

## The Trial

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### 1. Presenting the Elements of the Case and Defenses<sup>1</sup>:

1.1 Know what you need to prove. Trial counsel needs to prepare by knowing what factual elements of the case and the defenses need to be established for their particular client to prevail.

1.2 Limit what you need to prove. The trial is not the only source of facts that get into the record. In addition to the facts put into evidence at trial, trial counsel should use the usual pretrial procedures to put into the record the basic facts which are generally undisputed. In many circumstances, the trial counsel is most effective by limiting the factual disputes at trial to those that are truly in dispute.

1.3 Prove your credibility. The trial will turn on credibility: the witnesses and yours. Everything you do (before trial in the discovery, motions and pleadings as well as during trial) affects credibility. Attempting to prove that which you cannot impairs your credibility. An honest assessment of the issues that really matter, and truly need the judge's attention both improves your credibility and eases the life of the Judge.

1.4 Issues in the hypothetical. In the hypothetical, the trial is not in the adversary proceeding but instead is the evidentiary hearing on a motion for relief and objection to claim.

*A. Standing.* The threshold issue will be whether or not the movant has standing to seek relief from the automatic stay. In re: Hayes, 393 B.R. 259

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<sup>1</sup> This section was prepared by Edmond Ford. The opinions and errors contained in it are his and Attorney Bennett bears no responsibility for any mistakes or controversies contained.

(Bankr. D. Mass. 2008). See, e.g. Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L.Ed 2d (1975).

*B. Motion for Relief Issues.* The hypothetical trial issues include the issues relating to the motion for relief. Bailout Bank has moved for relief from stay for the missed post-petition payments, and because it alleges that there is no equity in the property. Thus, Bailout Bank is attempting to establish cause for relief from the automatic stay under 11 U.S.C. § 362(d)(1) (for cause, including adequate protection), and under 11 U.S.C. § 362(d)(2) (on the assert that there is no equity in the property, and the property is not necessary to effect a reorganization of the debtor). Trial counsel is going to be familiar with the applicable burdens of proof established by the statute. In connection with the relief from the automatic stay, 11 U.S.C. § 362(g) imposes the burden of proof and the issue of the debtor's equity in the property on "the party requesting such relief." 11 U.S.C. § 362(g)(1). The debtor or the party opposing such relief has the burden of proof on all other issues here. Those other issues include the issue of adequate protection.

Adequate protection can be provided by the debtor by making periodic cash payments "to such entity, to the extent that the stay under § 362 of this title . . . results in a decrease in the value of such entity's interest in such property." 11 U.S.C. § 361(1). The adequate protection standard is not the pre-petition contract payments, but instead is measured by the ongoing "decrease in the value of such entity's interest in such property." Id.

*C. Adversary Proceeding Issues.* The issues raised in the adversary proceeding are not properly part of the trial. In general, the motion for relief involves merely a determination of “whether a creditor has a colorable claim to property of the estate.” Wella v. Salem Five Cent Savings Bank, 42 F.3d 26, 32 (1<sup>st</sup> Cir. 1994), quoted In re: Hayes, 393 B.R. 259, 266 (Bankr. D. Mass. 2008).

*D. Claim Objection Issues.* In connection with the proof of claim, the Federal Rules of Bankruptcy Procedure provide that: “A proof of claim executed and filed in accordance with the Federal Rules of Bankruptcy Procedure constitutes *prima facie* evidence, validity and amount of the claim.” F.R.Bankr.P. 3001(f). In rebutting the proof of claim, the objecting party has to produce “substantial evidence,” and if the objecting party does produce substantial evidence, then the burden shifts to the claimant to establish the validity of its claim. In re: Hayes, 393 B.R. 259, 269 (Bankr. D. Mass. 2008), citing In re: Long, 353 B.R. 1, 13 (Bankr. D. Mass. 2006).

The proof of claim does not initially comply with F.R.Bankr.P. 3001(c) and (d). The claimant has the burden of establishing the validity of the claim. In re: Hayes, 393 B.R. 259, 269 - 270 (Bankr. D. Mass. 2008).

## 2. The Presentation of Witnesses: Eliciting Testimony at Trial.

### 2.1 General Comments.

With each witness counsel will need to structure the testimony so that the Court hears the *foundation* for the testimony (which has to come first), the *facts*, and *inoculation* against the anticipated cross examination.

Direct examination, in many ways, is more challenging and less fun than Cross Examination because counsel generally cannot use leading questions, it is the witness not counsel that will do the talking, counsel can merely guide, and despite the lack of control, counsel has to use direct examination to meet the applicable burden. In cross examination the show is the lawyer against the witness: as if it were a battle *mano a mano*. In the direct examination the lawyer needs to be almost invisible yet still in control.

- a. *Prepare the witness*. Because the lawyer is not the show preparing the witness is critical. The witness should be prepared to give the testimony that you will be attempting to seek. Preparing the witness will limit the need to resort to questions that may tend to be leading.
- b. *Kiss*. Keep the story simple and attempt to present the story in a logical fashion. In general, presenting the story through the witness in a chronological order is an appropriate logical fashion.
- c. *Lay the foundation*. Keep in mind the need to lay the foundation. A witness cannot testify except as to matters with respect to which the witness has personal knowledge. F.R.E. 602. The exception to that is expert witnesses who may testify as to things if the fact is of a type “reasonably relied upon by experts in the particular field in forming opinions . . .” F.R.E. 703.

- d. *Prepare for cross.* Prepare the witness to expect that you will ask some of the tougher cross examination questions and of course prepare the witness for all of the cross; and
- e. *Keep it short.* Stop when you are done.

## 2.2 The presentation of witnesses on behalf of the secured creditor.

*A. Sarah Phalen: Foundation and Facts.* The facts in the hypothetical (as often times in reality) leave it uncertain precisely who the secured creditor here is. Attorney Sleeper has an appearance, and has moved on behalf of Bailout Bank, acting in its capacity as the Trustee for the Obama Trust 2006-12. There is, however, on the witness list no person employed by Bailout Bank. Instead, the only witness that the secured creditor has is Sarah Phalen who is the Bankruptcy Supervisor for Not Mine Loan Servicing.

Attorney Sleeper therefore has to prepare Ms. Phalen to give direct testimony on each of the elements necessary to establish both the foundation for her testimony and his entitlement to relief. In addition, presuming that Attorney Sleeper is handling the claim objection, he must also walk her through each of the elements which he has to establish to establish a *bona fide* claim in this proceeding.

He therefore has to establish:

- a. Who she is and how she is related to the case;
- b. How her employer is related to this proceeding;

c. Why her employment with her employer gives her a foundation to testify as to facts relevant to the proceeding;

d. What those facts are that are relevant to the proceeding.

Mr. Sleeper must 1) prepare Ms. Phalen to trace the origination of the loan to its current holder, and use Ms. Phalen to introduce the evidence as to the current holder; and 2) use Ms. Phalen to trace the servicing rights and explain how it is that the Not Mine Loan Servicing has records which may be relied upon; 3) establish that Ms. Phalen has the custody of those records so as to be able to introduce those records under the applicable business records exception; and, 4) establish that those records are maintained by her employer in the ordinary course of its business.

The final topic that Sarah Phalen must discuss is the existence of the arrearages. Given the convoluted nature of the loan servicing history, Sarah Phalen would be well served to prepare to testify with precision as to her loan payments made and received throughout the entire course of the loan. Of course, there may be any number of problems there. The first may be her ability to testify as to loan payments made and received before Not Mine Loan Servicing acquired the servicing rights. Big Bay Lender provided the servicing up to six months prior to the bankruptcy filing. Counsel and Sarah Phalen have to be prepared to find a way to put into evidence in the face of the hearsay objection the records relating to Big Bay Lender's time of servicing.

*B. Sarah Phalen: Inoculation.* Finally, Mr. Sleeper has to use his direct examination of her to inoculate her against the likely attacks on cross examination.

Here, a likely attack on cross examination is the inconsistency between her testimony about the ownership interest of Bailout Bank as Trustee and the proof of claim which the employer filed. In direct examination Attorney Sleeper will, almost undoubtedly, as the obvious cross examination questions such as:

- a. Why was the proof of claim filed in the form that it was filed; and
- b. Why hasn't it been amended.

In addition, Attorney Sleeper will attempt to inoculate her testimony against the inconsistency between the motion for relief (which appears to assert the value of the property as \$250,000.00) and the statement in the proof of claim that the claim was fully secured in the amount of \$328,000.00.

The reason for the inoculation questions is two fold: first, trial is about credibility, both the credibility of the witness and the credibility of the lawyer are in issue. If the lawyer knows that there are significant areas of weakness in the witness's testimony that opposing counsel is going to reveal, the credibility battle is furthered by bringing those weaknesses out on direct examination, and allowing the witness to present the defense. That process allows both the lawyer and the witness to say to the Judge: "I know there are issues here, we are not trying to hide them from you, but you should rule in our favor because even with those issues we are right." The less work you make the judge do in figuring out what

the issue is, the greater the likelihood that the judge will spend more time and judicial resources understanding your side of the story.

Second, by asking the important cross examination questions on direct, you give the witness the opportunity to answer in the words that you have chosen. The witness feels more comfortable, and you can control both the content and the manner that in which your argument is presented. On cross examination, opposing counsel will be able to use leading questions, and thereby control the words through which the facts are presented. Words are our weapons. By inoculating against the cross you blunt your opponents sword. In addition, if you do not, and allow your opponent to cross on a critical issue that you have not addressed, your witness is in the uncomfortable position of either accepting the word choice of the opponent or appearing to be evasive.

### 2.3 Leading Questions.

The general rule is that you are not permitted to use leading questions on direct examination, F.R.E. 611(c), “except as may be necessary to develop a witness’ testimony” or when a party “calls a hostile witness, an adverse party, or a witness identified with an adverse party.” F.R.E. 611(c). The Court may permit the use of leading questions within the “sound discretion of the trial judge.” U.S. v. Mulinelli-Navis, 111 F.3d 983, 990 (1<sup>st</sup> Cir. 1997), quoting United States v. Brown, 603 F.2d 1022, 1025 (1<sup>st</sup> Cir. 1979). The court may permit the use of leading questions if the use of leading questions is necessary to develop the witness’ testimony, such as when the witness is unresponsive or shows a lack of understanding. Id.

### 3. Introduction Of Documentary Evidence<sup>2</sup>

#### **Step 1: The Document Must Be Relevant.**

In order for a document to be introduced into evidence, it must be relevant. For a document to be relevant, it must tend to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the document. [Federal Rules of Evidence 401 (“Evid. Rule \_\_\_\_”)]. Accordingly, before one determines how to introduce the document, one must determine the purpose for introducing the document. This is done by listing the elements which, if proven, establish the claim for relief, determining which facts are needed to establish the necessary elements to the claim and, finally, determining how a particular document tends to make the existence of that fact more or less probable.

#### **Step 2: The Document Must Be Authentic.**

Once it is determined that the document is relevant, the party offering the document must establish its authenticity. Evid. Rule 901 requires that as a condition precedent to admissibility of a document, the offering party must submit evidence sufficient to support a finding that the document is what the offeror claims it to be. Evid. Rule 901 sets forth various illustrations by which to authenticate evidence. With respect to documents [Evid. Rule 901(b)(1)], the most common method is through a witness who has knowledge of the document and can testify to its authenticity. Alternative methods include (1) the exception for public records, which is a writing authorized by law to be recorded or filed and, in fact, recorded or filed with public officers, or (2) ancient documents or data compilations, which are documents or data compiled in a form so as to create no suspicion concerning their authenticity and which have been existence for

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<sup>2</sup> This section is authored by Charles Bennett.

twenty years or more. [Evid. Rule 901(c)]. Further, certain documents are “self-authenticating.” Evid. Rule 902 provides, among other things, that certified copies of public records, commercial paper and related documents, certified domestic records of regularly conducted activities, certified foreign records of regularly conducted activities, and official publications, all are self-authenticating and do not require independent or extrinsic evidence in order to establish their authenticity.

**BASIC OFFER**  
[with Documents Pre-marked for Identification]

All documents should be pre-marked before trial. Documents which the parties agree can be admitted should be marked with numbers, if possible, in the order to be admitted. At the commencement of the trial, you should move that the agreed upon exhibits be admitted; otherwise the documents will not be part of the record. Documents not agreed upon should be marked with letters. Note that unless a document is identified, if it is excluded from evidence it will not be part of the record on Appeal.

1. Ask permission to approach the witness and when granted, hand the witness the document.
2. Ask the witness to review the document marked ---- for identification.
3. Ask the witness to identify the document. For example, letter dated May 5, 2007 from the witness to X, or memo written by witness on May 5, 2007 regarding X.
4. Offer the document to be admitted into evidence.

If the document is not admitted, you may need to make a proffer. A proffer is needed to preserve the record for appeal. To make a proffer, you request permission from the Court, then you state the reason for offering the documents:

I have offered Exhibit A for identification for the purpose of establishing  
X. OR

I would expect the witness to testify as follows concerning the document marked -  
-- for identification then provide of a summary of the expected testimony

**Step 3: Best Evidence**

A corollary to authenticity is the Best Evidence Rule. Evid. Rule 1002 requires, “To prove the contents of a writing, recording or photograph, the original writing, recording or photograph is required except as otherwise provided in these rules or by act of Congress.” However, the parties can stipulate to the use of copies and, most often, parties do so. Further, even without a stipulation, originals are not required if the original is (a) lost or destroyed, unless it was intentionally lost or destroyed, (b) the originals are not obtainable, or (c) the originals are in the possession of your opponent. See Evid. Rule 1004.

**Step 4: Is the Document Hearsay?**

Evid. Rule 801 defines hearsay as, among other things, a written statement offered to prove the truth of the matter asserted therein. If the document is being introduced for some purpose other than for the truth of its contents, it is not hearsay. For example, if notice is an element of your claim, you can introduce a writing providing the notice. The writing would not be hearsay because it is not being offered for the truth of the contents but merely for the purpose that the writing notice was given or sent. Evid. Rule 801(d) also provides that prior statements by the witness, either offered to impeach if they are inconsistent with the witness’s testimony, or if consistent with the witness’s

testimony, to buttress the witness's testimony if on cross-examination it has been implied that the witness's testimony is of a recent fabrication or subject to improper influence or motive, are not hearsay.

**Step 5: If the Document Is Hearsay, Does It Fall Within an Exception?**

Evid. Rule 803 provides exceptions to the hearsay rule. Please note that the fact that the witness may be present in the courtroom is not an exception to the hearsay rule. Nor is the fact that your opponent produced the document an exception to the hearsay rule, unless excepted by Evid. Rule 801(d). The most common exceptions to the hearsay rule as applicable to the admission of documents are: records of regularly conducted activities or the absence of such entry in the records, public records and reports, records of documents effecting an interest in property and market reports or commercial publications.<sup>3</sup>

The Federal Rules also permit the offering of summaries. Evid. Rule 1006 provides that the contents of voluminous writings, records or photographs which cannot conveniently be examined in the court may be presented in the form of a chart, summary or calculation. However, the underlying information from which the summaries were prepared must be available for inspection or copying or both by your opponent at a reasonable time and place.

**Example to introduce a business record:**

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<sup>3</sup> There is also a general exception to the hearsay rule, Evid. Rule 807, which rule permits that a statement not specifically covered by Evid. Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule of the Court determines that (a) the statement is offered as evidence of material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purpose of these rules and the interest of justice will best be served by the admission of the statement into evidence. However, Evid. Rule 807 requires that the proponent of such evidence must advise his opponent sufficiently in advance of the trial or hearing of the intent to offer such evidence, so that the adverse party has a fair opportunity to prepare and contest it.

Q: Let me draw your attention to Exhibit \_\_\_ for identification. Can you please review Exhibit \_\_\_?

A: I have done so.

Q: What is this document?

A: It is the [describes the document].

Q: Was it the regular practice of the company to make such records?

A: Yes.

Q: Was the document created in the ordinary course of business?

A: Yes, it was.

Q: Was it created contemporaneously with the events it records?

A: Yes, it was.

Q: Was the record made by a person with knowledge of the relevant information?

A: Yes.

Q: Did the business itself rely on these records or records of this type?

A: Yes, it did.

Q: Your Honor, I move to admit the exhibit into evidence.

**Example to introduce summary:**

Q: What is that document?

A: It is a summary of \_\_\_\_\_.

Q: Who prepared it?

A: I did [or it was prepared under my supervision.]

Q: What documents did you use to prepare it?

A: Witness lists the documents used.

Q: Does this summary accurately reflect the information contained in the underlying documents?

A: Yes.

Q: offer the summary into evidence pursuant to Rule 1006

4. Impeachment Techniques<sup>4</sup>.

On cross examination, the basic rule is that you need to know the case better than the witness. Impeachment of the testimony begins before cross examination. Many times the arguments that you want to make to impeach a witness' testimony are arguments which will go to the foundation of the testimony or of the witness' personal knowledge.

In preparing for to cross examine the witness, you need to consider the matter both from your client's prospective as well as from the witness' prospective. Witnesses, for the most part, do not think that they are lying. They do not believe that they are lying, and they do not expect to be treated as liars. Instead, witnesses generally believe that they are telling the truth as they know it.

Therefore, the examination technique that is most likely to yield significant results is understanding the truth as they know it, and also understanding the incremental facts or circumstances under which that witness would acknowledge the possibility that they were wrong.

The most successful cross examination is a cross examination to get a witness to admit that while the witness has testified to "X," if premise "A" was not true but instead premises "B" was the case, then the witness would have to concede the possible truth of the conclusion "Not X." In most circumstances, the witness in that circumstance will

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either agree to the possible viability of “Not X,” or reveal themselves as so outcome oriented as to lose credibility.

a. Evidentiary Objections. With that in mind, the usual means for impeaching a witness begins with evidentiary objections. The point of the evidentiary objection is to establish the lack of foundation, or the critical element in the factual foundation or the witness’ testimony. That can either be through the lack of knowledge or an objection based on the question or assuming facts which are not in evidence. The other evidentiary objection that can be used to highlight the argument that is intended to be made to impeach the witness’ credibility is that the testimony calls for an opinion from a non-expert witness that is not in violation of F.R.E. 701; that the testimony calls for hearsay; that the testimony lacks foundation; or that the question seeks to elicit irrelevant testimony.

On cross examination, the witness’ impeachment continues through any one of a number of essentially classic techniques:

b. The witness is biased.

With respect to expert witnesses, the classic bias challenge is through:

- i. Fees, hourly rate, and the examination of the witness’ profit motive;
- ii. The expert testimony in prior cases, such as an expert who has consistently testified as a plaintiff’s expert or, in this case, an appraiser who has never seen a property with equity;

iii. An expert whose only significant client or most significant client is the plaintiff;

c. Prior inconsistent statements.

The witness may make statements in testimony which are inconsistent with the statements made on the witness stand. The prior inconsistent statements can be in the form of a deposition of that witness taken in connection with a trial or maybe in another context, and may be written or not written. F.R.E. 613(a). In the hypothetical, the prior statement by Not Mine Loan Servicing as to the value of the collateral and the ownership of the debt is an inconsistent statement which can be used to impeach the testimony of Attorney Sleeper's witnesses relating to the ownership of the debt.

d. Impeaching the witness' character.

The character of a witness and the witness' character and reputation for truthfulness may be attacked. A party challenging a witness' character for truthfulness may on cross examination (and only on cross examination), and in the discretion of the court, inquire into specific instances of that same witness' misconduct concerning the witness' character for truthfulness or untruthfulness or concerning the truthfulness or untruthfulness of another witness as to which character the witness being cross examined has testified. F.R.E. 608(b).

In my opinion, cross examination as to character truthfulness is a dicey course. It is dicey because each witness takes the stand and takes the oath to tell the truth. The court hears hundreds and thousands of witnesses over the course of time. In many, many instances the opposing party thinks that the witnesses are

lying. In many, many instances the court has to choose between two diverse views of the truth. Unless there is something truly exceptional about this witness, a challenge as to the witness' character for truthfulness runs a significant risk of appearing to petty or mean spirited.

Witness bias cross examination (carried on to any great extent) also undercuts the implicit lawyer's promise to the judge that "I am not going to waste your time with trivia. You should believe me because I am going to get you to the core of this case as expeditiously as possible and when we get there you are going to see that my client is right." Your actions speak more loudly than words. Time spent on a collateral bias attack belies that implicit promise, and thereby impairs the lawyer's credibility on every other argument.

The exception may be if the witness is an important witness, and has committed a crime involving dishonesty. Evidence that a witness committed a crime involving an act of dishonesty or false statement is generally admissible. F.R.E. 609(a)(2). Such a conviction can, in appropriate circumstances, be useful to impeach a witness' credibility. My experience, for what it may be worth, is that witnesses with that history have a tendency to be more adamant that they are telling the truth. If the witness is not the critical witness in the case, such an impeachment has a tendency to divert the trial from that which is important to that which may be unimportant.

e. Impeaching the witness' competence.

Impeachment of the witness' competence is one of those kinds of impeachment which can be set up by the evidentiary objection. If, for example,

the issue is whether or not the witness had a foundation for making the statement, then the evidentiary objection is that there is an absence of foundation. The cross examination is into the basis for the so-called foundation and an attempt to establish that the witness' foundation for his or her opinion is flawed. So, for example, in the hypothetical, the appraiser may or may not have seen the inside of the house. The cross examination would therefore rather easily elicit from the appraiser the admission that the condition of the interior of the house, its layout and its utility, would have a significant effect on the ultimate conclusion as to the value.

#### 4. Opinion Testimony Lay And Expert<sup>5</sup>

Evid. Rule 701 through 706 govern the admission of opinions. Opinion testimony is typically provided by an expert; however, there are circumstances where a lay witness can provide opinion testimony. The Federal Rules of Civil Procedure requires disclosures with respect to expert testimony. See F.R.C.P. Rule 26, incorporated into bankruptcy proceedings by Bankruptcy Rule 7026. No such disclosure is required with respect to opinion testimony by a lay witness. However, good practice would dictate that in responding to discovery requests or as part of a pretrial memorandum, if you anticipate a lay witness to give opinions, that should be disclosed.

#### Lay Opinion Testimony

Evid. Rule 701 provides that if a witness is not testifying as an expert, the witness may still give opinions which were actually based on the perceptions of the witness helpful to a clear understanding of the witness's testimony and not based on scientific, technical or other specialized knowledge within the scope of Evid. Rule 702. In the

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<sup>5</sup> This section is authored by Charles Bennett

context of a motion for relief, the most typical type of lay opinion testimony relates to values of property. The mere fact that a witness is the owner of the property does not per se qualify the witness to render a lay opinion as to value. However, if the witness is the owner of the property and can lay a sufficient basis with respect to knowledge of the property and the general market conditions, the witness may be allowed to express an opinion of value. See Robinson v. Watts Detective Agency, Inc., 685 F.2d 729, 738-39 (1st Cir. 1982).

**Example – Lay Opinion:**

Q: How did you come to have knowledge concerning \_\_\_\_\_?

A: I am [my business was] the owner.

Q: As the owner, did you become familiar with the value of the \_\_\_\_\_?

A: Yes I did.

Q: How

A: List the circumstance owned for x years, received offers or purchase similar or aware of similar property sold etc

Q: What is the value?

A: \$

**Expert Opinion**

If the opinion is to be based upon scientific, technical or other specialized knowledge, then a lay witness cannot render that opinion, and it must be rendered by an expert. A witness is qualified as an expert by knowledge, skill, experience, training or education so as to have scientific, technical or other specialized knowledge to assist a trier of fact to understand evidence or to determine a fact in issue. [Evid. Rule 702]. The person offering the expert must establish the expert's qualifications. The opponent may

ask for a *voir dire* if the qualifications are at issue. The opponent may also challenge the admissibility of the expert's testimony on the basis that the testimony is not based upon sufficient facts or data, not the product of reliable principles or methodologies, or that the witness has not applied the principles and methods reliably to the facts of the case. While this challenge is a so-called "Daubert hearing," referring to the case of Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), it is unlikely that such a challenge would be applicable to the facts and circumstances described here. More likely, the Court would permit these types of issues to be raised on cross-examination, finding that they go to the weight to be given to the expert opinion as opposed to the admissibility of the opinion itself. However, if there is a substantial issue with respect to the actual admissibility of the expert's testimony because it fails to meet one of the three elements listed above, in order to preserve that evidentiary issue, it must be raised before the expert is permitted to render the opinion. An expert may rely upon various facts or data which would not otherwise be admissible. Those facts or data not otherwise admissible should not be disclosed as part of direct examination of the expert, though one should be cautious on cross-examination; otherwise, inadmissible evidence would become known to the trier of fact through the expert's response to cross-examination. Further, Evid. Rule 705 provides that the expert may testify to his or her opinion and give the reasons therefor, without first testifying to the underlying facts or data. Of course, the expert can be cross-examined with respect to the underlying facts. It should be noted that the expert's written report itself is hearsay and not admissible under any of the hearsay exceptions, unless the parties stipulate that the reports can be admitted. Very often, the procedure adopted by the courts, in particular with respect to appraisals of property, is that the expert report

with a covering affidavit is admitted as the direct examination, and the expert is then subject to cross-examination by the opposing party. This procedure should be discussed with the Court prior to the trial.

Example for Expert Testimony

### **QUALIFICATIONS**

Q: Please describe your education after high school.

Describe degree and areas of concentration

Q: Please describe your work history.

[For each significant job]

- years worked
- areas of focus
- duties and responsibilities
- specific projects

Q: What is your current position?

- areas of focus
- duties and responsibilities
- specific projects

Q: Have you taught any courses?

Describe

Q: Have you published any articles or books?

- describe

Q: Are you a member of any societies or associations?

Describe

Q: Have you testified as an expert

Describe the circumstances

Q: Is this a current copy of your resume?

[Introduce resume.]

### **BASIS FOR OPINION**

Q: Were you engaged by

Q: What were asked to do

Q: What is your compensation

Q: What did you do to prepare?

Q: What documents did you review?

Q: How did you develop your opinion?

Q: What did you do to verify or check your opinion?

### **OPINION**

Q: What is your opinion?

Q: Please explain why you have that opinion.

Q: Have you considered other alternatives?

Q: Why did you reject those alternatives?

Q: Are you aware of the opinion of the expert of the opposing party?

Q: Do you agree or disagree with that opinion?

Q: Please explain basis of disagreement.