New York Law Journal

EXPOSING AN EXPERT WITNESS' BIAS DURING CROSS-EXAMINATION: COLLATERAL ATTACK

By Ben Rubinowitz and Evan Torgan

When preparing for a cross-examination, the skilled litigator must always first determine his "theory" of the cross: specifically, it must determined if the suggestion to the jury is that the witness is truthful, honest but mistaken, or purposely exaggerating or shading his testimony to help one particular party. Where the theory of the cross-examination is that the witness is intentionally attempting to mislead the jury, then exposing the reason for the witness' deception, i.e., his bias, is a crucial goal of the cross examiner. Asking questions which allow the jury to see that the witness is not as credible as he or she would have the jury believe is a key component of this type of attack. But when dealing with the expert witness, exposing bias is not only an essential part of cross, but one that becomes imperative if counsel is to turn the jury against the so called "expert."

To expose such bias, one of the most effective methods is to focus on matters collateral to the central issue(s) in the case. This cross-examination technique, known as the collateral attack, can be one of the most effective methods to discredit the expert. At its core, exposing bias through the use of the collateral attack is one of the greatest and most time-tested techniques available to counsel. It goes without saying that the bias, hostility, or motives of an expert witness are relevant and proper subjects for impeachment.

The witness' financial bias often serves as the basis for the collateral attack. But to make the cross-examination on collateral matters even stronger, there are other avenues of attack that should be explored before focusing solely on financial interests. While many of these avenues will eventually lead back to financial bias, and are indeed intertwined with the expert's own financial interests, these lines of questioning often provide independent fodder for a compelling cross-examination.

To develop a strong collateral attack, research is essential. The internet has become one of the most valuable tools for gathering information about experts. Not only are publications posted on the internet, but disciplinary actions against the expert, resumes or curricula vitae, price lists, websites and jury verdict reporters, among other things, are posted there as well. In preparing to conduct a collateral attack of an expert, counsel must dig deep. Clearly, the more information counsel has for attacking the witness, the better the cross-examination will be. The focus of such fact gathering prior to trial is to determine whether the expert witness has some personal or financial incentive to provide a particular opinion at trial.

Oftentimes, the "regular" or "assembly-line" expert will purposefully inflate his or her credentials to try to impress the jury. If the attorney has not done his or her homework, that expert will likely carry the day in Court. If, however, the attorney is thoroughly prepared, and is able to expose exaggeration on the part of the expert regarding his credentials, not only will that expert's credibility quickly fade, but the attorney who called that witness to the stand will likely lose credibility with the jury as well.

New York Law Journal

Imagine the scenario in which an accident reconstructionist is called to the stand as an expert witness. Not only does this witness hold himself out as an expert in the field of accident reconstruction, but he also testifies that he has expertise on medically related issues. He offers opinion evidence on liability and causation, opining that the subject injuries were not caused by the impact, but were pre-existing injuries. Prior to the cross-examination, counsel did his homework and is well prepared for the collateral cross.

While counsel could conduct a voir dire examination, prior to the time the so-called expert offers his opinion on causation, the better approach might be to wait for the opportunity to conduct a full blown cross. Clearly, this is a a strategy call. A voir dire examination is a mini cross for the Court designed to expose the expert's lack of qualifications on the area about which he intends to offer opinion testimony. If victorious on voir dire, the result is that the Court will not allow the expert to offer such testimony. Strategically, counsel might be better off allowing the witness to testify regarding his questionable opinion evidence, and then exposing the witness as one who is less than credible on cross. To do this effectively, counsel must take his time in setting up the witness for the fall:

Q: Sir, you have offered your opinions to the jury as an accident reconstructionist, true?

Q: You base those opinions on many things, correct?

Q: Based, in part, on your review of the physical evidence, correct?

Q: Based, in part, on your review of the deposition testimony?

Q: Based, in part, on your review of the medical records and x-rays, correct?

Q: And based, in part, from the knowledge you have gained from your years of study and association with various related groups and organizations, true?

Next, the attorney should continue the set-up for discrediting the witness by slowly and carefully securing admissions which will later be used against him:

Q: Sir, we can agree that you would never exaggerate your credentials to the jury, true?

Q: You would agree with me, that you have never done that in the past, true?

Q: And the reason we know that you would never do that is because falsifying or exaggerating your credentials would be completely inappropriate, true?

At this point, the attorney can pick apart the expert's qualifications, making clear that the expert was unqualified to offer such opinion testimony. As this next set of questions is posed to the witness, the attorney should change the tone of his voice, expressing righteous indignation as he questions the expert:

Q: Sir, you've told this jury that you carefully reviewed the medical records and x-rays, true?

Q: You also explained that your opinion regarding causation was based on such review, right?

Q: But the truth is you never went to medical school, true?

Q: The truth is you're not a radiologist, correct?

Q: The truth is you never completed one course in any accredited medical college, true?

Q: You never even took one course anywhere on anatomy and physiology, true?

Next, a good tactic is to pit your own expert witness against this so called expert:

Q: But you are aware that Dr. Alexander did go to medical school?

Q: You are aware that Dr. Alexander is a bio-mechanical engineer, right?

Q: You are aware that Dr. Alexander is also qualified as a radiologist, true?

Q: You now know that Dr. Alexander spent four years in medical school, three years in engineering school, then did a four-year medical residency and a one-year medical fellowship, correct?

Q: You do admit that you have no degree in bio-mechanical engineering, correct?

Q: You told the jury that you learned how to read X-rays at the SAE course, true?

Q: SAE stands for Society of Automotive Engineers, correct?

Q: In fact, the course was not even taught by a medical doctor, true?

Q: And the portion of the course that was devoted to reading and interpreting X-rays lasted one half day, correct?

Q: Are you suggesting to us that you know how to read and interpret X-rays based on a course that lasted one half day taught by someone who wasn't even a medical doctor?

To continue the collateral attack, the attorney should expose all of the questionable qualifications which the expert has attempted to use in support of his expertise. To do this effectively, research must first be conducted to vet those exaggerated credentials:

Q: You told us you are a member of Sigma Si, the Scientific Research Society, true?

Q: Correct me if I am wrong, but there is no test to become a member of that organization, right?

Q: There is no certification for that organization?

Q: You simply pay a membership fee and you become a member?

Q: On direct exam, you told us that you were a member of the Society for Engineering Education, right?

Q: There was no test to become a member of that organization either, true?

Q: You simply paid a fee and became a member, right?

Q: But there is one organization that you are aware of that actually does require certification to become a member, true?

Q: And that organization is ACTAR?

Q: That's the Accreditation Commission For Traffic Accident Reconstruction, true?

Q: To become a member of ACTAR you must pass a test, right?

Q: And you, Sir, are not a member of ACTAR, true?

Q: You never even took the test to try and become a member of ACTAR, true?

Very often, the "professional testifier" will try to hold himself out as an expert in many different fields and areas. Clearly, there are times when the expert is, simply put, unqualified to offer such testimony and a challenge to the witness' ability to testify can be made on that basis. But even if the witness is qualified to testify, exposing that witness for the sheer number of cases and different areas in which he has testified will serve to discredit him. For years, trial lawyers have colloquially referred to this type of collateral attack as the "alphabet" cross. The goal of this attack is to let the jury

know that you are reciting the alphabet as you proceed, making clear that the expert is a "jack of all trades and an expert in none."

Q: Sir, you have testified in Automobiles accident cases, true?

Q: You testified in Bus accident cases?

Q: You testified in Crain accident cases?

Q: You testified in Dumpster cases?

Q: You testified in Elevator cases?

Q: So let's see we're up to "F". You've testified in Freight train cases?

Q: You've testified in Gas explosion cases?

This approach can continue by running through the alphabet while at the same time pointing out the number of years this witness has been supplementing his income through his forensic work.

After vetting the expert's qualifications and making clear to the jury that the expert is not all that he claims to be, the collateral attack can continue by focusing on the expert's financial interest in litigation. Generally, this attack focuses on the monetary rewards the expert receives for his in-court testimony and for the income he likely will receive in the future from such forensic work and trial testimony.

Q: Sir, you told us that you teach at City College, correct?

Q: You teach mechanical engineering courses, true?

Q: But you also have a devotion to litigation?

Q: You supplement your income with your involvement with litigation?

Q: Your involvement in litigation has been far more lucrative than teaching, true?

A: I wouldn't say that.

Q: Let's see. Isn't it true that you charge a flat fee to come to court for one day?

Q: You charge $3,300 for one day or any part of a day, true?

Q. We can agree that's far more than you are paid per day as a teacher at City College correct?

Q: Tell us how much you are paid at City College?

A: I'd rather not say.

Q: Is there ever a day when you make $3,300 as a teacher?

Q: We can agree this is not an isolated incident, correct?

Q: You testify in court quite often, don't you?

Q: Over the past year you testified at least a dozen times, true?

Q: That's close to $40,000 just for in-court trial testimony, right?

Q: But you do much more than just testifying, correct?

Q: You have a whole side business set up for your "expert" services, don't you?

Q: You take pride in that outside business, don't you?

Q: And you charge attorneys $330 per hour for your consulting services, right?

Q: You charge for your reports, correct?

Q: And you have many repeat customers, right?

(Here, the attorney can mention by name all the law firms the expert has worked with.)

Q: That side business pays you about a million dollars a year if we include all your litigation related work?

Q: You have been testifying for more than 25 years, true?

Q: And one thing is for certain. You would like to continue that business well into the future, true?

Q: Because it's a very lucrative business, right?

The depth of the witness' devotion to litigation can also be shown by demonstrating the expert's familiarity with the courts:

Q: Sir, not only have you been testifying for many years, but you have testified in New York Supreme Court?

Q: Bronx Supreme Court?

Q: Queens Supreme Court?

Q: Kings Supreme?

Q: Nassau and Suffolk Supreme Court?

Q: You've even testified out of state, correct?

Q: You've testified in California, true?

Q: You've testified in Pennsylvania, right?

Q: You've testified in Florida, right?

If a case comes down to a so-called “battle of the experts”, as many do, it may be far easier for a jury to reach its verdict based on who it believes as opposed to what it believes the scientific truth to be. To this end, diligent preparation and precise execution of your collateral attack on an expert

witness which renders the witness less than credible in the eyes of the jury is as important as any aspect of a trial.

Ben Rubinowitz *is a partner at Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz. He also is an Adjunct Professor of Law teaching trial practice at Hofstra University School of Law and Cardozo Law School. GairGair.com; speak2ben@aol.com*

____

Evan Torgan *is a member of the firm Torgan & Cooper, P.C. TorganCooper.com; info@torgancooper.com*

____

Richard M. Steigman, a partner *at Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, assisted in the preparation of this article;* rms@gairgair.com