

Cross-Examining Expert Witnesses

By Edward H. Pappas

Cases are not usually won through an opposing expert's testimony. Rather, they are normally won by your own well-prepared witnesses. Accordingly, the goal of expert cross-examination is twofold: (1) persuading the jury that your expert's opinions are credible and (2) showing that the opposing expert's opinions are unreliable. Your expert's credibility can be bolstered if you are able to discredit an opposing expert witness. Here are some insights into effective cross-examination of an expert.

Unsupported Assumptions

Every expert assumes facts provided by third parties to render an opinion. Invariably, the facts assumed by the expert are inaccurate or contested. If experts assume and rely on inaccurate facts, their opinions may no longer be credible or reliable. In this regard, it is much easier to attack the facts on which an expert relies.

For example, let's assume that a plaintiff claims damages for a 12-year period, and this claim is based on the assumption that the defendant had no reason to terminate a purchase order nine years earlier. Obviously, if this fact is wrong, the plaintiff's damage calculation will also be wrong. Cross-examination of the plaintiff's expert to challenge this fact is illustrated as follows:

Q. You are assuming that the defendant had no valid business reasons to terminate the purchase order; is that correct?

A. Yes.

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Q. If the evidence shows that the defendant did have valid business reasons to terminate the purchase order, your 12-year period for damages would be reduced to three years; is that correct?

A. Yes, if the defendant had valid business reasons to terminate the purchase order, then that would change my calculations and reduce the period for damages to three years.

Of course, the defense must produce evidence of business reasons for terminating the purchase order for this cross-examination to be effective. If, for example, the defense attorney shows documentary evidence of such business reasons to the plaintiff's expert, then the plaintiff's expert would have to explain why the damage calculations should not be reduced by 75 percent. The credibility of the plaintiff's expert will have suffered a serious blow because a critical fact was incorrect.

Failure to Comply with Industry or Professional Standards

Industry or professional standards, as well as learned treatises, provide a basis to compare an expert's opinions and methodologies with accepted opinions and methodologies. Under Rule 707 of the Michigan Rules of Evidence and Rule 803(18) of the Federal Rules of Evidence, learned treatises

may be used to impeach an expert's testimony if they are established as a reliable authority by the opposing expert's admission, by another expert's testimony, or by judicial notice. Here are some sample questions for an accounting expert witness:

Q. In forming your opinions in this case, did you rely on generally accepted accounting principles (GAAP) as codified by the Financial Accounting Standards Board?

A. Yes.

Q. Do you recognize GAAP as a reliable authority?

A. Yes.

Q. Does the professional service agreement marked as Exhibit 1 state in part that "[e]mployee shall be entitled to a bonus... as determined by generally accepted accounting principles employed by the CPA"?

A. Yes.

Q. Under this agreement, the employer's accountant was required to use GAAP in calculating the plaintiff's bonus; is that correct?

A. Yes.

Q. However, the schedules that were prepared by the employer's accountant to determine the employee's bonus were not prepared using GAAP; is that correct?

A. That is correct.

Your expert's credibility can be bolstered if you are able to discredit an opposing expert witness.

As a general rule, you should not ask a question to which you do not know the answer.

Bias

An expert's credibility can be diminished by showing that an opposing expert has a bias to testify against your client. Bias may be shown in many ways. To illustrate, the expert may have an economic interest to testify against your client, as shown below:

- Q.** Your medical practice is in the specialty area of vascular surgery?
- A.** Yes.
- Q.** Is this the same specialty area of practice as Dr. Smith?
- A.** Yes.
- Q.** Your practice is located in the service area of Jones Hospital; is that correct?
- A.** Yes.
- Q.** Is Dr. Smith's practice located in the same geographic service area?
- A.** Yes.
- Q.** It is fair to say that you and Dr. Smith, in your medical practices, are in competition for patient referrals from other doctors?
- A.** Yes, I believe so.
- Q.** And you and Dr. Smith are in competition for patients as well, true?
- A.** Yes.
- Q.** You and Dr. Smith are also in competition for performing vascular surgeries and other procedures at Jones Hospital; is that correct?
- A.** Yes.

Lack of Qualifications or Preparation

Some experts may not have specific experience with the issues in the pending case and some may take shortcuts in their investigation to save their clients money. To the extent you can show a lack of preparation or lack of expertise specific to the case at hand, you can discredit an expert's opinion—even more so if you can show that

the expert made errors as a result of his or her lack of specific expertise or preparation. This point is illustrated below:

- Q.** Did Mr. Jones, the president of Jones Automotive Supply, tell you that the company had used gross revenue ratios to determine usage?
- A.** Yes.
- Q.** You did not conduct your own detailed analysis of usage to confirm whether this method that Jones Automotive Supply was using resulted in an allocation that truly reflected usage, did you?
- A.** No, I did not.
- Q.** Instead, you accepted the method they handed you and assumed it to be correct; is that correct?
- A.** Yes.
- Q.** You now know that their accounting documents, in which this gross ratio method was already computed, contained incorrect figures; is that correct?
- A.** Yes.

Expert Witness Agreements

To the extent that a portion of an opposing expert's opinions are in accord with your own expert's opinions, highlight areas of agreement between the two experts. This will not only bolster your case, but also your expert's credibility.

Depositions

One of the keys to effective cross-examination of an expert witness is good deposition testimony. Ask open-ended questions at the deposition, but pin down the expert's opinions and assumptions. Then, use the deposition testimony at trial to cross-examine the expert. Use the exact words the expert used in deposition to prevent the expert from wiggling out of his own

testimony. The cross-examination may look like this:

- Q.** For purposes of your damage analysis, the critical event in this entire matter is the purchase order; is that correct?
- A.** No.
- Q.** Your deposition was taken in my office on February 12, 2012; is that correct?
- A.** Yes.
- Q.** Did you answer my questions under an oath to tell the truth?
- A.** Yes.
- Q.** Did you tell the truth at your deposition?
- A.** Of course I did.
- Q.** Was a court reporter present to transcribe your answers?
- A.** Yes.
- Q.** Now turning to page 30 of your deposition transcript, you testified under an oath to tell the truth that, "The critical event in this entire matter is the purchase order," correct?
- A.** Yes, I did.

At that point, you stop and emphasize this expert's inconsistent sworn testimony in your closing argument to discredit him.

Conclusion

The more questions you raise about opposing experts and their opinions, the less credible the experts become. Your cross-examination, however, should be short. And as a general rule, you should not ask a question to which you do not know the answer. ■



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