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Effective Cross-Examination Of An Economist

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In many lawsuits such as a wrongful death action, Title VII discrimination claim, or a wrongful discharge case, defense counsel may be confronted with the testimony of an economist who will project lost earnings and pecuniary loss that plaintiff is seeking to recover as a result of the alleged acts of defendant.

The primary goal of the cross-examination of an economist is to provide the jury with a basis to make an award of damages which is substantially less than the amount sought by plaintiff. The following steps will assist any defense counsel in reaching that goal.

1. Fully exercise your rights to discovery. In state court the defense is entitled to the identity of the expert and a summary of the facts and opinions upon which he/she will testify and his/her qualifications pursuant to CPLR 3101(d). In federal court, the defense is entitled to the entire expert report (FRCP 26(a)(2)(B)) as well as the right to take the deposition of the expert (FRCP 26(b)(4)(A)). Those rights should be fully exercised.

2. Investigate background of expert, including publications, pretrial testimony and prior depositions. A search of the expert's background is essential, including all prior testimony and publications. The opinions at trial may well vary from his/her prior statements. The Internet may provide you with a wealth of information regarding the witness — do not overlook it.

3. Familiarize yourself with plaintiff, including the personnel file. The expert economist may have obtained all of his/her information from plaintiff's counsel rather than interviewing the plaintiff or, in a wrongful death action, the next of kin. The information provided by plaintiff's counsel may be filtered and incomplete.

Defense counsel should be determined to become more knowledgeable about the plaintiff, his/her work habits and background than the expert witness. Misinformation or lack of knowledge on the part of the expert can be revealed to the jury and it can effectively undermine the

expert's opinion.

4. Analyze the profession of the plaintiff and its limitations. Defense counsel should become more familiar than the expert with plaintiff's job and its limitations for future advancement and income growth. The expert's lack of knowledge should be emphasized to the jury. The U.S. Department of Labor has information on numerous occupations that can be accessed at www.bls.gov/oco. Also, become knowledgeable of the company where plaintiff worked in order to ascertain whether the expert's projection of numerous years of continued income growth is realistic.

5. Bias. Defense counsel should ascertain the fee the expert will be paid for the time expended on the case, the time he/she spent preparing to testify, the number of times he/she has worked with plaintiff's counsel,

the nature of his/her business, and the extent to which he/she regularly appears for plaintiffs. As with most questions asked on cross-examination, you should know the answers to these questions before asking them. In essence, you want to undermine the claim that the economist is presenting an objective and independent view of the pecuniary loss.

6. Qualifications. In the event the witness is a reputable economist, do not waste time on challenging qualifications. However, if it is the first time the expert has testified in court and rendered an opinion as an expert, it is obviously a fact that should be revealed to the jury.

7. Analyze and be prepared to challenge the assumptions relating to projected inflationary rate and income growth. At present, it is not uncommon for an economist to suggest that future lost earnings would rise at a rate of 4 to 5 percent and that a portion of that increase (3.5 percent) would be the result of inflation. It is customary for the economist to also suggest that the rate would be constant for future years.

Defense counsel should demonstrate that during the past 20 years, this country has not had a single year of

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inflation of 3.5 percent or more and, in fact, during the past 10 years, the average annual inflation rate is less than 3 percent. Although a shift of 1 percent or 2 percent may not significantly impact the amount of the award, the above demonstration can undermine the credibility of the economist by pointing out that a critical assumption is not supported by historical fact. See U.S. Department of Labor — Bureau of Labor Statistics (<ftp://ftp.bls.gov/pub/special.requests/cpi/cpi.txt>).

8. Analyze and be prepared to challenge the assumption regarding personal consumption expenditures. In a wrongful death action, the economist will deduct from the pecuniary loss a percentage that is attributable to the decedent's personal consumption. The higher the percentage attributable to decedent's personal consumption the lower the award.

The economist may rely on the Patton-Nelson Personal Consumption Tables published in 1991 and updated in 1998, *Journal of Forensic Economics*, Vol. II, No. 1, Winter 1998. Defense counsel should be familiar with these tables but, more importantly, counsel should be familiar with the spending habits of the decedent since he/she may have been an above average consumer.

9. Analyze and be prepared to challenge the assumption relating to the work life projection. This projection will have assumed a number of facts including continuous

employment, no early retirement, and continued good health. It is important to determine whether these assumptions are realistic in light of the plaintiff's or decedent's prior job performance, health and the company where he/she was employed. Those facts that undermine the assumption should be pointed out to the expert and to the jury.

10. Analyze and be prepared to challenge the assumption relating to the household services component. In a wrongful death action, the expert will also project a value attributable to the loss of household services. The expert may rely upon a publication entitled *The Dollar Value of Household Work*, Wm. H. Gauger and Kathryn E. Walker, New York State College of Human Ecology, Cornell University, Ithaca, NY. Again, this publication may not accurately reflect the decedent's contribution to the household and those facts that weaken that projection should also be identified to the expert and to the jury.

As with all other cross-examinations, it is far better to make a few solid points that undermine the critical assumptions of the expert rather than devote significant time on minutia and economic theory.

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