Utilizing Expert Witnesses

Peter Sabin Willett, Moderator
Morgan, Lewis & Bockius LLP; Boston

Philip Bentley
Kramer Levin Naftalis & Frankel LLP; New York

Hon. Barbara J. Houser
U.S. Bankruptcy Court (N.D. Tex.); Dallas

Martha E.M. Kopacz
Phoenix Management Services; Boston

Wayne P. Weitz
EisnerAmper LLP; New York

ABI December Meeting
Challenging the Admissibility of Expert Testimony in Bankruptcy Court

By Philip Bentley[1]

A. The Legal Framework

The principal rule governing the admission of expert testimony is FRE 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.[2] In *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), the Supreme Court tasked trial judges with "ensur[ing] that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. The Supreme Court extended the trial court's "gatekeeping" role to "technical" and "other specialized" knowledge in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

Chief among the requirements imposed by FRE 702 is that an expert opinion have "a reliable basis in the knowledge and experience of [the expert's] discipline." *Daubert*, 509 U.S. at 591-92; *see also* FRE 702(c), (d). Although there is no definitive test for determining the reliability of expert testimony, the Supreme Court has identified a number of factors bearing on reliability, including (1) whether a theory or technique "can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) a

---

[1] Partner, Kramer Levin Naftalis & Frankel LLP.

[2] Also important is FRE 703, which permits an expert to base his or her opinion on otherwise inadmissible facts or data, so long as "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject . . . ."

technique's "known or potential rate of error," and "the existence and maintenance of standards controlling the technique's operation," and (4) whether a particular technique or theory has gained "general acceptance" in the relevant scientific community. *Daubert,* 509 U.S. at 593-94. Most fundamentally, the opinion cannot be "connected to existing data only by the *ipse dixit* of the expert." *Kumho Tire*, 526 U.S. at 157; *see also, e.g., Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 418, 419 (7th Cir. 2005) (damages expert's "method, 'expert intuition,' is neither normal among social scientists nor testable – and conclusions that are not falsifiable aren't worth much to either science or the judiciary."); *E.E.O.C. v. Bloomberg L.P.*, No. 07 Civ. 8383 (LAP), 2010 WL 3466370, at *15 (S.D.N.Y. Aug. 31, 2010) (excluding expert opinion "supported by what appears to be a 'because I said so' explanation").

FRE 702 also requires that an expert opinion "help the trier of fact." FRE 702(a). A number of corollaries follow:

- "As a general rule, an expert's testimony on issues of law is inadmissible." *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991); *see also Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 510 (2d Cir. 1977) ("The special legal knowledge of the judge makes the witness' testimony superfluous.").

- An expert report that serves as a mere "conduit" for hearsay likewise infringes the role of the factfinder because "the job[] of judging [the hearsay] witnesses' credibility and drawing inferences from their testimony belongs to the factfinder." *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (affirming exclusion of expert report "undergirded by hearsay statements"). "Although the Rules permit experts some leeway with respect to hearsay evidence, FED. R. EVID. 703, a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony." *Id.*

- An expert may not offer "'factual narratives and interpretations of conduct or views as to the motivation of parties.'" *Weisfelner v. Blavatnick (In re Lyondell Chem. Co.)*, 2016 WL 5900154, *3 (Bankr. S.D.N.Y Oct. 11, 2016) (quoting *In re Rezulin Prod. Liab. Litig.*, 309 F. Supp. 2d 531, 541 (S.D.N.Y. 2004)).

These rules apply in both jury and bench trials, though perhaps with less stringency in bench trials. As Judge Houser has observed, "th[e] Court's 'chief role when determining the admissibility of expert testimony under *Daubert* is that of a gatekeeper,' and there is little need for the Court to serve as a gate-keeper for itself." *In re Wyly*, 552 B.R. 338, 362 (Bankr. N.D. Tex. 2016) (quoting *Seatrax, Inc. v. Sonbeck Int'l, Inc*., 200 F.3d 358, 371 (5th Cir. 2000)).

B. Tactical Considerations

Assume you have solid grounds to challenge an expert's testimony – whether based on deficiencies in her qualifications, the reliability of her methodology, the helpfulness of her testimony to the court, or some combination of these elements. Should you assert your objections in a pre-trial motion *in limine*? Or should you wait until the expert has taken the stand, and then object to her testimony in whole or in part?

It has become customary to raise objections to expert testimony in advance, through a pre-trial *Daubert* motion. And doing so can have undeniable advantages. An objection that is not simple often benefits from the sort of marshaling of factual details (e.g., from the expert's report or deposition testimony) and case law that is difficult to do through oral argument alone. Particularly when the bases for the objection are factually or legally complex, the court may be unwilling to exclude expert testimony without full briefing by the parties.

In addition, a pre-trial motion that succeeds in excluding a key expert witness can lay the groundwork for a favorable settlement, or even for summary judgment, if the witness is indispensable to the other side's case.

On the other hand, proceeding by pre-trial motion can have significant disadvantages.

Even a successful pre-trial motion can turn into a long-term defeat if the other side has time, and is permitted by the court, to cure the deficiencies of the expert's analysis or to retain a more qualified expert.

A *Daubert* challenge that limits, but does not entirely exclude, an expert's testimony will by definition have eliminated some of your best cross-examination material.

And of course, many *Daubert* motions are denied – particularly in bench trials, where the court may prefer to avoid an unnecessary appeal issue by allowing the expert's testimony "for what it's worth." A failed pre-trial motion can be a boon to the other side if it alerts the expert to weaknesses in his analysis that he may not have fully appreciated. The educated expert may be able to cure these weaknesses prior to trial, or at least to defend his analysis more effectively during cross examination.

For these reasons, it may be advantageous, in the right case, to hold your *Daubert* objections until the opposing expert takes the stand.

Of course, your choice will be highly context-specific. Consider the grounds for your objection: Are they sufficiently simple that briefing is unnecessary? Consider the judge: Is she sufficiently experienced and confident on evidentiary matters that she may be willing to rule from the bench based on argument alone? Consider the prospects for settlement: Is there little settlement upside from seeking a pre-trial ruling excluding the opposing expert? If the answer to each of these questions is Yes, you may be well-served by departing from the customary practice and deferring your *Daubert* objection until trial.

ABI December Meeting
Cross-Examining Expert Witnesses in Bankruptcy Court

By Sabin Willett[1]

A. The Tool Kit.

First, prepare. Among the tools in your toolkit are:

1. *The expert report*. In an adversary proceeding, a litigant may not call an expert unless the litigant has previously served a comprehensive expert report. Fed R. Bankr. P. 7026; Fed. R. Civ. P. 26(a)(2)(B). This rule is presumptive in adversary proceedings, Fed. R. Bankr. P. 7026, but does not apply in contested matters, Fed. R. Bankr. P. 9014(c). Many significant expert matters arise in contested matters: valuation opinions in plan confirmation, collateral valuation in stay relief motions, analyses of key employee incentive plans, rejection of collective bargaining arrangements. A motion may lead to a full-on evidentiary hearing, but unless you make arrangements with opposing counsel or move in court, you will not necessarily be entitled to the report specified by Rule 26(a)(2)(B).

2. *The expert report obtained by interrogatory*. Even in contested matters, you may serve an interrogatory seeking information about the expert's work and opinion. *See* Fed. R. Civ. P. 33. In contested matters, outside an agreement, this can be the vehicle for bringing in the Rule 26(a)(2)(B) disclosure.

3. *Your own expert's* assessment of the strengths and weaknesses of the opponent's report.

4. *Scholarly Materials in the Field*.

5. *The Internet and Pacer.* An immense amount of information about the witness is already at your fingertips: transcripts in prior cases, publications, affidavits in other cases.

6. *Deposition*. Except where the court orders otherwise, a party may depose an opponent's testifying expert as a right. This applies in both adversary proceedings and in contested matters. *See* FED. R. BANKR. P. 7026; FED. R.

[1] Partner, Morgan, Lewis & Bockius LLP. The author gratefully acknowledges the assistance of Melissa Y. Boey, an associate at Morgan Lewis.

BANKR. P. 9014; FED. R. CIV. P. 26(b)(4)(A). Nevertheless, the rules betray a tension. Automatic disclosure of expert reports was designed "to obviate the need to depose expert witnesses." MOORE'S FEDERAL PRACTICE § 26.23[2][b]. *See R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 271 (6th Cir. 2010); *Meyer Intellectual Properties Ltd. v. Bodum, Inc.*, 715 F. Supp. 2d 827, 828 (N.D. Ill. 2010). The idea is that the report is supposed to give the opponent all she needs to put together an effective cross-examination. *See* Heretical Discussion, *infra* at C.

B. The Expert Report

Has the bar lost sight of the purpose of expert reports? Rule 26 requires a party to "disclose to the other parties" the expert's identity, which "must be accompanied by a written report – prepared and signed by the witness." The report must contain, *inter alia*, "a complete statement *of all opinions the witness will express* and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i) (emphasis added). So what happens? The adversary plaintiff serves an expert report. The opponent counters with a responsive report. (So far, so good.) Then comes plaintiff's rebuttal. The opponent parries with a sur-rebuttal. Sometimes it goes further. In all but the first salvo, each expert makes the case as to why the other expert is wrong.

After the first round, most of this is expensive, not required by the rules, and, provided that the bankruptcy court is *observing* the rules,[2] likely to help the opposing side more than the reporting expert. The purpose of an expert report is *notice*, not persuasion. The object of the exercise is to convey enough to the opponent so that she will be ready to rebut, to cross-exam and to offer a competing expert if necessary – in other words, to avoid unfair surprise. *See Reed v. Binder*, 165 F.R.D. 424, 429 (D.N.J. 1996); *Olmstead,* 606 F.3d at 271 (report must be sufficiently complete so that opposing counsel is not forced to depose the expert in order to avoid ambush at trial). *See also Reese v. Herbert*, 527 F.3d 1253, 1265 (11th Cir. 2008) (the expert disclosure rule is intended to provide opposing parties reasonable opportunity to prepare for effective cross examination and arrange for expert testimony from other witnesses) (citing to *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000)); *Meyer Intellectual Properties Ltd. v. Bodum, Inc.*, 690 F.3d 1354, 1374 (Fed. Cir. 2012). But nothing in the rules obliges the advocate to disclose anything except what "the *witness* will express," (emphasis added), and the work that went into those expressions. *A critique of the opposing expert that will be expressed through cross need not be disclosed.*

---

[2] This is not to be presumed. Read on.

A recent order in the Lyondell/Blavatnik fiduciary duty litigation illustrates how blurry the line between reports-as-disclosure and reports-as-evidence has become. *See generally Weisfelner v. Blavatnick (In re Lyondell Chemical Co.),* Adv. Pro. 09-1375 (GCM) (Bankr. S.D.N.Y. October 11, 2016), Dkt. No. 849, *Memorandum Opinion and Order Granting in Part and Denying in Part Access Defendants' Motion* in Limine *to Preclude Certain Testimony of Ralph Tuliano, David Witte, and H.G. Nebeker.* The case involves experienced trial lawyers on both sides, as well as a highly experienced former trial lawyer as a bankruptcy judge. The court recently granted partial relief to the defense per a motion *in limine* filed with regard to the scope of expert testimony. *Id.,* pp. 9-13. But the motion, and the order granting it, were styled as motions to exclude expert *reports* (as opposed to testimony): the parties had stipulated that the expert reports would be admitted in their entirety as direct testimony.

The rules contemplate supplemental reports in certain narrow circumstances, including where necessary to correct an earlier error, and where "the *evidence* is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C)…." FED. R. CIV. P. 26(a)(2)(D)(ii) (emphasis added); *Marmo v. Tyson Fresh Meats, Inc.,* 457 F.3d 749, 759 (8th Cir. 2006) ("The function of rebuttal testimony is to explain, repel, counteract or disprove evidence of the adverse party.") Note the reference to "evidence:" *i.e.*, an additional opinion that may be offered by the proponent's expert. There is no requirement that one rebut with cross: *i.e.*, that one expert report the flawed premises in another expert's report that cast doubt on the expert's conclusions and expertise. *See New York v. Solvent Chem. Co.*, 685 F. Supp. 2d 357, 414 (W.D.N.Y. 2010); *ABB Air Preheater, Inc. v. Regenerative Envtl. Equip. Co.,* 167 F.R.D. 668, 673 (D.N.J. 1996) (characterizing rebuttal as a "showing of facts" supporting the opposite conclusion).[3] As the First Circuit has put it, "rebuttal is a term of art, denoting evidence introduced by a plaintiff to meet new facts brought out in the opponent's case in chief." *Lubanski v. Coleco Indus., Inc.*, 929 F.2d 42, 47 (1st Cir. 1991). *See also Poly-Am., Inc. v. Serrot Int'l, Inc.,* Case No. 300CV1457D, 2002 WL 1996561, at *15 (N.D. Tex. Aug. 26, 2002).

[3] With regard to rebuttal expert reports in particular, this proposition has also been cited in *Bone Care Int'l, LLC v. Pentech Pharm., Inc.,* Case No. 08-1083, 2010 WL 3894444, at *15 (N.D. Ill. Sep. 30, 2010), and *Grove City Veterinary Serv., LLC v. Charter Practices, Int'l LLC*, Case No. 3:13-2276, 2016 WL 1573830, at *15 (D. Or. Apr. 19, 2016).

Whether the report is an opening or a rebuttal report, the disclosure requirement is the same -- that the expert disclose "a complete statement of all opinions the witness will express and the basis and reasons for them." FED. R. CIV. P. 26(a)(2)(B)(i). Testimony need not have verbatim consistency with the report; reasonable synthesis and elaboration is permitted. *See nCUBE Corp. v. SeaChange Int'l, Inc.*, 809 F. Supp. 2d 337, 347 (D. Del. 2011). The core question is simply whether the objecting party had fair notice. *See* MOORE'S FEDERAL PRACTICE § 26.23[2][b][ii].[4]

If the opposing party's report introduces a new subject for expert opinion, a rebuttal report is warranted. Suppose that an opponent's report, addressing the feasibility of a plan to reorganize a water treatment plant, introduces an opinion as to the covalency of hydrogen bonds in liquid water. Your expert is not a chemist and has not addressed the subject. The rule permits you to file a rebuttal report disclosing the opinion that your expert (likely a different one) will offer on the subject. But if your expert's opening opinion already addressed the covalency of hydrogen bonds in liquid water, then there is no requirement that he note his critique of the other opinion.

Or is there? The rules do not contemplate that reports will be seen by the fact-finder prior to the hearing. *See* FED. R. CIV. P. 26(a)(2)(A), (B) (disclosure of trial expert's identity, accompanied by the expert report, must be made "to the other parties"). There is no occasion for them to be seen at the hearing either, except when, for example, a report might be used to impeach direct testimony as a prior inconsistent statement. *See* FED. R. EVID. 613. A report offered by its *proponent* to persuade the fact-finder of its correctness is hearsay. *See* FED. R. EVID. 801(c). Hearsay is generally inadmissible, *see* FED. R. EVID. 802, and thus the bankruptcy court, as fact-finder, should not consider it. But a practical problem

[4] If, at trial, an expert is to be asked to provide an opinion, it is dangerous not to have disclosed this prior opinion in a report, even if it is an opinion explaining the criticism of the opposing expert's view. A party with the burden of proof cannot provide a new theory of liability under the guise of rebuttal. *See, e.g., 103 Inv'rs I, L.P. v. Square D Co.,* 372 F.3d 1213, 1217 (10th Cir. 2004). In most circumstances, however, adequate disclosure has likely occurred. For instance, an opinion that H_2O freezes at 32°F implies an opinion that it does not freeze at 33°F. It would thus follow that if an expert has disclosed that his opinion that certain pipes did not freeze is based upon the freezing point of water, he can, implicitly, criticize an opponent's theory that depends on the water having been frozen.

has developed. Case management orders often provide for the *filing* of expert reports. Sometimes – particularly in preparation for a major judicial exercise, such as a contested confirmation hearing, the fact-finding bankruptcy judge wants to read the reports in advance.

The writer believes that a court should not do this and counsel should object if a CMO provides for it. Confusion may arise because the court has discretion to "exercise reasonable control over the mode and order of … presenting evidence," *see* FED. R. EVID. 611(a), and this often includes provision for *direct examinations* to be in writing, with the witness present for live cross examination. But written direct is not the same as an expert report. It must meet the standards for direct testimony: it must be sworn, with sufficient foundation, given of the witness's personal knowledge or opinion, and so on. And it must be one, unified examination, not the running blog-thread of thrust and parry that the reports have come to represent. The filed direct may *include* items that were earlier disclosed in reports; and it may indeed be supported or illustrated by charts, graphs, demonstratives and the like, but that is not the same thing as saying that the expert reports simply come sailing in whenever they are served. Rule 611 does not suggest (and Rule 802 would not permit) a fact-finding court to peruse the court docket for the filing of the various reports required by Rule 26.

Suppose that the enterprise value of ABC, a manufacturer of titanium dioxide, is in dispute. Your expert, Prof. Direct, prepares a multiples-of-earnings comparables analysis, using as a starting point ABC's calendar 2015 EBITDA. TiO_2 prices dropped significantly in 2016, and your opponent's expert, Prof. Cross, prepares an analysis using the trailing twelve months' EBITDA. The result is a lower valuation, in part because the trailing twelve pick up a recent, downward price spike. Prof. Direct's opening report cites as a reliable industry index Chemical Monthly, which contains data on TiO_2 prices over the past twenty years. The report notes that in his view the calendar earnings are the most predictive, given the volatility of the market for the commodity.

On direct examination, Prof. Direct need not be asked whether, in his opinion, *Prof. Cross's* opinion is wrong. But his direct can and should lead the factfinder to conclude that it is wrong, without mentioning Prof. Cross, and without any rebuttal report on the subject ever having been served. In the writer's experience, provided that Prof. Direct's report disclosed his basis for choosing the calendar approach, trial judges will not exclude (on the grounds that Prof. Direct did not file a rebuttal report opining that trailing twelve measurement is wrong) a direct examination of Prof. Direct that comments on why he did not choose the

alternative:

"Q. Professor, what measure of earnings did you use as your starting point?

A. Calendar 2015.

Q. Please explain why you selected the calendar earnings as your starting point?

A. [Explanation].

Q. Are there other measures of earnings that can be used?

A. Yes. The trailing-twelve months is sometimes used in a comparables analysis.

Q. Why did you not use that metric for this case?

A. I considered the price variations shown in Chemical Monthly. In light of that history of price volatility and the price ranges experienced, I believe the market would assess calendar earnings as more indicative of real value.

Prof. Direct should be allowed to make the last point regardless of whether he has filed a rebuttal report. His citation to the source in the report, and discussion of why the calendar approach is pertinent, discloses enough by inference about why the alternative would not be. If he has *also* put this in a rebuttal report, his own direct will be no stronger, but Prof. Cross will be well-armed for cross examination. Prof. Cross may or may not be ready to address this anyway, but the rebuttal report insures that he will.

Still, there is that practical problem. If you cannot convince your judge not to read the reports, then a different set of rules applies. They have become persuasion documents, and you may determine that you need to make your case in rebuttals.

C. Should You Depose the Opposing Expert?

Yes, you read that correctly. Pose the question to your colleagues or client, and your law partners will conclude that you have taken leave of your senses. In large cases, expert depositions are routine. Absent court intervention, it is your

right to take them. ("*They're* taking depositions, and we're not??") Yet the writer's experience with expert depositions is mixed. Most of them are all but useless.[5] The examining lawyer fills 15 or 20 pages with information about the expert's background that could be obtained in a Google search, and spends the balance of the proceeding asking the deponent to confirm that Exhibit 12 says what it says.

A second category are use*ful* depositions – but more useful to the witness than the advocate. The advocate learns the witness's background (already known or knowable), and that she stands by her report. The expert learns more useful things: the attorney's questioning style, his sophistication in the area of expertise, his nuances and personality. She gets comfortable with him. She gets an advanced look at his trial themes, with the result she will put her trial preparation time to good use, and be better prepared for cross-examination.

The smallest category is the deposition useful only to the advocate. The deposing lawyer learns something that he can use effectively at the hearing, but the expert leaves the room uncertain where the cross will go. Often these depositions dart from point to point, from discrete fact to fact, without narrative connection. The examiner does not proceed chronologically. Instead of walking through the report in organized fashion, he leaps to page 37, and then leaps out again. The relevance of his questions is never clear, and their order will not track the future cross-examination at hearing. He does not argue or fight. It is not clear to the witness that he even understands the subject.

A different calculus may result when one's objective is settlement. A full-on cross of an expert in deposition may help set a case up for settlement, and the advocate may determine that his powder is better spent early, in an effort to create incentives for that settlement. It depends on the case. If a cross is devastating and there is no obvious way to recover from it, a powerful cross can turn opposing counsel, and perhaps the expert as well, into an advocate for settlement in the opposing camp. Where the issues are close, this may be less likely, and the advocate may decide that it is not worth airing the advocate's theories too early.

Sometimes, "ownership" is a fruitful subject. In bankruptcy cases, opinions are often submitted by financial advisors. The FAs are corporate entities. At the

[5] The Seventh Circuit has, in fact, indicated that one goal of expert report disclosures is to avoid unnecessary depositions and reduce costs. *Salgado by Salgado v. Gen. Motors Corp.,* 150 F.3d 735, 742 n.6 (7th Cir. 1998).

top sits Ms. Smith, the busy vice president of Float Shares & Co. LLC; beneath her toils an army. In the heat of a contested matter, a report is served: an anonymous slide deck with a Float Shares monogram and an elaborate footnote to the effect that Float Shares does not vouch for the earnings projections. This won't do. An expert witness is a human being, not an LLC; and the witness must "prepare and sign" the report. It is not Float Shares' opinion; it is Ms. Smith's. FED. R. CIV. P. 26(a)(2)(B).

Well, what about Ms. Smith? Did *she* write the report? Did she actually put keys to a keyboard? Who did? (She may not know). Who composed the text for the typist to type? (She may not know). Who did the work to gather the comparable companies? Show her Schedule D, the sources consulted for the report. One of them is Pratt's fifth edition. Did she read the entire volume in the preparation of this report? Surely not. Which portions did she read? Any? Where this is all headed is the general question whether the opposing expert – the human being -- has been diligent. Perhaps she has, in which case you drop the subject for trial. Perhaps she has not, in which case you may return to the lack of personal investment in an effort to persuade the fact-finder that the report does not reflect expert judgment, but the consensus of more junior folk.

Suppose there is a lacuna in the report: an ellipsis in the logic, a math error. These always present a tricky problem. Examine the witness and she will learn about it, and perhaps amend it into insignificance before trial. Lay low and you may learn at trial, to your chagrin, that the error is your own. On points like this, your first port of call is your own expert. Can he think of an explanation? Does he think it is an error? How certain is he? *If we are certain that it is a material error, why raise it in the deposition?*

Other points may bear inquiry because there is no possibility of surprise anyway. Suppose the examiner thinks the absence of Acme as a comparable in the witness's report is significant. Surprise on the point is implausible, because Acme appears in his expert's report. The examiner may do this:

Q: Ms. Smith, are you familiar with Acme Corp.?

A: Generally.

Q: Is Acme Corp. a comparable company to the debtor?

A: Not in my opinion.

Q: Why is Acme Corp. not comparable?

A: It has no foreign division.

Q: Does any other factor makes it not comparable?

A: Not that I can think of right now.

Q: Take your time. Does any other factor come to mind why it is not comparable?

A: Not that comes to mind.

Many lawyers cannot resist. They proceed with:

Q: I show you Exhibit 8 at page 65. Does that show the breakdown of contribution to Debtor's EBITDA in 2015?

A: It does.

Q: The foreign division contributed only two percent, is that correct?

A: It appears so.

Why did he just do that? Save the point for trial! Use it in the deposition and the expert and counsel have time to try to repair. Save it for trial and they may miss it.

This circles back to the provocative question we began with. Why take the deposition at all? Whom are you going to help by deposing the expert – you, or the expert herself? If the answer is that you will learn a trivial detail or two, while the opponent will get a dry run at your theories, then the rational decision would be not to take the deposition. But there is that hydraulic client/partner pressure. If a deposition is either prudent or unavoidable, consider:

a. Send a skilled colleague to take it. Don't let the expert meet you and become more comfortable with you.

b. Gather information without giving a hint as to its relevance. Ask purely fact based questions. Jump from point to point. Be neither chronological nor topic oriented.

c. Do not waste time authenticating obviously authentic things or things that may be authenticated by request to admit. This will never be important in the hearing.

d. Human details are easier to remember and make a bigger impression on the audience. If a meeting was significant and the expert attended, find out human details of the meeting. What did they eat? Did someone tell a joke? What was the joke? Often there will be hints of this in the email. Drill into them.

D. The Hearing.

Suppose Ms. Smith, the opponent's expert, is highly competent and her opinion sound. Your opponent has just completed her direct exam. She is passing the witness to you.

1. *What should you do?*

i. ...No harm. Don't give Ms. Smith a second opportunity to drill her point home. Expert testimony is always more effective and persuasive when an expert confounds a hapless cross-examiner. No cross at all is better than this cross.

ii. ...Limit her. Suppose there are six elements in the logical path to the conclusion, and she agrees with your expert on four of them. Use cross to establish that. ("Ms. Smith, you agree with Mr. Jones on point A? Yes. On Point B? Yes. On Point C? Yes. D? Yes.") Narrowing the points of contention will sometimes diminish the impact of a good expert.

iii. ...Skate her off the relevant ice. Occasionally one can make a strong witness irrelevant. Suppose, in a valuation case, the DCF is based (as it must be) on the business plan. The company, not the economist, prepared the latter. You might decide tactically to launch your entire assault on the business plan. The economist will have to admit that his own opinion would have to change if the business plan were unrealistic.

iv. ...Attack her credibility indirectly. An expert who has insufficient personal involvement, and only a surface familiarity with the work done to prepare the result is vulnerable. *See supra,* p. 10.

v. ...Point out her interest in the outcome. Suppose Ms. Smith is the debtor's financial advisor, and the compensation arrangements include a success fee, with "success" defined to include a confirmed plan. Her opinion is offered in aid of confirmation. Courts have seen these engagements before, and may react badly to a cross that puts too much weight on the point. If perceived as a direct assault on integrity, the exam may inspire sympathy for the expert.

But the point is real and should not be lost. Suppose Ms. Smith has steadfastly defended her own judgment, but conceded that a different exercise of professional judgment would lead to a different – say a lower – valuation. Imagine, then, the following thread. ("Ms. Smith, you lead the engagement for Float Shares? You prepared your report four months ago? You exercised professional judgment in reaching the opinions in that report? In doing so you had to make choices? You considered and rejected some comparables? You considered and accepted others? The same is true of discount rates? I show you Exhibit 16 – is that Float Shares' engagement letter? Signed eighteen months ago? The compensation arrangements begin on page 4? There is a provision for a "Success" Fee? The "Success" Fee is a million dollars? It is payable on the occurrence of certain events? One of them is plan confirmation, is that right? You prepared your report while this engagement letter was effective? When exercising your professional judgment, you were aware of the terms of this letter? If your opinion is accepted, that will help the debtor achieve confirmation? If the debtor achieves confirmation, your firm will earn $1 million?").

Self-evidently, the rule of glass houses applies here with force.

How should I do it?

i. ...Crisply. Keep questions short. A shorter question is easier to follow and harder to duck.

ii ...With baby steps. Don't fumble through exhibits or spend pages of transcript paraphrasing or quoting from documents to which you want an answer. Break questioning up in a way that walks the witness to the point.

Don't ask:

Q: Directing your attention to exhibit 34 in the Plaintiff's Exhibit binder, isn't it a fact, Ms. Smith, that paragraph 16 to Schedule A of Exhibit 34, which purports to list all of the comparable companies that you considered, does not include Acme Corporation?

Ask:

Q. Ms. Smith, please turn to Exhibit 34.

A. I have it.

Q. Schedule A contains your report?

A. It does.

Q. In paragraph 16 you list comparable companies?

A. Yes.

Q. This is the complete list of companies you selected as comparables to the debtor?

A. Yes.

Q. The list omits Acme Corp?

A. Yes.

iii. Let her foul it off, then throw the same pitch. When the witness tries to deflect your question, some lawyers will immediately try to force a responsive answer. (One often hears, "Just yes or no!") The theatre of that moment is unhelpful, though: it is more likely to suggest a lawyer afraid of context than an evasive expert. Remember, there is no jury. The judge is going to hear, and perhaps has heard, the expert's account anyway. It is better to let the expert speak, then return doggedly to your question. If the pattern continues several times, then you may seek help from the judge. But let the expert, not you, prove her own evasion. Do not fear the pivot – but insist on pivoting back.

iv. Give a prior inconsistent statement its due dignity. Remember Acme, and the witness' deposition testimony that it was irrelevant because it had a foreign division? Suppose at trial she testifies on direct that it is irrelevant because it has

plants in Louisiana, and the debtor does not. Don't just blurt out, "Ms. Smith, isn't it a fact that you never said anything about Louisiana in your deposition?" A drumroll is in order.

Q. Ms. Smith, a few minutes ago, when Mr. Collins asked you why Acme was not a comparable, you testified that it was because Acme has Louisiana operations – do you recall that?

A. Yes.

Q. Do you remember meeting my colleague Ms. Batchelder three weeks ago for a deposition?

A. Yes.

Q. You came to our office with Mr. Collins?

A. Yes.

Q. You answered Ms. Batchelder's questions under oath?

A. Yes.

Q. You told the truth that day?

A. Of course.

A. Afterwards you reviewed a transcript, marking errors?

A. Yes.

Q. You signed that transcript?

A. Yes.

Q. Ms. Batchelder asked you about Acme, didn't she?

A. I don't remember.

Q. Your Honor, may I approach?

The Court: You may.

Q. Counsel, page 83, line 12. Ms. Smith, did Ms. Batchelder ask you this question: "Why is Acme Corp. not comparable?"

A. She did. I remember now.

Q. You answered, "Because it has a foreign division," did you not?

A. I see that.

Q. And you said that?

A. Yes.

Q. You did not say, "Because it has plants in Louisiana."

A. Not then.

Q. She asked you whether there was any other reason it was not comparable, did she not?

A. Yes.

Q. She asked you to take your time?

A. That's what it says.

Q. You didn't mention Louisiana plants at any point during the deposition did you?

A. I guess I didn't.

Do the full drumroll once only. But do it. Thereafter Ms. Smith will tend to agree with a question whenever she sees the transcript begin to emerge from the lectern.

What shouldn't I do?

i. …Dwell on credentials, unless. In the writer's experience, once a witness has cleared the threshold to be able to give an opinion, her intelligence and teaching ability from the stand are much more important than her resume, *unless* you can show that she's never, or rarely before done the particular type of analysis at issue. If it is a question of who has more awards, or who has testified in more cases, leave it.

ii. …*Fight her strength.* Take on the witness on her safest ground, and the result of a long skirmish is likely at best to be a draw. A lawyer might fence with a valuation expert about his use of one comparable or the absence of another. The expert typically is ready for this and has an answer. The appropriateness of comparable choice is much better presented by one's own expert on direct examination. It may be necessary to confront the expert on his "strong turf," but these can be the most challenging cross-examinations.

iii. …*Go for the master stroke.* Try to tie up your legal theory in a neat bow through the witness, and you risk disaster. Unless done with exceptional skill, this generally will backfire – and put the refutation into the mouth of an expert, where it is most damaging.

iv. …*Directly assault credibility without powerful evidence.* Sometimes -- rarely -- a frontal assault is warranted, when you encounter an expert who is an actual liar. He has misrepresented his credentials or perjured himself. These witnesses are not hens' teeth, but they are rare, and the odds are against you having one. Frontal assaults should be undertaken only when the evidence is powerful. You can't make this attack unless you are going to win it. Make sure your evidence is bulletproof, and rehearse with your most difficult, adroit partner play-acting the witness. If you can't do it smoothly with him, think very hard about doing it at all.

vi. …*Use deposition testimony as prior inconsistent statement when it isn't.* Impeach only with (a) real inconsistency that is (b) nontrivial. At deposition Ms. Smith mentioned that Fred and Amy worked on the comps. At trial she says that Amy worked on the comps. That is not a prior inconsistent statement. At trial she says the meeting was four hours. At deposition she said it was three hours. This is a prior inconsistent statement, but without more, a trivial one. One often sees quibbles of this sort. Generally they fall flat. They tend to reinforce the expert's opinion, because the dominant refrain in the court-room is, "Is this all that lawyer has?"

vii. ...*Ever let her show and tell.* It is one thing to allow Ms. Smith her evasive answer before yanking her back to your question, and quite another to let her near a whiteboard. Use of demonstratives with a hostile witness is not for the faint of heart. Avoid it. A clever witness may ask you, "Mr. Jones, would you like me to explain on the whiteboard." You will answer, "Ms. Smith, the rule of this proceeding is that I am required to ask questions, not answer them. And vice versa. If I should need you at the whiteboard, I will let you know."

Top 10 Expert Witness Tips

1. Bill and collect before you testify, if possible. Don't allow opposing counsel to use your receivable as a challenge to your independence. Read your retention agreement if it has been provided to opposing counsel.
2. Make sure your CV is accurate and that you know it well. Google yourself; review your LinkedIn profile; review your firm's website. Pay careful attention to how questions about your CV are asked and answered.
3. Be thoroughly familiar with your report, including the facts and conclusions presented. Know the documents that your report relies upon and how to cross reference with charts or verbiage in your report. Know the layout of the report document to facilitate easy reference. Read your report multiple times over the days leading up to your deposition or testimony.
4. For videotaped depositions, speak to the camera, not to the lawyer asking you questions.
5. Read your deposition twice for accuracy. Correct any answers that were improperly recorded due to typos by the court reporter, misunderstood questions or non-applicable answers. Read your deposition several times before additional testimony.

PHOENIX EISNERAMPER

Top 10 Expert Witness Tips (cont'd)

6. Understand the differences between deposition and trial testimony. In depositions, stay calm regardless of the conduct of the questioning counsel. Be a duck: visibly calm above the waterline, but acutely active out of sight. Listen well and answer only what's asked. Don't assume that you know what the questioner wants.
7. For trial testimony, prepare an outline with counsel of your direct testimony *and* potential cross examination questions that may arise. Practice, practice, practice – with and without your script.
8. Speak slowly and avoid industry jargon, especially if you are testifying before a jury. Keep explanations simple and be careful using analogies or hypotheticals – they can be a two-edged sword.
9. For counsel: on redirect, reference back to the question you are trying to fix before asking the witness your question.
10. Dress conservatively and maintain a polite and professional manner. Refrain from "off the record" discussions with lawyers or others. Be respectful of court personnel and speak slowly and clearly for the reporter's benefit.

PHOENIX EISNERAMPER