

MAXIMIZING YOUR RETURN ON INVESTMENT

by Robert M. Brlas and Karen L. Giffen

There's this case – you've been working on it for a while now, understanding the allegations, interviewing potential witnesses, moving forward with discovery. The plaintiff alleges financial damages as a result of the actions of the defendant. The allegation sounds plausible, but can the alleged damages be quantified and supported – or can they be shown to be speculative and unsupported? You know you have to get your arms around the issue of damages – it is a key element in measuring the value of this case for your client – but “numbers” are not your forte. You believe it likely that you will eventually need an expert to explain it all to the jury and the expert disclosure deadline is not too far off.

The firm-wide e-mail goes out: “Need a financial damages expert. Any recommendations?” After talking to several candidates, the selection is made – you now have a financial expert as part of your team! After congratulating yourself for making an astute selection, you have to ask, “How do I make effective use of this person to get the information and testimony I need?”

There are certain fundamental rules that should be followed in almost any situation to get the most out of an attorney/expert relationship. The following is our list of “Financial Expert Fundamentals.” They are based upon the viewpoints of both counsel and the financial experts developed over the course of many years. We believe implementing these measures will enhance the value you obtain from the financial expert from strategic, efficiency and work product perspectives.

Retention Documents

Most experts will require some type of retention letter that documents the terms of their engagement. Many times the engagement letter will specify that the purpose of the engagement is to retain the person as an expert witness. Remember though, you are at the earliest stage of your relationship with your expert – do you really want to commit to putting this person on the stand already? What if you find that your “expert” can't articulate his or her opinion properly; doesn't have the ability to answer tough questions; turns out to have personality traits which may undermine their credibility with jurors; or maybe worst of all, after completing the analysis, the expert cannot provide an opinion supporting your client's position!

The best way to avoid these problems is to hire your “expert” as a “financial consultant,” whose

expertise is necessary for you to provide legal advice to your client. This gives you the flexibility and time to get to know your expert – see how they work, how they handle tough situations, whether they can explain their findings and most importantly, whether they can provide the opinion your case needs. If the expert is able to deliver on all these counts, you can then amend the retention documents and expand the role to “expert”. If you find the person is unable to deliver what you need, the person's findings will not likely be discoverable since it will be protected as part of your work product.

More than Numbers

“Figure out the damages.” If this defines your expectations of your expert, you could both shortchange yourselves and your client. Individuals qualify as experts for reasons other than their ability to add and subtract. These professionals have typically been exposed to a wide variety of cases and issues throughout their careers. They are more than “number crunchers,” they are business people with a wealth of knowledge. Why not use this to your advantage?

Sit down with your expert and go through the case theories and fact patterns before their work begins. This session can be an important factor in defining how the expert approaches their work and

how they can assist you with your case. For instance, what if the expert can help you with issues beyond damages? There are many occasions where financial experts can assist with liability issues such as causation or piercing the corporate veil. Many times, analyzing issues such as these requires only minimal additional work on the part of the expert and can be helpful in either proving or disproving the entire case.

Discovery

The expert's insights and experiences can also assist you in preparing focused and effective document requests. There is nothing worse than going through a document production process which doesn't provide the information desired or provides it in a manner that makes it inefficient to analyze.

The expert, having gone through the process many times, can assist you in focusing your document request to get the information both of you need. This is not limited to just numbers-related information. In fact, financial statements, tax returns, invoices and the like are only a small portion of what the expert typically needs to understand the potential damage issues in a case. Items such as production reports, subcontractor agreements, ship logs and even weather reports can play an important role in damage analyses depending upon the industry and situation.

Another area where the financial expert can be particularly adept is in the use of electronic records. Obtaining and analyzing hard copies of financial data can be difficult and time consuming.

Obtaining the same information in electronic form can allow you to analyze data in a relatively short period of time compared to the weeks or months it could take to analyze the hard copy version. Electronic data also enables more thorough and cost effective analysis than what could otherwise have been accomplished. The financial expert can help you identify the electronic information that is important to your case and how to obtain it in a format that would facilitate its analysis.

Communication is Key

The question always comes up: “How much information do I share with my expert?” Certainly you don’t want to overwhelm them with information they will spend time (and money) analyzing that is of little or no value. However, you don’t want to keep information from them that may impact their conclusions.

The best way to achieve the proper balance is frequent communication and updates –verbal of course – to share the latest developments. Case theories tend to evolve and change over time. Not only can information developed by counsel influence the damage issues, but information developed by the financial expert can impact counsel’s approach to liability issues and other theories of the case. This can be particularly important on the plaintiff’s side of a case; after all, do you want to win the battle (i.e., a great liability case) and lose the war (i.e., a damage award that does not justify the amount invested in the case).

Open communication between counsel and their financial expert can help to keep the case on track and avoid expensive mistakes along the way.

Depositions

A good deposition can provide significant and helpful information to the financial expert. However, getting the right information can be difficult. This can be due to the witness skillfully evading important questions, or the attorney not understanding how to ask the questions in a way to elicit the information the expert wants.

Before taking depositions, tell your expert who you are going to depose. Although you may think certain witnesses have no bearing on damage issues, you could be surprised. For instance, maybe it would be helpful to know from a salesperson what products have been sold (or not sold) to a certain customer; maybe a member of the maintenance crew can tell you about the reliability of a certain machine that manufactures a key component of a product that is subject to the damage claim. Admissions from these individuals, so far removed from “the numbers,” could significantly impact the damage claim.

When it comes to those witnesses who have a direct bearing on damage-related issues, it can be helpful to solicit potential questions from your expert that will contribute to understanding the important elements impacting damages. An even better solution is to bring your expert with you to assist with these depositions because, even if the correct question is asked, the witness may answer it in a way that does not address the issue with the specificity the damage expert requires. The attorney, not being a “financial expert,” hears what appears to be an appropriate answer and moves on, missing a key opportunity to advance the case without even realizing it! If the attorney’s expert was

sitting there listening to the witness’ answer, the appropriate follow-up questions could be passed along to counsel to “clean up” what was missed.

Testimony— Make the Investment in Preparation

The following scenario may sound familiar: counsel has a “preparatory” meeting with their financial expert before the expert’s deposition or trial testimony. Counsel tells the expert, “You’ve done this many times before, so you know the drill.” The expert agrees, the two of them spend a few minutes going over the testimony in a perfunctory manner, and the meeting is over. Counsel justifies the approach to themselves under the theory that, “This person is a professional. I need to prepare other witnesses who don’t do this for a living. That’s where I need to spend the limited time I have left before trial.”

Of course, nothing could be further from the truth. The flaw in the logic is that preparation is only important for the witness. Preparing counsel to elicit the testimony needed from the expert is just as important. One of the worst things that can happen to an expert is knowing what the key points of their testimony need to be, but counsel never provides the expert the opportunity to provide the testimony because they don’t ask the right questions!

Counsel and the expert must commit the time necessary to make sure the testimony conveys the necessary information in a cohesive and informative manner. Go over the questions that you plan to ask and the questions the expert would like you to ask! Agree on the key points you want to get across; make sure the expert understands your goals for his or her testimony so you are both on the same page. Explore the use of demonstrative exhibits that can assist you in making complex financial testimony easy for the trier of fact to understand. Discuss potential areas of cross examination so the expert can prepare appropriately.

Proper preparation will make both your jobs at trial much easier. And, after all, you have both invested a lot of time and energy in the case prior to trial – this is not the time to let down your guard!

The effective use of a competent financial expert can have a major impact on your ability to achieve the desired results for your client. The role they play in the litigation is up to you; take the time necessary to understand where and how they can help. Solicit their input on a regular basis and invest the time necessary to extract the value they can bring to the case. If you follow the fundamental steps discussed above, you will go a long way toward assuring both you and your client get the return you expect. 

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