



*International Association of Defense Counsel*

## **Trial Academy**

### ***THE DIRECT AND CROSS EXAMINATION OF AN ECONOMIST***

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## INTRODUCTION

Here's the situation: You are near the end of the third week of trial. All good intentions to the contrary notwithstanding, the proof on both sides of the case has gone in at a laborious pace. All counsel, the court and, most significantly, the jurors are soul weary. So, who is the next witness? An economist.

It almost never fails. Whether you are representing a plaintiff or a defendant, damages experts will testify late in the case. There are sound strategic reasons for this, chiefly the need for the trial record to be as complete as possible to provide a credible basis for your expert's conclusions. Nonetheless, even under the best of circumstances your jury is likely to be fading in energy and enthusiasm. When then confronted with the prospect of hearing from an economist (vivid images of math, charts, graphs, and tables abound), many jurors, even those who have been with you throughout the trial, will simply check out mentally, physically or both.

Sound like a challenge? You bet. However, with proper foresight and planning, you can effectively present or impeach the testimony of an economist, as your needs may demand.<sup>1</sup>

### **Economic Loss Damages:**

You simply cannot adequately prepare for the direct or cross-examination of an economist without a basic understanding of the type of testimony such witnesses typically present and the dynamics associated with the selection of such an expert.

In most personal injury and wrongful death cases, the plaintiff will seek economic loss damages incurred by the plaintiff both before the trial and those damages likely incurred in the

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<sup>1</sup> It should be noted here that this paper will focus exclusively on the presentation of an economist at trial, in the context of direct and cross-examination. Consequently, only passing reference is made to address the numerous and equally critical issues related to the preparation and use of a report by an economist and the examination of an economist in a deposition.

future. The following are the types of economic damages most likely sought in personal injury and wrongful death cases:

**1. Lost Earnings or Earning Capacity:** This category of damages constitutes the income plaintiff would make but for the claimed injury or death and is typically represented by a determination of the plaintiff's **gross economic loss**.<sup>2</sup> The starting point for this calculation is the plaintiff's income at the time of the event, and the calculation is affected by plaintiff's industry, health, gender, career experience, and education. Also considered are the plaintiff's base earnings rate, wage growth rate, and **work life expectancy** (typically as reflected in a **life expectancy table**).

**2. Personal Consumption:** From the economic loss calculation, a deduction is made for the consumption of the plaintiff over the remainder of his or her lifetime, including food, shelter, clothing, education, and the cost of leisure activities and hobbies.

**3. Employee Benefits:** The plaintiff is entitled to those employee benefits he or she would obtain after the injury or death, including health insurance, life insurance, disability insurance, accrued vacation, and employer contributions to retirement plans.

**4. Future Medical Expenses:** These are the medical expenses, if any, the plaintiff will incur in the future as a result of the injury.

**5. Household Services:** These damages include the lost value of household services formerly performed by the plaintiff and are conventionally calculated at the rate those services could be purchased by the plaintiff from a third party in the relevant market. Note that these damages should not be calculated at the effective hourly rate of plaintiff in his or her own occupation.

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<sup>2</sup> For convenience of reference, terms appearing hereafter in **bold** are defined and addressed in the section of this paper entitled **Economic Damages: An Essential Glossary**.

**6. Hedonic Damages:** Probably the most nebulous of economic damages, hedonic damages are awarded for the value of life or pleasure of life. However, trial courts around the country have barred economists such as Stanley Smith, a well-known purveyor of hedonic damage theory, after judges determined their hedonic damage calculations to be speculative at best. Cross-examination of such experts should focus on the methodologies and assumptions of these experts. The defense attorneys should strive to determine just how these economists are arriving at hedonic value figures. A *Frye/Daubert/Kumho* motion to exclude should be considered.

**7. Recovery in a Particular Jurisdiction:**

Recovery of certain types of economic loss damages can vary from one state to another. Hedonic damages, for example, are not available in every jurisdiction. Therefore, you should:

- a. research what damages can be recovered in a particular jurisdiction and discuss with your expert the elements of damages recoverable; and
- b. determine what factual evidence relates to damages, convey this evidence to your expert, and determine how you can establish the necessary evidence at trial.

**Economic Damages: An Essential Glossary<sup>3</sup>**

Perhaps the most fundamental rule of effective jury trial advocacy is that you and your witnesses, particularly your expert witnesses, must address the jurors on their level. No where is this more critical or daunting than in the presentation or confrontation of economic testimony. You simply will not be able to advocate effectively in this area without a mastery of at least the following basic terminology and concepts:

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<sup>3</sup> The authors gratefully acknowledge the permission granted by IADC member Daniel K. Cray, of Cray Huber Horstman Heil & VanAusdal, LLC, for the liberal use of material originally developed by him in the paper he presented at the 2001 IADC Trial Academy, entitled *The ABC's of Successful Defense to Plaintiff's Economic Testimony*.

## 1. Annuity Figures

Annuity figures are the amount and duration of payments that can be made available to the plaintiff by means of the purchase of an annuity contract, and the cost of such a contract. The use of annuity figures by defense counsel makes sense for several reasons. First, it allows the defendant to fund streams of future costs for catastrophically injured plaintiffs for less money. Second, the defendant need not directly inform the jurors that the injuries suffered by the plaintiff have reduced his life expectancy significantly. Third, annuity payments are made for the life of the covered individual. Annuity companies pay even if an injured plaintiff lives longer than his expected life. This concept is especially appealing to jurors who have to determine damages, but are uncertain as to the proper life expectancy to assign to the plaintiff. If jurors are given annuity information and believe the plaintiff can/will purchase the annuity, you may have helped the jury out of their life expectancy dilemma.

## 2. Assumptions

Economists are paid to make educated guesses about future economic events. When an economist determines the **present cash value** of economic loss items such as plaintiff's future medical care costs, the economist makes assumptions as to the future inflation rate of medical supplies, future interest rates, the plaintiff's life expectancy, **worklife expectancy** etc. When uncovering the opinions of the economic witness, the practitioner must understand the assumptions upon which opinions are based. Many times a plaintiff's economist will make assumptions based upon **statistical averages** that have no direct application to the plaintiff (or plaintiff's decedent). The assumptions made by the economic witness can be fertile ground for cross-examination by a well-prepared defense attorney.

### 3. Business Opportunity

Injured parties often testify to grandiose plans concerning new business opportunities that were assertedly cut short due to the defendant's conduct. For example, the "Dot Com Company" which would have had an IPO but for the missed business opportunity directly resulting from injury caused by the defendant. Laws in most states limit the plaintiff (and his economic witness) from testifying as to loss of business opportunity that is remote or speculative.

### 4. Discount Rate

For the defense attorney combating claims of future economic loss, one of the sharper arrows in his quiver is a healthy discount rate. The concept of discount rate is fairly straightforward. A discount rate is an interest rate at which a present lump sum would grow to equal specified future payments. Many tort reform statutes around the country have provisions allowing discounting of future awards to present cash value. For example, using a healthy discount rate to obtain present **cash value** of future care costs of a disabled child will reduce by millions of dollars the economic loss award if the plaintiff obtains a verdict.

### 5. Economic Theory

Different schools of economics teach different economic theories and models. It is extremely difficult to cross-examine an economist regarding economic theory. Further, 99% of all jurors will be unable to understand the import of this cross-examination even if you gain the testimony you seek - and you will almost certainly bore them to tears in the process. Cross-examination on the method used by the economist to calculate net economic loss is something that jurors can understand (and maybe even enjoy) particularly when you expose the improper **assumptions** and data used with the economic projections. Most economists use an economic model that determines net loss by obtaining a **gross economic loss** figure, and then multiplying

by a set growth rate. Net loss is then calculated by reducing this future loss figure by a set **discount rate**.

#### 6. *Frye/Daubert/Kumho* Motion

As expert testimony became more and more commonplace in our court system, the United States Supreme Court has determined that judges must insure that all scientific testimony for which a party seeks admission is not only relevant but reliable. *Daubert v. Merrell Dow*, 519 U.S. 879 (1993). There, the Supreme Court held that it was the role of the trial judge to determine whether the methodologies used by expert witnesses were scientifically valid. If not, the opinion witness testimony should be ruled inadmissible. In *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court clarified the scope of *Daubert* to include all opinion witness testimony based upon scientific, technical or other specialized knowledge, including the opinion testimony of economic experts. It is incumbent upon defense counsel to challenge plaintiff's economic testimony by a *Daubert/Kumho*-type motion where the evidence warrants. [NOTE: In certain states one may still have to rely upon *Frye v. U.S.* as the standard for expert witness testimony.]

#### 7. **Gross Economic Loss**

Gross in this context does not necessarily mean large. As seen under the **economic theory** section above, gross economic wage loss of an injured worker is the combined loss of wages and fringe benefits reduced by a **discount rate** in order to arrive at a **present cash value** sum.

#### 8. **U.S. Labor Department Data**

The U.S. Department of Labor maintains an expansive list of economic data categories defining the **statistically average** worker within certain characteristics and classifications.

These characteristics and classifications include job title, age, gender, race, etc. Statistics are also kept concerning **worklife expectancy** of American workers. It has been the authors experience that at times plaintiff's economic witnesses fail to properly categorize the plaintiff and as a result use improper Department of Labor statistics. Further, many economists fail to use updated Department of Labor data as it becomes available. The challenges associated with the admission of this type of data are discussed below.

### **9. Life Expectancy Tables**

Life expectancy tables show, or purport to show, the statistical life expectancy of various types of persons. In many jurisdictions, such tables are statutorily codified and so readily admissible in support of damages testimony. The challenges associated with the admission of this type of data in jurisdictions where it has not been codified are discussed below.

### **10. Present Cash Value**

Present cash value can be defined as the lump sum of money today, which when grown at a predicted interest rate will yield streams of calculated monetary loss in the future. Most, if not all, awards for economic loss should be reduced to present cash value if allowed under the laws of the jurisdiction. Otherwise, the plaintiff obtains an enhanced recovery that does not reflect the true loss. Plaintiff's experts often assume that earnings will increase due to inflation at the same rate as investments and thus apply a minimal or no discount rate. This is a major area in which to impugn the credibility of the plaintiff's economist. However, you should keep in mind that average return on investments usually exceeds the inflation rate generally reflected in wage increases.



## 11. Rated Age

The rated age of an injured plaintiff is determined not by chronological age only, but by also taking into account plaintiff's serious medical conditions or illnesses. When a rated age is assigned a seriously injured plaintiff, many times the rated age is much greater than his chronological age. (Reflecting a reduced life expectancy due to the plaintiff's injuries.) Rated age is assigned to an injured party by annuity companies so that **annuity pricing** can be determined for the injured party. A quick example. Plaintiff is a 19-year-old, C-4 level quadriplegic. While his chronological age is 19 years, his rated age may be 62 years. This means the plaintiff has a life expectancy equal to a 62-year-old. Therefore, the higher the rated age, the lower the premiums charged for the purchase of an annuity.

## 12. Statistical Average

This concept is the plaintiff's economist's friend. Plaintiff's economist determines **economic loss** based upon statistical averages. It is up to the defense attorney to show how plaintiff's economist has failed to take into account, or has misstated by use of such averages, important individual characteristics of the specific plaintiff.

## 13. Time Value of Money

The time value of money is simply the way in which money grows through investment. This concept is underappreciated by the average juror. Do not take for granted that your jury understands this very basic idea. In order to teach the jury the mathematical concept of **present cash value** and how it relates to the time value of money, a mathematician can be called to the witness stand. The mathematician, unlike the defense economist, is not susceptible to cross-examination on **economic theory**. The mathematician can explain the important concept of the time value of money and how it relates to present cash value without having to concede matters

relating to **economic theory**. You may, in the alternative, want to consider calling an annuitist to serve this role. The annuitist can testify to the theory and practices surrounding **annuity figures**, and can generally testify as to the type and cost of annuities available to be purchased by the injured plaintiff. Caution must be used when determining whom to call to explain annuities. Some states do not allow annuity testimony, while others allow the testimony depending upon the witness called. If an annuity salesman is called, the court may bar this testimony based upon a hearsay objection if the salesman does not know underwriting practices relative to an annuity.

#### **14. Treasury Bills**

Treasury Bills represent an extremely conservative vehicle of investment. Return on thirty-day treasury bills are substantially lower than what an investor would obtain with a conservative, balanced portfolio. Because Treasury Bills have lower return rates than average investment vehicles, they are the investment darling of plaintiff's economist. Using Treasury Bills allows the plaintiff's economist to keep **discount rates** at or near 0%. How many people do you know that invest in only thirty-day Treasury Bills?

#### **15. Worklife Expectancy**

Each occupation has its own worklife expectancy. Construction workers have shorter total worklife expectancy than other less physically demanding jobs. Each occupation also has its own age-earning cycle. You should not allow an expert to simply assume a worker's earnings will grow by a set rate every year. Some workers are not as productive in their later years and therefore have fewer earnings. Occupational data such as worklife expectancy tables are available through the **U.S. Department of Labor**.

## **Economic Loss Experts**

Plaintiffs routinely will deal with economic loss damages through an economist. For defense counsel, however, it is a daunting proposition whether to call your own economic witness to the stand. The prevailing thought among defense counsel is that an economist should not be called as a defense witness unless he or she can expose the plaintiff's economist to be a charlatan. The fact that you may not call an economist to the stand, however, should by no means stop you from an early consultation with an economist. This consultant can help shape discovery on economic issues, as well as help with your inquiry of the plaintiff's economist at his deposition or during cross-examination. Unless they are defending a case in which their client admits its liability for compensatory damages and the plaintiff's damages figures are substantial, most defense counsel are reluctant to challenge the plaintiff's economist by presenting testimony from a defense economist. The concern is, of course, inadvertently setting a floor for the jury's damages deliberations.

If you decide you need to present an economist, you will want to consider the following guidelines in making your selection and preparing for your expert's testimony:

### **1. Choosing Your Expert:**

**a.** Get started as early in the case as you reasonably can so that you may postpone a final decision about using the economist as a work-product protected consultant or, rather, as a testifying witness.

**b.** Always involve your client in the analysis and selection of an economist. Frequently, your client will have a stable of such experts with whom they have worked effectively.

**c.** Check with your firm, other colleagues, and expert banks for referrals to good economists. For example, the IADC regularly publishes requests of its members for names of potential experts and information about such experts.

**d.** After compiling a list of potential economists, analyze each candidate's potential effectiveness as a communicator. This is particularly critical when retaining an economist for trial testimony purposes. Many experts are naturally animated and voluble, particularly those who are teachers by trade, but the typical economist is liable to be quite devoid of these characteristics. To assure that you don't take on a greater witness preparation challenge than you can reasonably manage, make every effort to conduct your interviews with potential candidates in person.

**e.** By means of an interview and contact with credible references, you are best able to determine whether the economist will provide intellectually honest, rather than bought and paid for opinions.

**f.** Contact attorneys who have retained candidates in the past, and ask for their honest assessment.

**g.** If possible, request a copy of the economist's deposition and/or trial testimony transcripts to review the manner in which he or she handled themselves in prior testimony.

**h.** If the candidate has received graduate degrees, investigate the subject of any research conducted by the expert or any articles he or she may have written.

**i.** Familiarize yourself with your candidate's publications, as your opponent will look for ways to use such published materials for impeachment.

j. If the economist has published materials, determine which publications have been peer reviewed.

k. Inquire how often the candidate has testified on behalf of plaintiffs and defendants, and review representative reports prepared by the candidate in other matters for plaintiffs and defendants.

## **2. Preparing the Direct Examination of Your Expert:**

Once you have selected an economist, begin right away preparing for your expert's direct testimony. This will allow you to have a sound roadmap for the preparation of your economist for deposition and trial. As you prepare an outline of the direct examination, consider carefully the following:

a. Each question you ask your economist should be asked in a way which produces answers that are easily understandable. The foundational requirement for any expert testimony is that it be helpful to the trier of fact. Like it or not, you will test the jurors' patience severely just by putting an economist on the stand. They need to know on direct that both you and the witness are on their side and want them to have clear guidance. Make EVERY effort to be sure the jury does not think this testimony is a waste of time.

b. Consider the juror's viewpoint when asking your questions: what does the juror most want to hear from the economist? Then form your questions in order to produce an answer which is most meaningful to the jury.

c. Ask questions that educate the jury in a step by step manner about the important elements of your client's full economic loss.

d. Make sure that in your efforts to insure that the jury can understand the testimony of your economist, you do not use as aids graphics or other materials that are

viscerally confusing to your least competent juror. Most graphs and tables, no matter how simple, will be a significant challenge to your jury.

### **3. Preparing the Expert:**

Once you have you have completed your outline, you will need to turn your attention to preparing your economist to testify. As noted above, and memorable rhetorical flourishes like ñirrational exuberanceö aside, few economists are born communicators and the preparation of these experts is critical to the success of their direct examinations. It is important you convince your economist that he or she must teach and explain both conclusions, bases and methodology to the jury in a way that could be understood by a sixth grader.

Keep in mind the following:

1. Depending on your jurisdiction, most communications that an attorney has with their expert may be viewed as discoverable. You should communicate with your economist as if those communications are discoverable.

2. Build rapport and relationship with your economist by studying in advance and convincing the economist that you understand fully even the most technical aspects of his or her work and report. In this way you will establish trust with the economist that you can then trade on in breaking the testimony down into its simplest terms and in convincing the economist that he or she can communicate simply.

3. After the deposition and the production of your expert's file materials have been completed, consider preparing and using a script with your expert to prepare for trial testimony. Obviously, you will not want the expert to participate in the preparation of the script itself or to have it with him or her at trial. However, with experts who will have significant

difficulty in communicating clearly, the use of a script for use in trial preparation can be effective.

## **THE DIRECT EXAMINATION**

### **1. The Direct Examination Generally:**

The direct examination of an economist requires adherence to the same basic rules that apply to the direct examination of any expert witness. Given the supremely challenging context of the economist's testimony, however, the cost of failing to adhere to these rules will be at least relatively more severe.

Take the utmost care to:

- a. never ask a question to which you do not know both the answer and the carefully prepared form of the answer;
- b. do not ask leading questions;
- c. look at the expert as the expert is testifying and respond with appropriately engaged facial expressions and tone of voice.

### **2. Qualifying the Damages Expert:**

Once on the stand, your economist must demonstrate that he or she is qualified to testify under Federal Rule of Evidence 702, thus showing the court the expert has specialized knowledge that will assist the jury. Take special care that this part of the examination is animated, conversational, and non-technical. If technical terms must be addressed, be sure to ask "What does that mean?" Note the following as well:

- a. Carefully develop the economist's background, focusing on the most impressive aspects of his or her experience that relate closely to your case.

**b.** If the economist has published in prominent professional journals, be sure he or she discusses the qualifications process and peer review concept.

**c.** Highlight the economist's prior trial experience, emphasizing that other courts have found him or her qualified to testify as an expert.

**d.** If your opponent tries to stipulate that the expert is qualified, decline, as it is important for the jury to hear about the expert's qualifications. The judge may limit the qualification testimony, so be prepared to discuss your expert's strongest points early.

### **3. Building the Foundation for Expert Testimony**

Once your economist has been qualified as an expert, develop a foundation for the testimony to follow:

**a.** You may want to start with the date that the economist was retained and the reason for that retention. This is also an excellent place in which to address openly and honestly the fact that the economist is not an ombudsman at large and is being paid to assist your client. Make clear that there is a reasonable basis for the rate charged by the economist for his or her services.

**b.** Make clear what the expert was told about the case, the extent of the expert's assignment, and what the expert has done to form his or her conclusions, including an identification and discussion of all the materials the economist reviewed.

**c.** Emphasize that the economist independently analyzed the plaintiff's potential economic loss and is prepared to provide an opinion regarding those damages.

**d.** Confirm that the economist's opinions are in a final form and have ample support in the record perfected to that point in the trial. This may be a good opportunity to help the jury understand why the economist has to testify late in the trial.



e. Be sure the opinions expressed by the expert are noted explicitly as being held to a reasonable degree of economic certainty. Use this opportunity to have the economist explain what is meant by such a "reasonable degree" of certainty in the field of economics, and use this explanation to bolster his or her credibility.

f. Isolate each opinion and make sure the economist provides a clear factual basis for each conclusion reached. In particular, it is critical that the jury understand how the economist assesses the plaintiff's economic value or earnings potential and how carefully the economist applies his expertise to the specific facts of your case.

g. Make liberal use of "how," "what" and "why" questions. For example: "How do economists know?" or "Where do economists get their information?"

h. Make sure that all final opinions expressed by the economist are documented by way of an exhibit in some form, be it a report or other writing. This will allow the jury to concentrate on each opinion and to see all of the information relied upon by the economist. (For this reason, the expert should be encouraged prior to deposition and trial to prepare a report that is clear and readable.) In some jurisdictions, the offer of an expert's report into evidence will be met with a hearsay objection. To be sure, you do not want to offer a report into evidence unless your economist is prepared to testify to everything in it. However, even if the objection is sustained, chances are the jury will be suspicious of opposing counsel's interest in keeping it from them.

i. Take care that your economist's methodology and numbers do not just magically appear. Lay the ground work for each. One successful way for the economist to illustrate his methods and numbers is to write key words on a large pad in front of the jury, thus allowing the jury to watch and absorb each of these one after the other as they lead toward a

conclusion. If you plan to have your economist use this method, make sure you have him or her practice writing and explaining terms before testifying in order for you and the economist to gain a high comfort level in using and explaining the most important terms (e.g., life expectancy, inflation, present value, discount rate).

**j.** If the expert has developed a chart or other aid, move for its admission into evidence stating that you would like the jury to have it to assist them during their deliberations, thus daring your opposing counsel to object.

**k.** In order to make the economic loss testimony as understandable as possible, avoid too much detail while being certain that the basis for each of the economist's figures is absolutely clear. For example, the jury does not need to understand the concept of "discount rate" as it is used to render a present value damages figure. The jury does need, at least, to understand the simple and critical concept that a higher discount rate will render a lower damages figure and a lower discount rate will render a higher damages figure. If you do not help the jury get that correct on direct, your economist will be vulnerable on cross-examination to being asked to "admit" the relation between discount rates and damages, thus insinuating that he or she was trying on direct to mislead or at least confuse the jury.

**l.** Be sure to have your economist walk the jury through different models demonstrating how certain assumptions affect the results (e.g., earlier or later retirement, the possibility that employment opportunities will not continue in the plaintiff's specialty, etc.). This will blunt the jury's sense that your witness is simply pulling numbers out of the air.

**m.** Listen closely to the testimony, and watch the jury. When necessary, slow the economist down by repeating what he or she said and following up, even politely interrupting, with "Please explain what you mean," or "Could you turn the board to the left so

that everyone can see?ö. This allows you to reinforce the key aspects of the testimony through repetition and, just as importantly, assures the jury you are on their side and want them to understand.

n. öDraw the teethö on any information that may appear to undermine your economist's position, in anticipation of expected cross-examination. Ask how the economist has considered this information and how it should be understood. This will blunt the impact of cross-examination.

o. End the direct examination with the strong, important point that you want the jury to retain and remember from your economist ó his opinion regarding the damages required to make the plaintiff whole.

#### **4. Admission of Supporting Documents into Evidence**

Whether you are representing the plaintiff or the defendant, getting your damages expert's supporting materials into evidence, where necessary, can be particularly challenging.

Consider, for example, a situation in which defense counsel has determined it is crucial that two documents supporting the defense damages expert's are admitted into evidence in a federal court trial.

The first document is a spreadsheet report titled öOccupational Employment and Wage Estimateö of various occupations prepared by the Bureau of Labor Statistics of the U.S. Department of Labor. This report shows that in 2006, the latest data available, the annual mean salary for physicians was \$142,000, substantially less than the amounts used by plaintiff's expert in his calculations.

The second document is a study by the nonprofit Center for Sustainable Living, a well-respected organization in California that purports to perform statistically valid studies on various

aspects of modern life. The Center recently issued a report titled "How to Add Five Years to Your Life and Save the World for Your Grandchildren." The authors of the report surveyed myriad research done in the past decade by the Center, industry groups, universities and "think tanks" on a healthy, sustainable lifestyle. The authors conclude the report with a "Top 10" list of recommendations, including this one: "Avoid overly stressful or demanding professional occupations that, while perhaps offering better pay, over the years take an extraordinarily high toll on physical and environmental well-being." Defendant's expert intends to use this study and its conclusion to support his testimony that, while plaintiff may have lost the chance to be a physician, she is still capable of earning a good living at many types of jobs and living a happy, fulfilling life. Defendant hopes to link this expert's "money isn't everything" testimony to the testimony of an occupational expert's list of potentially satisfying, although lower-paying, jobs that plaintiff should be capable of performing.

In general terms, the Federal Rules of Evidence and applicable case law require that evidence be relevant, and its probative value must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or result in waste of time or needless presentation of cumulative evidence. Rules 401 and 403, FRE. We can assume for purposes of this example that the testimony of the defendant's expert meets these requirements.

Expert testimony is largely governed by Rules 702 to 705.

Rule 702 allows a witness who is an expert by knowledge, skill, experience, training or education to offer an expert opinion if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Rule 703 provides that that an expert may offer an opinion by relying on facts or data reasonably relied on by experts in his field, even though the facts or data are not admissible in evidence. Such inadmissible facts or data may not be disclosed to the jury unless the court determines that their probative value outweighs their prejudicial effect.

Rule 705 provides that an expert may offer his opinion without first testifying about the underlying facts or data unless the court requires otherwise. The expert may be cross-examined on the underlying facts or data.

Rules 801 to 807, addressing hearsay issues, also may be implicated in the admission of the documents.

To introduce the Department of Labor's wage report, the examination of defendant's expert might go as follows:

Q. Dr. Jones, are you aware that plaintiff's expert witness, Dr. Smith, has testified that plaintiff would have earned a goodly sum over her lifetime if she had been able someday become a physician?

A. Yes.

Q. And are you aware that my client, R&R Trucking, does not contest the fact that the plaintiff, unfortunately, is not likely to become a physician? That we're all in agreement on that point?

A. Yes.

Q. And that what we're really debating at the moment, is how much plaintiff might have earned over her lifetime if she had been a doctor?

A. Yes.

Q. What, in your professional opinion and to a reasonable degree of certainty as required in your profession, would plaintiff likely have earned annually as a physician?

A. I used the figure of \$142,000 a year in my calculations.

Q. How did you arrive at that figure?

A. I examined a report called the "Occupational Employment and Wage Estimate," which is regularly published by Bureau of Labor Statistics of the U.S. Department of Labor. This report shows that in 2006, the latest data available, the annual mean salary for physicians was \$142,000. When I say "annual mean," that means half the physicians earned less than that amount and half earned more.

Q. Did you use a different figure for early years and increase it in later years?

A. No. I concluded the most accurate calculation was to just use this figure for all years. She probably would have made less in the early years and more later, but using it for all years, I believe, gives her the benefit of the doubt and is the most accurate way to calculate it. Of course, I had to also discount the total amount to present-day value.

Q. Right, and we'll talk about present-day value in a few minutes. But tell me, what is the Bureau of Labor Statistics?

A. It's a federal agency, based in Washington, D.C. It regularly gathers information and statistics from all types of sources, private and governmental. It compiles all that data and publishes all sorts of reports on matters related to labor, employment issues and job markets nationwide, statewide and in local metropolitan areas.

Q. Now, Dr. Jones, do economics experts such as yourself consider the Bureau of Labor Statistics a reliable source of information?

A. Oh, very much so. There are private companies that also issue reports, but many times they're just a rehash or regurgitation in a different format of something the government already has published. There is no better source of information for this type of data. It's rock solid.

Q. How many years have you been reading wage reports from the Bureau of Labor Statistics?

A. Oh, my goodness. Let's see. I guess for at least 28 years.

Q. You've waded through many a report, then haven't you?

A. Yes, sir.

Q. And so I take it that this report is one that's regularly issued by the Bureau?

A. Right. It's issued at least twice a year, I believe. The law requires them to do it.

Q. Can an average person, like me and these good people listening to us, understand this kind of report?

A. Certainly. Sometimes it takes some training or experience to get through them and understand them. They have some abbreviations and what I call inevitable bureaucratese, but there are usually explanations. Since the Internet came along, there's a lot of helpful information posted on the Labor Department's website.

Q. Let's look at a document that's been marked for identification as Exhibit 22. What is that?

A. That's four pages from the spreadsheet I referred to earlier, the wage report from the Bureau of Labor Statistics.

Q. What is that first page?

A. It's the title page of the report I mentioned, the wage report in December 2006.

Q. And are these three pages the entire report?

A. Oh no, the entire report is much longer. These pages are just excerpts of the report.

Q. And what is the second page of Exhibit 22?

A. This spreadsheet page shows the annual mean salary for physicians nationwide in 2006. The report is fairly long and covers all kinds of occupations. The physician information is right there on line 316 of this page. You go over to the column G marked "a\_mean," which stands for "annual mean." I know that because the explanatory chart for this report tells me that.

Q. And if you'll turn to the third page, what is that?

A. That's the explanatory chart I just mentioned, showing what "a\_mean" stands for.

Q. Your Honor, Defendant moves to admit Exhibit 22 into evidence.

Plaintiff: Objection. This document is hearsay. It's not admissible under Rules 801 to 803. And it's not admissible under Rule 703, Your Honor. Rule 703 says, and I quote, "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

[NOTE: If defense counsel believes the judge is likely to admit the document, he may not mind if plaintiff's counsel states his objection before the jury. If he's not so confident, he may ask if they could approach the bench and do it on the record more quietly, or the jury could be excused. Remember that jurors hate to bounce in and out of the courtroom too much, and they may dislike the idea of secret exchanges or withheld information. Most federal courts and many



state courts require that admissibility issues pertaining to exhibits be resolved by way of in limine motions before the trial begins.]

Plaintiff: Your Honor, this document is "otherwise inadmissible" because it's hearsay. It's a statement, a written assertion under Rule 801(a). Defendant is offering it to prove the truth of the matter asserted, that a physician would earn \$142,000 a year. It does not fall under either of the "not-hearsay" statements of Rule 801(d). It does not fall within any of the hearsay exceptions in Rule 803, either. It's just totally inadmissible.

Court: Mr. Defense Counsel?

Defendant: Your Honor, first of all, this report is not hearsay because we are not offering it to prove the truth of the matter asserted. We are offering it as evidence on which Dr. Jones properly relied in preparing his report and his calculations of plaintiff's lifetime earning loss. It's just one of many pieces of data he relied on. Second, it absolutely does fall within at least two of the hearsay exceptions in Rule 803. Under Rule 803(8), it is a record or report prepared by a public office or agency that sets forth "matters observed pursuant to a duty imposed by law as to which matters there was a duty to report." It also falls under Rule 803(17) because it is a market report or commercial publication that is generally used and relied upon by the public or by persons in particular occupations. So it's not hearsay at all, and even if it were hearsay, it falls within these two exceptions and so it is admissible. Finally, Your Honor, Rule 702 does not say that facts or data relied on by an expert cannot be admitted to the jury. Rule 702 just serves a gate-keeping function. It serves the same purpose as Rule 403. It's intended to prevent a party from trying to confuse or mislead jurors by dumping a bunch of irrelevant material in their lap, hoping that the key facts will get lost in a pile of paper. That's not at all what we're doing here.

We just want this jury to see, in black and white, a hard number that comes from an extremely reliable source that was relied upon by Dr. Jones in his calculations. That's why we introduced only the three relevant pages. The probative value of those pages far outweighs any unfair prejudicial effect, and I submit there is no unfair prejudicial effect at all.

Court: Mr. Plaintiff's counsel? Anything else?

Plaintiff: It is hearsay. Defendant is offering it for the truth of the matter asserted. \$142,000, flat out. Dr. Jones can certainly testify about it, but there's no reason to give Exhibit 22 to the jury. They don't need it and it's not admissible. It is unfairly prejudicial and, standing alone, it has no probative value. And furthermore, defendant has not offered anyone from the Bureau of Labor Statistics to show that this report is really the one it issued.

Court: Well, Dr. Jones testified he has read these for a number of years, and he identified it. It is a public report from a federal agency, right? Are you saying a party has to call a Labor Department employee from D.C. to admit a wage report in every trial?

Plaintiff: No, not necessarily, Your Honor. But these reports are not automatically admissible just because it has a big "D.C." stamped on them, either.

Court: Perhaps not. But I'm going to admit it. I find that it's not hearsay because it was admitted for something other than the truth of the matter asserted, i.e., to show the basis of the expert's calculations. I further find that it falls within the exception in Rule 803(8). And if there is any unfair prejudicial effect, it's outweighed by the probative value. Counsel, you may proceed.

Defendant: Thank you, Your Honor.

## THE CROSS-EXAMINATION

Reduced to its simplest terms, the cross-examination of an opposing party's economist should be focused upon a single theme: the witness has been paid to manipulate otherwise straightforward figures for the purpose of delivering as high (or low) a damages total as possible. Are the basic rules for this cross-examination different than those applied to the cross-examinations of other lay and expert witnesses? No. The stakes are simply higher. So do your best to attend very closely to the following basic principles.

### **1. General Objectives:**

**a.** Make your adversary's economist your own by insisting upon his or her agreement to the key undisputed damages facts supporting your position.

**b.** Most plaintiff attorneys work with one or two economists. If plaintiff's counsel has an active practice, an economist can consult many times with her each year. This fact may be helpful to defense counsel in several ways. First, the bias of "purchased testimony" is apparent. Second, plaintiff's counsel may become complacent in his preparation of the expert in your particular case because he has presented this expert so often that he or she believes preparation is no longer necessary. Third, the defense attorney has an ability to obtain transcripts of testimony by this economist and can compare the "future economic forecasting" contained within older projections to what actually occurred. It is highly unlikely that plaintiff's economist hit a home run every time in his economic forecasting.

**c.** Rarely will plaintiff's economist seek more than a minimum amount of information about the plaintiff (or plaintiff's decedent). Plaintiff economist's "complete" file usually consists of: a birth date, 1-3 years of tax records, job classification, race and gender. Because the plaintiff's economist is really only interested in obtaining data for statistical

averages, this economist has no need for important information such as plaintiff's health habits (alcohol, drugs, injuries and illnesses), level of education, personal consumption figures, bank accounts, cancelled checks and investments. It is the job of the defense attorney to obtain this information and determine if this particular plaintiff is "outside" the statistical norm.

d. It is imperative that the practitioner determine the area in which plaintiff's economist is going to testify. Is he or she going to testify as to lost future earnings? Or is the testimony to be on the issue of hedonic damages? Once the practitioner knows the area testimony he or she can tailor the discovery to attack the witness. Before cross-examining any expert regarding opinions as to economic loss issues, the defense practitioner must prepare a detailed assessment of the qualifications, methodologies and acquired data of each expert witness.

e. Be sure to obtain full discovery of the medical history of a plaintiff (or plaintiff's decedent). Only by obtaining full data will you be in a position to properly assess whether the plaintiff had a normal life expectancy, or whether the plaintiff's previous medical condition prohibited him from taking the job he claims he would have started but for the defendant's negligence.

f. Plaintiff economists want jurors to believe that an economist knows the best investment vehicles for catastrophically injured plaintiff. Many plaintiff economists have zero experience in investing. However, this does not stop the economist from opining to the jury that the most conservative investment vehicles must be used. The defense attorney must ask herself whether this testimony is reliable given the witnesses admitted lack of investment experience. A Frye/Daubert/Khumo-type motion may bar these opinions of plaintiff's economists.

**g.** Attack the economist's credibility in the sharpest terms available to you, whether it is his or her credentials, methodologies, or assumptions. Any economist will have to concede ultimately that at least their choice of discount rate is a guess with respect to future economic conditions.

**h.** Establish an alternative basis for each of the economist's calculations, not necessarily to show that one is right or wrong, but rather to show that there are limitless possibilities.

**2. Short and Simple:**

**a.** Although often difficult, do your utmost to keep the cross examination simple and short. Unless the direct examination has been unusual in the extreme, the jury will only be that much wearier when faced with the prospect of your cross-examination.

**b.** Ultimately, unless you can demonstrate something akin to outright fraud, the jury will not be interested in the predicates for theories and counter-theories. Their instincts and intuitions will most likely cause them to be skeptical of the testimony of an economist. Play to that instinct by obtaining admissions that all you need for different results is different inputs, even inputs that have little or no basis.

**c.** The more time you spend debating nuances of statistical analysis with the economist, the greater the likelihood the jury will sense that you are afraid of the damages figures and lose its focus on, and perhaps its trust in, the principal thrust of your case, which often is the liability issues. Worse yet, the jury will sense that you have also lost trust in your liability case.

### **3. Determine Vulnerable Areas in the Economist's Analysis:**

**a.** Find and focus on an area of attack that makes the largest single impact on the economist's calculation. This should resonate throughout the entire cross-examination. A small change in a soft figure like a discount rate can make a dramatic difference in the damages total.

**b.** Test the economist's qualifications and experience in testifying as an expert. Economists are employed in many different types of positions, most of which have nothing whatsoever to do with the calculation of future tort damages.

**c.** Find inconsistencies in the economist's earlier writings, works, or testimony. For example, has the economist stated elsewhere under oath that he does not render future damages opinions without an independent vocational analysis being performed on the plaintiff? Why is he willing to testify without one in your case?

**d.** Test the legitimacy of expert's sources and methodology. For example, do Wall Street forecasts bear any reasonable relation to the investment prowess of the plaintiff over the remaining years of his or her life? Does the methodology developed for estimating the future value of assets to be purchased by a corporation bear any reasonable relationship to the plaintiff's future tort damages?

**e.** Only if appropriate, contrast your economist's credentials with those of the economist of the opposing party.

**f.** Challenge the impartiality of the economist by targeting the following areas:

**i.** Compensation: Does the fee appear unusually large or the rate unusually high, either in absolute terms or in relation to the work accomplished?

ii. Repeated retention: Does the expert have a relationship with adversary or adversary's law firm? Is he or she a professional witness? Does he or she testify only for plaintiffs or defendants?

g. Keep the examination focused, stay in control, and do not let the economist lecture to the jury. In the case of a rambling economist, don't hesitate to ask for the court's assistance in getting an answer to your question.

h. Make your particular points and sit down. The jury will not award you extra credit for comprehensiveness.

#### **4. General Guidelines:**

a. Prepare an outline of your cross-examination but do not limit yourself to this outline. Outlines can often impede effective listening.

b. Listen carefully to the economist's answers during both direct and cross examination. You, and no one else, is in charge of developing the examination record to best suit your needs as an advocate. Get an answer to your questions and get the answer the way you need it. On direct, this can only be achieved by practicing with the witness.

c. Have all potential impeachment evidence at hand throughout the direct and cross of either side's economist. Whether impeaching or drawing the teeth on potentially damaging material, your lack of preparation in this regard can be fatal in the eyes of the jury.

### **CONCLUSION**

The effective examination of an economist will call upon the broadest possible range of your skills as a trial lawyer. While the context is challenging and the risks are many, the rewards are potentially greater still. Just when they least expect it, jurors can be reminded that

you are on their side, want them to understand, and are willing to help keep them from being misled. What an opportunity!

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