PROGRAM SUMMARY 7-15-23

By: Gary Wallace-Program Summary Committee Chair

CDCBAA Holds Sixth Meeting and MCLE Program of 2023: "WITNESS TESTIMONY - TESTIFYING IN COURT AND AT MEETINGS OF CREDITORS"

On July 15, 2023, the CDCBAA held its sixth members meeting and MCLE program of the year. The meeting and program were conducted as a live webinar via Zoom video. The program topic was: "WITNESS TESTIMONY - TESTIFYING IN COURT AND AT MEETINGS OF CREDITORS." Our distinguished speaker was David Lally, Esq. | Law Office of David Brian Lally. Former CDCBAA president and current board member Hale Andrew Antico moderated. What follows are some of the highlights of the seminar.

Mr. Lally, who has tried nearly 100 cases during a lengthy and successful career, began his presentation by impressing upon counsel the importance and methodology for using direct testimony by declaration as evidence when permitted or required. He stressed, for example, the importance of the declarant having personal knowledge of the facts stated therein.

For purposes of objections to testimony, Mr. Lally suggested having a short checklist of objections at the ready (possibly taped to a laptop at eye level) for quick use, since objections to questions are waived if not asserted timely (i.e., usually before the answer is given).

Mr. Lally also stressed the importance of having your witness not only tell the truth, but also to make eye contact with the trier of fact (usually the judge, of course, in bankruptcy cases). Mr. Lally also reminded counsel to strongly encourage clients to listen to the questions asked by opposing counsel before answering and then just answer the question without a lengthy explanation or becoming argumentative with opposing counsel. Under no circumstances should counsel coach the witness. Wait for a break to speak in private with the witness if s/he is being evasive or incomplete with answers, or use redirect examination for rehabilitation.

Clients should be advised to not begin answering a question until opposing counsel is finished asking the question. This allows for the witness to think about the question and understand it before answering. It also allows the attorney time to possibly interpose an objection. Clients should be advised to never guess at an answer, although an honest and reasonable estimate when there is sufficient information to do so, is generally acceptable. Saying "I don't know" or "I can't recall" is a proper answer when that is the truth, and it is preferrable to a guess. However, it should not be used to conceal potentially damaging information, and too many such answers when the witness is reasonably expected to know the answer will harm the witness's credibility.

Witnesses should answer questions with confidence but not aggressively. Witnesses who have been previously deposed should be given a copy of their deposition transcripts for further review ahead of their testimony. Impeachment by use of prior deposition testimony can be embarrassing, even devastating. The same is true for documents that will be used as exhibits. The witness should be thoroughly familiarized with these documents prior to taking the stand.

Counsel should be alert to questions concerning their client's character. Except in criminal matters, where it more frequently is found appropriate, the introduction of character evidence is rarely appropriate in bankruptcy proceedings.

Mr. Lally also touched on a number of other objections to evidence, including hearsay, privileges, and the best evidence rule. Although assertion of the Fifth Amendment privilege against self-incrimination is rare, when it is invoked by a debtor, evenly properly, the judge can reach a negative inference from that assertion. So, counsel should strive as best they can to assure themselves that such an issue will not arise with their client during the proceeding by ferreting out such issues in advance with detailed witness preparation.

Attorneys should expect to be required to stand when objecting to a question. If unsure, stand (or at least ask the judge whether it is necessary before the trial begins). On cross-examination, counsel should ask narrow questions that do not allow for much more than a yes or no answer. Leading questions are proper on cross-examination.

Regarding 341(a) hearings, counsel should make certain that their client-debtors review their bankruptcy petition again just ahead of the hearing.

In sum, Mr. Lally made clear to all that a prepared witness usually makes for the best witness. It is the job of counsel to undertake that preparation with the witness.

Throughout the presentation, Mr. Lally also shared a number of excellent war stories with the audience.

The seminar was interactive, and attendees were permitted to ask questions. Pop-up poll questions were presented to attendees at various points as well.

The next CDCBAA members meeting and Zoom MCLE program will be held on August 26, 2023. The topics will be "SETTLEMENT AGREEMENTS and ADVERSARY PROCEEDINGS 101, Part Two." Our speaker will be John Tedford, Esq. from Danning, Gill, Israel & Krasnoff, LLP, and Hon. Wayne Johnson | Bankruptcy Judge, Central District of California, Riverside Division. We hope you will join us.

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