Effectively Deposing Your Opponent’s Financial Expert

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Financial Experts’ Reports

a) Calculation of Economic Damages:
   • Contract disputes;
   • Lost earnings;
   • Business interruptions;
   • Intellectual Property infringements;

b) Business Valuation;

c) Forensic Accounting
Before taking expert deposition…
...complete fact discovery

a) Interrogatories answered;
b) Documents obtained;
c) Lay and other witnesses deposed
Purposes to depose the expert:

a) To determine the expert’s opinions and the complete basis for those opinions;

b) Undermine or limit the impact of the expert’s opinions and conclusions;
General Outline of Expert Deposition

a) The expert’s qualifications;
b) The expert’s previous testifying experience;
c) The facts upon which the expert based her opinions;
General Outline of Expert Deposition (continued)

d) The analysis and assumptions the expert made;

e) The professional standards followed;
General Outline of Expert Deposition (continued)

f) The professional literature and / or studies considered, and;

g) The expert’s opinion;
Financial Expert’s Qualifications

a) Federal Rule of Evidence 702 – expert witness must be qualified by knowledge, skill, experience, training or education;

b) Is there a connection (“nexus”) between credentials and the specific subject on which the expert opines?
Financial Expert’s Credentials - Sample

a) Public Accounting - CPA;
b) Business Valuation - ABV, CVA, ASA, CBA;
c) Fraud Examination, Financial Forensics – CFE, CFF;
d) Economics – PhD in Economics
Previous Testifying Experience

a) Has the expert testified previously on similar matters?
b) Are the expert’s opinions consistent with previous testimony?
c) Has the expert been disqualified or barred from testifying?
The Facts

a) What documents did the expert receive?
b) What documents did the expert review?
c) Did the expert make additional requests for information?

*The selection of documents can create bias!*
e) What other documents / date did the expert consider?

- Government statistics (labor, economic, financial);
- Industry data;
- Market data;
- Other texts, standards or documents?
Analysis and assumptions - methodology

a) Does the damage model comport with the facts and legal story presented?

b) Does the damage model fit within statutory guidance, contract language and case law?
Financial Expert Report – Key Elements

Goal – construct a damage model to measure the financial amount required to make the injured party whole.
Financial Expert Report – Key Elements (continued)

a) Measurement points:

- Ex Ante (“from before”) – damages measured on the date of the “event”;
- Ex Post (“from after”) – damages measured as of the date of the report or anticipated trial date.
Financial Expert Report – Key Elements (continued)

b) Comparative scenarios:

- Before and After;
- But For;
- Yardstick;
- Market Share.
The Before and After Method

Keys to employing the Before and After Method include having:

1) Sufficient historical data upon which to build a reliable forecast.
2) Similar economic and industry conditions during the before and after periods.
3) Data and information necessary to thoroughly analyze each period.
Universal “But For” Model

Universal Damages Model

"But For" Profits
Actual Profits
Best Case Profits
The Yardstick Approach

• With the Yardstick Approach, the damages expert attempts to measure damages by comparing the performance of the impacted business after an event to the performance of a comparable business during the same period.

• Factors to consider can include size, location, customer base, market share, and product differences.
Financial Expert Report – Key Elements (continued)

c) Assumptions in Financial Projections:

• Future growth rates (nominal vs real);
• Discount rates (risk free and risk adjusted);
• Is there bias in client and counsel provided assumptions?
Financial Expert Report – Key Elements (continued)

d) Quality of Work:

- Were appropriate documents used?
- How was market or industry data defined, gathered, analyzed and interpreted?
- Are there clerical errors in calculations?
Financial Expert Report – Key Elements (continued)

d) Quality of Work (continued):

• Did the expert adhere to applicable professional standards?
• Did the expert test the analysis against competitor or industry experience?
Daubert Challenges

a) Qualifications – the expert does not possess the prerequisite qualifications;

b) Methodology – the expert did not use appropriate methodologies;
Daubert Challenges (continued)

c) Application – the expert failed to apply the methodologies properly, and

d) Support for Opinions – the expert failed to support his conclusions or establish a direct link between the litigated actions and the calculated damages.
Common Errors in Financial Experts’ Reports

• Failure to establish a causal link;
• Failure to consider other factors contributing to losses;
• Failure to perform reasonableness check;
• Limited access to relevant data;
Common Errors in Financial Experts’ Reports (continued)

- Failure to consider independent data;
- Failure to distinguish between fixed and variable expenses;
- Failure to consider mitigation effort;
- Relying on a “cookie-cutter” approach.
Questions?

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