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Direct and Cross Examination of Financial Experts – Lessons from the Trenches

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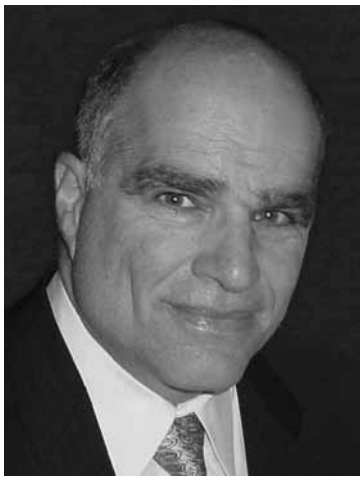

Thomas Neches

Having testified at trial more than 75 times as an expert on damages and other financial issues, I welcome the opportunity to pass along some lessons I have learned.

Direct Examination

Nothing your expert does is more important than direct examination trial testimony. This is where the tires hit the road. This is your expert's one chance to convince the jury that his findings and opinions, typically the result of complex, tedious and obscure calculations, make more sense than the opposing expert's analysis.

Before trial, make sure you and your expert have the same understanding about what opinions the expert will offer – and will not offer –and the bases of these opinions. In a lost profit case, for example, your expert may have calculated future damages based on a projection that your client (a company) will require an additional five years to rebound to the level of profits it would have achieved absent the opposing party's alleged wrongful acts. Perhaps unbeknownst to you, however, this projection was not the expert's own work; he merely accepted a projection made by your client's Director of Marketing. Or, perhaps your expert performed his own future sales projection, unbeknownst to your marketing expert, whose own projection is different. In every case, it is essential to clear up misunderstandings like these before trial, and to make sure the foundation for all assumptions accepted by your expert will be in evidence at trial.

Typically, direct testimony for a financial expert lasts one hour – or less. Your expert does not need to testify about every detail of his analysis. He needs only to convince the jury: (1) he knows what he is talking about (i.e., he qualifies as an expert), (2) he did sufficient work to support his opinions, (3) he performed his work carefully and competently, and (4) his resulting opinions make sense.

Attorneys differ regarding the sequence in which they want experts to explain their analysis and opinions. Some attorneys prefer the following sequence: (1) Summarize expert opinions, then (2) Explain the rationale for the opinions. Other attorneys instead prefer the expert to: (1) Explain the steps performed in his analysis, then (2) Arrive at his expert opinions.

My personal preference is the second approach. It makes the direct testimony more like a story, and it reduces the need to flip back and forth between summary and supporting exhibits. Also, in my experience, when you attempt to present expert opinions at the beginning of an expert's testimony, the opposing attorney sometimes objects on the basis the opinions lack foundation, and these objections sometimes are sustained.

It is well known that financial expert testimony is more persuasive, or at least less boring, when it is accompanied with the use of charts and other demonstrative exhibits. I believe financial expert testimony is best presented not as a narrative supported by charts, but as a presentation of a series of charts, each of which the expert explains to the jury.

Make sure you have all exhibits and documents the expert will refer to in his testimony organized and ready for immediate display to the judge and jury. Whenever possible, have the expert explain the exhibits while standing in front of them, rather than sitting in the witness chair.

Attorneys are accustomed to preparing direct testimony outlines for their witnesses, be it percipient or expert. But for expert witnesses, the expert should write the outline himself (at least the first draft), not the attorney. Further, it should be more than an outline, it should be a script. The advantages of having an expert prepare his own direct testimony outline include these:

The expert has the best understanding of the subject area of the testimony, and therefore is in the best position to determine how to explain it clearly.

It is a relief to trial attorneys to have a least one task lightened.

In the off chance the outline is discovered by the opposing attorney, it is better for the jury to learn the script was written by the witness than by the attorney.

To avoid disclosure, I always prepare my direct testimony outline after my deposition, and I never bring the outline to the courtroom. If an attorney (who perhaps read this article) were to try to impugn my testimony because it was

scripted, my response would be:

Q: You wrote a script for your testimony, right?

A: *Of course. I didn't want to waste the jury's time making it up as I went along.*

The effort to write a direct testimony outline is significant – typically it requires one-to-two day's work for each hour of direct testimony. Why so long? Simple: it is hard to explain complex things clearly.

Review the testimony outline prepared by the expert from the perspective of your three audiences: (1) the jury, (2) the judge, and (3) the court of appeal. A full rehearsal of your expert's direct testimony is ideal – if you have the time and budget. In my experience, this almost never is the case. Either way, at trial itself it is important to listen to the expert, exactly as if you and he were having a conversation. Did you understand what your expert just said? If not, ask follow up questions. Did the expert say everything he was supposed to say? Be flexible. Direct examination never goes exactly as planned at trial.

Cross Examination

Here is an amazing fact: frequently the foundation of the opinions I am advocating as an expert is stronger at the end of my cross examination than at the beginning. This remarkable phenomenon is not the result of any extraordinary skill as a witness on my part. Rather, it reflects two things:

An experienced expert witness can turn a poor cross examination question into an opportunity to reemphasize and restate the strongest portions of his testimony, or – worse yet – to bring up new arguments or cite evidence not mentioned during his direct examination, and

A remarkably high percentage of trial attorneys ask poor cross examination questions.

What is a poor cross examination question for an expert? It is more than merely any question to which you did not know the answer prior to asking. It is any question that fails to meet this criterion: any answer other than "Yes" is false or non-responsive. Simply put, ask only questions that end with the phrase, "…, correct?" and to which the only possible answer is, "Yes." This should not be a news flash to most trial attorneys. Unfortunately, in my experience, too often it seems to be.

Be aware, however, that some experts seem to be psychologically incapable of answering any question briefly, let alone with a single word. Early in the cross-examination, admonish this witness to answer only, "Yes," but also listen carefully to the expert's answers the first few times this happens. Sometimes, the more non-stop talking the witness does, the more boring, irrelevant, confusing, or exaggerated what he says becomes. In such cases, let the expert talk. Get the admissions you were seeking, and allow the expert to destroy his own credibility.

In most cases, however, you will want to limit the opposing expert's answers to "Yes." When cross examining an expert, your goal is not to let the expert educate the jury by answering your questions. Your goal is to educate the jury yourself by pointing out the portions of the expert's analysis you find useful, while the expert confirms your points as you make them. Do not argue with the expert during cross examination. Instead, guide the expert to verify the points about his analysis you want to use in your closing statement, and make your arguments then.

Creating wiggle-proof cross-examination questions requires care and preparation. Rely on your own expert to assist you in determining exactly what points you want to make. Be careful to avoid phrasing questions for which the intended meaning of a "Yes" or "No" answer can be unclear.

Many cross examinations of a financial expert appropriately may start with the time-honored "garbage in, garbage out" line of questioning:

As a financial expert, you are familiar with the phrase "garbage in, garbage out," correct? It means that, even when the calculations are performed correctly, if the inputs to the calculations are flawed, the outputs from the calculations may be flawed as well, correct? Your opinions include calculations that have inputs and outputs, correct?

And then you can get into details. For example:

One of your inputs was using an 8.0% discount rate to discount future lost profits to present value, correct?

In your calculations, plaintiff would not have incurred a single penny of additional overhead expense to earn the lost sales you projected, correct?

You calculated lost profits continuing five years into the future, correct?

Be careful with these two frequently-asked, seemingly-"Yes"-only questions, which may not yield the hoped-for results:

You're being paid for your testimony, correct?

No. I'm being paid for my time.

You're a professional witness, correct?

No. I'm a professional business analyst. The time I spend testifying in court is a small fraction of the hours I work.

Refrain from asking experts questions that amount to, "You murdered your wife, correct?" In one cross-examination, my response to such a question was both easy and satisfying:

You were told to come up with the highest possible damage figure you could find, correct?

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No.

Have every document you plan to use in cross examination at your fingertips. Having prepared your cross-examination outline, be flexible with how you use it at trial. Like direct examination, cross examination at trial never goes exactly as planned.

Redirect Examination

Unless your expert needs major rehabilitation, or you fear some of the opposing attorney's cross-examination questions of your expert have misled the jury, I recommend no redirect examination. If your expert's direct testimony went as planned, he already has explained his findings and opinions as clearly and persuasively as you and he could devise. Rehashing the support for the weak points in your expert's work – which should have been the only subject of cross-examination – may only emphasize these weak points in the jury's mind and provide opposing counsel additional bites at these particular apples on re-cross examination. The sweetest sound after the end of my cross-examination testimony is when counsel says, "No redirect. We rest our case." ■

Thomas Neches, managing partner of Thomas Neches & Company LLP, provides accounting, financial, business valuation, and statistical analyses to assist attorneys involved in litigation. Mr. Neches has testified as an expert in state and federal courts in Arizona, California, Florida, Kentucky, Missouri, Nevada, New York ,and Oregon.

Mr. Neches has testified to juries on behalf of both plaintiffs and defendants in antitrust, breach of contract, fraud, intellectual property, lender liability, personal injury, and wrongful termination cases. Examples of the litigation issues he has addressed include lost profits, lost business value, determining a reasonable royalty, and piercing the corporate veil. Representative industries regarding which he has testified include banking, entertainment, insurance, manufacturing, retail, securities, and wholesale.

He is a Certified Public Accountant, Accredited in Business Valuation, a Certified Valuation Analyst, a Certified Fraud Examiner, and is Certified in Financial Forensics. He received his BA in Mathematics and Literature from UC San Diego and his MS in Operations Research from UCLA.