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Preparation and Cross-Examination of the Forensic Expert in Divorce Cases

MARK A. CHINN

There is a strong trend for the involvement of CPAs, valuation experts, rehabilitation experts, and mental health professionals in the preparation, negotiation, and litigation of divorce cases. In fact, during the last 20 years, the use of experts in divorce cases has exploded. The involvement of experts in divorce has taken the following forms:

- Experts in preparation and evaluation of settlement,
- Experts for each side in preparation for trial,
- Expert testimony in trial,
- Court-appointed evaluators and
- Court-appointed masters.

Although attorneys do not have the knowledge of the expert, attorneys are trained in acquiring knowledge. The good attorney will study the books and articles that the experts study. He or she will become versed in the rules and guidelines of the trade. The attorney will attack the expert's qualifications and will attack the expert's compliance with the standards of the trade. She will attack the expert's assumptions and knowledge and she will attack the expert's bias. Finally, the attorney will use the credible and honest opposing expert to establish points for his side, thus bring more credibility to his own position.

The intent of this article is to provide some real-life examples of successful cross-examinations of experts in court. A short list of tips for preparing experts that may be used by lawyers or given

to experts in preparation for cross-examination follows the examples.

CHALLENGING EXPERTISE

To provide opinions, experts must be "qualified" by the court to state opinions as experts. The process for determining whether an expert should be qualified is "*voir dire*." During this process, each attorney and the judge have the opportunity to inquire into the professional's qualifications to state expert opinions.

Challenging expertise involves inquiry into education, certification, training, and background. It is important for an expert to show a court that he has specialized knowledge and training in a field.¹

The cross-examining attorney will have several objectives: first, to keep the expert from testifying at all or to limit his expertise; and second, if the attorney cannot keep him from testifying, to show that the expert is not as qualified as his own expert, and should not, therefore, be given credence; and third, to use the opposing expert to establish critical points for his own side of the case.

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In the following cross-examination, the defense offered the family CPA as a witness to rebut the expert valuation of a dental practice by a court-appointed expert. The defense sought to show that the local CPA had more intimate knowledge about the dental practice and the value of practices in the locale. The focus of the cross-examination was to show that the local CPA did not have the same credentials as the CPA who was certified as a valuation expert.

Use the opposing expert to establish critical points for your side.

Voir Dire Examination by Mr. Chinn

Q. Mr. Smith, are you familiar with Shannon Pratt?

A. Yes, sir. He was the author of the class that I took.

Q. Is he the author of this book called *Valuing a Business*, that I'm holding up?

A. Yes. I'm familiar with it.

Q. On page 7 of this book, authored by Mr. Pratt, it says there's nothing in the uniform CPA examination in reference to the subject of business appraisal. Do you agree or disagree with that?

A. I would agree with that.

Q. Now, AICPA is the American Institute of Certified Public Accountants; is that correct?

A. Yes.

Q. Are you aware of the other entities that might certify people for business appraisals?

A. Yes.

Q. Can you name them?

A. The NACEA.

Q. What is that?

A. National Association of Certified Evaluation Analysts.

Q. Any other entities?

A. I think there are a couple more, but I can't give you the names of them. The AICPA has recently gotten into that field, and there are a couple of other organizations that have been created to designate specialists in that field. I don't know the names of all of them.

Q. Have you ever heard of the North American Council of Appraisal Organizations?

A. Yes, but they don't give a designation as a goal ...

Q. And they promulgate uniform standards of professional appraisal practices?

A. That's correct.

Q. And have you reviewed those?

A. Yes, don't ask me to quote them, but yes I have read them. I have seen them.

Q. Now, there is also something called The Uniform Standards of Professional Appraisal Practice, isn't there?

A. Yes, sir, I believe so.

Q. You believe so?

A. Uh-huh.

Q. Do you know what the Uniform Standards of Professional Appraisal Practice are?

A. I can't quote them for you. I have the literature on them but, I can't quote them for you.

Q. And there's also something called the American Society of Appraisers, the ASA. Have you ever seen it?

A. Yeah.

Q. And what does the professional designation ASA stand for?

A. ASA?

Q. Yes.

A. I do not know.

Q. Would that be Accredited Senior Appraisers?

A. That's an appraiser who is limited to the... I think would be limited not necessarily to business evaluations but to other types of evaluation such as real estate.

Q. Are you a member of the American Society of Appraisers?

A. No, sir, I'm not.

Q. Are you familiar with their business evaluation committee?

A. Familiar with it?

Q. Yes.

A. I've heard of it.

Q. Are you a member of it?

A. No.

Q. Are you a member of the Institute of Business Appraisers?

A. No.

Q. Have you ever attended any of their seminars on business appraisals topics?

A. No, sir.

Q. Do you know what a CBA is?

A. Yes, sir.

Q. What is that?

A. Certified Valuation Analyst.

Q. I think you probably were close. It's Certified Business Appraiser.

A. You said CVA.

Q. CBA.

A. You said CBA?

Q. Yes, sir.

A. Excuse me, I misunderstood you.

Q. Certified Business Appraiser, are you familiar with that designation?

A. No.

Q. Have you ever testified in court as to what the value of a dental business is?

A. No.

Q. Have you ever testified in court as to what the value of a medical practice is?

A. No.

Q. Now, you have... have you written any articles on business valuations?

A. No, I have not.

Q. Have you made any presentations to CPAs or business appraisers on the subject of business evaluations?

A. No.

Cross-examination can reveal the expert not willing to give direct answers when caught.

DO NOT OVERSELL QUALIFICATIONS

Although it is important to impress the court with actual expertise, it is equally important not to oversell. The expert must be aware of the fact that opposing counsel may research the prior opinions of the expert and the prior court decisions in which the expert has participated.

The following is an example of an expert who oversold his qualifications. On direct examination, he said that he had testified in many cases and had never had an opinion rejected by the higher court. Research proved the claim was not true. Cross-examination also revealed an expert who was not willing to give direct answers when caught.

Cross-Examination by Mr. Chinn

Q. Dr. Jones, you were asked by Mr. Barnett if the [state] Supreme Court affirmed every single opinion you ever made.

A. And I said, they haven't affirmed everything, obviously, but I'm not aware of them criticizing me in any particular kind of way.

Q. It's true, isn't it, that in the dioxin case, that case was reversed; right?

A. That's what I heard. I've not read the opinion.

Q. It's true, isn't it, that in *In the Interest of DKL*, which involved the child abuser where you testified that you did not think that the abuser would abuse again and recommended lifting a no-contact order that the [state] Supreme Court went against your recommendation and reversed that case, didn't they?

A. Like I said, that case does not ring a bell. I know that there are a lot of cases out there that I have not seen—in fact, the majority of them. I just have not been told of any.

Q. And it's true, isn't it, that in the *Hart v. State* case, which was decided in 1994, that the [state] Supreme Court excluded your testimony because you had tried to provide a legal conclusion?

A. That must have been some technicality that I'm not aware of. I don't even remember the case.

KNOWLEDGE

The expert must be careful not to allow himself to be placed in a situation in which he has not had the opportunity to prepare or to become acquainted with the facts. If a situation like this arises, when testimony is intended to be limited to certain opinions, that fact should be disclosed by the expert himself before cross-examination. The expert should be mindful of the fact that even prior disclosure of knowledge or valuation limitations may not protect him or her from embarrassment.

Place the expert in a position of saying, "I don't know."

In the following scenario, a highly qualified CPA took the stand in a contempt case to show that a doctor did not have the cash flow to make the payments he was supposed to make pursuant to a divorce. The doctor was an OB/GYN anesthesiologist who moved 30 miles away from town and borrowed huge sums of money to start a horse farm in the country. The doctor's personal checking account revealed the deposit of huge sums of money, yet he contended he required a reduction in the support and alimony he was paying. Cross-examination was designed to show that the expert did not really know anything about this doctor and his financial

situation. Note how the expert was placed in a position of repeatedly saying, "I don't know."

Cross-Examination by Mr. Chinn

Q. I'm Mark Chinn. How are you this morning?

A. Fine. Thank you.

Q. I represent Sarah Gray and her children.

A. Yes.

Q. Have you prepared tax returns for Dr. Gray in the past?

A. No, I have not.

Q. Did you prepare his 1996 return?

A. No, I did not.

Q. So, your complete familiarity with this case is from your review of tax returns for years 1994 to 1996, a cash journal for 1997 prepared by Dr. Gray, and earnings from his corporation for 1997?

A. Yes.

Q. The tax returns—you had nothing to do with the preparation of those, so you did not go behind any of the documentation of the tax returns—you did not go behind the basis of those tax returns; you accepted the numbers as presented to you; is that correct?

A. I looked at some background information as related to the farm losses, but that's the extent of it.

Q. Okay, please listen to my questions carefully. I asked you before I asked that questions what you had reviewed, and I recapped what I had written down from your prior testimony, and that was that you had reviewed tax returns for '94 to '96, a cash journal prepared by Dr. Gray for '97, and earnings from his corporation for 1997. Would you please tell the court what other documents you reviewed other than those?

A. A depreciation schedule that relates to the farm purchases and equipment.

Q. Who prepared the depreciation schedule?

A. The CPA that prepared the tax returns.

Q. Did you go behind the depreciation schedule at all to look at documentation regarding that depreciation schedule to see for example when things were purchased and what their value was?

A. It is on the schedule. The schedule shows the date of purchase, the original cost.

Q. So you accepted numbers presented to you by prior CPAs and by Dr. Gray?

A. Yes, sir.

Q. Have you reviewed Dr. Gray's checking accounts?

A. Not directly.

Q. So, you don't know how much he has deposited each month into each of his checking accounts; do you?

A. I do not.

Q. And you don't know how many checking accounts he has.

A. I do not.

Q. You don't know how he has used funds that he has borrowed from banks, do you?

A. Only to the extent that he has told me.

Q. Now Ms. Adams, you have estimated or you have accepted a salary for Dr. Gray at \$14,500 per month?

A. Yes.

Q. Does that salary include dividends that might be distributed to him by his corporation?

A. His corporation is a professional corporation. I don't think it would distribute dividends, and there have been no bonuses *per se* paid out of salary that are not reflected.

Q. Well, let's stop and look at that. How long has this corporation been in existence that he is getting salary from right now?

A. Since some time in 1996. Well, he has been an employee since some time in 1996.

Q. When did he go on salary?

A. He has... I'm not sure.

Q. So, this is a professional corporation, totally within his control; isn't it?

A. He is not the sole shareholder.

Q. Who are the other shareholders?

A. I don't know.

Q. How many are there?

A. I don't know.

Q. Have you gone in to look at the business records of the corporation to determine if there are funds in excess of the salaries so that perhaps you could determine whether or not Dr. Gray could pay himself more than this salary?

A. I have not.

Q. Okay. Now, have you had an opportunity to take a look at this farm that Dr. Gray operates?

A. I have not.

Q. Are you aware of what he farms down there?

A. I'm aware that he raises horses.

Q. How many horses does he raise?

A. I don't know.

Q. Are you aware of Dr. Gray's training in the field of horse raising?

A. I am not.

Q. Are you aware of whether or not this farm is a hobby or a business?

A. I am not.

1. And you're not aware of the reasons behind the decline in Dr. Gray's income over the years from being an anesthesiologist.

(a) know that is has to do with contracts with various area hospitals, I believe. I believe he is not serving in certain hospitals now.

Q. And you're not aware of whether or not Dr. Gray's has voluntarily elected not to be in those contracts, are you?

A. No, I am not.

Q. And you're not aware of what kind of work schedule Dr. Gray is keeping, are you?

A. I am not.

Q. And you're not aware, are you, of the impact of the fact that Dr. Gray, who is a Jackson anesthesiologist, chose to move 30 miles from his practice?

A. I am not.

Q. You're not aware of the impact it might have on his work availability because he lives 30 miles south of town, are you?

A. No.

Q. Although you would imagine that maybe he would be less available for on-call duty if he was 30 miles away than if he lived in this town, aren't you?

A. Yes.

In another case, a qualified CPA expressed an opinion about the value of a business after having looked at the earnings of the company. The expert's valuation of the business was not central to his testimony, but he ventured into that territory and suffered a loss of credibility for his lack of knowledge.

The expert should "Google" himself and be familiar with his profile.

Cross-Examination by Mr. Chinn

Q. Mr. Expert, you haven't done an appraisal of the value of the stock, have you?

A. No, sir. I have not.

Q. You have not obtained a detailed history of ABC?

A. No, sir.

Q. You have not done a detailed review of the operations of ABC?

A. No, sir.

Q. You have not done a detailed review of ABC's competition?

A. No, sir.

Q. You have not done a detailed review of ABC's organization?

A. That's correct. I have not.

Q. You have not had the opportunity to do a detailed review of ABC's facilities and equipment?

A. No, sir. I haven't.

Q. You've not had the opportunity to walk through ABC?

A. No, sir.

Q. You have not had the opportunity to look in detail at ABC's management?

A. No sir. I haven't.

Q. You have not done an economic analysis of the place of ABC's environmental waste companies in the economy?

A. No, sir.

Q. You have not had an opportunity to do a detailed review of the strengths and weaknesses of ABC's business?

A. No, sir.

Q. However, Mr. [my expert] has had an opportunity to do a detailed review of all of the things I just mentioned, hasn't he?

A. Yes, sir.

Q. And, if you're going to do a good appraisal on a company, you would want to do a detailed review of the history, operations, competition, organization, facilities and equipment, and management, as well as the place of the business in the industry, wouldn't you?

A. Sure. Yes, sir.

FOLLOWING THE STANDARDS

Any expert must keep in mind that one of the first things a lawyer will look for is a standard for the expert to follow and whether the expert has followed his own standards.

Failure to concede a valid point will hurt credibility.

In the following cross-examination, the local CPA with intimate knowledge of his client's practice attempted to state an opinion critical of the opinion of the court-appointed valuation expert.

Cross-examination went into his compliance with accepted business valuation standards.

Q. Would you agree that it's appropriate in doing a proper business appraisal that the valuation analyst should look at the national economic picture in detail before making decisions?

A. Yes.

Q. Have you conducted a similar survey of national economic information before appearing here in court today for the purposes of valuating this practice?

A. No.

Q. Would you agree that one of the standards for proper business appraisals is to conduct a survey of state and local economic information pertaining to that business before rendering an opinion as to valuation?

A. Yes.

Q. It's true, isn't it, that you have not conducted a formal study of state and local economic information pertaining to this dental practice for purposes of appearing in court here today to make an opinion about the valuation of this property?

A. I have not.

Q. Now, before making your reports that you've shown me earlier today, you did not consult with the business valuation standards of the American Society of Appraisers, did you?

A. No, sir.

Q. As a matter of fact, as you told me earlier today, you didn't prepare a formal report like Mr. Valuation Expert did?

A. No, sir, I did not.

Q. And again, there is nothing in the uniform CPA examination that addresses the subject of appraisal, is there?

A. No, there is not.

BIAS

Most people are familiar with traditional ways attorneys show bias. For example, the cross-examiner will ask how much the expert has been paid and attempt to show the court that the opinion is motivated by the payment of the fee. The expert must simply handle this in a straightforward fashion on direct examination in order to take the wind out of the sails of the cross-examination. Another way to show bias is to show that an expert always takes a particular side in cases. Many experts handle this by trying to diversify their involvement so they do not appear to have such a bias.

For the expert that has been a CPA for the business, bias can be a problem. In the following case, the CPA had been the CPA for the family during the marriage and testified for the husband, but never spoke to the wife. This was used against him in cross-examination.

Q. Did you do that for purposes of appearing in court here today?

A. I have been there and I am familiar with the history of the business probably better than Mr. K.

Q. The truth of the matter is that you've been working with Dr. S for a very long time?

A. And Jane, of course.

Q. And you say you also work for Jane?

A. They filed a joint return, that's what I did for them all those years.

Q. Have you cooperated with Dr. S in preparing his case for him?

A. Yes.

Q. You've talked with him about the valuation of assets and about accounting for purposes of this court proceeding?

A. Yes.

Q. And, as a matter of fact, you talked with Dr. S about this business valuation and consulted with him and received his opinions about it, didn't you?

A. Yes.

Q. But you didn't have a single conversation with Jane, did you?

A. No, sir.

TIPS FOR EXPERTS

Below are tips that experts would do well to be familiar with.

- There must be a clear engagement letter or contract. Many times experts are caught off guard by questions about areas they have not prepared for.
- Before testifying, experts must familiarize themselves with everything that is in their reports and that took place.
- When testifying or giving a deposition, it may be best to have all of notes of every kind available to prevent, "I don't know" responses.
- Qualifications are an issue. Prepare and present a detailed resume showing education, experience, publications, speaking

engagements, advanced training, certifications, memberships, and so on.

- Study *Daubert*. Be prepared to discuss: "literature" and "objective criteria."
- If possible, be prepared to state that the expert's methods of evaluation and opinion are based upon particular, widely accepted authorities. For example, an expert in domestic abuse might cite the materials distributed by the National Center on Domestic and Sexual Abuse.
- If the expert is licensed by a state agency, read the statutes regarding the profession and the regulations of the regulatory board.
- The expert will be tested on anything he says that is not reflected in his report and questioned as to why it was not in his report if it was important.
- If the expert is a member of an association, and that association has guidelines regarding the area of expertise, make sure that the report complies with the guidelines. Know the guidelines inside and out. The lawyer will know the guidelines and will surgically dissect every move with the guidelines.
- Know that the opposing counsel will "Google" the expert and be aware of the profile, involvement in cases, and publications. The expert should "Google" himself and be very familiar with his profile.
- Opposing counsel will have read everything the expert has written, including Web site materials and blogs.
- Know the most important writings on the topic. Lawyers will find the preeminent texts in the field, ask for the expert's agreement that the text is preeminent, and then grill the expert on it. The lawyer will seek concessions as to points of expertise that helps his or her case. This has to be handled carefully as failure to concede a valid point will hurt credibility.

NOTE

1. Federal courts and many states apply the standard for qualification of experts that is stated in the seminal case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1996). This case imposes a test that is thought to make it more difficult to introduce expert opinion than it was before. *Allen v. Pennsylvania Engineering Corp.*, 102 F. 2d 194, 196-98 (5th Cir. 1996). See, "Daubert and Kumba: Addressing the Court's Role as Gatekeeper of the Experts" in *The Mississippi Lawyer*, October, 2000, by David L. Ayers and C. Victor Welsh, III.