

Cross-Examining Financial Experts

A Trial Lawyer's Perspective

By Kenneth F. Neuman

If you are going to engage in complex commercial trial work, one of the key issues you will likely face is the cross-examination of the opponent's financial experts. Throughout my 28-year career as a complex commercial law trial attorney, I have conducted more than 50 business law trials through verdict, including jury trials, bench trials, and arbitrations (in 2014 alone, I had a six-day jury trial and two bench trials of five and six days respectively). In the course of my trial practice, I have cross-examined dozens of experts and have also observed opposing counsel's cross-examinations of my experts. Through these experiences, I have identified five critical components for a successful cross-examination of a financial expert witness.

Prepare, prepare, prepare

Preparation is key for any successful trial lawyer, but preparing for the examination of an adverse financial expert takes a special intensity. In particular, preparation must start with a road map identifying the main points of the expert's anticipated testimony that will need to be attacked (you should already know exactly what the expert is going to say from his or her report or prior discovery deposition and from consulting with your own expert). Once the key points of attack are identified, you need to know the discovery material backward and forward—the key documentary evidence, deposition testimony, and opinion letters—that underlie the expert's opinion, as well as the

authoritative materials on which they have relied. Moreover, you must be ready if the expert tries to change his or her deposition or report testimony on the witness stand. Know exactly where in the deposition transcript or report the expert testified one way, and when and if he or she deviates from that testimony at trial. Finally, your cross-examination outline and supporting evidence must be simplified, with clear references to every exhibit you intend to use during the exam.

I typically create a single binder that contains my exam outline, key pages of the expert's report and deposition (for impeachment purposes), and copies of every trial exhibit I intend to reference, which should already have been introduced into the record. A good cross-examination must be smooth and polished. The judge, jury, or arbitrator—not to mention your client—need to see that you, not the opposing expert, are in control and have a smooth delivery.

Attack the weakest point first

When it comes to the substantive cross-examination itself, it is best to identify the weakest point of the financial expert's testimony to begin your attack and discredit the expert. The sooner you can convince the fact finder that the expert is not credible or that his or her opinions have major defects, the better. When cross-examining financial experts, you are not building to a big finish; you are looking to immediately discredit the witness so the fact finder will discount what was just heard. In a recent trial, I immediately pounced on the fact that the other side's real estate valuation expert had failed to actually inspect the commercial buildings on which he was opining as to value. I quickly raised that failure at the outset of my cross-examination and convinced the judge to disallow the

expert's testimony.¹ Remember: the judge, jury, or arbitrator has just listened to the witness give opinions that are directly adverse to your client's position; the sooner you can begin to discredit all or portions of that presentation, the more devastating your cross will be.

KISS (Keep It Simple, Stupid)

Generally speaking, financial experts are highly educated and highly specialized (CPAs, MBAs, real estate appraisers, forensic auditors, etc.). They frequently speak in their own vernacular, and the concepts they discuss are often complex. Juries, on the other hand, may have little understanding of complex financial issues such as business or real estate valuation methodologies, financial statements or complex tax returns, and damage calculations. After all, if the issues were simple, the parties would not need experts.

Given that the subject matter may be unfamiliar to the fact finder, you must figure out how to simplify the points you want to make on cross-examination. For example, if you are cross-examining an expert on a business valuation issue and he or she has used an overly aggressive discount rate to support the value being advocated (whether it is too high or too low), you must first make sure the fact finder understands what the discount rate is, and what happens if it goes up or down. Even if the expert had previously testified on the issue, it is good to remind the fact finder of the issue and why it is important. (For example, "So if I understand your testimony, if you increase the discount rate and everything else remains the same, the valuation of the business goes down.")

Simplifying complex financial issues is important no matter who is the finder of fact. Remember, many trial court judges

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do not come from the business side of the legal profession. Even though they may have some familiarity with complex financial issues, you should not assume that every judge is readily conversant on valuation and other topics that may be the subject of expert testimony. So, even when cross-examining a financial expert before a judge sitting without a jury (or even an arbitrator), make certain to keep the points of your cross-examination simple and directly relatable to the issues before the court. And don't assume the judge, jury, or arbitrator is familiar with jargon and uncommon acronyms (for example, I felt it important to explain to a judge that "ROI" stood for "return on investment").

Get in and get out

Given that the very nature of financial expert testimony is technical and often dry (unless you are also a financial geek, like me), piling on another half-day of cross-examination of a financial expert is unlikely to allow you to make the points necessary for the fact finder. Rather, a pointed, punctuated cross-examination focusing on the weakest points of the expert's testimony is the best means of conveying the critical points you are trying to make. Whether the case is being tried to a judge, jury, or arbitrator, focusing on the minutiae is never a good idea. Debating whether the interest applied should be 5 versus 6 percent or engaging in impeachment of an expert for having testified in only seven cases instead of the nine cases in which your expert has testified are all mistakes I have witnessed in trial. Instead, directly attack the expert's weakest positions that effectively support your case and then sit down.

Remain flexible and open minded, paying attention to the direct examination

For all the preparation you must undertake to effectively cross-examine the opposing expert witness, you cannot lock into a script before hearing the witness's actual testimony. Pay close and careful attention to the expert's direct exam to look for additional weaknesses that can be used to

make key points on cross. Did the expert recant some of his or her deposition testimony? Has the expert conceded points you have raised in trial? Has the expert's testimony varied from the facts put into evidence? Any of these scenarios is possible and, in fact, common, but you need to listen closely to the direct testimony as it is introduced. In fact, you may need to make adjustments to your cross-exam on the basis of this testimony. Keeping an open mind about the expert may also lead to unexpected opportunities. For instance, has the adverse expert used a chart or other demonstrative exhibit that you could use to highlight one of the expert's weaknesses? If so, you can effectively use the expert's own chart or exhibit against him or her to highlight a key point in your case. Again, these are often unexpected opportunities. Paying close attention to the direct examination and keeping an open mind for making last-minute changes to your cross is critical to an effective cross-examination.

Conclusion

Like all aspects of trial work, a successful cross-examination of the opposing party's financial expert requires an abundance of advance work and an ability to adjust your strategy depending on testimony that

may not be expected in the direct examination. However, unlike your approach for cross-examination of the other party or other key adverse fact witnesses, I suggest that a "lethal strike" strategy is usually best for opposing experts. If you follow these five guidelines, you will likely have greater success in neutralizing the opposing financial expert. ■



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ENDNOTE

1. In particular, when I started my cross, I wasn't sure if the expert had ever visited the buildings, so I asked him to describe what he remembered about the physical characteristics of the buildings' interiors. When he admitted he didn't "recall" for the third or fourth time, I asked him, somewhat rhetorically, if he'd ever been to any of the parcels. When he sheepishly admitted he had not, I immediately moved that his testimony be stricken.



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