

What Approach Do You Take with Expert Witnesses?

Most of the expert witnesses I cross or depose these days are "insular witnesses" - meaning that they testify at regulatory hearings (which are rather genteel), are high paid and everything is very straight forward and predictable - and there's little focus on lines of questioning designed to show that the witness is a hired gun or charges too much because that's the assumption in these proceedings about all of the witnesses.

However, I have an upcoming case where I'm deposing an expert (an appraiser) who will be testifying at a jury trial. Based on my research and my own expert, it appears that he's made a serious error in his valuation methodology. What is your preferred approach for expert depositions? Try to pin the expert down? Give him a chance to explain his approach? And are there other lines of questioning that would be fruitful to eventually use to discredit an expert before a jury?

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Without knowing your case details, I would opt for ambushing the expert at trial.

Walter D. James III, Texas

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Is his methodology the norm for the field? Why did he choose that methodology over another methodology? If it is not the norm, what is the norm and what result would that give?

Usually in appraisals your asking them why they selected this comp versus other comps

Erin M. Schmidt, Ohio

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Andy Simpson is the guru on everything expert witness. You might give him a call.

Sharon Campbell, Texas

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You answered part of your question - ask your expert witness (during prep, not EBT/Hearing /Trial) what he did wrong and how he got there and then ask him the proper steps to get to the proper place/evaluation. Work with your expert to craft questions to lead the opposing expert down the garden path about how he did great work and then ask him how he got that piece of garbage he calls a valuation (you'll have to craft that last question better than I did)

Bruce Wingate, New York

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If you're confident that there will be a trial and that the expert will be allowed to testify, then the typical rule of thumb is to lay the groundwork to impeach at deposition, but save the impeaching for trial.

But in (the typically more likely situations) where a bad expert could make settlement more likely, or you can potentially preclude the expert from testifying about the issue where his opinion is junk (or from testifying at all), then you want to lay it all out at deposition.

I'm sure it varies by jurisdiction, but I find it's awfully hard to surprise or ambush anyone these days at a civil trial. Given the pretrial disclosures that many judges require (all federal and a lot of state), given the fact that your expert is likely to address shortcomings in the other side's expert's opinion, etc., it's unlikely that you can truly ambush an expert (or any witness) at trial on something substantive. So I find there's typically little upside in not firing all the ammunition available to you before the trial starts.

As for an appraisal in particular, unless there is some glaring hole in methodology, the dispute is usually going to boil down to subjective things like which comparable is most comparable, and how to value the differences. This means it's usually their appraiser against yours. I think as long as the other side has a competent appraiser, it's going to be hard to have some kind of ambush-worthy material about his report.

Patrick W. Begos, Connecticut

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I have never deposed an appraiser. However, just in case you do not already know this, real estate can be valued in at least 3 different ways. One uses comps, another uses ROI, and I can't remember the third. But they can lead to widely varying numbers. I never understood why all three are sometimes accepted, since they definitely can lead to different numbers. But I know that is industry standard from my days long ago as a real estate agent and more recent reading for our real estate investment purchases as landlords, trying to determine how to calculate ROI value rather than value based on comps.

Tina Willis, Florida

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There's a lot that goes into this. How likely is the case to go to trial versus being settled, where you would disclose the mistake in settlement

negotiations, anyway? Is there going to be a Daubert motion?

Generally speaking, I like to let an expert witness speak and tell me and show me how smart he is. I ask open-ended questions and encourage long winded responses. I play the role of Columbo. If I know he's made a mistake, I'll try to let him make it again in the depo, but without being obvious about it. I might just go through the report, paragraph by paragraph, asking him to explain how he reached each conclusion until we eventually come to the section with the error. Then I'll continue through the rest of the report, so that it is not evident that I even caught the mistake. If I can get him to keep recommitting to the mistake, I do. The more ways he repeats the mistake, the better. Only after that will I consider revealing the mistake to him.

One key concern is whether correcting the mistake will help my client (i.e., the ultimate opinion will change significantly in my client's favor). If so, there's not as much downside to correcting it in the depo. If it's a mistake in methodology that just undercuts the entire opinion but that doesn't directly alter the conclusion in my client's favor, I'm less likely to expose it in the depo.

A half way point is to get him committed to the mistake, and then lead him through the methodology but with different numbers. That way you might get him to demonstrate with the math that he made the mistake, but he won't realize it because you aren't working with the numbers he used.

Sometimes the expert catches the mistake during depo prep or during the depo. If so, so be it. Make the most of it. Keep emphasizing that it was a mistake. Ask how many other mistakes there are in his report. Have him

point out each one.

Keep in mind that a really good expert can recover from most mistakes. All he has to do is be magnanimous about it and then explain how it doesn't really make a difference in this case because (pick one: I used conservative numbers, the rate of price increases in this market overcomes my error, etc.). So it may be good to find out how the expert will handle the mistake in front of the jury.

Andy Simpson, U.S. Virgin Islands

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To properly address the appraisal issue, I would go over it with my own expert. Flaws in methodology can be analyzed, math can be discussed, and potential more correct solutions settled on.

With credentials and a high subjective factor, impeachment of appraisers does not always work as intended. My approach would incorporate discussions with another appraiser (either consulting or testifying).

One approach that may work is going over the standards they are supposed to use. Knowing what their credentials mean and how they are supposed to do their work better than they do can provide for a robust cross-examination.

Another area to explore with highly credentialed appraisers is the level of work they performed versus delegated, although the approach to that issue can go either way. Some do their homework prior to deposition and trial and others get sloppy.

Darrell G. Stewart, Texas

