

J. Edgar Murdock American Inn of Court

Mixed Fact/Expert Witnesses

Skit Outline

Scene 1

Marissa/Brad

Meeting between petitioner/client and petitioner's counsel concerning whether petitioner should invoke Rule 615 and Rule 145.

Counsel

- As you know, we are preparing for a *Branerton* conference next week with respondent's counsel.
- We need to discuss several topics, the first of which is attendance at trial.
- Rule 145 of the Tax Court Rules of Practice and Procedure and Federal Rule of Evidence 615 provide that "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses."
- We need to decide whether we want to request that the court exclude the witnesses during the trial.

Client

- Why would we do this?

Counsel

- Excluding witnesses is a well-recognized way of preventing witnesses from changing their testimony based on the testimony of other witnesses.¹

Client

- I certainly don't want to be excluded from the trial. Are there any exceptions to this rule?

Counsel

¹ "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." 6 Wigmore §§ 1837-1838.

- There are a couple of exceptions. Tax Court Rule 145 nor the Federal Rule of Evidence 615 authorize the exclusion of (1) A party who is a natural person, or (2) the representative of a party that is not a natural person, or (3) a person whose presence is shown by a party to be essential to the representation of such party's cause.
- Because you are the designated representative of your company, you would not be excluded regardless of what we decide.
- However, we need to discuss our other witnesses.

Client

- Well, our witnesses include company employees Scott and Sue, who helped structure the transactions; Jane and John, who can testify about the transactions and also about the economics of similar transaction since they have worked at other large investment banks; and Mr. X, our independent expert.
- I'm sure that none of these witnesses would ever change their story regardless of what they heard at trial, so what's the harm in having them excluded?

Counsel

- It is important for our expert witnesses to hear the testimony of respondent's expert witness so that he can assist us in understanding respondent's expert's testimony.

Client

- That's a good point. Then we probably shouldn't invoke the rule to exclude witnesses.
- But how do we know that the IRS won't invoke the rule if we don't?

Counsel

- We don't know. Rule 145(a) of the Tax Court Rules provides that the Court can exclude witnesses "[a]t the request of a party," or it "may make the order on its own motion."
- The IRS may want our witnesses to be excluded so that they can't listen to the testimony of other fact witnesses and then change their stories to make them all consistent.

Client

- If the Court decides to exclude our expert witnesses, can we appeal to the Judge?

Counsel

- Yes, we can argue that an exclusion to Rule 615 and 145 applies. Both rules provide an exception for "a person whose presence is shown by a party to be essential to the presentation of such party's cause," and courts often apply this exception to expert witnesses.

- However, the Court generally has discretion to make a final decision.²

Client

- If we argue that an exception can be made for experts, would that apply to just Mr. X, or would it also apply to Jane and John?

Counsel

- That's a tough question. Jane and John will be testifying about both their personal involvement with your company's products and also their expertise with similar products based on their industry experience.

Client

- If the Court decides to exclude witnesses from the trial, can't our witnesses just talk to each other about their testimony? After all, they all work together and know each other.

Counsel

- No, Rule 145 also prohibits witnesses from discussing their testimony with other witnesses or prospective witnesses.
- Rule 145(b) provides that the Court may punish violators of Rule 145(a) as for a contempt.
- The contempt penalty can be applicable to witness, as well as counsel or a party.

Client

- I think our best option is to convince respondent's counsel not to exclude the witnesses.
- It is important for all of our experts, including Jane and John, to be able to hear the testimony of respondent's expert witness, and we don't want to take the chance that they would not qualify for an exception to Rules 615 and 145.

Scene 2

Susan/Kevin

Meeting between Assistant Area Counsel and inexperienced IRS trial attorney to discuss whether respondent should invoke Rule 615/Rule 145.

² See *Alexander Shokai, Inc. v. Commissioner*, 34 F3d 1480, 1488 (9th Cir. 1994) (Circuit courts review Tax Court rulings on evidentiary issues, including exclusion of witnesses under Rule 145, for abuse of discretion, and an erroneous decision is cause for reversal only if it is prejudicial).

AAC

- Preparing for Branerton conference next week
- Let's discuss exclusion of witnesses
- Case will involved technical issues and some complicated facts
- Have you decided whether to invoke rule to exclude witnesses

ITA

- I've read the rule and I've read the notes to the FRE and I'm confused – the purpose of the rule is to discourage the witnesses from adopting each others' testimony or fabricating points, but it seems to me it would be helpful to have Jim Smith, our revenue agent with technical expertise, present during the trial to explain things to us
- If I invoke rule, the company people won't be able to learn from each other during the trial
- On the other hand, it may be more confusing
- The judge might get bored if I have to go over all of the same ground with every one of the witnesses
- We only have the revenue agent and our expert, but I want both of them in the courtroom

AAC

- Exceptions to exclusion
 - Party/natural person
 - Party representative
 - Presence essential to presenting party's claim or defense
 - Person authorized by statute to be present
- Turner case dealt with a revenue agent with expertise
- We can have our cake and eat it too – exclude the taxpayer's witnesses, but keep ours
- On the other hand, didn't you suggest that taxpayers' witnesses John and Jane might have to file expert reports

ITA

- Yes, Rule 143(f) provides that any person presented as an expert witness must submit a written expert report as their direct testimony

AAC

- And did you follow up to determine whether company employees with specialized knowledge were treated as fact witnesses or expert witnesses

ITA

- Yes

- Rule 143(g)(1) of the Tax Court Rules of Practice & Procedure states that “[u]nless otherwise permitted by the Court upon timely request, any party who calls an expert witness shall cause that witness to prepare a written report for submission to the Court and to the opposing party.”³ TAX CT. R. 143(g)(1).
- A similar rule appears in both the Federal Rules of Civil Procedure (the “Federal Rules”) and Rules of the Court of Federal Claims. Their versions, however, explicitly exclude from the report requirement employees for whom giving expert testimony is outside normal duties.
- Federal Rule 26(a)(2)(B) provides that “[u]nless otherwise stipulated or ordered by the court, this disclosure [of witness identities] must be accompanied by a written report – prepared and signed by the witness – if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.” FED R. CIV. P. 26(a)(2)(b). *See also* R. CT. FED. CL. 26(a)(2)(B).

AAC

- Let's be sure to discuss this at the Branerton

During the meeting, respondent's team concludes that it would be preferable to exclude the witnesses because of the risk that some of petitioner's fact witnesses might alter their testimony based on the testimony of other witnesses. Respondent believes that its own employee/expert could remain in the court room during the trial if respondent designates the revenue agent as a party representative.

Scene 3

All

Branerton conference to discuss multiple issues, including whether either party intends to invoke Rule 615.

Respondent's counsel

- Respondent's counsel intends to invoke Rule 615 to exclude witnesses.

Petitioner's counsel

- Disagrees, emphasizes the importance of allowing expert witnesses to hear the testimony of other expert witnesses.

³ Current Tax Court Rule 143(g) was Tax Court Rule 143(f) as recently as January 2010. It appears most often in cases and commentary as the latter since it was located there for more than fifteen years. All references to the rule have been updated in language quoted here.

Respondent's counsel

- Explains that this can be remedied by allowing expert witnesses to remain in the court room.

Petitioner's counsel

- Agrees with this solution. Then asserts that it will exclude Scott and Sue, but not Mr. X, Jane, or John.

Respondent's counsel

- Disagrees that Jane and John can stay because they are fact witnesses.

Petitioner's counsel

- Asserts that they should be allowed to stay because they are also experts in the industry and can testify about the economics of financial products similar to the ones that petitioner sells.

Respondent's counsel

- Have Jane and John prepared expert reports?

Petitioner's counsel

- No, they aren't testifying about anything scientific, they are just going to testify about their experience in the industry.

Respondent's counsel

- That doesn't matter. Rule 143(g) provides strict rules for expert reports, and testimony can be excluded entirely for failure to comply.

Petitioner's counsel

- If that will settle the matter, Jane and John will prepare expert reports.

Respondent's counsel

- That still doesn't change the fact that they are testifying about the facts of the case.
- Argues that experts are generally permitted to stay because they do not testify about the underlying facts, and therefore there is less risk that their testimony will be tainted by the testimony of other fact witnesses. This rationale does not apply to witnesses who will also be testifying about the facts of the case.

Petitioner's counsel

- Disagrees. Suggests that this may be an issue for the Judge to decide.

Open discussion to the audience:

- Should witnesses that testify as both fact and expert witnesses be excluded in these circumstances?
- Are Jane and John required to prepare expert reports?

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Rule 615

Mixed Fact/Expert Witnesses

Petitioner is a financial services corporation specializing in individually structured financial products. The IRS determined a deficiency in petitioner's income taxes for 2007 as a result of the recharacterization of items of income and deductions in connection with certain of the products sold by petitioner in that tax year. Petitioner intends to call several of its employees, many of whom have prior experience at large international investment banks, to testify concerning the specific products that have been challenged, including the analysis involved in structuring such products. In addition, petitioner has retained an independent expert to provide testimony concerning the market economics, investor input, and to describe typical long and short term performance with respect to products similar to those that have been challenged. Petitioner would like the employee witnesses to be present during the course of the trial so that they can anticipate the type of questions that will be posed by respondent concerning the economics of the products, and so that they will have the appropriate context in order to provide more accurate and nuanced responses.

Respondent is aware that petitioner will likely be calling employees as witnesses, and is concerned that the presence of the employee witnesses in the court room during the trial will enable those witnesses to insure that their testimony is consistent with one another. Respondent is also considering calling the revenue agent that analyzed the products and wrote the revenue agent's report as a factual/expert witness. The revenue agent also has specialized knowledge and experience concerning financial products that was obtained in the private sector.

Impeachment

MODERATOR sets up the topic of impeachment by kicking off a discussion of the relevant rules.

The rules of evidence address the competence and the credibility of a witness.

Rule 601 requires that the witness be competent.

- Competence is the ability of the person to serve as a witness
- Court determines competence
 - Judge ensures minimal credibility for any reasonable person to put any credence in their testimony
- Competence is generally presumed
 - Taken together, the effect is that the Judge typically focuses more on proffered testimony rather than the witness -> e.g., the testimony lacks relevance

Rule 603 requires that, before testifying, a witness must declare that he or she will testify truthfully by oath or affirmation

- The rule has a backstop: A witness that commits perjury commits a crime under Title 18

Rule 602 requires that the witness must have perceived the matters about which he or she testifies through one of his senses.

Transition discussion to credibility

Stepping back, the competency inquiry for the judge is different from the credibility inquiry

If a witness is not credible or offers inconsistent statements, the witness is not necessarily incompetent

The jury determines credibility

- Credibility meaning the witness's character for truthfulness
- Not the witness's character generally

Opposing sides work to establish credibility and attack credibility through impeachment

Impeachment tests the quality and believability of a witness's statements

The presentation last April demonstrated trial techniques of impeachment by prior inconsistent statements. Today, we will focus on some of the other rules governing impeachment / proving credibility [character for truthfulness (not character generally)], explaining that the vignette will demonstrate impeachment.

- Rule 608(a) permits character evidence to be used to support or impeach a witness's credibility. This evidence must be presented through another witness. Evidence *supporting* truthfulness is not permitted until the witness's credibility is attacked.
- Rule 608(b) permits impeachment through evidence of a witness's instances of conduct on cross-examination. However, if a witness denies the conduct on cross-examination, extrinsic evidence may not be introduced.
- Rule 609 imposes specific requirements on impeaching a witness about prior criminal convictions. Unlike Rule 608(b), extrinsic evidence may be introduced if the witness denies a conviction on cross-examination.

Vignette 1: Testing credibility of a paid preparer

MODERATOR: Our first vignette focuses on a case before the Tax Court. Petitioner Mac worked full time as a driver for an express delivery service. He also claimed a loss on Schedule C for a car repair and customizing business. The Service determined that Mac repaired and customized cars as a hobby and could not claim any losses stemming from the purported business. The Service also asserted a negligence penalty. At trial, Petitioner Mac testified first and testified about the facts of his work on cars and that the expenses listed for tools and business use of the home garage he expanded were ordinary and necessary. Mac's counsel later calls Mac's tax return preparer Pat Peterson to testify.

The return preparer Pat Peterson will be played by David Blair.

Petitioner's counsel will speak first and will be played by Matt Lucey.

Respondent's counsel will be played by Sean Akins.

PETITIONER'S COUNSEL: Mr. Peterson. What is your profession?

PAT: I sell cell phones at a shop on Main Street and, in the winter and spring, prepare tax returns out of the shop.

COUNSEL: Do you know the petitioner in this case?

PAT: Yes. I prepared Mac's tax returns the last two years.

COUNSEL: What do you recall about the tax returns?

PAT: Mac is a driver for United Express, delivering packages around town. I have many tax return clients who work for United Express and Mac came to me after

someone he works with gave Mac my name and number. When Mac came in the first time, I met with him and conducted my standard interview. It's a very thorough interview. I asked him about all of his potential income and he mentioned that he made some money working on cars – fixing them and customizing them. Minor things like tinting windows or putting in new sound systems. He had never listed that income on his return before. I told him that he had to list it and sent him home to look through his records and figure out how much money he had received. I also told him that he could deduct business-related expenses and described to him the types of expenses that the IRS allows. I told him to look for those records, too. He came back with some records and notes about what he received and what he spent. I put the numbers together on a Schedule C for Mac.

COUNSEL: Was the return you prepared that year correct?

PAT: Absolutely. Mac knows a lot about cars. He has been tinkering with cars since he was a kid. The work he does is excellent and I believe he can use these skills to work for himself full-time one day, setting his own hours instead of having to be at work at 6 a.m. every day like he does now.

1. Improper opinion testimony demonstrating Mac's truthfulness before Mac's truthfulness has been challenged

COUNSEL: How many times did you meet with the petitioner to complete the tax returns?

PAT: I had two long meetings with him when preparing his first tax return. When he came back the second year, I had another long meeting with him.

COUNSEL: Have you also talked with other people about the petitioner?

PAT: Yes. Many of my other clients know Mac because they all work together.

COUNSEL: Based on your experience with the petitioner, what is your opinion of his truthfulness?

PAT: He's a very truthful person.

COUNSEL: No more questions.

2. Bias

RESPONDENT'S COUNSEL: Mr. Peterson, did the petitioner pay you to prepare his tax return?

PAT: Yes. He paid me \$250 for each return.

COUNSEL: Did he pay more for each return because the return contained a Schedule C?

PAT: Yes. I charge more for Schedule C returns because they are a lot more complicated to complete and take much more of my time.

COUNSEL: So, you made more money from preparing petitioner's return than you would have if petitioner did not need to file a Schedule C?

PAT: Yes.

COUNSEL: Has the petitioner paid you for anything else?

PAT: Yes.

COUNSEL: What?

PAT: When the IRS targeted Mac for an audit, he stopped by the store. I offered to help him with the issues that the IRS raised for an hourly fee. I helped Mac explain his situation to the IRS. But, the examiner didn't understand the law and anything about Mac's situation. Mac paid me about \$300 for that. After Mac got the 90-day letter, I told him that he had to stand up against the IRS. Mac hired a lawyer to file this court case. Mac paid me to speak to his lawyer and to take time away from my shop to come down to court today.

3. Memory / FRE 602 – Lack of personal knowledge about accuracy of tax return

COUNSEL: Earlier you mentioned that the petitioner was excellent with cars. Has he ever done work on your car?

PAT: No.

COUNSEL: Have you ever seen the petitioner work on a car?

PAT: No.

COUNSEL: Why do you think the petitioner is excellent with cars?

PAT: We talked a lot about what he did with cars during the initial interviews at my office. He spoke of a lot of very technical things when he described what he did to cars.

COUNSEL: How familiar are you with cars?

PAT: Not at all. I can't even change the oil in my car.

COUNSEL: Then, how can you measure the petitioner's skill level with cars?

PAT: I'm not sure.

COUNSEL: Did you ever visit the petitioner's garage?

PAT: No.

COUNSEL: Did you talk to any of the people who owned the cars that petitioner worked on?

PAT: No.

COUNSEL: When you prepared petitioner's returns – the returns you said were absolutely accurate – did you rely on any information that didn't come petitioner?

PAT: No.

4. FRE 609 – Impeachment about conviction

COUNSEL: Mr. Peterson, did you ever live in Florida?

PAT: Yes.

COUNSEL: In fact, you lived there in July 2006, didn't you?

PAT: Yes.

COUNSEL: Is it true that, in July 2006, you were convicted in the United States District Court for operating a ponzi scheme?

PAT: I'm not sure.

COUNSEL: You received 18 months confinement, didn't you?

PAT: Yes.

COUNSEL: No further questions.

MODERATOR leads a discussion about the vignette:

Imagine we are petitioner's counsel. Respondent's counsel led off impeaching on bias and lack of personal knowledge and perception. Is there any way to rehabilitate Pat, the return preparer, on redirect?

Does Pat have anything but hearsay to add the case? The negligence penalty?

What error did petitioner's counsel make when asking Pat about the petitioner's reputation? Pat improperly gave testimony regarding Mac's honesty before Mac's honesty was called into question. There is nothing in the fact pattern that indicates that Mac is a dishonest person. Just that he picked a dishonest preparer.

Respondent's counsel concluded with questions about Pat's conviction for running a Ponzi scheme. Pat ultimately admitted to the crime. What if Pat hadn't admitted to the crime? Extrinsic evidence would be permitted. How? Get a certified copy of the judgment of conviction. Anything else to address Pat Peterson having a common name? Get evidence of the witness's identity as the convict such as fingerprint analysis.

Would anyone here have a concern about bringing forth the preparer's Ponzi scheme conviction? What if it were a different crime? What consideration should be given to the nature of the crime? How close should the nature of the act relate to truthfulness or the case? How recent in time?

- Some jurors could regard impeachment of irrelevant or long-past crimes as an act of desperation in which the proponent "dredged up" this "ancient history" because the proponent had no ammunition to attack the substance of the witness's testimony -> Beware smuggling in evidence of bad character in violation of FRE 404 and 405

Let's imagine that instead of a conviction for a Ponzi scheme, the Tax Division has instead sued Pat to obtain a civil injunction to enjoin Pat from preparing federal tax returns based on practice of making up Schedule C businesses for taxpayers who had no true businesses. Could respondent's counsel ask Pat about this? Introduce evidence of the injunction suit?

Would anyone here take action from knowledge that Pat had been kicked out of law school 15 years earlier for cheating? Too old? Ask Pat directly? [608(b)] Reputation/opinion testimony? [608(a)] Call whom?

How different is reputation testimony and opinion testimony? Is reputation testimony really opinion testimony disguised?

PROBLEM WITNESS

LYING WITNESS

Atty: You were married during 1997?

Wit: Yes.

Atty: During 1997, your wife was not an employee of the company?

Wit: No.

Atty: During 1997, your wife not an officer or director of the company?

Wit: No.

Atty: And during 1997, your wife was also not a shareholder of the company?

Wit: No.

Atty: For 1997, you never deducted any of your wife's expenses as business expenses?

Wit: No, I wouldn't do that.

Atty: On direct, you stated that on one business trip you traveled to New York City on August 3, 1997. Do you recall that direct testimony?

Wit: Yes.

Atty: And that trip was to conduct business?

Wit: Yes.

Atty: Now, for that trip, you flew from Dallas, Texas to New York City?

Wit: Yes.

Atty: The cost of that airfare was charged on a credit card in the name of the company?

Wit: Yes.

Atty: The company paid those credit card charges for the airfare?

Wit: Yes.

Atty: And the company deducted all of the amounts included in the credit card bills during 1997 as business expenses?

Wit: Yes.

Atty: Now, you have before you a copy of the exhibits that have been stipulated to in this case. Would you refer to Exhibit 201-J.

Atty: Do you have that in front of you?

Wit: Yes.

Atty: This is the bill for the credit card maintained by the company covering charges made during the month of August 1997?

Wit: Yes.

Atty: Go to ninth page of that exhibit and look at the first entry listed for August 3, 1997 which is on the sixteenth line of that page. Take your time, do have that page and line?

Wit: Yes, I have that.

Atty: That entry reflects a roundtrip charge for airfare from Dallas, Texas to New York City on August 3, 1997?

Wit: Yes.

Atty: Now look at the next line down on that bill. Do you see that entry?

Wit: Yes.

Atty: That entry is for a second roundtrip airfare charge from Dallas, Texas to New York City on August 3, 1997?

Wit: Yes.

Atty: That second roundtrip airfare was for your wife?

Wit: I believe so.... yes.

Atty: Your wife wasn't involved with the operations of the business during 1997?

Wit: She would travel with me and help entertain the wives of my clients when we went out to dinner and she would go shopping and stay with the other wives while we were in meetings, so I consider that to be a vital function of the business.

Atty: But Mr. ___ your wife was not involved in the day-to-day operations of the business during any part of 1997, was she?

Wit: Well, she and I discussed business and she was involved in helping me make decisions about the operations, and we were doing this during 1997.

Atty: So it is your testimony here today that your wife was involved in the day-to-day operations of the company during 1997?

Wit: I would say yes. She knew the business, almost as well as me, she helped out with the business, was frequently involved in helping me make business decisions, and that required her to travel with me to help entertain our clients and promote the business. If you look at my itineraries from my business trips my wife was often included on some of the events.

Judge: Which exhibit is this.

Wit: I gave it to my attorney. I'm not sure which exhibit he marked it as.

Opp. Counsel: Um...sorry your honor, it appears that this was not introduced into evidence.

Judge: Counselor, respondent must have an opportunity to inspect it.

Opp. Counsel: I am looking for it, but it appears that I do not have it on me. I think that perhaps my client never gave me the itineraries, although I know we discussed it.

Judge: Mr. ___do you happen to have it on you?

Wit: No, I gave it to my attorney! I didn't have another copy.

Judge: We will proceed without it and strike reference to it. Please proceed with the examination, counselor.

Atty: You are no longer married to the wife you had in 1997?

Wit: No.

Atty: You were divorced in Tampa, Florida in 1998?

Wit: Yes.

Atty: There was a trial in your dissolution proceeding was there not?

Wit: Yes.

Atty: And you testified at that trial?

Wit: Yes.

Atty: Drawing your attention to the document that has been given to you marked for identification purposes as Exhibit 250-R. Do you have that in front of you?

Wit: Yes.

Atty: This is a portion of the transcript of the trial of your dissolution of marriage that took place in Tampa in 1998 which includes part of your testimony.

Wit: Yes, I see that it is part of the transcript.

Atty: And your testimony was given in that case on May 10, 1998?

Wit: Yes, that's what it says here on this exhibit.

Atty: You testified under oath in that case?

Wit: Yes.

Atty: You were represented by an attorney at that trial?

Wit: Yes.

Atty: In fact your attorney asked you questions during your testimony?

Wit: Yes.

Atty: Directing your attention to page 45 of Exhibit 250-R, beginning on line 3 of that page, do you have that page and line sir?

Wit: Yes.

Atty: During your testimony your attorney asked you the following questions and you gave the following answers:

Q: Did your wife ever have any involvement in the day-to-day operations of the Company?

A: No, she was never involved.

Q: Did she make any business decisions or help you in making any of the business decisions involving the company?

A: No, she had nothing to do with the business, in fact, I don't think she has been down to the office in the last 5 years. I built that company and made it what it is today and she had nothing to do with how much it is worth. She never did anything to help.

Atty: Did I read the transcript correctly?

Wit: Yes.

Atty: Thank you. No further questions.

J: Good afternoon Mr. _____, I trust that you had a good lunch. I remind you that you are still under oath. Counselor, you may proceed.

A: Thank you, Your Honor. On direct you stated that you traveled to NY on business from... let me look at my notes, here are the dates, do you recall the time you went to NY during the tax year at issue?

W: Yes.

A: When were you there?

W: Where counselor?

A: NY?

W: Well, I talked about a number of times I went to NY on business.

A: OK, well it was that time that you stayed at the Ritz/Carlton hotel. When was that?

W: Well... I often stayed at the Ritz/Carlton hotel. Can you be more specific?

A: Well...May I have a moment, Your Honor?..... [Flips through notes and exhibits] Okay, I have it, here it is..... You testified earlier that on one trip from 8/3/97 to 8/6/97 you were in NY on business and you stayed at the Ritz/Carlton Hotel. Do you recall that testimony earlier today?

W: Yes. As I stated earlier I was in business in NY on several occasions during 1997 and I often stayed at the Ritz/Carlton.

A: And how much did you spend during that trip to NY.

W: What trip?

A: The one from 8/3/97 through 8/6/97?

ADC: [Leans over and says "Lead the witness!"]

W: I can't recall specifically, its in my records.

A: What records?

W: The ones I gave to my attorney several months ago.

A: What specific records?

W: The receipts. I've seen them in the court documents here but I can't recall which ones.

A: May I have another moment, Your Honor?

Judge:: Yes, but make it quick counselor.

A: Thank you, Your Honor. [Flips through stack of exhibits. Finally finds the one] Ok, I think I've found them. I'm looking at a receipt here for you hotel bill at the Ritz/Carlton from 8/3/97 through 8/6/97.

Judge: Which exhibit counselor?

A: Oh... sorry, Your Honor....Exhibit 201-J.

Judge: Thank you.

A: Now, Mr. _____, looking at that exhibit, see that amount?

W: Which exhibit, I don't have a copy of the exhibits.

A: Sorry, here is a copy of the exhibit...[starts to walk up to the witness]

J: Counselor please ask permission to approach the witness.

W: Sorry Your Honor, may I approach the witness?

Judge: Yes.

A: Now Mr. _____, you have Exhibit 201-J in front of you?

W: Yes.

A: How much did you spend on the hotel rooms?

W: I'm not sure, there is a lot of information on this receipt covering the several days I stayed there and its all coded.

A: OK....[takes some time to find the entry] go to the second page, no, wait, it looks like 1, 2, 3,4,5,6,7,8,9, on that page.

W: Let me count the pages, did you say the ninth page?

A: Yes.

W: [Counts the pages] Ok I have the ninth page. What did you want to know?

A: OK how much was the charge for the room you stayed in?

W: I'm not sure which entry the room is.

A: Wouldn't it be the most expensive entry on the bill?

W: I think so.

A: Ok...go to, let me see, the 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15, ok the 16th line of that page, do you see that.

W: Let me count....1,2,3,4,5,6,7,8,9,10,11,12,13, what line did you say?

A: Huh, the 16th I believe, yeah the 16th line.

W: OK I have that line, what was the question?

A: OK, How much was the rate for the room?

W: The cost on line 16 is \$450

A: Now was that for one room for one night?

W: It could be, it was a large suite which I needed to entertain my clients when we met.

A: Was there a charge for that same night for an additional room?

W: I'm not sure, I would have to look at the bill again.

A: Will you look at the exhibit and tell us if there was a charge for a separate room at the hotel for that same night?

W: It looks like there was.

A: And what was the rate for that separate room?

W: It looks like the same rate \$450.

A: Who stayed in that room?

W: My wife.

A: Why did your wife need a separate room?

W: She frequently accompanied me on my business trips so that she could help me with my clients. She would socialize with the wives of my clients and promote our business, and she would discuss the business.

A: But what did she have to do with your business?

W: She knew the business, almost as well as me, she helped out with the business, was frequently involved in helping me make business decisions, and that required her to travel with me to help entertain our clients and promote the business.

A: Are you currently married to Mrs. _____?

W: No.

A: Were you divorced?

W: Yes

A: When and where were you divorced? Was there a trial of that divorce?

W: We were divorced in Tampa, Florida in 1998, and there was a trial.

A: Did you testify at that trial?

W: Yes.

A: Isn't it a fact that during that trial you testified that your wife had no contact with the business?

W: I can't recall what I testified to at that trial, it was a long time ago.

A: Well.... in the transcript of that trial you stated, and I quote..."She never did anything to help." Do you recall making that statement under oath in that trial?

W: No, I don't recall saying that. Maybe if I could see the transcript of the trial that will help.

A: I'm asking the questions here.

J: Counselor, do you have a copy of the trial transcript?

A: Yes your honor, but I'm just impeaching the witness and its not in evidence.

J: I understand, but could you grace the rest of us with what you are referring to in that transcript?

A: Oh, yeah, I'm looking at page 45, at line 15. Do you see that Judge:?

J: No, I don't have a copy of the transcript. Could we see that counselor?

A: Sure, Your Honor, here use my copy.

J: That's fine counselor, but what are you going to use?

A: Oh, sorry, I guess it would have helped to have copies for everyone to refer to.

J: Yes it would have been better.