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Using Damages Experts More Effectively

Involving Pros Early Can Change a Case's Direction Entirely

By Karl J. Schulze

Business litigation today rarely progresses without the use of a variety of experts, whether as a proactive or reactive measure.

Categories of experts include those who possess specialized technical knowledge and will assist primarily in establishing or refuting liability, as well as those with financial expertise who will serve as damages experts, provide summary testimony that ties together the testimony of technical experts and attach a value to the claimed damages.

Damages experts can often be used more effectively in business and real estate litigation. The suggestions discussed below will not come as great revelations to attorneys whose practice includes such litigation; rather they are basic principles and techniques that often are overlooked.

Bring in the experts early

Consider retaining them initially as consultants only, with the option of designating them later or selecting another testifying expert if appropriate. Many key actions and events occur early in the litigation process and can set the tone for all that follows, frequently locking one into a strategy that ultimately may not be the optimum.

Examples of assistance that financial/damages consultants can provide in the early stages of a case include discovery assistance, as in, Do you want financial statements only, or do you need to get the general ledger, too? How about accountants' working papers?

Often the early involvement of a damages expert can alter the entire direction of your case. We have encountered numerous instances in which the nature and components of damages presumably were set in stone, but after an initial review issues or facts were brought to light that completely changed the thinking of counsel and client.

A recent example of this was a case in which a software developer had entered into a joint development contract with our client, a large tech company, calling for a minimum payment and the right to terminate by either party without further obligation.

Our client exercised this right and terminated the agreement, and the software developer demanded arbitration, claiming our client had not acted in good faith in pursuing the potential marketing opportunities for the product.

The plaintiff hired an economic consulting firm which created a damage scenario demonstrating that the plaintiff had "suffered" a loss of profits in the billions. We disputed that scenario because the plaintiff previously had not experienced any profit.

Defense counsel's planned strategy was to attack the computation of the damage claim, but after retaining experts at an early stage counsel was advised that attempting to rebut such a claim itself would provide some perceived legitimacy to that claim.

Instead, the strategy was revised to focus on the completeness of our client's actions under the agreement.

Counsel and experts demonstrated at arbitration that our client had performed all of its duties under the contract and that previous payments to the plaintiff had more than compensated them for all amounts due. The arbitrators found in our client's favor, awarding nothing to the plaintiff.

Bring your expert to the opposing expert's deposition

Having your expert attend the opposing expert's deposition can serve three important purposes: first, by consulting with counsel during breaks, your expert can help assure that you get the information you need without leaving any critical questions unasked; second, any new or unexpected testimony presented at deposition can be dealt with "on the fly," again without leaving any important avenues unpursued; third, it shows the other side that you are serious and thorough in your preparation and will serve to keep the opposing expert on his or her toes.

A recent example of the success of this move involved a commercial landlord versus major tenant matter in which the expert attended the opposing expert's deposition, pointing out two calculation errors and one erroneous assumption. The net effect was to bring both experts' numbers into line; the case settled shortly thereafter.

Maximize the use of visual aids

It is an old axiom but quite true in litigation: Tell me and I will forget, show me and I *may* remember, involve me and I *will* remember. This means that, in general, any-

thing that can be converted to graphic form probably will be more effectively communicated.

Examples of such categories include presentation of damage categories and amounts; graphics showing flow of funds or transactions; organization charts and charts showing relationships among parties or entities; and timelines of key events and dates.

But one caveat – try not to over-graphic the trier of fact. An abundance of graphics can dilute their effectiveness. Similarly, showing something in graphic form when it can be explained simply without graphs can be counterproductive. If damages are $1 million, a simple chart stating "Losses = $1,000,000" usually will have more impact than an attempt to convert such information into a graph.

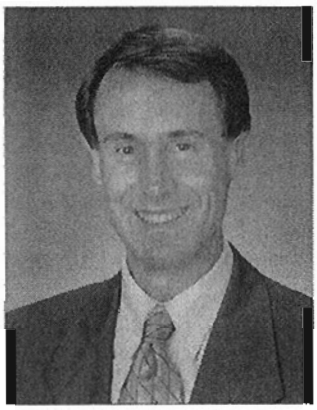
Perform due diligence on your own expert

The other side surely will do this. Ask for and check references. Look up prior testimony and ask the expert directly whether any prior testimony might be used to demonstrate a conflict with the opinion he is expressing in the current matter. Also, it can't hurt to ask whether anything on his curriculum vitae can be challenged as inaccurate or embellished.

Don't overreach on damages

Many a party's legitimate case has been destroyed due to a tendency to push an outrageous monetary claim for damages in the hope that a larger award will result (or, in the defendant's case, recalculating the plaintiff's claim to zero or below). Juries are smarter than this, and will react negatively to such obvious overreaching. A well-supported and fact-based damage presentation is much more likely to lead to the desired result.

These pointers are not rocket science, nor do they represent an exhaustive list. However, keeping these simple approaches in mind when dealing with damages experts in litigated, arbitrated or even mediated matters will usually result in the client being better and more effectively served.



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