of the jury. Simply put, you may have provided the best work product, but unless you can communicate it effectively to your intended audience, you will be doing your client and yourself a disservice.

Take these guidelines and instill them into your testimony. Be aware of the negative aspects, and don't let them happen to you.

Conclusion

As a CPA, you probably have the core traits to be an expert: experience, knowledge, communication skills, and other qualities that would help the court understand the evidence. However, even though you may think providing "consulting services" or "expert services" to an old client is a logical extension of your relationship and is easy enough to do, this will be a new role for you, with new standards and rules. Take the extra steps to know them. Your opposition will know them and expect you to know them too. Being an expert witness is popularly akin to "testifying in court," but it is usually a long road you have to travel before you actually get to court.

AICPA Practice Aid 10-1 must be in your tool kit if you are providing, or even contemplating, consulting or expert witness services. There are several other AICPA practice aids that you should have as well, as previously mentioned.

When serving as an expert, even though the likelihood is that you will not testify in a case, you need to prepare every case as if you will testify. Do not take shortcuts, even though you think the case will settle.

Finally, if and when you testify, remember to embrace both form and substance. You need to be a good and honest communicator and have a solid report to convince a jury. 

¹ *Excerpts and points are from a Forensic and Litigation Annual Conference presentation delivered Oct. 7, 2008, by Mark I. Bernstein and Annette M. Rizzo, titled "The Expert Witness Accountant."*

² *Ibid.*

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