

ATTACKING THE NUMBERS EXPERT

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I. INTRODUCTION

Economic proof is an integral part of any significant litigation whether it be a personal injury case or complex commercial litigation. John G. Koeltl and Robert B. Pringle, *Use of Experts in Commercial Litigation: Discovery and Trial Techniques* at 1 (Practicing Law Institute 1988) (hereinafter "Koeltl and Pringle at ____"). The "numbers expert" is an especially important witness since he or she is typically called to testify regarding damages. While cross examining an expert witness can be one of the most difficult aspects of a lawsuit, it can also prove to be one of the most productive aspects of the lawsuit as well. Consequently, your ability to deal effectively with such an adverse expert witness can produce good or disastrous results. Charles F. Preuss, *Finding the Achilles Heel: Discovery Techniques to Attack Adverse Experts I*, (International Assoc. of Defense Counsel Annual Meeting July 12-13, 1991) (hereinafter "Preuss at ____"). The effective cross-examination of adverse expert witnesses begins with thorough preparation. The best cross-examination of an expert witness is usually 1) short; 2) uses plain English so that the jury can understand and follow the logic of the questions; 3) uses only leading questions; and 4) does not permit or require repetition of direct testimony. Sheryl J. Willert, *Cross Examination of Plaintiff's Expert Witnesses: Avoiding the Minefield*, Article prepared for Williams, Kastner & Gibbs, Seattle, Washington at N-5 (hereinafter "Willert at ____").

II. PREPARATION

Although the usual considerations of cross-examination of witnesses apply equally well

to cross-examination of experts, experts require *additional* preparation and involve other cross-examination and impeachment methods. *Id.* The state and federal rules of civil procedure outline the information obtainable from expert witnesses and such information is crucial to appropriate preparation. Specifically, Texas Rule of Civil Procedure 166b(2)(e) and Federal Rules of Civil Procedure 26(a)(2) and 26(b)(4) set forth the information that a party must provide to its opponents about the expert witnesses it has retained. The Federal Rules require extensive disclosures, including a report that contains a complete statement of all opinions to be addressed by the expert and the bases for the opinions, all data on which the expert relied, the qualifications of the expert, including publications for the preceding ten years, the compensation being paid to the expert, and a listing of any other cases in which the expert has provided testimony for the preceding four years. The Texas Rules merely provide that the mental impressions and opinions of the expert are discoverable as well as any report or material prepared by the expert and any facts or document on which the expert relies in forming his opinion. Accordingly, in state court actions, the lawyer must be especially diligent in preparation for cross-examination of the expert witness.

In order to be properly prepared to depose and cross examine an expert witness, the following information should be obtained.

- a. Curriculum vitae - carefully study the curriculum vitae, and confirm the degrees allegedly obtained and memberships listed; scrutinize the publications attributed to the expert witness, and obtain copies of relevant publications. Review organizations of which the expert is a member, and determine whether the organization has a position or publications

regarding the area in controversy in your case; if so, obtain and review that information.

- b. A diligent search should be made for all previous deposition and trial testimony of the expert. Begin the search within your own law firm and by contacting other local litigators. A search can be expanded to review brief banks compiled by trial lawyer groups such as the Defense Research Institute, Texas Association of Defense Counsel, or the Texas Trial Lawyers Association.
- c. Determine other lawsuits in which the expert has testified and contact the opposing counsel in those lawsuits to obtain deposition transcripts and general information about the testifying traits of the expert.
- d. Be certain that you understand the subject matter before attempting the expert's deposition. *Your* expert can be extremely helpful in this regard by explaining numerical formulas and theories, defining technical terms and by assisting in the preparation of specific, technical questions. Additionally, read the technical literature to become well informed. Robert G. Beshears, *Cross-Examination of Expert Witnesses*, Defense Counsel Training Manual at 239 (IADC 1989) (hereinafter "Beshears at ____").

After gathering the pertinent information, including a copy of the expert's written report, forward the information to your client and your economics expert. Prior to the adverse expert's deposition, review his or her previous deposition and trial testimony for any statements or opinions contrary to the opinions anticipated in your lawsuit. Any contrary statements may be

used during cross-examination to impeach the expert witness. Additionally, review the publications prepared by the expert witness that are relevant to the subject matter of his testimony in your case. Search the articles prepared by the expert witness for any inconsistencies with his opinions in your case and use any such inconsistencies to impeach the expert. Finally, after scrutinizing and verifying the expert's curriculum vitae, use any misrepresentations contained therein for impeachment purposes.

In addition to your preparation, your own economics expert should be fully utilized in preparation for cross-examination of the adverse numbers expert. Request that your expert critically review the adversary's expert report and identify any questions or problems he might have regarding formulas used by the expert; theories adopted by the expert; assumptions made by the expert; and charts, tables and/or figures relied upon by the expert. Ask your expert to prepare questions to ask the adverse expert during his deposition and, if appropriate, to attend the deposition with you.

III. THE ACTUAL DEPOSITION

Have all exhibits you intend to use indexed, marked and readily available; have the adverse expert's previous publications indexed and cross-indexed if you intend to use them for impeachment purposes, and index the expert's prior depositions for efficient impeachment. Since the primary goal of a deposition is to learn everything you can about all the expert's opinions and the bases of those opinions, let the expert talk as freely as possible about those opinions. Avoid interrupting the witness. By not immediately attacking the witness, you may be able to obtain some favorable acknowledgements about recognized authors or your own experts. Preuss at 9.

a. Background Information

Begin the deposition by developing the expert's credentials, or lack thereof. Inquire about the expert's educational and work history as well as his present employment. Concentrate on what is not contained in his curriculum vitae; locate the gaps in academic training or employment history. Preuss at 10. Explore the extent to which the expert serves as an expert witness and on what topics he considers himself to be an expert. Ask the expert if there are areas in which the expert's opinions disagree with acknowledged experts or recognized publications in the field. Preuss at 10. Determine whether the expert typically testifies for plaintiffs or defendants, and whether the expert has a "history" with the attorney for whom he is testifying in your case. Determine whether anyone assisted the expert in preparing his report or preparing for his deposition. Because many experts are busy, they may entrust a portion of their work to an assistant who is a weaker witness, and depending on the nature of the work, it may be wise to depose the assistant. Preuss at 11. Finally, inquire about the expert's rate of compensation and whether he has an interest in the lawsuit. Preuss at 12.

b. Expert's Work on This Case

After discussing the background of the expert and his opinions in the case, it is time to begin attacking the assumptions made by the expert in his calculations. Ask the economist to define any abbreviations or symbols in his work and to explain all formulas used in his calculations. Gerald D. Martin, *How to Depose and Cross-Examine Plaintiff's Economic Expert: An Economist's Guide for the Defense*, The Economic Expert in Litigation: 1993 (DRI 1993) 13, 15 (hereinafter "Martin at ____"). Establish when the expert was contacted, what the expert was asked to do, who contacted the expert, and what information the expert has been

provided with in order to form his expert opinions. Determine exactly what documents were provided to the expert and when, so that his opinions can be limited to those documents. Sometimes lawyers only provide their experts with portions of the available documents, depositions and financial information and it can be effective in cross examination to provide the expert with additional information and/or documentation during the deposition and ask the expert whether the information is important and how such information impacts his opinion. Such questions may illustrate that single factors or assumptions can dramatically impact the expert's opinion. After determining the expert's assignment, begin a specific attack on his assumptions.

1. Specific Questions in a Personal Injury Lawsuit

- In a personal injury case, ask the plaintiff's economist to calculate the life expectancy of the injured plaintiff or the deceased, as well as for the plaintiff's spouse. Ask for the specific table used in the calculation; the tables are periodically updated and it is critical that the most recent table be used. Inquire as to whether economist reviewed the plaintiff's or spouse's medical records that might indicate a reduced life expectancy. Martin at 15.
- Ask the economist to calculate the worklife expectancy of plaintiff. Be certain that the expectancy is calculated on the age of plaintiff at injury and NOT at trial. Not all people have the same work life expectancy - this is not the same as expected retirement age. This variable fluctuates considerably by occupation, sex, race, and education level. There are specific government tables available that contain this information -- be certain that the plaintiff's economist has used the proper table. Martin at 15, 21. Also review the plaintiff's or deceased's

medical records. A pre-existing medical condition can shorten a person's life expectancy and projected work life expectancy. It is critical that the economist take these conditions into consideration as part of their assumptions. If he failed to, be sure to establish that such a change would have a big impact on the final calculation. Kenneth G. Bouchard, *A Defense Lawyer's Guide to Cross-Examination of the Economic Expert*, The Economic Expert in Litigation: 1993 (DRI 1993) 29, 33 (hereinafter "Bouchard at ____").

- Find out the plaintiff's income history and determine the source for that information. Martin at 16.
- Inquire as to whether the economist has met with the plaintiff, or if it is a wrongful death case, with the family. If not, question the economist regarding his knowledge of what the plaintiff or deceased actually did around the house. Bouchard at 33-34.
- Inquire as to whether the economist has reviewed IRS records on the plaintiff or the deceased. If not, question his assumptions regarding the actual amount of money earned by plaintiff or deceased. Martin at 16.
- Determine from personnel records whether the plaintiff or deceased received good reviews at work and whether he was absent from work frequently. This will affect the table value used for calculations.
- Also review the personnel record for any personal problems or driving record problems such as alcoholism, drug abuse, or driving while intoxicated. A DWI can prohibit a person from obtaining a job in a large size of the work market.

- Also check the wage increases that plaintiff or deceased had routinely been receiving and compare them to the state and national average. If they are below average, question the economist regarding whether he made the proper assumptions. Bouchard at 32.
- Ask plaintiff's economist whether he used a table of average earnings to determine an earnings history. This is completely improper if the plaintiff has an *actual* earnings history. Bouchard at 31.
- Look critically at the base earnings rate used by plaintiff's economist because even a small decrease in this number can have a dramatic effect on the final damage calculation. Bouchard at 31.
- If plaintiff's economist uses national wage rates or benefits averages, confront him with the state published information *if* the numbers would result in a smaller damages calculation (they usually are, due to the lack of unionization). Have the expert recalculate the damages using the lower numbers or, if this is not possible, at least get the expert to admit that the lower wage rate would have a dramatic effect on the damage calculation. Bouchard at 31.
- Inquire as to whether plaintiff's economist includes inflation in the chosen wage growth rate (figure obtained from governmental tables) but uses a discount rate after inflation. If he does, you can discredit his analysis as "double dipping" because proper economic analysis either reduces the wage growth rate and the discount rate by the rate of inflation, or includes inflation in both rates. Bouchard at 32.

- Because a typical worker does *not* receive the same increases in earnings throughout his career (earnings of workers in their 20's and 30's tend to increase well above average, and then tend to level off in their 40's, and increase gradually or decrease thereafter). Therefore, if the plaintiff's economist uses a straight average to calculate projected earnings, as opposed to a number from a governmental index or table, his calculation is fundamentally flawed. However, such flaw usually results in a smaller damage number. Bouchard at 32.
- Look closely at what plaintiff's expert includes in the overall damage calculation. For example: vacation and sick benefits do *not* benefit survivors, and unemployment compensation benefits should *not* be included in a lost wages analysis. If the plaintiff's economist includes social security benefits, be certain that his calculation also includes an offset for consumption of those benefits after retirement. Also, medical benefits should be questioned: did the plaintiff's economist cut that benefit out of the damage calculation at plaintiff's 65th birthday, when Medicare kicks in; did the plaintiff's economist reduce the medical benefits for the years after his children turn 18, or are no longer covered by the medical benefits? These questions will illustrate the weaknesses in the economist's assumptions.
- With respect to the value of household services, plaintiff's economist can be easily attacked. Oftentimes economists take the professional rate paid for a service (such as auto mechanic work) and apply it to the plaintiff, who is usually an amateur. Bouchard at 33-34.

- Inquire into the assumptions made by plaintiff's expert and the rates of compensation used in the calculation. Ask whether the expert met with the family or whether he relied on what the lawyer told him. This is one area in which an economist can really get hurt if he did not confer with the family to learn what services the injured plaintiff or the deceased actually performed for the family. Bouchard at 34.
- Determine whether the plaintiff's economist took a consumption deduction for a decedent, and inquire into the assumptions used in determining that deduction. For example, such a deduction should include *all* amounts typically spent by the decedent on himself, NOT just the necessities. Therefore, if the decedent had any high cost habits such as a drug, alcohol or gambling problem, or if he owned his own personal airplane, this must be considered in determining how much the decedent would have consumed and this number should be deducted from anticipated earnings. Accordingly, it is proper to inquire about decedent's lifestyle, morals, reputation, etc. in order to make an accurate analysis of his consumption figure. Thoroughly question the plaintiff's economist regarding this calculation because it could prove to be beneficial. Martin at 23; Bouchard at 35-37.
- Review all the charts and tables on which plaintiff's economist relies to be certain that he has used the proper figure from the chart or table and to ascertain whether the data on the table or chart is the most up-to-date data available. If an economist relies on a table that bases its figures upon 20-30 year old data, he

should be cross-examined and attacked on the point that those numbers are not current and that a more up to date table is available.

- Some economists' calculations are flawed with respect to single-person households. The consumer expenditure data available, if used in conjunction with the Earl Cheit's study for the Institute of Industrial Relations (1961), yields ridiculously low percentages because the table and study were designed to measure one member of a family's percentage expenditure per month, NOT a single person household. However, there is now a table that includes a factor for single person households, and it is critical to ascertain whether the plaintiff's economist used that chart. Martin at 22-23; Bouchard at 37-38.
- With respect to a plaintiff or decedent who is a child, the plaintiff's economist is even more vulnerable because he has to make additional assumptions, such as whether the child graduated from high school, college, graduate school, how the child performed in school, what type of job he would have obtained, and potential earning capacity. Bouchard at 38.

2. Specific Questions in a Commercial Litigation Case

In commercial litigation, the legal issues presented in the case define the nature of the necessary economic proof. Koeltl and Pringle at 1. Thus, it is not possible to create a general list of questions to be asked the expert witness. As in a personal injury case, it is important to question the expert witness as to his opinions and then establish what he has relied upon as bases for those opinions. For example, in computing damages for alleged injury to a business, an antitrust expert witness may assume a certain market share, level of gross revenue, or profit

margin for the company. Koeltl and Pringle at 8. These assumptions should all be questioned on cross-examination. Specifically, the cross-examiner may inquire as to 1) the basis for each of these assumptions, 2) whether or not effects of lawful competition have been considered, and 3) what discount or inflation rates have been used in computing losses. *Id.* The cross-examiner should also probe as to how sensitive the expert's assumptions are to changes in variables. *Id.*

IV. CONCLUSION

The key to cross-examining the plaintiff's economist is to focus on and point out the fact that his calculation is based on numerous assumptions and then begin to establish and identify the flaws in those assumptions, and to demonstrate that when the assumptions change, the damage calculation is reduced.