

Utilizing Effective Witness Testimony in Damage Matters

By Jim McGovern

This is the first in a series of articles that discuss effective utilization of experts in calculating damages.

We start with a discussion of the various roles in which an expert can be used and some guidance on how to maximize effectiveness. The next will address the legal principles applicable to proving damages and the third in the series will assess various frameworks in which the expert can assess damages.

Damage engagements in commercial litigation have increased greatly over the past years. The role of the financial expert whether as a consulting expert or expert witness has also expanded. An expert can act in a capacity of financial analyst, fact witness, consulting or testifying expert. It is crucial that the expert understand the strategy as well as the role he or she is expected to play at the outset of the engagement.

At the outset, the expert must conduct a thorough risk assessment of the matter as well as investigate any potential conflicts of interest.

Working with counsel, the expert should communicate clearly his needs to access evidence and agree with the attorney on an established communications and sharing protocol of information. The work product or objective of the engagement must be clear to both counsel and expert. The best way to achieve that is through a detailed and organized engagement letter that clearly defines the role of the expert and the mutual expectations of the retaining attorney and expert as to the product and process. If the role or expectations change during the course of the engagement, it is advisable to amend or supplement the original engagement letter to best reflect those changes.

As stated above, the financial expert can be retained in several capacities. Each role represents different challenges and opportunities.

The Expert Witness

As a testifying expert, you're engaged to provide "an informed evaluation of complicated facts through the application of scientific, technical, or otherwise specialized knowledge." See generally Fed. R. Evid. 702 advisory committee's notes (1972). The product is your testimony offered in the form of an expert opinion. As

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a damages expert, you will be expected to offer an opinion on the issues of causation and/or the existence of damages, or perhaps a combination thereof.

The expert is expected to act as both an interpreter and communicator of complex facts and issues in order to assist the trier of fact in coming to a well-reasoned conclusion regarding damages.

As an expert, you should prepare for scrutiny not only of your work, but your history. Rule 26 A (2) of the Federal Rules of Civil Procedure requires counsel to, "In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." In addition work performed by the testifying expert is usually discoverable under a variety of scenarios. This may include documents, written notes, workpapers, reports, and written and verbal communications, as well as electronic files. However, under federal rules, draft reports and communications between the attorney and expert may be exempted from disclosure and protected either as an attorney-client communication in anticipation of litigation or under an attorney work product privilege. State rules on discoverability of draft reports vary. Therefore, it behooves the expert to know the rules of the jurisdiction before producing any draft reports. The scope of discovery also extends not only to the expert, but also to any work performed under his direction by staff. There is case

law that suggests that even when an expert is retained only in a consulting capacity, he may still be subject to discovery, especially if there is communication between him and others involved in the litigation. See *Trigon Insurance Co. v. US*, 205 F.R.D. 277, 289 (E.D. VA. 2001).

As an expert witness, having a clear mutual understanding of the process especially as it relates to discovery is important to function, but perhaps as important is the ability of the expert to remain independent and objective, letting facts lead the work product. If an expert is perceived to lose objectivity or lack independence, at best, the trier of fact may find him less than credible and at worst, be barred from testifying altogether.

Consulting Witness

Unlike testifying experts, a consulting expert is usually not expected to render a formal opinion. Rather, a consulting expert is retained to assist in discovery, interpretation of evidence and providing the attorney with advice regarding potential litigation strategies or determining the value of the case. There can be additional



value as well when the consulting expert can assist the attorney in pointing out weaknesses or potential alternative theories of the matter.

The consulting expert's role generally has less restraint as it relates to discovery and protocol than that of the testifying expert. Facts known to, or opinions held by an expert retained "in anticipation of litigation or to prepare for trial" and who is not "expected to testify at trial are ordinarily exempt from discovery absent a showing of 'exceptional circumstances.'" (Fed.R.Civ.P. 26(b) (4) (D)). See *Republic of Ecuador v. Mackay*, 742 F.3d 860 (2014).

The consulting expert may also have greater latitude to prepare alternative damage models without having to inform the opposition as may be required under the federal rules. That is not to say that a testifying witness cannot or should not also prepare alternative models or calculations, but if done so, they must be incorporated in his findings accompanied with a clear statement of why the alternative model should not be considered reliable (if it will result in a reported finding). To do anything less, the expert risks the loss of credibility, or as some have stated in the literature perceived to be a "hired gun."

The Trier of Fact

While perhaps not as common as the roles of testifying and consulting expert, financial experts can also provide clarity in certain types of complex litigation by being retained as a finder of fact. In this

role the expert is engaged to decide certain facts that are in dispute. For example, financial experts have served as court appointed "Special Masters" where they assist the judge or supplant the judge's understanding of accounting or financial issues that may require a ruling. Fed. R. Civ. P. 53(a).

Additionally, an expert may be asked to act in the role of arbitrator. This position has usually been held historically by lawyers, but with the financial complexity of commercial litigations, it is now common to have financial experts serve in this role, particularly in matters where the dispute centers on accounting issues or damage calculations.

Whether serving in any of the aforementioned roles, when considering a damages engagement the expert must clearly understand the expectations of the attorney who has engaged him. There are times when the needs of the litigation could transform a consulting witness into a testifying witness. In times when this occurs, it should be clearly understood by all parties that the decision to do so should only be done in light of the nature of the information previously disclosed to the expert because any information previously disclosed will then very likely be subject to discovery as applied to expert witnesses. See generally Fed. R. Evid. Article VII. Opinions and Expert Testimony and Fed. R. Civ. Pro. Rule 26(a)(2)(A).

There are some basic rules of the road that should be foremost in the mind of the

expert when followed whenever retained:

- Understand the work product required and clearly outline the responsibilities and protocols for providing the work product to counsel.
- Testifying experts must remain objective and independent.
- Consulting experts should provide advice, but be mindful of the potential that this role could change based on the evolution of the litigation strategy.
- Be mindful that any opinion must be grounded not only upon the facts, but also upon your education, experience and specialized knowledge in the area that you will testify.

Conclusions

Qualifications alone rarely will withstand litigation without "showing the math" as to how an expert reaches the conclusions offered. The expert must provide an easily understandable map that accounts for all the conclusions, including obvious causes that may also contribute to the damage calculations. At the end of the day, damage calculations that accurately account for relevant issues and discount irrelevant issues will meet the test of reasonable certainty.

Opinions grounded in accepted professional methodology and based on reliable and credible data that can be summarized and made easily interpretable by the trier of fact can sustain challenges and provide for an effective deployment and use of the expert witness.

Source: Christopher F. Murphy, Experts, Liars, and Guns for Hire: A Different Perspective on the Qualification of Technical Expert Witnesses, 69 Indiana L.J. 637, 649 (1993).

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