Examining The All-Purpose Expert

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Over the last half-century there has been a dramatic growth in the use of expert witnesses at trial. Not surprisingly, the use of the "professional testifier" has become commonplace. Whether these "professional" witnesses truly provide insight into areas that are outside the ken of the jury is an issue that is open to debate. What is not open to debate, however, is that these professional witnesses can, if given the opportunity, damage or destroy your case. Knowing how to strategically attack these witnesses and expose both bias and lack of qualifications is essential to the successful outcome of a trial.

Oftentimes the "professional" expert is one who no longer practices in his field—whether as a doctor, an engineer or an economist. The true vocation of such an expert can be summed up in two words: courtroom testifiers. The courtroom is where the bulk of their time is spent. The courtroom is where their money is made. Reduced to the most basic of terms, these witnesses are colloquially known as "jacks of all trades"—witnesses who will say anything and render opinion for a buck. Moreover, they are often unqualified to render opinion on the subject about which they are testifying.

There are two procedural devices that can be used to preclude expert testimony if the witness is truly unqualified. The first is a motion in limine made either before the trial or before the witness testifies. This approach does not involve witness examination at all, but involves making a clear and cogent argument to the court that the witness is unqualified to render an opinion. A second approach, often combined with the motion in limine, is to move for a voir dire examination of the so called expert.

Voir Dire Examination

A voir dire examination is nothing more than a mini cross-examination designed to expose the expert's lack of qualifications on the area about which the expert intends to offer opinion testimony. Voir Dire examination allows the adversarial attorney to conduct a portion of his cross-examination of the expert right in the middle of his opponent's direct exam. If properly conducted, it serves as a powerful means to discredit the expert before the expert even renders his opinion. By conducting a voir dire examination, the adversarial attorney has disrupted the examination and, if successful, has derailed it as well.

The right to conduct voir dire examination rests within the sound discretion of the trial court. The voir dire examination is limited in scope. It centers solely around the expert's lack of qualifications to render meaningful opinion evidence. Following the voir dire, a motion may be made to disqualify the witness from testifying due to inadequate qualifications as an expert in the field in which he claims to be so qualified.

Imagine the scenario in which a plaintiff's attorney in a medical negligence case calls an internist to the stand to offer opinion testimony that the defendant doctor failed to timely diagnose an expanding brain aneurysm which ultimately led to the patient's death:

Q: Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether the defendant doctor failed to timely diagnose the brain aneurysm?

By the adversary: OBJECTION

Court: Counsel?

Adversary: Lack of foundation. May I conduct a voir dire examination?

Court: You may.

Q: Doctor, there are fields of medicine dealing directly with issues relating to pathology of the brain, true?

Q: Neurology is, in part, such a field, true?

Q: Neurosurgery is, in part, such a field, true?

Q: Neuroradiology of the brain is such a field, true?

Q: To be clear doctor, you are not board certified in neurology, true?

Q: You are not board certified in neurosurgery, true?

Q: In fact, you do not conduct any surgery at all, true?

Q: You are not board certified in neuroradiology, true?

Q: Or any part of radiology?

Q: You have not taken any specialty boards in neuroradiology, true?

Q: What you do, generally, is treat patients for colds?

Q: What you do, generally, is treat patients for fevers?

Q: What you do, generally, is treat patients for sore throats?

Q: You perform no diagnostic studies to diagnose brain aneurysms, true?

Q: And when an issue concerning pathology of the brain comes up, you refer the patient to a specialist, true?

Q: Often in the field of neurology, true?

Q: To one that you consider to be an expert, true?

Q: You also, at times, refer the patient to a neuroradiologist?

Q: To conduct appropriate studies?

Q: Such as MRI exams?

Q: Or brain CAT Scans, right?

Your honor, I object to this witness giving opinion evidence in this matter.

Whether the court rules for or against the attorney conducting the voir dire examination, that attorney has unquestionably interrupted the flow of the exam and, more importantly, cast doubt on the integrity and credibility of the witness.

Cross-Examination

While trial lawyers may have the opportunity to conduct a voir dire examination to preclude the witness from offering any opinion at all, a better approach might, at times, be to resist the temptation to conduct voir dire and move in for the kill by waiting and conducting a full blown cross-examination. This approach, if successful, will not only serve to discredit the witness but will serve to discredit counsel for having the audacity to stand behind such a witness.

As with any cross-examination, the goal is to create a cogent and compelling argument for summation that the witness ought not to be believed. When dealing with the all-purpose expert, however, the goals are both direct and indirect. First, the direct goal is to discredit the

expert. Second, the indirect goal is to cast doubt on the integrity of your adversary for putting this witness on the stand.

To accomplish these goals, the trial attorney must carefully map out a cross that focuses, in large part, on the collateral attack. A collateral attack is one in which the expert is examined on areas collateral to the substantive issues on which the expert rendered opinion testimony. If the expert has previously testified on a wide range of divergent subjects, the cross should focus on the variety of areas in which this expert has rendered opinion. If done properly, the argument that the witness is a "jack of all trades, expert in none" will become clear. If the expert has devoted a good portion of his professional life to litigation, and derives a substantial portion of his income from these endeavors, then the amounts of money made during that time will become a fertile area for cross. The argument that the witness will say anything for a buck will become apparent.

To accomplish these goals, the trial lawyer must scour through sources of information that can enhance the attack including jury verdict reporters, trial transcripts, and reports rendered in the past by that expert. The amount of work done in the past for the adversarial firm can prove fruitful. The percentage of earnings devoted to litigation along with the percentage of cases the witness has testified in for plaintiffs and defendants can prove useful. Each subject area can serve to discredit the witness.

Imagine the scenario in which a defense lawyer calls a purported accident reconstructionist, Mark Puppet, to the stand. Assume the case involves a pedestrian struck by a bus. Although the plaintiff's attorney knows the witness can be challenged on voir dire examination, no objection or request for a voir dire is made. Instead, the plaintiff's attorney patiently (although anxiously) waits to attack the witness during a full-blown cross. The first line of attack deals with the witness' qualifications to render opinion:

Q: Mr. Puppet, you've told us on direct that you are a Professor at St. John's University, true?

Q: But you don't teach engineering, right?

Q: You don't teach accident reconstruction?

Q: In fact, you've never taught one course in accident reconstruction?

Q: But you do teach statistics, correct?

Q: Can we agree that these statistics classes don't focus on bus-pedestrian accidents?

Q: They don't focus on walking speeds of pedestrians?

Q: They don't focus on coefficient of friction of road surfaces?

Q: You mentioned that you published in your field?

Q: Isn't it true, sir, that not one of these publications deals with bus-pedestrian accidents?

Q: Not one publication deals with bus accidents generally?

Q: Not one deals with reaction times of drivers?

Q: Not one deals with reaction times of pedestrians?

Q: In fact there is not one publication that you wrote that has anything to do with issues involved in this case, true?

Q: Did you mention that to my adversary before coming to court?

Next, the focus of attack should deal with the various subjects in which the expert has previously rendered opinion. This information is easily gleaned from the verdict reporters:

Q: In the past, you've rendered opinion on "slip and fall" cases, true?

Q: You've testified in fork lift accident cases, true?

Q: You held yourself out as an expert in that field even though you've never even driven a fork lift?

Q: But you felt comfortable coming before a jury and stating that you were an "expert" in the field, true?

Q: You've testified in train accident cases, true?

Q: You've testified in bus accident cases, true?

Q: You've testified in truck accident cases, true?

Q: You've testified in car accident cases, true?

Q: You've testified in cases involving tree roots, true?

Q: You've testified in cases involving falls down stairways?

Q: You've testified in cases stemming from slippery bird repellants, true?

Q: You've testified in cases stemming from potholes?

Q: You've testified in cases stemming from motorcycle accident cases?

Q: You've testified in matters stemming from snow and ice cases?

Open-Ended Questions

While it is generally better to lead during cross, there are times when low-risk, open-ended questions can enhance the attack:

Q: How many times have you testified in slip and fall cases?

Q: How many times have you testified in train accident cases?

Q: How many times have you testified in stairway accident cases?

Regardless of the answers to these questions, the destructive cross can proceed. Assume the answer to any of the above questions is "few." The following questions can be equally probing:

Q: So that's not really your area of expertise, true?

Q: That's certainly not an area you've lectured your statistics students about, true?

If the answer happens to be "I don't recall," the follow-up questions can be equally damaging:

Q: So, you've done this so often that you've lost count? Or

Q: You've certainly felt comfortable rendering opinion testimony on that subject, true?

The frequency with which the all-purpose expert testifies, his familiarity with the various courts in which he testifies along with his earnings can prove damning:

Q: In the last year alone, you've testified in Manhattan?

Q: You've testified in Queens?

Q: You've testified in the Bronx?

Q: You've testified in Nassau County?

Q: Suffolk County?

Q: Brooklyn, right?

Q: In each courtroom, you testified on a different subject area?

Q: You held yourself out as an expert in each?

Q: And in each case you testified for the defense?

Q: In the last year you did not testify one time for a plaintiff's firm?

Q: Not only have you testified but you prepared reports?

Q: The majority of those reports were for the defense, true?

Q: Your relationship with the defense attorneys has been a lucrative one?

Q: Far more lucrative than as a statistics professor, true?

Q: Fair to say it's not even close?

Q: For clarity, Mr. Puppet, when you come to court, you charge $5,000 for half a day, true?

Q: $10,000 for a full day, right?

Q: You don't even make that much in a week as a statistics professor, true?

Q: You charge for reports?

Q: Up to $2,000 for a report, correct?

Q: Isn't it true that you've made over $1 million testifying for the bus company that is a defendant in this case?

Q: And you certainly earned much more than that if we add in your pay for the reports on cases that did not go to trial?

Q: Fair to say your relationship with the bus company is a lucrative one?

Q: One that you would like to continue in the future, right?

Witnesses who regularly testify in accordance with the dictates of the attorneys who retain them, regardless of both their actual knowledge of the subject and the reality of the facts relevant to the case, can present a significant challenge at trial. True experts with impressive credentials and credibility in their respective fields will acknowledge the truth and concede points on cross-examination if they are logical and accurate. The professional testifier, however, may "stick to the script" regardless of the facts. Indeed, many times no one else at the trial will say anything that supports your adversary's case with the force and certitude that such a testifier will. Thus, the skillful attorney's ability to expose this witness for what he is to the jury is critical to overcome the import of this type of testimony.

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