

Successful Use of Financial Experts

Financial experts provide invaluable services to the court and to parties in interest in litigation.

By David Bart

Share this:



By effectively understanding and capitalizing on a financial expert's role in litigation, clients and counsel can best leverage their expert's contributions to litigation matters.

The Financial Expert's Role

A financial expert's main role is to educate, by helping the attorney and the court to understand the financial aspects of a case during evidence gathering, trial preparations, possible mediation and in court at trial. Therefore, the expert's ability not only to understand the issues but also to communicate them clearly and in understandable language is paramount.

Beware of the expert who cannot educate the attorney and who requires much guidance. Financial experts should be capable of explaining their methods, underlying data, procedures, ethical issues, proper formats, interpretations, and terminology. They should also be able to explain potential weaknesses, questions they may face, questions for the opposing expert and expected answers, as well as liability and damage theories. The basis for the expert's conclusion must be clearly understood by both the attorney and expert before trial to prevent misinterpretations or surprises.



Protection you can count on at any stage of life.
Group term life insurance – especially for lawyers. [Learn more.](#) →



Streamline. Collaborate. Innovate.
Nasdaq Boardvantage [LEARN MORE](#) ▶  

Streamline. Collaborate. Innovate.

Nasdaq Boardvantage

LEARN MORE ▶



Nasdaq



You are currently viewing 1 of 5 for the month.

Premium Content For:

Litigation Section

Join - **NOW**

Objectivity

Above all, experts need to be objective, offering their unvarnished view of the issues. Financial analysis, data analytics, and other financial and accounting tools offer powerful means to assess the historic and projected outlooks that underpin an assessment of causation, calculation of value, or determination of damages. However, it is essential that experts maintain objectivity—both for their own credibility and for the clients they serve. Performing a biased analysis geared toward supporting a position rather than performing an independent, objective analysis geared toward evaluating strengths and weaknesses poses a significant risk that the expert's views may be considered tainted or even that the expert may be prohibited from testifying. An honest view serves everyone's best interests by indicating the strength of the evidence and analysis that supports the findings while still recognizing the evidence and analysis that contradicts those findings.

Issues Addressed by Financial Experts

Financial experts provide invaluable services to the court and to parties in interest in litigation. As business experts with specialized training, they can provide evidence and opinions that assist the trier

of fact in reaching an understanding of key financial issues in the case. The trier of fact can be a jury, a judge in the case of a bench trial, or an agreed-upon individual or panel appointed in an alternative-dispute-resolution arena such as arbitration.

Beyond standard accounting and tax issues, financial experts acting in a consulting capacity can help attorneys understand a wide range of issues as they prepare trial strategy and can then serve as expert witnesses to communicate those issues in court. The range of topics addressed by qualified financial and business testimony is significant. A representative list includes the following:

- Corporate finance and transaction analysis
- Cash flow results, analysis, and management
- Forensic accounting and fraud investigation
- Business valuations
- Loan compliance, i.e., financial reporting and covenant testing
- Contract compliance, i.e., royalties and revenue recognition
- Business viability assessment and business plan feasibility analysis
- Management and operations evaluation
- Director and officer liability issues
- Lost profits computations
- Antitrust matters, i.e., price-fixing and competitive issues
- Damage computations

The types of professionals available to analyze these and other topics are quite varied, encompassing accountants, business consultants, turnaround experts, fraud examiners, tax professionals, and others with specialized training. Determining the relevance and the role of the financial professional required for each case will depend on the fundamental questions affecting that specific litigation and the counsel's overall litigation strategy.

Credibility

The success of the expert in its role as educator depends on credibility. Expert credentials are vital to establishing credibility with clients and especially with the court. Financial and accounting experts are governed by a wide range of rules defining their professional conduct. For example, certified public accountants are governed by the American Institute of Certified Public Accountants. Financial experts may possess a variety of other designations or certifications from other organizations that demonstrate their qualifications. Those other certifications and participation in professional organizations may impose additional governing concepts upon the expert.

Examples of certifications include the following:

- Certified Fraud Examiner (CFE)
- Certified Insolvency Reorganization Advisor (CIRA)
- Certificate in Distressed Business Valuation (CDBV)
- Certified Anti-Money Laundering Specialist (CAMS)
- Certified in Financial Forensics (CFF)
- Accredited Senior Appraiser (ASA)
- Chartered Financial Analyst (CFA)
- Certified Financial Planner (CFP)
- Certified Financial Consultant (CFC)
- Certified Turnaround Professional (CTP)
- Certified Management Accountant (CMA)
- Accredited in Business Valuation (ABV)
- Certified Information Technology Professional (CITP)

Key Issues to Consider

The following questions may help clients and counsel evaluate and select the best expert for their situation. In addition, these questions can help clients and counsel think about key issues when deciding how to get the most from a financial expert.

- 1 Does the expert have the appropriate background, qualifications, and experience necessary to render an opinion? Has the expert provided expert testimony in this area previously?
- 2 Has the expert ever failed to be qualified as an expert in another case under *Daubert* or another standard? Does the expert have any prior opinions that were excluded by another court? Does the expert have any prior opinions that may adversely impact the current case?
- 3 Will the expert be assisted by a knowledgeable team with sufficient resources to handle the case?
- 4 What rules apply to communications with the expert? In other words, what is the venue (i.e., federal court, state court, or alternative-dispute-resolution arenas such as arbitration or mediation)? What are the court's expectations regarding rules of evidence and the use of expert testimony? Can the expert meet these expectations?
- 5 What privileges will be available to protect the expert's work product and communications between the expert and counsel? What protocols will be put in place to avoid unnecessary written communications between the expert and counsel? Does the expert have experience working within this environment?
- 6 Does the expert have any material conflicts of interest? Are they disclosed?
- 7 Will the expert have fair and complete access to all of the pertinent facts necessary to perform an independent and objective analysis? Will the opinion itself be independent and objective? Will there be any limitations on access to documents or people?
- 8 How could the expert's findings affect overall trial strategy, timing, document requests, or other aspects of the case? Will all findings from the expert's investigation be revealed, even if they jeopardize the case? How could these findings impact other related litigation?
- 9 Will the expert testify as an expert witness or only serve as a litigation consultant? Can the relationship change from litigation consultant to testifying expert, or will a separate expert handle specific issues? When may this shift occur? Can the expert execute the shift? What are the implications for discovery?

Managing the Engagement

Financial experts and litigation consultants should focus on investigating facts and circumstances and performing analyses regarding key financial and accounting questions involved in the litigation. They should not offer legal opinions. Their job includes educating their client and the client's attorney about their business, financial and accounting facts, related analysis, and findings.

As an expert witness, the financial expert's primary role is to educate the trier of fact—be it a judge, jury, or other arbiter—about the issue at hand. It is common for a business or financial litigation consultant to shift roles and later testify as an expert on matters involving business viability, solvency, cash flow forecasts, business performance, tracing of prior transactions, financing alternatives, business valuation, and other topics. Here, the attorney and the expert must remain cognizant of the shifting definition of these roles and the implications for the expert and the overall case.

Effective management of the engagement requires careful, personal oversight and thoughtful communication among the expert, the client, and counsel:

- Communication is critical, but the expert and counsel need to be careful of discovery implications for all written materials, including billing and budgeting documents, depending on the venue.
- Regular meetings, both in person and telephonically, between the attorney and the consultant or expert will be necessary to maintain a clear understanding about the issues, the documents being requested, and the analysis being performed.
- Written reports can help document the work performed (i.e., memos, letters to counsel, the Rule 26 expert report itself) and provide a defined basis for evaluating the expert's findings.
- While strict budgets are often difficult to implement due to the evolving nature of the work, fee estimates and phased work can help prevent surprises.
- Most important, make sure that the professional responsible for overseeing the work or providing the expert opinion is involved in the oversight of her staff and the development of the analysis. Consider using the expert in the discovery process to help ensure that the expert receives the financial information needed to form a complete opinion, and as a means of using the expert's knowledge and experience to help develop the theories of the case. Critically, experts' findings, analysis, and opinions should be their own.

Finally, it is critical to determine whether the expert has the backing and support of a knowledgeable team that can provide the staffing resources to perform the work and that can tackle issues that may arise. A well-supported expert should also have the ability to tap other resources or areas of expertise within the firm for additional research or other needs. In some matters, the expert may be supported by separate, outside litigation consultants. This three-way relationship between counsel, the expert, and the litigation consultant can offer its own strategic benefits: triangulating these roles can help preserve attorney-client privilege by separating the work-consulting role from the expert role.

Conclusion

Above all, the expert must be honest and objective with his client and the court. When experts are perceived as a hired gun or mouthpiece, they will not be seen as useful to the court, and the case itself can be jeopardized.

A good expert will not simply advocate. A good expert should identify key topics and break down component issues to determine a set of basic assumptions or conclusions that can be drawn from the facts. Careful analytical work persuasively presented in an articulate, forthright manner should lead to firmly supported opinions that can make the difference between winning and losing the case.

The successful financial expert will understand and manage these items as a key member of the litigation team. By working together, the attorney and the financial expert can better focus on the many financial issues present in complex commercial litigation matters.

Understanding and managing these issues should help attorneys and clients choose the right expert for their litigation matters.

David Bart is the senior director of financial advisory services at RSM US LLP in Chicago, Illinois.

Copyright © 2018, American Bar Association. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the

You are viewing article 1 of 5 for the month.

Upgrade now to get access to exclusive ABA content.

[View DETAILS](#)

