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USING EXPERT WITNESSES IN LITIGATION

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USING EXPERT WITNESSES IN LITIGATION

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The Litigation Consultant v Expert

A. The Litigation Consultant:

- Provides advisory services to the attorney
- Helps prepare the case for trial
- Does not testify or issue a report of his/her opinion
- Often described as "an adjunct to the lawyer's strategic process."

B. The Expert Witness

- An individual by virtue of education, training, skill or experience is believed to have expertise and specialized knowledge in a particular subject beyond that of an average person
- Issues a report and testifies at trial
- Used by both sides to advocate differing positions

C. Why it matters whether the individual is a Litigation *Consultant* or an *Expert*

- The discovery rules distinguish between the two and place different disclosure requirements on an expert
- Know your forum. Know your rules

D. The Discovery Rules:

- In federal court: FRCP 26(a)(2)
  - FRCP 26(a)(2)(A):
    - Requires a party to disclosure the identify of any witness to be used at trial
      - This is the expert, generally not the consultant
  - FRCP 26(a)(2)(B)(ii):
    - Requires the expert to provide a written report that must include:

- Complete statement of all opinions the expert will express and the basis for them
- *The facts or data considered by the expert in forming those opinions* – regardless of whether the expert relied on documents that were privileged
- Any exhibits the expert will use to summarize or support the opinions
- The expert's qualifications and publications for the prior 10 years
- A list of all other cases during the previous 4 years that the witness testified as an expert at trial or deposition
- Statement of compensation

- Attorney working with the expert needs to be diligent and make sure that the report is thorough and contains all of this information
  - Assume your adversary does her homework – you should too
  - Conflict check: Want to identify any prior cases in which your expert gave a contradicting opinion

- FRCP 26(b)(4):
  - Amended effective December 1, 2010
  - The old rule did not carve out exceptions to the disclosure requirements – which led to routine discovery disputes about certain disclosures
  - Now, Rule 26(b)(4)(C) protects against the disclosure of certain specific items under Rule 25(a)(2):
    - Draft reports
    - Communications between attorney and accountant expert unless that communication
      - Relates to compensation
      - The attorney provides a fact that the expert considers in forming the opinion

- How to avoid this: Provide the expert with the pleadings and transcripts of witness depositions instead of telling the expert the facts

- The communication identifies assumptions the attorney made and the expert relied on them in forming the opinion

- FRCP 26(b)(4)(D):

  - Provides for no discovery of an expert "who has been retained or specifically employed by another party in anticipation of litigation or to prepare for trial but who is not expected to be called as a witness at trial.

    - Generally, this is a *consultant*

    - But, this rule is not absolute.

    - A party may obtain such discovery:

      - Under Rule 35(b) - specifically limited to examiner's report when there is a physical or mental examination

      - On showing "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means."

- In state court: CPLR § 3101(a):

  - Provides, "generally, there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action regardless of the burden of proof."

  - CPLR 3101(d)(1): Must disclosure

    - The expert intended to call at trial

    - The subject matter "in reasonable detail" on which the expert is expected to testify

    - Substance of facts and opinions

    - Expert's qualifications

  - CPLR 3101(d)(2):

- Subject to provisions in paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party or by that party's representative (including consultant) may be obtained only upon a showing that the party seeking discovery has substantial need thereof in preparation of his case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *But the court shall protect against the disclosure of the mental impressions, conclusions or legal theories of the representative concerning the litigation*

    - Similar to Rule 26(b)(4)(C)(ii)

- Fact-based inquiry as to whether consultant's work product *may* be discoverable

- Ex. *Concorde Art Assocs., LLC v Weisbrod Chinese Art, Ltd.*, 2009 NY Slip Op 50754(U) [Sup Ct Nassau County, 2009] (Austin, J)

    - Defendants sought the expert's report

    - Court denied request which was prepared in anticipation of litigation

- Ex. *Christie's, Inc. v Zirinsky*, 2007 NY Slip Op 32792(U) [Sup Ct NY County 2007] (Friedman, J)

    - Involved an engineer who was designated as a litigation consultant expert

    - That fact alone did not render from the engineer automatically immune from discovery as the document must be prepared "primarily if not solely for litigation."

    - There was insufficient evidence to identify the exact date the engineer was retained as a litigation consultant

    - The letters at issue did not directly or implicitly threaten litigation.

    - Court ordered *in camera* inspection of documents

- Caveat: Many New York County Commercial Division Judges are moving away from CPLR and adopting the federal model of expert discovery

    - Check the individual practices of each judge

- In arbitration:
    - Depends on what rules the arbitration body uses
    - Find out early on what rules you will be following
        - AAA generally follows the Federal Rules
- Deposing the Expert Witness
    - Allowed in federal court under FRCP 26(b)(4)(A)
    - Generally not allowed in state court unless special circumstances warrant and a court order is obtained (CPLR 3101(d)(1)(B))
        - Ex. *Concorde Art Assocs., LLC v Weisbrod Chinese Art, Ltd.*, 2009 NY Slip Op 50754(U) [Sup Ct Nassau County, 2009] (Austin, J)
            - Defendants sought to depose the expert
            - Court recited special circumstances necessary for expert deposition
                - Evidence on which a party's expert had opportunity to examine no longer exists or destroyed
                - Denied the request because the defendant made the items available to plaintiff for inspection and failed to allege the special circumstances necessary for deposition

E. Clearly distinguish the expert's role through the Retainer Letter

- Should be entered into:
    - As early as possible
    - Between attorney and expert – not client
- If there is a discovery dispute over the expert's work papers and communications, the court will look to the retainer letter to determine the expert's role
    - Ex. *Delta Financial Corp. v Morrison*, 14 Misc3d 428 [Sup Ct Nassau County 2996] (Warshawsky, J)
        - Plaintiff sought discovery concerning an accounting firm that was hired in 2002 by the corporate defendant to assist with the preparation of its financial statements and conduct 2 residual

certification evaluations. That same accounting firm was retained in February 2003 to serve as a litigation consultant expert to assist in understanding the complexities of the valuation of the certificates.

- The discovery sought pertained specifically to the accountant's work as a litigation consultant, which the defendant argued was protected by privilege and not subject to disclosure. The plaintiff argued that if the accountant had not been hired as a litigation consultant, there would be no question that it would have the right to discovery any analyses the accountant did for the certificates because he was a fact witness.

- Court engaged in thorough step-by-step analysis

    - Was the accountant retained as a litigation consultant – *i.e.* what did the retainer letter say

    - Are litigation consultants offered protection from discovery – CPLR 3101(d)

        - Party claiming the protection bears the burden of proving it

    - Are the documents at issue cloaked with that protection – *i.e.* where they created as a result of either the litigation consultant retention or communications made in furtherance of that retention (versus created when the accountant was simply acting as the client's accountant apart from litigation)

    - Are there exceptions to the protection privileges - CPLR 3101(d)(1)(i)

- Concluded that the accountant was retained as a litigation consultant who was outside the reach of 3101(d)(1). It went so far as to say that even if that same accountant was then designate as a witness to testify at trial and then become an expert witness, that would not change the disclosure requirements under the CPLR, which require only the substance of the facts and opinion, and a summary of the grounds for those opinions – not the specific documents

F. Retaining same expert as litigation consultant and testifying expert

- Not precluded by the federal rules or CPLR

- The pitfall: Information and documents protected from discovery may be subject to disclosure

    - If you consultant prepared a report as a *consultant* and then, as an expert, relies on his own report and findings, that report may be subject to discovery under FRCP 26(a)(2)(B)(ii)

    - Example: *American Steamship Owners Mut. Protection & Indemnity Assoc., Inc. v Alcoa Steamship Co.*, 04 Civ. 4309 [SDNY 2006] (Francis, J)

        - Attorney who had been a legal consultant to the plaintiff was subsequently retained as a rebuttal witness. The defendant sought production of a letter that the witness had received while acting in capacity as the consultant, which was not prepared or reviewed in connection with his expert role.

        - The court ordered production of the letter stating "it is unlikely that an expert can cast from his mind knowledge relevant to the issue on which he is asked to opine merely because he learned of its prior to receiving the assignment."

        - In a footnote, the court stated "of course, the [plaintiff] could have avoided this result by choosing an expert with whom it had no prior relationship and then being circumspect in choosing what documents to provide for the expert's review."

    - Example: *Semi-tech Litigation LLC v Bankers Trust Co.*, SDNY 2004

        - Plaintiff retained witness as a non-testifying consultant and subsequently designated him as testifying witness. At deposition, plaintiff's counsel refused to let witness answer questions concerning communications on the basis of privilege, and plaintiff refused to produce certain documents on that basis as well

        - Court stated that under FRCP 26(a)(2), the adverse party is permitted to probe on deposition the data the witness considered in forming his expressed opinions.

        - Ordered production of all documents considered, regardless of the date on which the information came to the witness's attention and ordered him to answer all questions on deposition.

    - Example: *Beller v William Penn Life Ins. Co.*, 15 Misc3d 350 [Sup Ct Nassau County 2007] (Warshawsky, J)

- Accountant was hired as a litigation consultant *and* testifying witness

- During deposition, the witness was instructed not to answer certain questions unless he could do so without divulging his "thought process in connection with the litigation." Unsurprisingly, the witness said he could not distinguish between the attorney work product and the mechanics of the assignment itself.

- Specifically, the accountant refused to answer questions concerning 4 communications he had with the attorney

- Court looked to retainer letter – dated November 29, 2006 and expert report dated December 1, 2006.

- Found that as of the time the accountant began working on the assignment, he was both a litigation consultant and an expert.

- The "slope became slippery" when the attorney's communications contained not only the attorney's mental impressions, but certain facts.

- Court stated that when an expert is deposed, the adversary is allowed to inquire upon what information did the expert render his/her opinion (what was the basis of the opinion), just as the expert report that is to be provided to the adversary is to state in reasonable detail the subject matter on which each expert is expected to testify the substance of the facts and opinions of which each expert is expected to testify, the qualifications of each expert witness, and a summary of the grounds for each opinion.

- It was clear to the court that the attorney provided necessary explanations to the accountant for him to complete his report. The plaintiff's counsel (seeking disclosure) argued those were not mental impressions of defense counsel. However, because the court could not determine the propriety of the questions, he gave the plaintiff a choice: (a) submit written questions in the previously precluded areas, avoiding anything that defense counsel said to the witness that reflect mental impressions or (b) reopen deposition into precluded areas subject to parameters.

Who's Your Expert?
The Trial Expert v. The Litigation Consultant

By Hillary A. Frommer

To most lawyers and clients, the "expert" is the individual who persuades a jury of a party's position with his or her superior knowledge and stature in the professional community, be it in medicine, engineering, accounting, or any other technical area. That is not the only role of an expert. There are two types of experts in litigation: the trial expert and the litigation consultant. The trial expert is, by virtue of his or her education, training, skill or experience, believed to have proficiency and specialized knowledge in a particular subject beyond that of an average person. Utilized by both sides to advocate their respective positions, the trial expert prepares a written report and testifies at trial. The litigation consultant, on the other hand, does not issue a report or testify at trial. Rather, the consultant provides advisory services to the lawyer and helps prepare a case for trial. Defined as "an adjunct to the lawyer's strategic thought process,"[1] the litigation consultant assists in the litigation from its earliest stages by identifying important facts and issues, or the strengths and weaknesses of the case.

The distinction between the two types of experts is critical for purposes of pre-trial discovery. In both the state and federal courts, discovery is generally permitted of the trial expert only. In state court, expert discovery is governed by CPLR 3101(d)(1), which mandates disclosure of: (1) the name of the expert the party intends to call at trial; (2) the subject matter "in reasonable detail" on which the expert is expected to testify; (3) the substance of the expert's facts and opinions; and (4) the expert's qualifications. On its face, CPLR 3101(d)(1) does not apply to the litigation consultant who does not testify at trial. However, the consultant is not always (or automatically) immune from discovery. CPLR 3101(d)(2) allows for discovery concerning the litigation consultant in certain, narrow circumstances, stating:

> Subject to the provisions in paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that party's representative (including... consultant) may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Because the materials are disclosed under CPLR 3101(d)(2) only pursuant to a court order, the statute instructs the court ordering the disclosure to "protect against the disclosure of the mental impressions, conclusions or legal theories of the representative concerning the litigation."

The Federal Rules of Civil Procedure similarly limit discovery to the trial expert. Rule 26(b)(3)(A) exempts from discovery "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's...consultant...)" unless: (1) the materials are otherwise discoverable under FRCP 26(b)(1), the general rule addressing the scope and limits of discovery; or (2) the requesting party demonstrates a substantial need for them to prepare its case, and cannot obtain their substantial equivalent without undue hardship.[2] If a court orders discovery of a litigation consultant's materials then, under Rule 26(b)(3)(B), it must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories" of that consultant.

Discovery disputes frequently arise when parties seek documents prepared by or sent to a litigation consultant, as such materials are rarely produced without opposition. In those circumstances, courts engage in a fact-based inquiry to determine whether a litigation consultant's materials are in fact discoverable under the applicable rules. Indeed, CPLR 3101(d)(2) and FRCP 26(b)(3) raise numerous factual questions: Was the litigation consultant's work product prepared solely in anticipation of litigation or for trial? Do the materials sought contain the litigation consultant's mental impressions, conclusions or any legal theories? Is the requesting party's need for that material substantial? Can the requesting party obtain substantially the same information from other sources? What constitutes undue hardship?

For example, in *Oakwood Realty Corp. v. HRH Constr. Corp.*, the Appellate Division affirmed the trial court's decision ordering the plaintiff to return a report prepared by the defendant's litigation consultant, upon finding that it had been prepared in anticipation of litigation and thus was exempt from disclosure under CPLR 3101(d)(2). Similarly, in *Skolnick v. Skolnick*,[3] the respondent was alleged to have forged certain checks that were the subject of that turnover proceeding.

The respondent sought to obtain documents that the petitioner had provided to a handwriting expert, and communications between petitioner's counsel and the handwriting expert. The court denied that discovery, concluding that the handwriting expert was retained as a litigation consultant and the subject materials were prepared in anticipation of litigation. In *Christie's, Inc. v. Zirinsky*,[4] the plaintiff sought from the defendants' engineer, who had been the defendants' "long-time consultant," certain letters between the defendants, defense counsel, and the engineer. The defendants argued that the materials were immune from discovery because the engineer was a non-testifying litigation consultant. The court found, however, that merely naming the engineer as a litigation consultant did not automatically render the materials immune from discovery. The court also stated that the fact that letters between the engineer and the defendants were routed to the defendants' counsel did not protect them from discovery, because the documents must be prepared "primarily if not solely for litigation" for such immunity to attach.[5] Importantly, the court ordered an *in camera* inspection of the documents at issue—and the documents were thus potentially exposed to the plaintiff—because it could not determine, on the record before it, whether the letters had been prepared in anticipation of litigation.

So now the question becomes, can one expert wear both hats in the same litigation? Technically, yes. Neither the state nor federal rules prohibit a party from retaining a consultant to help prepare a case for trial and then designating that same individual as a trial expert. But beware: by engaging the same expert as consultant and trial witness, a party runs the risk that information provided to the consultant, which is generally not subject to disclosure under CPLR 3101(d)(1) or FRCP 26(b)(3)(A), may become discoverable.

For example, materials an expert obtains while acting as a consultant may become discoverable if the expert then relies on them in forming the opinions to which he will testify at trial. This is precisely what occurred in *Semi-tech Litigation LLC v. Bankers Trust Co.*[6] The plaintiff retained an expert as a litigation consultant and subsequently designated him as a trial witness. During discovery, the plaintiff refused to produce documents that it had provided to the expert while the expert was acting in his consultant capacity and before he was designated as a trial witness, but which the expert relied on in forming his opinions. The plaintiff's counsel also prohibited the expert from answering questions at his deposition about communications he had with the plaintiff during that "consultant" period, even though the expert testified that he relied on those very communications in forming his opinions. Pursuant to FRCP 26(a)(2), an adverse party may question an expert on the data he considered in forming his expressed opinions. The court therefore ordered the plaintiff to produce all documents the expert considered in forming his opinions, regardless of when the expert obtained them, and ordered the expert to answer all questions at his deposition concerning that same subject matter.

A similar situation arose in *Beller v. William Penn Life Ins. Co.*[7] The defendant retained one accountant as both a litigation consultant and testifying witness. During the accountant's deposition, agreed to by the parties notwithstanding CPLR 3101(d)(1)(B), the expert was instructed not to answer questions unless he could do so without divulging his "thought process in connection with the litigation."[8] Unsurprisingly, the accountant refused to answer questions about certain communications he had with defense counsel on the grounds that he could not distinguish between attorney work-product and the mechanics of the assignment itself. A discovery dispute ensued. However, in arguing against the disclosure, the defendant did not attempt to differentiate the accountant's role as consultant from that as trial witness.[9] The court noted that the defendant made a "wise" decision and stated that it would have rejected such an argument.[10] Instead, the defendant argued that the communications were immune from discovery as attorney work-product (under CPLR 3101(c)), and as materials prepared in anticipation of litigation (under CPLR 3101(d)). Because an expert's report must contain in reasonable detail the substance of the facts and opinions of the expert's expected testimony and a summary of the grounds for each opinion,[11] the court determined that at a deposition, the adversary may inquire into the information the expert relied on in rendering the opinion. Examining the communications at issue, the court found that the attorney had indeed provided the expert with explanations necessary for the accountant to complete his report, but that parts of the conversations at issue could be protected from disclosure either as attorney work-product or trial preparation materials because they may have included the attorney's mental impressions. Ultimately, the court determined that the plaintiff was entitled to learn from the defendant's expert what was said to him during conversations with the defense counsel which the expert used as grounds for his opinion.

A party may also be required to disclose information it provides to a consultant if a court concludes that an expert realistically cannot segregate that material from the information the expert obtains while acting as a trial witness. *American Steamship Owners Mut. Protection & Indemnity Assoc., Inc. v. Alcoa Steamship Co.*[12] is a perfect example. There, the plaintiff retained an attorney as a consultant and then subsequently designated him as a rebuttal expert at trial. The defendant sought production of a letter which the expert obtained while acting in his consultant capacity. Although the expert

neither prepared that letter nor reviewed it in forming his opinion, the court ordered the plaintiff to produce it because it was "unlikely that an expert can cast from his mind knowledge relevant to the issue on which he is asked to opine merely because he learned of it prior to receiving the assignment."[13] The court appeared keenly aware that the plaintiff placed itself in that discovery situation by designating its litigation consultant as a rebuttal witness, as it stated in a footnote, "of course, the [plaintiff] could have avoided this result by choosing an expert with whom it had no prior relationship and then being circumspect in choosing what documents to provide for the expert's review."[14]

As the case law reveals, using one expert as a consultant and trial witness in the same case may result in the disclosure of communications between the attorney, client, and expert which may otherwise be immune from discovery. Before designating a consultant as a trial witness, an attorney should consider whether such disclosure, if court ordered, will impact the case, and to what degree. Will a communication be exposed at trial? If so, will it negatively alter the jury's perception of the expert witness or dilute the strength of the expert's opinion? One way to avoid both the disclosure and potentially problematic results thereof, as noted in *American Steamship Owners*, is to retain two distinct experts. However, if there can be only one expert, attorneys and clients should be very careful what, when, and how they communicate with the expert.

Endnotes

1. *Oakwood Realty Corp. v. HRH Constr. Corp.*, 51 A.D.3d 747, 858 N.Y.S.2d 677 (2d Dep't 2008).
2. Fed. R. Civ. P. 26(b)(3)(A)(i) and (ii).
3. 2010 NY Slip Op. 33074(U) (Sur. Ct., Nassau Co. 2010); *see also Concorde Art Assoc., LLC v. Weisbrod Chinese Art, Ltd*, 17 Misc. 3d 1115[A] (Sup. Ct., N.Y. Co. 2009) (court denying the defendant's request for a report prepared by the plaintiff's expert upon finding that it was prepared in anticipation of litigation, because it was done before the action commenced and on counsel's recommendation, and because the defendant failed to show a substantial need for the report or that it could not obtain the same information from other sources).
4. 17 Misc. 3d 1123[A], 851 N.Y.S.2d 68 (Sup. Ct., N.Y. Co. 2007).
5. *Id.*
6. 02 Civ. 0711 (S.D.N.Y. 2004) (Kaplan, J).
7. 15 Misc. 3d 350, 828 N.Y.S.2d 869 (Sup. Ct., Nassau Co. 2007).
8. *Id.* at 351.
9. Although the defendant did not make that argument, the court turned to the retainer letter to see if it revealed whether the accountant was acting as a consultant when he communicated with the defendant's attorney (*Id.*). That proved unhelpful. In light of the dates of the retainer letter and expert report, the court concluded that the accountant was retained simultaneously as a litigation consultant and trial witness. The retainer letter is an important tool. If a party uses the same expert as both a litigation consultant and trial witness, it is crucial to clearly delineate when the expert's role changes. One way to accomplish this is with a clearly stated, dated retainer letter. Courts often turn to the retainer letter to determine whether an expert was functioning as litigation consultant or trial expert (*See id.*; *Delta Financial Corp. v. Morrison*, 14 Misc. 3d 428, 827 N.Y.S.2d 601 (Sup. Ct., Nassau Co. 1996).
10. *Id.* at 352.
11. CPLR 3101(d)(1).
12. 04 Civ. 4309 (S.D.N.Y. 2006) (Francis, J).
13. *Id.*
14. *Id.*

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Let's hear it from the expert

By Hillary Frommer

On a Thursday afternoon in April, I sat down with Dr. Gerald Goldhaber, President and CEO of Goldhaber Research Associates, who has offices both in Buffalo and New York City.

Goldhaber is an expert witness, nationally renowned, with more than 30 years experience in the fields of warning label research and political polling.[1] I asked him to describe some of the most challenging aspects of dealing with lawyers. He provided some very insightful and invaluable advice that all lawyers should follow when working with expert witnesses.

Retain an expert as early on in the litigation as possible

Goldhaber described situations when he was retained as an expert at the tail end of the discovery process, or even after discovery has closed. In his view, a lawyer places both the expert and client at a disadvantage by retaining an expert witness late in the litigation. According to Goldhaber, there are several critical reasons why the lawyer should retain the expert as early as possible. First, the expert needs specific information in order to form the opinion about which he or she will testify at trial. That information comes from the documents and deposition testimony elicited during discovery. By engaging the expert before document discovery is complete and the critical depositions are taken (including the depositions of the parties and relevant fact witnesses), the expert can advise the lawyer what documents to request and what questions to pose at a deposition, which will contain the information needed to formulate the expert opinion. If the lawyer engages the expert after discovery has been completed, it may be too late to get the expert everything he or she needs. As a result, the expert could have an incomplete picture of the facts and ultimately render an incomplete or even inaccurate opinion.

Second, the expert needs sufficient time to formulate the opinion, and in federal cases, to prepare the FRCP Rule 26(a)(2)(B) report.[2] Experts are busy people; they do not just work on your case. Just ask Goldhaber, whose office is inundated with four-foot high stacks of binders, documents, and transcripts relating to the multiple cases in which he is currently engaged. A conscientious and thorough expert, Goldhaber reads every document and deposition transcript. If placed in a time crunch however, it becomes very difficult for him, or any expert witness, to review all of the necessary materials. This can lead to an incomplete report or, what is more embarrassing for the expert, lawyer, and client, sloppy work product.


Hillary Frommer

The decision to retain an expert will ultimately be made by the client, and of course has an impact on the litigation costs. Lawyers should discuss as soon as possible with the client the value of retaining the expert at the outset of the case, because while more costly, this can only benefit the client in the end.[3]

Give the expert everything he or she needs to do the job hired to do

When Goldhaber is retained as an expert witness, he does not want to review a lawyer-prepared summary of a deposition. He wants to read the entire deposition transcript. He does not want to see only those cherry-picked documents which the lawyer thinks are relevant. He wants to see every document produced in discovery by all parties. When Goldhaber has been retained as a rebuttal witness, he wants to review all of the materials his opposing expert reviewed in forming his or her opinion. In fact, Goldhaber told me that when he is retained as a rebuttal expert in federal cases, the first thing he reads is the list of the materials relied on by the opposing expert.[4]

Experts are retained because, well, they are experts. They know better than the lawyers which documents and testimony are important for the opinions they were hired to provide. Thus, one of the first questions the lawyer should ask the expert is "what information do you want?" The answer will likely be "everything," but if it is not, consider giving it all to him or her anyway.

Do not deliberately keep "bad" information from the expert

Most disturbing to Goldhaber is when lawyers outright withhold documents from him which they think are harmful to the case. The only thing that accomplishes is upsetting the expert — who now is missing critical information, will formulate an opinion based on incomplete facts, and is poised to be blindsided during cross-examination at trial with that withheld information. Experts want to be known in the business and perceived by jurors as thorough and accurate. Withholding key information from the expert because it is not "good for the case" jeopardizes the expert's reputation inside and outside the courtroom. In fact, Dr. Goldhaber related to me an incident where an expert resigned from an engagement before trial because the lawyers withheld a critical document from him.

It is important for the lawyer to provide the expert with all of the tools he needs to give the most effective testimony at trial that will hopefully help win the case, no matter how damaging the lawyer thinks they are to the case. Let the expert decide how those "bad" facts impact his or her expert opinion, if at all.

Allow adequate time to prepare for trial

When Goldhaber takes the witness stand in a courtroom, he wants to be confident that he is able to help the lawyer present the expert opinion in the best way possible. This can be accomplished only through adequate preparation with the lawyer. The expert should be well-prepared not only to present his or her opinion in the most effective way, but also to answer the anticipated tough questions on cross-examination.

One interesting tidbit from Goldhaber: when preparing to testify, he likes to know the make-up of the jury (such the demographics and occupations of the jurors), which lawyers obtain during voir dire. In Goldhaber's experience, that information has helped him establish his credibility with the jury as an expert.

Note: Hillary A. Frommer is counsel in the commercial litigation department of Farrell Fritz, P.C. She represents large and small businesses, financial institutions, construction companies, and individuals in federal and state trial and appellate courts and in arbitrations. Her practice areas include a variety of complex business disputes, including shareholder and partnership disputes, employment disputes, construction disputes, and other commercial matters. Ms. Frommer has extensive trial experience in both the federal and state courts. She is a frequent contributor to Farrell Fritz's New York Commercial Division Case Compendium blog. Ms. Frommer tried seven cases before juries in the United States District Court for the Southern and Eastern Districts of New York and in all of those cases, received verdicts in favor of her clients.

1 Dr. Goldhaber's clients have included Fortune 500 companies, educational institutions, and governmental organizations. He has written and edited 10 books and is a frequent lecturer on the topics of warnings and communication. More information about Dr. Goldhaber and Goldhaber Research Associates is available at www.Goldhaber.com.

2 If expert is writing a report, tell him immediately when that report must be produced in the otherwise—not the week before it is due.

3 When deciding whether to retain an expert, the lawyer should have a candid discussion with the expert about his or her fees, and ask the expert to prepare a budget that includes how much time the expert anticipates reviewing the discovery materials, and the expected costs for such review.

4 Those materials must be disclosed pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure.

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Our File No. [redacted]

May 22, 2009

BY FACSIMILE
Mr. [redacted]

Re: [redacted]
Index No. 08-[redacted] (Supreme Court Suffolk County)

[redacted]
Index No. 08-[redacted] (Supreme Court, Suffolk County)

Dear Mr. [redacted]:

This letter serves to confirm the engagement by Farrell Fritz, P.C. ("FF") and [redacted] (the "Client") of Marcum & Kliegman, LLP ("Consultant"), wherein Consultant is being retained to provide certain professional services as a consultant solely for the purpose of assisting FF in providing legal advice to the Client with respect to the above-referenced actions. All consulting services performed by Consultant pursuant to this agreement shall be in accordance with the terms and conditions set forth below.

Consultant will provide expert services that, in its professional judgment, are appropriate for this matter and in accordance with applicable professional and ethical standards. Consultant agrees that it will be reasonably available to confer with FF upon request, will provide FF with such documents and information as Consultant may possess, and as FF reasonably may request relating to the matter, will disclose all facts and circumstances of which Consultant is aware that may bear upon its opinion, and will otherwise assist FF's efforts as we reasonably request.

Consultant understands that it has been retained by FF, on behalf of the Client, and will submit all reports, communications and work product to FF. Consultant understands that it may be necessary for FF to share with Consultant, FF's theories of the case, strategy, considerations, mental impressions, conclusions and other thought processes that relate to communications

between FF and Cient, and, at times, to include Consultant in meetings with Client. Consequently, Consultant understands that the work performed by Consultant will be confidential, constituting a portion of FF's attorney work product, and is to be regarded as being covered by the attorney-client privilege and the attorney work-product doctrine.

Consultant's fees shall be based on the amount of time Consultant actually works on the engagement. Consultant agrees that the Client is to be solely responsible for any and all fees. The Client's consent to such arrangement for payment of Consultant's fees shall be acknowledged by Client's signing of this retainer agreement. A copy of Consultant's rate sheet is annexed hereto as Exhibit "A."

Consultant shall immediately notify FF of the occurrence of any of the following events: (a) a request by any person not previously designated by FF or the Client to possess the authority to act on behalf of FF or the Client to examine, inspect or copy any work papers, test results, records, reports, findings, recommendations, data, memoranda or other documents prepared by Consultant solely in connection with this agreement or submitted to Consultant by someone other than the requester relating in any way to its role as a consultant under this agreement; (b) an attempt to serve, or the service of, any court order, subpoena or summons on Consultant which requires the production of any such documents; and (c) the exhibition or surrender of any such documents in a manner not expressly authorized by FF or the Client.

Consultant understands that FF may also wish to engage Consultant to assist FF by providing expert witness services in this matter. Should FF wish to engage Consultant in that capacity, FF's decision will be made in light of the nature of the information previously disclosed to Consultant. In such case, Consultant understands that any work performed in an expert witness engagement, as well as any other information disclosed to Consultant, may be subject to the rules of discovery as appropriate for expert witnesses.

Very truly yours,

[redacted]

Accepted and agreed to as of the date hereof:

[redacted]

By: _____

Name: [redacted]

Title: Partner

_____

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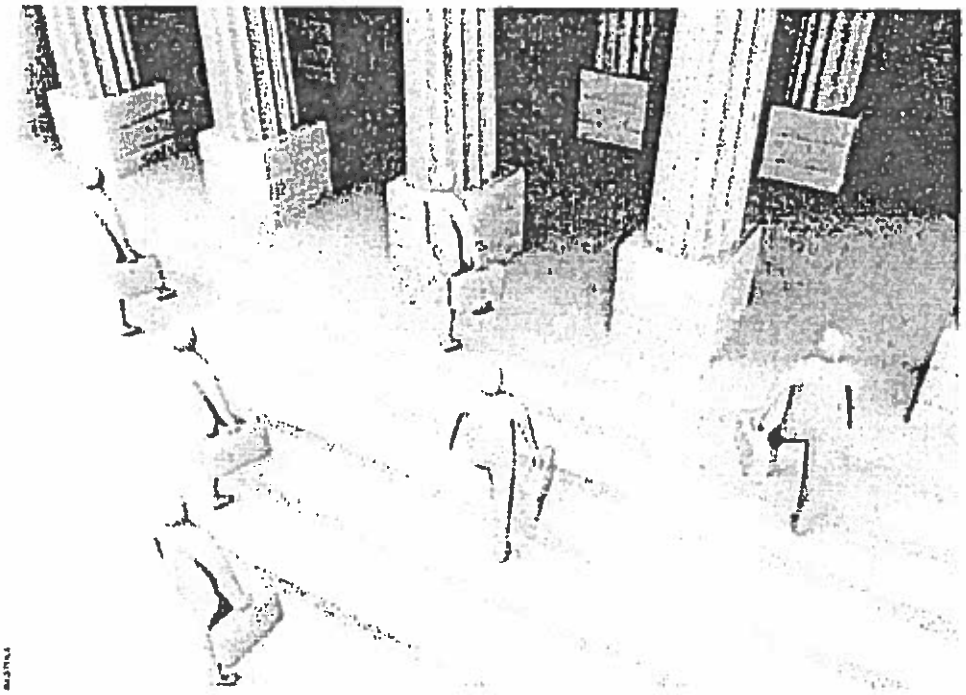

Commercial Division **Rule Changes** Will Foster **Efficiency** and **Predictability**

BY MARGARET A. DALE AND DAVID M. JACOBSON

Several recently adopted changes to the rules of New York's Commercial Division highlight the broad impact that Chief Judge Jonathan Lippman's June 2012 Task Force Report has made, and continues to make, on the state's business courts. These changes, which include increased monetary thresholds, limits on depositions and interrogatories, and a mandatory mediation program in New York County, are designed to make New York's commercial courts more business friendly and to reduce the time and expense of litigation. Some of the rule changes bring Commercial Division practice in line with existing federal court practice. This article surveys the new rules that have been adopted and other potential changes outlined in the Task Force Report that would, if adopted, further reform the Commercial Division. We anticipate that the changes will produce greater efficiency and cost predictability, which will in turn make the Commercial Division a more desirable forum for business litigants.

MARGARET A. DALE is a partner and DAVID M. JACOBSON is an associate at Proskauer Rose, where they practice in the litigation department.

The Task Force Report

In June 2012, the Chief Judge's Task Force on Commercial Litigation in the 21st Century issued a report (the Task Force Report) that recommended wide-ranging changes to the rules, practices, and structure of the Commercial Division. The recommendations focused on docket reform, judicial support and engagement, procedural reforms, programs to facilitate early case resolution, procedures to support international arbitration, and long-term strategic goals. Recognizing the important role that the rule of law and efficient, high quality commercial courts play in maintaining New York's status as a world-leading financial and commercial center, Lippman declared the goal of the Task Force to "make sure that New York remains at the cutting edge of how commercial disputes are resolved [...] and set a new vision for how we in the New York State court system might better serve the needs of the business community and our state's economy." State of the Judiciary, Feb. 14, 2012. Task Force co-chair and former Chief Judge Judith S. Kaye underscored the need for more efficient case resolution procedures to satisfy the needs of litigants when she commented that the Commercial Division is "overburdened" by a "burgeoning, increasingly complex workload".

The first reforms went into effect in September 2013. Several more have gone into effect between June and September 2014, and other reforms are currently proposed and open for public comment before adoption. Still other proposals recommended in the Task Force Report have not yet progressed to rulemaking but may be coming in the near future.

Increased Monetary Threshold

In January 2014, the monetary threshold for obtaining a Commercial Division judicial assignment in New York County increased from $150,000 to $500,000. Monetary thresholds in several other counties doubled in July 2014. Nassau County's $200,000 threshold is the highest threshold outside of Manhattan; several other counties now have thresholds of $100,000 or $150,000. These increased thresholds are intended to reduce the size of the Commercial Division's docket and make it easier for the Commercial Division to handle the larger and more complex commercial cases with greater speed and efficiency.

Early Assignment of Cases

Effective Sept. 2, 2014, parties must seek the early assignment of cases to the Commercial Division. Under newly amended §§202.70(d)-(e) of the Uniform Civil Rules for the Supreme Court and the County Court, Rules of the Commercial Division of the Supreme Court (the Rules), a party seeking assignment to the Commercial Division must file a Request for Judicial Intervention (RJI) designating the case as "commercial" within the 90 days following service of the complaint. If this does not occur, the parties will be precluded from seeking a Commercial Division judge assignment later except by letter application to the administrative judge showing good cause to transfer the case. That said, a non-Commercial Division judge to whom a case is assigned may sua sponte request the administrative judge to transfer a case provided that jurisdictional requirements are met. The rule change is intended to promote early and continued judicial involvement with the goal of facilitating prompt resolution of discovery disputes and monitoring compliance with discovery obligations. Given the tight time frame, litigants should immediately consider whether a newly-filed case warrants assignment to the Commercial Division and make the request within the deadline or face being precluded from seeking transfer.

Limiting Discovery

Several new rules impose real limits on discovery. Rule 11-a, effective June 2, 2014, imposes a maximum of 25 interrogatories per party and, unless otherwise ordered by the court or consented to by the parties, limits the scope of interrogatories to defined topics such as names of witnesses with material knowledge, the computation of damages, and the location and existence of relevant documents and other physical evidence. Contention interrogatories may be served only after the conclusion of other discovery. The rule is intended

» PAGE S13

Rule Changes

« Continued from page 54

to minimize unnecessary burdens that come from excessive interrogatories and acknowledge the benefits of obtaining information directly from witnesses at deposition rather than from interrogatory responses carefully drafted by counsel. The Task Force Report also recommended a similar rule imposing limits on document demands, but as of this writing that recommendation has not progressed to rulemaking.

A proposed rule open for public comment through Aug. 19, 2014, would impose a limit of 10 depositions per party and a durational limit of seven hours per deposition. The rule mirrors Federal Rules of Civil Procedure 30(a)(2)(A)(i) and 30(d)(1). Under the proposed rule, the parties could agree to alter the limits or alternatively a party could seek leave of court to alter these limits upon a showing of good cause. The new proposed rule responds to concerns voiced by in-house counsel about the enormous expense (and undue delays) that unlimited depositions can impose.

Rule 11-b, effective Sept. 2, 2014, modifies privilege log practice to reduce the time and expense involved in the preparation of the logs. The Task Force Report noted that the cost of privilege logs often outweighs their value because logs are frequently "not reviewed or used in any way by the parties." Rule 11-b requires parties to meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the logs and methods that can streamline the process, including logging documents by category instead of individually. Rule 11-b expresses the Commercial Division's preference for categorical designations, which save time and expense, and provides that if a requesting party demands a document-by-document privilege log, the producing party may apply to the court for the allocation of costs, including attorney fees, incurred in preparing the itemized log. To the extent that parties continue to request document-by-document logs, the rule provides that such logs will now include only a single entry for each email chain, as opposed to separate entries for each email within the chain. Additionally, the rule encourages parties with complex cases to hire a Special Master to assist with discovery issues, including to review documents withheld as privileged that are being challenged by the nondisclosing party. With these changes, the new rule seeks to preserve the ability of parties and the court to monitor improper withholding or redaction of documents at a significantly reduced cost.

E-Discovery Guidelines

New Rule 11-c introduces precatory guidelines with respect to the discovery of electronically stored information (ESI) from nonparties, with the purpose of improving the efficiency of e-discovery and reducing the burdens and costs imposed on nonparties. The guidelines instruct parties seeking ESI discovery from a nonparty to reasonably limit discovery requests and to take into consideration several "proportionality factors," including the importance of the issues at stake in the litigation, the amount in controversy, the expected importance of the requested ESI, the availability of the ESI from another source, and the expected burden and cost to the nonparty. Because the guidelines are not mandatory, it remains to be seen what impact they will have.

Expert Discovery Reforms

Rule 13(c), in effect since September 2013, requires parties to confer about expert disclosure within 30 days after the close of fact discovery and to set a schedule for expert discovery that will conclude no later than four months after the close of fact discovery. The rule requires the exchange of expert reports and specifies the information those reports must include. The rule also provides for depositions of testifying experts and requires that expert discovery be completed before a note of issue may be filed. This rule change is intended to provide parties with an earlier, meaningful opportunity to evaluate the strengths and weaknesses of claims, which is expected to lead to the earlier resolution of some cases.

New Accelerated Adjudication Procedures

Rule 9, in effect since June 2, 2014, allows Commercial Division judges to initiate accelerated adjudication procedures (akin to a "rocket docket") in a given case with the consent of the parties. These procedures require parties to conclude all pre-trial proceedings within nine months of the RJI filing. To opt into these accelerated procedures, parties must agree to waive certain rights and objections, including objections based on lack of personal jurisdiction or forum non conveniens, the right to a jury trial, the right to recover punitive or exemplary damages, and the right to an interlocutory appeal. The parties also must agree to limit discovery substantially, with default limits set at seven interrogatories, five requests to admit, and seven depositions per side. Notably, however, these limits may be changed by agreement of the parties. Paired with the new requirement that parties seeking a Commercial Division assignment file an RJI within 90 days of service of the complaint, the combined effect is that parties that agree to accelerated procedures can expect to begin trial no later than one year after the complaint is served.

Obligation to Confer

Newly amended Rule 8(a), effective Sept. 2, 2014, mandates that prior to a preliminary conference parties must confer about voluntarily exchanging information in an effort to aid early settlement. The rule is intended to promote early, cost-effective settlement discussions. In order to avoid disputes, however, the rule stops short of imposing an obligation to exchange information. It remains to be seen how useful this reform will be given the voluntary nature of the exchange.

Staggered Court Appearances

In August 2014, Chief Administrative Judge A. Gail Prudenti approved a proposal for staggered court appearances, where attorneys are scheduled to appear in court at specific times. Staggered court appearances avoid "cattle calls" that can cause attorneys to waste significant time in court before their case is called, and, therefore, should reduce attorneys' fees. Staggered appearances are a regular practice in federal court and had become increasingly common in Commercial Division practice prior to their recent adoption.

Mandatory Mediation Pilot Project

By administrative order effective July 28, 2014, the Commercial Division established a New York County-only mandatory mediation pilot project that will last 18 months. The program sends to mediation every fifth case that is newly assigned to a Commercial Division judge. The procedures governing the pilot project are set forth in the Rules and Procedures of the Alternative Dispute Resolution Program of the Commercial Division. If all parties to a case referred to mediation agree that the case is not suitable for mediation, they can opt out. Otherwise, a party that does not want its case to go to mediation has 30 days to petition the court and make a showing of good cause why mediation would be ineffective, unduly burdensome, or unjust.

> The changes will produce greater efficiency and cost predictability, which will in turn make the Commercial Division a more desirable forum for business litigants.

After a case is referred to mediation, counsel for the parties are instructed to confer and attempt to agree upon a mediator. Within 120 days of the RJI filing, counsel for the parties must jointly inform the court's Alternative Dispute Resolution Coordinator that they have selected a mediator or, alternatively, request that the Coordinator provide a list of neutrals. The parties must then agree upon a mediator or rank the mediators in order of preference. If the parties are unable to agree and the ranking process does not produce a preferred mediator, the Coordinator will designate a mediator. The mediator may allow discovery as necessary to assist in the resolution of the case. The parties have up to 210 days from the time that the RJI is filed to complete the mediation process. If they need more time, the Coordinator can request court authorization to continue the process beyond that date. The mediators will serve at no charge during preparation for the mediation and for a total of four hours during actual mediation sessions. After that, the parties will share responsibility for fees of $300 per hour.

The program is intended to help parties resolve disputes faster and at a lower cost and, therefore, has garnered support from, among others, in-house corporate counsel. It can also be expected to reduce stress on the courts, which may help the Commercial Division handle the cases that remain on its docket with greater speed.

Some have criticized the pilot program for its arbitrariness. Critics argue that parties may waste time and resources mediating a case to no resolution and then, months later, be forced to return to square one and litigate. However, defenders note that even if mediation fails to completely resolve a case, it can narrow the issues or provide parties with a better understanding of their adversary's position, which can assist in resolving cases faster. If the pilot program is a success, it could lead to a more permanent mediation program, perhaps across multiple counties.

Special Masters Pilot Program

Under a new "Special Masters" pilot program, adopted in August 2014 and beginning Sept. 2, 2014, one or more Commercial Division judges will refer complex discovery issues to a pool of seasoned former practitioners who are no longer in active practice. The Special Masters will serve pro bono. The pilot program is scheduled to last 18 months. As of this writing, Chief Administrative Judge Prudenti and the courts had yet to decide which counties will test the pilot.

Possible Future Proposals

The Task Force Report contains numerous recommendations that have yet to progress to rulemaking. Suggestions worth considering include:

- The creation of a searchable database of Commercial Division decisions. This would help counsel in researching and briefing arguments before the Commercial Division and would help the Commercial Division develop its own body of case law, which ultimately provides predictability to litigants that appear before it.
- Strict rules requiring parties to meet and confer regarding discovery disputes and to provide advance notice of discovery motions.
- Letter briefing for discovery motions and conducting discovery conferences by telephone. Letter briefing for discovery motions is regular practice in federal court and reduces time and expense where more formal briefing is not necessary. Many discovery conferences do not need to be handled in person, and allowing telephone conferences would increase efficiency and reduce attorney fees.

Overall Assessment

On balance, the recent changes are important measures to keep the Commercial Division robust and allow it to meet the needs of the business community. Counsel practicing in these courts need to be aware of the new rules and the sometimes serious consequences of failing to abide by them. We expect that the new measures will improve efficiency and cost predictability and will lead to the earlier resolution of some cases. Corporations and their in-house counsel will welcome many of these changes, and as the changes take effect, the expectation is that litigants will find the Commercial Division an increasingly appealing forum for resolving complex business disputes.

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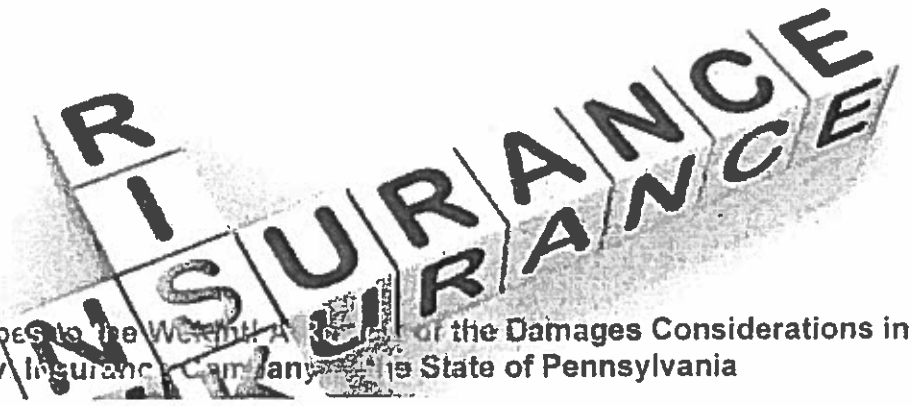

Wait, wait... It Goes to the Weight! A Review of the Damages Considerations in Manpower, Inc. v. Insurance Company of the State of Pennsylvania

Chuck Darder chuckdarder@gmail.com

Download PDF

Spring 2014

Introduction

Manpower, Inc. ("Manpower") sued the Insurance Company of the State of Pennsylvania ("ISOP") regarding an insurance coverage dispute over claims made by Manpower against ISOP for "business interruption losses and the losses of its business personal property and improvements and betterments."[1] The lawsuit arose over a June 15, 2006, partial building collapse that "rendered wholly inaccessible" the offices of Manpower's subsidiary, Right Management, "because the building could no longer be occupied by order of the Parisian Department of Public Safety"[2] (the "Parisian Order"). Notably, Right Management's office space and furnishings were not damaged, but the collapse made it impossible to access the office space and interior furnishings.[3] In time, Right Management relocated, but due to the continued Parisian Order regulations, it was not able to gain access to either its restricted office space or its office furniture inside that office space.[4] The building collapse and Right Management's inability to access the office space or its furnishings (due to the Parisian Order) caused Right Management to lose income and to incur "expenses from the interruption of its business operations."[5]

The inaccessible office was covered by two different policies: a "difference in conditions policy—the 'master' policy—issued by ISOP and covering Manpower's operations worldwide"[6] and a policy carried by Right Management issued by ISOP's French affiliate, AIG-Europe (the "local policy").[7] According to the district court, "the local policy provides the first line of coverage, and the master policy fills in the gaps by providing excess coverage over the local policy's limits, or by covering specific losses that are not insured under the local policy."[9] After the collapse, Right Management recovered $250,000 from the local policy "pursuant to a provision covering losses caused by a lack of access by order of a civil authority"9 and $250,000 from the master policy under that policy's lack-of-access provision.[10] Manpower, however, also sought up to an additional $12 million from ISPO under the master policy for claimed "business interruption losses and the loss of—not damage to—the business personal property located in the office space Right Management could no longer access, as well as the improvements and betterments it had made to that space and had to replicate in its new offices."[11] ISOP denied the claim under the master policy for these losses, and Manpower filed this lawsuit in the district court.[12]

The Motion for Summary Judgment

On its motion for summary judgment, ISOP argued that Manpower was not entitled to reimbursement for the claimed expenses under the master policy because the losses "were not caused by the building collapse, but only by the [the Parisian Order] closing [...] the building."[13] Manpower argued that it was entitled to reimbursement for the expenses "because its interest was not limited to the portion of the building reserved for its exclusive use, but also included common areas, elevators and staircases, safety systems, and the building's foundation and support structure, which were necessary to its use of the leased space."[14] Any damage to the structure Manpower argued, that made it impossible for Manpower to operate out of that location "triggered the coverage under the master policy's general business interruption provision."[15]

In its ruling on the cross motions for summary judgment the district court ruled that "the collapse rendered the entire [building] unstable, at least for a period of eight to ten weeks following the collapse, during which temporary measures were taken to ensure the building's stability."[16] Specifically the district court stated, "it was the collapse itself that prevented Right [Management] from using its offices, and the [Parisian Order] merely confirmed

that the collapse rendered the entire building unstable."[17] As such, the district court ruled that Manpower was "entitled to reimbursement for any business interruption losses it sustained between the collapse and the time the necessary repairs could have been, or were completed, up to $15 million."[18]

ISOP next filed a motion in limine after expert discovery ended to exclude Manpower's damages expert's opinion regarding Manpower's business interruption loss claim arguing that his outcome "was not the product of a reliable methodology."[19] The master policy contained a provision that detailed the methodology for determining lost profits in the event of a business interruption (lost revenues minus non-continuing expenses).[20] The district court ruled that the expert properly followed the prescribed methodology and that his "calculations were, therefore, straightforward."[21] However, the district court went further and stated that the question of whether those straightforward calculations were reliable "turns on whether [the expert] used reliable methods when selecting the numbers used in his calculations—specifically, projected total revenues and projected total expenses."[22] At issue, according to the district court, was Manpower's expert's choice of a 7.76% growth rate in making his calculations (reflecting Right Management's income growth for a five-month period in 2006).[23] ISOP argued this growth rate projection was improper because it did not accurately reflect Right Management's "historical performance, which included a negative average annual growth rate of 4.79% during the period 2003 to 2009, and a mere 3.8% growth rate in the period of January 2005 to May 2006."[24] At his deposition, Manpower's expert explained that he was aware of Right Management's performance from 2003 on, but that he "used a shorter period from which to extrapolate the growth rate because according to Right [Management's] managers, the recent acquisition of Right [Management] by Manpower and the enactment of new policies and installation of new managers had turned the company around by the end of 2005."[25]

The district court did not take issue with Manpower's expert's use of a "basic growth-rate extrapolation..."[26] but instead rejected Manpower's expert's choice of the specific growth rate.[27] Moreover, the district court took issue with Manpower's expert relying on his interviews with Right Management's management because, according to the district court "[Manpower's expert] is not an expert on business management, and thus [Manpower's expert's] conversations with Right [Management's] managers cannot be considered a reliable basis for a revenue forecast."[28] Finally, the district court rejected Manpower's expert's choice "to treat Right [Management] as essentially a new business, the valuation of which requires examination of other indicators to make up for a lack of a track record."[29] As such, the district court ruled in favor of ISOP's motion in limine and excluded Manpower's expert from testifying.[30]

The Reconsideration

Manpower filed a motion to reconsider with the district court arguing that Manpower's expert had performed a more complete analysis than the district court appreciated including "calculating various growth rates" and that the district court "misapplied Rule 702 and Daubert by taking out of the jury's hands the questions of whether [Manpower's expert's] reasonably relied on the testimony of Right Management executives and whether a growth rate derived from a five-month period was reasonable."[31] Manpower also submitted a supplemental report from its expert. This supplemental report consisted of an affidavit in which Manpower's expert:

> *further explained parts of his expert report. For example, he attested that he did more than simply select the five-month growth from one year to the next, citing a table in his report in which he sampled longer and shorter growth periods. [Manpower's expert] said he believed that the growth rate yielded by the five-month comparison was more reliable and conservative that those derived from 12-and 14-month periods (20.1% and 13.67%, respectively).*[32]

The district court again held that Manpower's expert's "conversation with Right [Management's] managers was not a reliable basis for his selection of a growth rate," and that the field of forensic accounting requires an expert to do more than develop a list of possible growth rates and choosing a growth rate from that list.[33] According to the district court, Manpower's expert "should have cited 'literature from the field of forensic accounting' because 'it's what's normal in the field of forensic accounting that matters."[34] As the district court saw it, Manpower's expert was doing little more than relying "merely on his intuition rather than established principles."[35] After this ruling, on September 6, 2011, the district court ruled in favor of ISOP's subsequent motion for summary judgment because "without [Manpower's expert's] testimony, Manpower lacked any evidence to support the existence or the amount of a business interruption loss."[36]

The Appeal

Manpower appealed to the Seventh Circuit Court of Appeals arguing that the district court abused its discretion in not allowing Manpower's expert to testify and the Seventh Circuit agreed: "In this case, we conclude that the concerns that prompted the district court to exclude Sullivan's opinion implicated not the reliability of Sullivan's methodology but the conclusions that it generated. Sullivan 'utilized the methods of the relevant discipline."37 In its ruling, the Seventh Circuit expanded on its prior rulings regarding a trial court's discretion when it comes not to reviewing an expert's methodology, but to reviewing the basic data an expert plugs into an established (or, in this case, contractually prescribed) methodology.39 The Seventh Circuit ruled that the district court's assessment:

> *of the reliability of the methodology ought to have ceased (or proceeded to the second variable in the business-loss equation.) Instead, the district court drilled down to a third level in order to assess the quality of the data inputs Sullivan selected in employing the growth rate extrapolation methodology. What the district court took issue with was not Sullivan's growth-rate extrapolation methodology, but rather his selection of certain data from which to extrapolate. Indeed, the district court effectively acknowledged that its problem was not with Sullivan's methodology but with his data selection when it stated that 'had Sullivan not chosen such a short*

> *base period for calculating lost revenues, I might have found his analysis reliable. The district court thought Sullivan should have selected different data, covering a longer period, as the base for his projection, but the selection of data inputs to employ in a model is a question separate from the reliability of the methodology reflected in the model itself.*[39]

The Seventh Circuit's ruling is consistent with its own previous rulings and is instructive to both lawyers and damages experts.

In another recent case, *Stollings v. Ryobi Technologies*, 725 F.3d 753 (7th Cir. 2013), the Seventh Circuit held that even though a qualified expert used a "rough estimate,"[40] excluding those inputs was an abuse of discretion.[41] In Stollings, the district court found that the expert used a valid methodology "but found the expert's opinion unreliable only because he concluded that one of the key data inputs he used was not sufficiently reliable."[42] The Seventh Circuit reversed because "[t]he judge should have let the jury determine how the uncertainty about [the accuracy of the data input] affected the weight of [the expert's] testimony."[43] Moreover, in Smith v. Ford Motor Co., 215 F.3d 713, 718 (7th Cir. 2000), the Seventh Circuit held that: "The district court usurps the role of the jury, and therefore abuses its discretion, if it unduly scrutinizes the quality of the expert's data and conclusions rather that the reliability of the methodology the expert employed."[44] According to the Seventh Circuit:

> *Reliability, however, is primarily a question of the validity of the methodology employed by an expert, not the quality of the data used in applying the methodology or the conclusion produced. The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment.*[45]

Conclusion

Litigators and experts should be aware of the distinction made here by the Seventh Circuit between a Daubert challenge to methodology and an opposing party's challenge to data inputted into an accepted (or, again, in this case contractually mandated) methodology for determining the alleged damages (or lack thereof) in a pending litigation. In Manpower the Court suggests a damages expert should be granted some leeway (subject, of course, to the finder of facts determination) on the inputs an expert enters into his or her calculations (so long, of course, as the calculations themselves survive the Daubert analysis). This acceptable range is, of course, limited by other Federal Rules of Evidence intended to restrict evidence that is irrelevant, prejudicial, etc. As such, the Manpower decision (and the preceding Seventh Circuit decisions) reveals important considerations for lawyers facing Daubert challenges against their damages expert's choice of inputs into what may be an otherwise acceptable methodology or calculation.

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[1] *Manpower, Inc., v. Insurance Company of the State of Pennsylvania, 732 F.3d 796, 799 (7th Cir., 2013)*
[2] *Manpower, 732 F.3d 796, 799.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id. at 800.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id. at 801*
[19] *Id. (emphasis added)*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id. at 802*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id. at 802-803*

[32] *Id. at 803.*

[33] *Id.*

[34] *Id*

[35] *Id*

[36] *Id.*

[37] *Id.*

[38] *Id. at 805.*

[39] *Id. at 807.*

[40] *Id. (citing Stollings v. Ryobi Technologies, 725 F.3d 753, 767 (7th Cir. 2013)) see also Stollings at 765 ("Rule 702's requirement that the district judge determine that the expert used reliable methods does not ordinarily extend to the reliability of the conclusions those methods produce—that is, whether the conclusions are unimpeachable.").*

[41] *According to the Seventh Circuit: "Admittedly, this is not always an easy line to draw. As the Supreme Court observed in General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997), 'conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data.' The critical inquiry is whether there is a connection between the data employed and the opinion offered, it is the opinion connected to existing data 'only by the ipse dixit of the expert,' id., that is properly excluded under Rule 702."*

[41] *Manpower, 732 F.3d 796, 807.*

[42] *Id. at 807.*

[43] *Id. at 807; see also Tuf Racing Products v. Am. Suzuki Motor Corp., 223 F.3d 585, 591 (7th Cir. 2000).*

[44] *Manpower, 732 F.3d 796, 806 citing Smith v. Ford Motor Co., 215 F.3d 713, 718 (7th Cir. 2000).*

[45] *Smith v. Ford Motor Co., 215 F.3d 713, 718 (7th Cir. 2000)*

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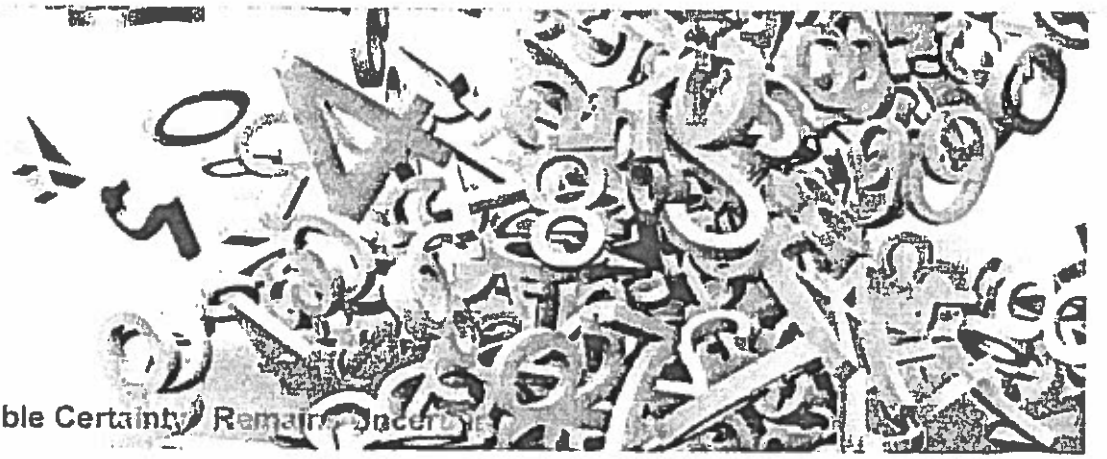

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Spring 2013

Introduction

Many legal and financial practitioners are facing increasing challenges on whether alleged damages have been proven with reasonable certainty. This article explores the theoretical and practical considerations of reasonable certainty [1]

Achieving reasonable certainty as to the calculation of damages is a critical goal in any matter for which damages are to be proven. If a party cannot demonstrate that their damages calculations are reasonably certain, the court is obligated to exclude the testimony. Without this testimony, even successful proof on liability may lead to an award of no damages. Courts have stated it this way:

> *In order that it may be a recoverable element of damages, the loss of profits must be the natural and proximate, or direct, result of the breach complained of and they must also be capable of ascertainment with reasonable, or sufficient, certainty. , absolute certainty is not called for or required.*[2]

Professional literature, court opinions, rules of evidence, and other bodies of knowledge and works of law often use the phrase "reasonable certainty" when discussing damages. However, the threshold for reasonable certainty remains ambiguous. It is important to note that this discussion does not define a specific checklist, mathematical formula, or mechanical manner of deducing whether damages opined by the expert is reasonable certainty. No such specific mechanism exists that can be applied to all matters. Indeed, as described herein, "most courts agree that reasonable certainty as to damages is a flexible, inexact concept."[3] Rather, this piece provides a discussion of the factors, elements, and/or characteristics of expert opinions that can generally be considered for any matter to determine the extent to which damages opined on by an expert rise to the level of reasonable certainty.

The article is segmented into several sections. In the first section, we briefly review the Federal Rules of Evidence on the admissibility of expert testimony. We then consider certain sources from professional literature for discussion and commentary on achieving reasonably certain expert opinions as to the calculation of damages. Finally, we review the recent opinion of one notable judge, Judge Richard Posner, in the case of Apple v. Motorola. In this opinion, Judge Posner provides his guidance and interpretation on the efforts experts should take to achieve a reasonably certain opinion as to damages, at least as it applies in that case. Taken together, these sections are intended to provide guidance to lawyers and experts toward achieving a reasonably certain result.

The Federal Rules of Evidence

The Federal Rules of Evidence (Rule 702) provide guiding principles meant to hold expert testimony to account. Rule 702 has four components:

> The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue
> The testimony is based on sufficient facts or data

> The testimony is the product of reliable principles and methods
>
> The expert has reliably applied the principles and methods to the facts of the case[4]

These four criteria provide the general framework for damages experts to consider in developing their opinion. However, whether an expert's opinion actually meets the threshold of reasonable certainty in any particular court or for any particular matter involves a more significant assessment of the efforts undertaken by the expert to determine damages.

Attempts to Define "Reasonably Certain"

In many cases, courts and learned commentators have provided a definition or interpretation of what reasonably certain means in the context of damages calculations. The following is a collection of certain of those interpretations (emphasis added in each):

> "Does the court think that, given all of the circumstances, this plaintiff has presented ***sufficient evidence to make it fair*** to award it the damages in question."[5]
>
> "Damages for future lost profits must 'be capable of measurement based upon known reliable factors ***without undue speculation.***"[6]
>
> "While it is true that such damages need not be proved with mathematical certainty, neither can they be established by evidence which is ***speculative and conjectural.***"[7]
>
> "The plaintiff has the burden to present evidence with a tendency to show the probable amount of damages to allow the trier of fact to make 'the most ***intelligible and accurate estimate*** which the nature of the case will permit.'"[8]
>
> The amount of alleged loss "***could not be speculative, possible or imaginary***, 'but must be reasonably certain.'"[9]
>
> Lost profits damages should not be "too dependent upon numerous and changing contingencies to constitute ***a definite and trustworthy measure of damages.***"[10]
>
> Lost profits damages should not be based on "too many undetermined variables" and "competent proof" addressing these variables could have removed the "lost profit claim from the ***realm of impermissible speculation.***"[11]
>
> "[D]amages need not be proved with mathematical certainty, but only with reasonable certainty, and evidence of damages may consist of probabilities and inferences... Although the law does not command mathematical precision from evidence in finding damages, sufficient facts must be introduced so that the court can arrive at an ***intelligent estimate without conjecture.***"[12]
>
> "[A]nticipated profits may be recovered when '"they are reasonably certain by proof of actual facts, with present data for a ***rational estimate*** of their amount.'"[13]

As noted, attempts to define reasonably certain have considered phrases such as "rational estimate"; "impermissible speculation"; "intelligent estimate"; "imaginary"; and "intelligible and accurate estimate". These phrases demonstrate courts' attempts to better convey expectations and to frame their evaluation of the damages testimony.

An an article for the Business Litigation Section of the Dallas Bar Association in 2011, Hon. Martin "Marty" Lowy noted that "[w]hatever methods are used, the final calculation, as well as all of its elements, should be reasonable. Put another way, the expert, like the jurors, ***should not leave common sense behind.***"[14](Emphasis added.)

Regarding the courts' varied assessments of "reasonably certain," in 1929, Professor Charles T. McCormick succinctly noted:

> *[A]n examination of a large number of the cases, in which claims for lost profits are asserted, leaves one with a feeling that the vagueness and generality of the principles which are used as standards of judgment in this field are by no means to be regretted. It results in a flexibility in the working of thejudicial process in these cases – a free play in the joints ofthe machine – which enables the judges to give due effect tocertain "imponderables" not reducible to exact rule.*[15]

Indeed these quotes from various courts demonstrate the "free play in the joints" described by McCormick. This supports the concept of a "best efforts" doctrine when evaluating the threshold of reasonably certain. However, a comparison of the following three opinions demonstrate the wide latitude courts have used when evaluating whether "best efforts" necessarily results in a reasonably certain result.

> "If the best evidence of damage of which the situation admits is furnished, this is sufficient."[16]
>
> "Though plaintiff's proof 'not without fault,' it was sufficient because it was the best reasonably obtainable under the circumstances."[17]
>
> "The quantity of proof is massive and, unquestionably represents business and industry's most advanced and sophisticated method of predicting the probable results of contemplated projects. Indeed, it is difficult to conclude what additional relevant proof could have been submitted by (the plaintiff) in support of its attempt to establish, with reasonable certainty, loss of prospective profits. Nevertheless, (the claimant's) proof is insufficient to meet the required standard."[18]

A review of the case referred to in the latter quote is instructive. In that matter, the court's concerns appear to rest with the foundation for the analysis of the expert. That is, while the expert may have utilized "business and industry's most advanced and sophisticated method" in the calculation, if the foundation of such analysis is speculative or unreliable, the result may be speculative or unreliable, as well. The court in that case appears to

emphasize the importance of the "foundation" of the expert analysis in its determination of whether the result is a reasonably certain measure of the damages in that case.[19] The importance of a "stable foundation" was also noted in Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1976) where the court indicated "the plaintiff must show 'a stable foundation for a reasonable estimate' of damages…"[20]

In November 2010, Robert Lloyd of the University of Tennessee, Knoxville, published The Reasonable Certainty Requirement in Lost Profits Litigation: What it Really Means.[21] This research paper provides a comprehensive review of court opinions which considered the reasonable certainty of lost profits damages. In this research paper, Lloyd concludes that there are six factors courts consider "to determine whether a party has proven lost profits with reasonable certainty."[22] Lloyd notes that these factors are:[23]

1. The court's confidence that the estimate is accurate
2. Whether the court is certain that the injured party has suffered at least some damage
3. The degree of blameworthiness or moral fault on the part of the defendant
4. The extent to which the plaintiff has produced the best available evidence of lost profits
5. The amount at stake
6. Where there is an alternative method of compensating the injured party

Several factors listed by Lloyd are seemingly beyond the calculations that are typically prepared by an expert, but may be relevant for counsel's consideration. Lloyd notes that "[i]n most cases, courts deciding whether lost profits have been proven with reasonable certainty consider all or almost all of these factors" but also indicates that "[t]he vast majority of opinions focus on only one or two factors."[24]

This discussion illustrates the challenges that experts face: If the courts provide varied guidance on what is or is not reasonably certain, how is an expert to know whether his or her work is reasonably certain? A common theme in the materials and opinions described is that the expert must develop a foundation for his or her work that is based on reasonable facts and build on that foundation with the expert's best effort using the documents and information reasonably available to them. An expert must then consider what is his or her "best effort." This term, much like reasonable certainty, does not have a standard, clearly articulated definition. In the following section, we review the recent decision of Judge Posner in Apple v. Motorola. The opinion of Judge Posner provides another, recent, review of one judge's assessment of both "reasonable certainty" and "best effort" as it pertains to damages. The opinion of Posner is not likely shared by all damages practitioners, or all judges, but it does provide a thorough discussion of issues pertinent to this article.

Apple v. Motorola

In *Apple v. Motorola*, Judge Posner took a stern approach in affirming that "any step that renders the analysis unreliable…renders the expert's testimony inadmissible." Posner proposed three "tests of adequacy" that the court should consider when exercising its duty as gatekeeper. Of particular interest are the reasons the Apple and Motorola experts failed to meet the threshold of reasonable certainty.

Judge Posner specified three tests to assess the merits of expert testimony:

1. "[w]hether the expert has sufficiently explained how he derived his opinion from the evidence that he considered"[25]
2. whether the expert "[e]mploys in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"[26]
3. "[e]ven where expert testimony is admissible it may be too weak to get the case past summary judgment"[27]

By using these tests, Posner evaluated whether the expert exercised best efforts to develop a:

sound opinion based on
an accepted method applied to
relevant data
judged against the intellectual rigor of an industry expert.

Test 1:

The first test of the adequacy of proposed expert testimony for Posner is "whether the expert has sufficiently explained how he derived his opinion from the evidence that he considered. Any step that renders the analysis unreliable renders the testimony inadmissible. This is true whether the step completely changesa reliable methodology or merely misapplies that methodology." Federal Rule of Evidence 702(d) states that testimony may be admitted if the "expert has reliably applied the principles and methods to the facts of the case."[28] Thus, Posner takes Rule 702(d) one step further. For Posner, a "best effort" at "reasonable certainty" to "reliably apply" principles to the facts of the case no longer appears sufficient.[29]

Sound opinion: The court looks to several key variables to assess whether testimony has achieved reasonable certainty. These variables include sound data, acceptable methodology, and logical opinion. Posner offers an example during his discussion of Expert M's (expert for Motorola) patent valuation. In this instance, Expert M assigned the patent in question 2% of the total portfolio value despite the fact that the actual patent represented only 1% of the total number of patents in that portfolio. Ultimately, Posner concludes that Expert M's testimony would be excluded, because Expert M's declaration does not answer that essential question: How to pick the right non-linear royalty.[30] Posner's criticism indicates his distaste with the unsubstantiated number. It may well be that the patent portfolio consisted of patents of various values (i.e., 100 patents do not necessarily retain 1% each of the total value). Indeed, Expert M may well have had good, qualitative reason to attach a premium to the patent in question. Nevertheless, Expert M's inability to attach this premium tosome quantifiable variable rendered it a "gap" in his analysis. Once again, Posner takes a hard line approach in affirming that, "any step that renders the analysis unreliable... renders the expert's testimony inadmissible." This indicates Posner's consideration of a judicial duty to exclude testimony where it falls short of this first test. Indeed, this appears consistent with the case of ATA Airlines v. Federal Express Corporation wherein Posner stated that, "the evaluation of [expert testimony] may not be easy; the 'principles and methods' used by expert witnesses will often be difficult for a judge to understand. But difficult is not impossible. The judge can require the lawyer who wants to offer the expert's testimony to explain to the judge in plain English what the basis and logic of the testimony are ... If a party's own lawyer cannot understand the testimony ... the testimony should be withheld from the jury."[31] He even proposes that, in particularly complex or technical situations, the court should hire an aid to help the judge gauge the validity of testimony.[32]

Test 2:

The second test states that an expert should "employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the field." "Sufficiency" and "Reliability," for Posner, seem to be evaluated as a "best effort" analysis defined as the rigor that could be expected of an industry expert. This standard is a high one, and particularly relevant to the (a) quality of data, (b) the expert's chosen methodology, and (c) the general standards of analysis (for example: did the expert consider alternatives?).

Quality of data and methodology: Judge Posner in Apple v. Motorola largely melded these two areas by virtue of the fact that he did not believe that the method for obtaining data was sound. Twice Posner finds Expert A (expert witness for Apple) falls short of "best efforts" when compared against the standard of intellectual rigor of the industry expert. Posner appears to further Rule 702 by qualifying the word "reliable" and supplanting the metric "intellectual rigor of the expert in the field." The following example serves as an illustration: Posner states, "I am merely asserting that the survey that Motorola did conduct, which did not look for aversion to partial obstruction and so far as I can tell had nothing to do with its pricing, but rather with helping the company to determine which programs and features are particularly important to users, is not the kind of survey that Expert A – assuming him to be a responsible adviser on marketing or consumer behavior – would have conducted."[33] The inference, therefore, is that sound financial analysis alone may not be sufficient for admissibility of the financial expert's testimony. Indeed, his burden may be greater; a "best effort" at achieving the "reasonably certain" threshold appears to be judged by Posner against the benchmark of the "intellectual rigor of an industry expert." Second, Posner dismissed Expert A on the grounds that his due diligence was not to the standard of the industry expert. "Suppose Expert A had been hired by Motorola to advise on how Motorola might obtain the functionality of the '263 [patent] at lowest cost without infringing on that patent. Obviously, he would not have gone to the patentee for that information! For it would be in the patentee's interest to suggest a method of inventing around that was extremely costly – because the costlier the invent-around, the higher the ceiling on reasonable royalty."[34] Posner's disagreement on the method used to aggregate data for the purposes of the expert's analysis demonstrated to him that the expert fell short of Posner's interpretation of "best efforts" and consequently the threshold of "reasonable certainty." Specifically, he takes issue that the hypothetical "expert in the industry" would not have followed this procedure of market research.

General standards of analysis: On the third point, it appears that a failure to consider alternatives would fall short, at least for Posner, of the "vigorous" standard expected of an industry professional. "This is one fatal defect in Expert A's proposed testimony (referencing the survey criticized), but there is another, and that is a failure to consider alternatives to a 35mm royalty that would enable Motorola to provide the superior gestural control enabled by the relevant claim in the Apple patent. In reference to this situation, Posner once again compares Expert A to the hypothetical industry by creating a hypothetical skit in the text of his judgment. Posner asks his reader to "imagine a conversation between Expert A and Motorola, which I'll pretend hired Expert A to advise on how at lowest cost to duplicate the patent's functionality without infringement:"

> Motorola: "What will it cost us to invent around, for that will place a ceiling on the royalty we'll pay Apple.
>
> Expert A: "Brace yourself: $35 [million] greenbacks."
>
> Motorola: "That sounds high; where did you get that figure?"
>
> Expert A: "I asked the engineer who worked for Apple."
>
> Motorola: "*Dummkopf!* You're fired!"[35]

This dialog serves to illustrate several key points: 1) Posner once again compared Expert A's performance against that of the hypothetical industry expert – in this case, a consultant; 2) A failure to consider alternatives will undermine expert testimony admissibility. Indeed, in Posner's later consideration of a separate Motorola expert, Expert M-2, Posner reinforced this position by excluding her testimony because "Expert M-2 failed to consider the range of plausible alternatives."

Posner seemed to advocate preclusion of expert testimony that falls short of the above thresholds "where an [expert] failed to do so – then his proposed testimony should be barred." Note the definitive nature of his language; he states that testimony "should" be barred, not that it "may" be barred.

Test 3:

Posner's third test – "[e]ven where expert testimony is admissible it may be too weak to get the case past summary judgment" – is less revealing. Simply put, it appears to serve to reaffirm the wide judicial discretion enjoyed by the court in its role as "gatekeeper." Here, Posner cited the case of Hirsh v. CSX Transportation Inc.,36 wherein the court distinguished between the admissibility of evidence and its sufficiency. As circumstances would have it, the court permitted a summary judgment despite the fact that opposition expert testimony was admissible under Daubert.37 In other words, despite a valid expert opinion, the merits of the case may be that the testimony's validity does not compel the court to entertain a trial.

Conclusion

A "reasonably certain" threshold for expert testimony is a function of "best efforts" having regard for the merits of the case. The courts enjoy a wide judicial discretion in determining whether or not the expert's testimony qualifies as a "best" effort and it appears that the courts will look toward several potential variables including, but not limited to: (a) soundness of opinion based upon (b) an acceptable methodology underpinned by (c) relevant data, all of which is to be judged against and, at least according to Posner, (d) the intellectual rigor that could be expected of an industry expert. Finally, where expert testimony falls short of the standard, Judge Posner believes that the trial judge "should" throw out the testimony in question. The word "should" may serve as fertile ground upon which the seeds of a new "duty to exclude" testimony may grow.

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[1] *Of course, with a topic of this breadth and significance, this piece is not meant to serve as a comprehensive analysis of all relevant aspects of reasonable certainty.*

[2] *Morris Concrete, Inc. v. Warrick, 868 So. 2d 429 (Ala. Civ. App. 2003).*

[3] *Milikowsky, A Not Intractable Problem: Reasonable Certainty, Tractebel, and theProblem of Damages for Anticipatory Breach of a Long-Term Contract in a Thin Market, Columbia Law Review, Vol. 108, Page 467.*

[4] *Federal Rules of Evidence (As amended Apr. 26, 2011, eff. Dec. 1, 2011).*

[5] *Lloyd, The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means, November 2010, Page 6.*

[6] *Lloyd, The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means, November 2010, Page 7 (citing Bykowsky v. Eskanazi, 2010 N.Y. App. Div. LEXIS 3317 (Apr. 27, 2010).*

[7] *Lloyd, The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means, November 2010, Page 26 (citing Katskee v. Nev. Bob's Golf of Neb., Inc., 472 N.W.2d 372, 379 (Neb. 1991).*

[8] *Banks, Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?, Albany Law Review, Vol. 74.2, 2010/2011, Page 643 (citing Duane Jones Co. v. Burke, 306 N.Y. 172, 192, 117 N.E.2d 237, 247–48 (1954) (quoting SUTHERLAND ON DAMAGES § 70 (4th ed. 1916)).*

[9] *Banks, Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?, Albany Law Review, Vol. 74.2, 2010/2011, Page 644 (citing Kenford, 67 N.Y.2d at 259–60, 493 N.E.2d at 234, 502 N.Y.S.2d at 131.*

[10] *Banks, Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?, Albany Law Review, Vol. 74.2, 2010/2011, Page 644 (citing Witherbee, 155 N.Y. at 453, 50 N.E. at 60).*

[11] *Banks, Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?, Albany Law Review, Vol. 74.2, 2010/2011, Page 644 (citing 155 N.Y. at 405, 624 N.E.2d at 1012, 604 N.Y.S.2d at 917.*

[12] *Delahanty v. First Penn. BK, N.A., 318 Pa. Super. 90, 464 A.2d 1243 (1983).*

[13] *Independent Business Forms, Inc. v. A-m Graphics, Inc., 127 F.3d 698 (8TH Cir. 1997).*

[14] *Hon. Martin "Marty" Lowy, Proving and Defending Lost Profits Damages, Dallas Bar Association, Business Litigation Section, June 2011, Page 11.*

[15] *Lloyd, The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means, November 2010, Page 36 (citing Charles T. McCormick, The Recovery of Damages for Loss of Expected Profits, 7 N.C. L. Rev. 235, 248 (1929)).*

[16] *Lloyd, The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means, November 2010, Page 37 (citing Charles T. McCormick, Handbook on the Law of Damages §27 at 101 (1935).*

[17] *Lloyd, The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means, November 2010, Page 37 (citing Koehring Co. v. Hyde Const. Co., 178 So.2d 838, 853 (Miss. 1965).*

[18] Lloyd, The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means, November 2010, Page 40 (citing 493 N.E.2d at 236).

[19] Banks, Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?, Albany Law Review, Vol. 74.2, 2010/2011, Page 645 (citing Kenford, 67 N.Y.2d at 262, 493 N.E.2d at 336, 502 N.Y.S.2d at 133.

[20] Wathne Imports, Ltd. v. PRL USA, Inc. (63 A.D.3d 476 (2009), 881 N.Y.S.2d 402)(citing Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1976).

[21] Lloyd, The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means, November 2010.

[22] Id. at 6

[23] Id

[24] Id. 6.

[25] Apple, Inc. And NeXt Software Inc. (f/k/a NeXT Computer, Inc.) v. Motorola, Inc. and Motorola Mobility, Inc., No 1:11-cv-08540 (E.D. Ill. (May 22, 2012).

[26] Id. at 3.

[27] Id. at 4.

[28] Federal Rules of Evidence (As amended Apr. 26, 2011, eff. Dec. 1, 2011)

[29] Apple, Inc. And NeXt Software Inc v. Motorola Inc and Motorola Mobility, No 1:11-cv-08540, (E.D. Ill. May 22, 2012). Notably, this particular requirement was first suggested in the case of ATA Airlines, Inc. v. Federal Express Corporation, No 11-1382,11-1492 (S.D. Ind. December 2011). Here, Judge Posner indicated that the burden for "sufficient explanation" is to be shouldered by the expert, counsel, and judge. He stated, "it is the [Judge's] responsibility, as painful as it may be, to screen expert testimony, however technical; we have suggested aids to the discharge of that responsibility." Posner continued, "[i]f a party's lawyer cannot understand the testimony of the party's own expert, the testimony should be withheld from the jury. Evidence unintelligible to the trier or triers of fact has no place in a trial."

[30] Apple, Inc. And NeXt Software Inc., (f/k/a NeXT Computer, Inc.) v. Motorola, Inc. and Motorola Mobility, Inc., No 1:11-cv-08540, (E.D. Ill.May 22, 2012)

[31] ATA Airlines, Inc. v Federal Express Corporation, No 11-1382,11-1492, (S.D. Ind. December 27, 2011).

[32] Id. at 27.

[33] Apple, Inc. And NeXt Software Inc., (f/k/a NeXT Computer, Inc.) v. Motorola, Inc. and Motorola Mobility, Inc., No 1:11-cv-08540, (E.D. Ill. May 22, 2012)

[34] Id. at 16,17.

[35] Id. at 17

[36] Hirsch v. CSX Transp., Inc., 656 F.3d 359, 362 (6th Cir. 2011).

[37] CSX Transp., Inc. v. United Transp. Union, 879 F.2d 990, 1004-05 (2d Cir. 1989).

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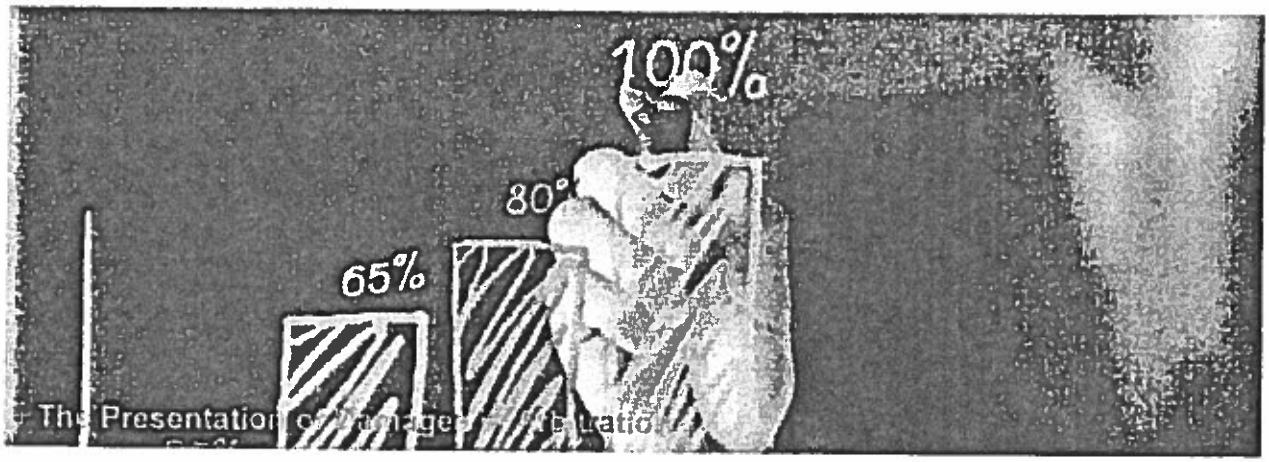

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Introduction

The use of arbitration for commercial disputes continues to be a topic debated amongst corporate counsel and litigators. A recent study conducted by the Rand Institute for Civil Justice had the following key findings:[1]

A majority of respondents believe that contractual arbitration is better, faster, and cheaper than litigation, with most claiming it is "somewhat" so.

A large majority (71 percent) perceive professional arbitrators as tending to split awards, regardless of the merits of the case, rather than ruling strongly in favor of one party

A majority believe that in addition to time and cost savings, four factors encourage the use of arbitration:

Avoiding exposure to potentially uncertain or emotionally driven jury awards
Control over the arbitrator's qualifications
Confidentiality of proceedings and decisions
Complexity of cases and/or contracts

Further, the Rand study found that a majority of respondents considered that arbitration was strongly discouraged by only one factor – the right of appeal.[2]

While arbitration has its advantages, many still consider one disadvantage to pertain to the awards found by the arbitrators. Despite certain evidence to the contrary, a majority of respondents to the Rand study still believe the norm amongst arbitrators is to "split the baby." Further, the study notes, "Our findings suggest that there is widespread belief that arbitration leads to compromised awards."[3]

Consequently, the topic of the presentation of damages in complex commercial disputes continues to be of significant interest and development. This article discusses certain of the trends in the presentation of damages in arbitration. In addition, the article presents a brief discussion on how Delaware is providing an interesting example of how to use arbitration as a fast-track venue for corporate litigation.[4]

Laying the Foundation

The issue of damages becomes critical early in the case development. In a recent article for the National Academy of Distinguished Neutrals, John Sherrill, Esq., noted: "At the preliminary conference, the arbitrators should describe for the parties their general philosophy that will be followed for administering the case to keep it moving smoothly toward a final resolution. Also, normally discussed at this conference are summaries by counsel of claims, damages and defenses, the scope of the discovery to be engaged in by the parties (depositions, interrogatories, document production, etc.), and special problems or legal issues that counsel feel will be present in the dispute."[5]

Arbitrators are increasingly seeking a more in-depth assessment of damages claims early in the case. Experienced arbitrators understand that in order to move forward with reasonable discovery, one must understand what the parties are arguing. In a complex commercial dispute, the claimed damages can be a critical component to those arguments. As such, arbitrators are increasingly adopting a proactive approach to understanding damages such that the process can be more effectively managed. This also provides the arbitrator with the opportunity to understand how the case is developing with respect to damages as the facts become evident, rather than waiting until the hearing to learn of the experts' thoughts and findings.

A Working Group of the Conflict Prevention & Resolution Institute has been studying how damages are determined in arbitration. The group recently produced a "Protocol on Determination of Damages in Arbitration." In this report, "it prescribes that arbitrators address, in or about their initial conference with the parties, the subject of damages, having the parties articulate their theories of compensation and their defenses, including mitigation of damages. Addressing these matters early in the proceeding, instead of leaving them in the background for presentation at later stages, enables the arbitrators to have a greater understanding of the relevance of evidence presented to them and may enable both parties and arbitrators to understand better the legal and factual aspects of the dispute."[6]

The advantage for the arbitrator is that he or she will have an understanding of both the damages claims (amounts) as well as the inputs and assumptions that will need to go into those calculations. This provides a foundation for the arbitrator to more effectively manage the proceeding, limit or expand discovery, and understand the impact / relevance of certain fact findings on the calculation of damages.

Reconciling the Experts

Oftentimes in commercial disputes, the experts are calculating damages utilizing different frameworks or different expectations regarding the potential findings of the arbitrator. At the hearing, this may leave irreconcilable differences between the opinions of one expert and another. Alternatively, one expert may simply address concerns in the assumptions and conclusions of another expert, but not offer any independently developed opinion. Another trend being considered by arbitrators is having the experts work more collaboratively.

Arbitrators certainly recognize that each party may want to have their expert consider the facts independent of another expert, but it can be helpful for the arbitrator to understand where the similarities exist between the experts and where the differences truly exist. One way to accomplish this is to have the experts participate in some form of joint presentation. This may be prior to the hearing or it may be during the hearing.

In a 2007 article published in the Dispute Resolution Journal, George Ruttinger and Joe Meadows of Crowell & Moring LLP discussed the possibility of having the experts testify in each other's presence. "All counsel can agree to have both sides' experts present testimony at the same time. In this scenario, "dueling" experts may question each other, giving the arbitrators real-time insight into the competing views on the most contested issues. This format can benefit the side that has the stronger expert witnesses."[7]

Additionally, John Sherrill's article for the National Academy of Distinguished Neutrals notes several similar trends among arbitrators learning about the damages models of the experts:[8]

> The presentation of direct testimony of witnesses in writing, with the witness being subject only to live cross-examination.
>
> Using "panels" of witnesses from each side to simultaneously testify regarding broad issues, rather than putting each witness on the stand separately.
>
> Direct confrontations between opposing experts, with each expert given the opportunity to question the opposing expert, and allowing the arbitrators to ask questions as appropriate.
>
> Bifurcation of the proceedings to hear only the portion of the case dealing with liability before accepting any evidence concerning damages. Of course, a preliminary finding of no liability would obviate the need for any evidence of damages, sometimes saving significant hearing time. However, this procedure would only be more efficient if the proof of damages can be completely separated from evidence concerning liability, which is often not the case.

These recommendations echo many of the significant issues identified in the report of the Conflict Prevention & Resolution Institute.

Arbitrators are also increasingly asking proactive questions to more completely understand damages calculations. Ruttinger and Meadows note: "Counsel who has confidence in the expert may invite the arbitrators to question the expert directly on controversial matters before the other side's cross-examination. Having arbitrators question the expert witness at this time may lessen the impact of a skillful cross and provide valuable insight into the direction the arbitrators are leaning. In addition, it provides counsel with an opportunity to make midcourse corrections if needed."[9] As discussed below, this also provides the arbitrators with the opportunity to make more informed decisions regarding the damages pursuant to their factual findings.

The Presentation of Damages

While arbitrators may request detailed reports and schedules be submitted by the experts, they are increasingly aware that the complexity of a damages calculation is often not clearly understood from simply reading the expert report. While the expert may have fulfilled their obligation to fully disclose the methods used and the basis for their calculations, it can often be difficult to completely describe how each factor of such a calculation

relates to other factors. That is, even experienced commercial arbitrators will likely be unable to recreate an expert's damages model to understand its inner workings.

The Protocol developed by the Conflict Prevention & Resolution Institute "sets out prescriptions for the presentation by experts of their damage calculations, requiring that they make their presentations in a way that permits the arbitrators to understand not only the results, but also the methodology by which the experts reached their conclusions and how different assumptions may alter the calculations."[10]

Often, arbitrators are in need of a more complete and detailed explanation of how the damages calculations are constructed. In particular, arbitrators may ultimately find in favor of certain facts that do not perfectly match the damages framework for either expert. However, without an intimate understanding of the damages framework, the arbitrator may not be able to modify the calculations of the experts to determine an award that is congruent with their factual findings.

New Delaware Arbitration Rules

The Delaware Court of Chancery recently adopted new arbitration rules. These rules provide for a new alternative for resolving significant business disputes. Of particular interest to the presentation of damages are the following significant provisions:

Speed to Resolution – The rules specify that a preliminary conference must be held within 10 days of the petition being filed to address procedural matters and to schedule a hearing. A hearing is required to be scheduled within 90 days of filing the petition (unless otherwise agreed to by the parties).[11]

Court of Chancery Arbitrator – The arbitrator hearing the case will be a permanent member of the Court of Chancery, internationally recognized and respected for its expertise and experience in handling complex commercial disputes.[12]

Additional provisions provide for the confidentiality of the proceedings, cost-effective fee structure, and significant flexibility afforded to the parties to tailor the scope of the proceedings.

These new arbitration rules in Delaware may significantly alter the presentation of damages in these cases. With the case heading to a final hearing with 90 days, the experts' work will likely commence soon after the scheduling order is finalized, if not before. This may also impact whether expert depositions are taken and, if so, when. In addition, these rules may further the trend described above regarding the depth of detail provided to the arbitrators. With arbitrators possessing significant experience in commercial litigation, it may be easier for experts to expound on the constructs of their damages calculations. It may also be easier for arbitrators to discuss with the experts the inner workings of the expert analysis.

Conclusion

While arbitration continues to offer an alternative to costly and public litigation, it is still a unique venue that is continuing to develop. Recent studies and surveys suggest that parties to an arbitration, as well as the arbitrators themselves, are increasingly interested in establishing a more complete understanding of the economic damages at issue. To achieve this many are utilizing experts early in the arbitration hearings to assist the parties in understanding how the facts of the dispute could give rise to damages. As the case progresses, experts are increasingly being asked to participate in greater dialogue with other experts and with the arbitrator to establish the framework for damages and the information that supports the calculations.

As arbitration continues to develop and evolve as a means of dispute resolution, it is possible that experts will have an increasing role, not as an advocate but simply to explain and demonstrate how a business has been impacted by certain actions. The financial and economic expertise of the expert offers an often-needed compliment to the legal expertise of the lawyers as well as the business acumen of the parties involved.

1 Business-to-Business Arbitration in the United States – Perceptions of Corporate Counsel. Shantz, Kipperman, Soma, Rand Institute for Civil Justice, 2011

2 Business-to-Business Arbitration in the United States – Perceptions of Corporate Counsel. Shantz, Kipperman, Soma. Rand Institute for Civil Justice, 2011

3 Business-to-Business Arbitration in the United States – Perceptions of Corporate Counsel. Shantz, Kipperman, Soma. Rand Institute for Civil Justice, 2011

4 Squire Sanders, Corporate Alert, May 2011, "Delaware Adopts New Arbitration Rules for Significant Business Disputes"

5 National Academy of Distinguished Neutrals, Member Article, John Sherrill, "Effectively Managing a Complex Commercial Arbitration," May 2010 – http://www.nadn.org/articles/SherrillJohn-EffectivelyManagingAComplexCommercialArbitration(May2010).pdf

6 http://businessconflictmanagement.com/blog/2011/03/new-protocol-on-damages-in-arbitration/

7 http://www.crowell.com/documents/Using-Experts-in-Arbitration_Dispute-Resolution-Journal_Ruttinger-Meadows.pdf

8 National Academy of Distinguished Neutrals, Member Article, John Sherrill, "Effectively Managing a Complex Commercial Arbitration," May 2010 – http://www.nadn.org/articles/SherrillJohn-EffectivelyManagingAComplexCommercialArbitration(May2010).pdf

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11 Squire Sanders, Corporate Alert, May 2011, "Delaware Adopts New Arbitration Rules for Significant Business Disputes"

12 Squire Sanders, Corporate Alert, May 2011, "Delaware Adopts New Arbitration Rules for Significant Business Disputes"

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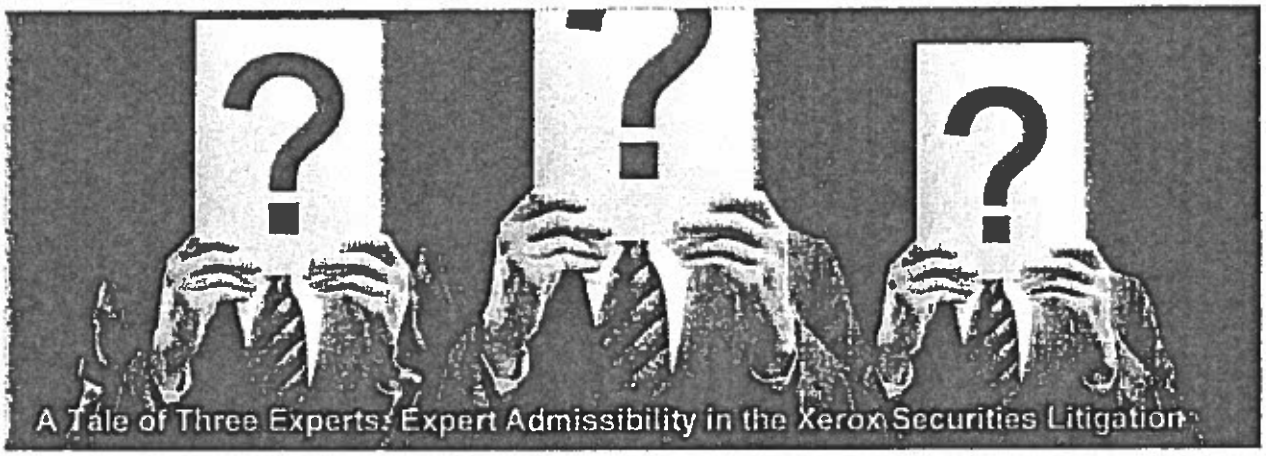

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The opinions of financial experts are facing ongoing scrutiny under the watchful and educated eye of the courts. As the court has continued to define its role as "gatekeeper" in cases involving claims for financial damages, the qualifications and methodology of financial experts are being questioned with much greater frequency. The precedent established by *Daubert, Kumho, and Joiner*, among other cases, is constantly evolving as courts become more sophisticated in their consideration of opinions offered by financial and economic experts.

Recently, the Connecticut Bankruptcy Court's ruling in the *Xerox Corporation ("Xerox") Securities Litigation*[1] offered a unique discussion of the admissibility of three financial and economic experts. Each expert offered opinions on various financial issues in relation to Xerox and the alleged artificial inflation of its common stock price after its alleged misrepresentation of the impact of a reorganization of its Customer Business Organization (the "CBO reorganization")

The court's ruling in this case (in response to the Plaintiff's motion to exclude the Defendant's expert testimony from the three experts) is unique in that it offers a comprehensive discussion seldom seen from any court on the factors considered in reaching its decision. Further, the case is rare in that it involves the examination of three separate financial experts against the same admissibility criteria as employed by the same court. The different rulings on each of the three experts provide further insight into the thought process and primary factors considered by the court in admitting or excluding the testimony of financial and economic experts.

With the recent adoption of the revised Federal Rules of Evidence regarding discovery from expert witnesses,[2] it seems the courts are intent on focusing on the merit of an expert's opinions and not the substance of draft reports and other items not necessarily pertinent to the expert's opinions. In this piece, we discuss the "gatekeeper" role established by *Daubert and Kumho Tire*, as well as the ruling in the Xerox case as an example of the courts current interpretation of this role.

A Brief History of Daubert and Related Rulings

Daubert v. Merrell Dow Pharmaceuticals[3] ("Daubert") was a groundbreaking case for expert witnesses of all disciplines. The legal standard first adopted in *Daubert* is still widely referenced when the admissibility of an expert is questioned. *Daubert* established that "Expert testimony is not admissible unless it is first determined by the trial judge that the expert is qualified and that the opinions of that expert are scientifically reliable."[4] The factors considered in reaching this determination (often called the *Daubert* criteria) include "1) whether the methods upon which the testimony is based are centered upon a testable hypothesis; 2) the known or potential rate of error associated with the method; 3) whether the method has been subject to peer review, and 4) whether the method is generally accepted in the relevant scientific community."[5]

The Federal Rule of Evidence Rule 702 ("FRE 702") later adopted the guidelines set forth in *Daubert*, and expanded on the factors to be considered by courts in evaluating the admissibility of opinions offered. FRE 702 states that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." However, there are certain criteria which must be met by that expert including "1) the testimony is based on sufficient facts or data, 2) the testimony is the product of reliable principles and methods, and 3) the witness has applied the principles and methods reliably to the facts of the case."[6]

Since *Daubert* and the enactment of FRE 702, several other decisions have addressed the issues of expert admissibility and expanded on the court's ruling in *Daubert*. In *General Electric Co. v. Joiner*[7] ("*Joiner*") the court held "1) that the "gatekeeper" function allows the courts itself to investigate the expert's reasoning process as well as the expert's general methodology (frequently analyzed under the rubric of reliability"), and 2) that the standard of review for an appellate court of such a trial court's decision is "abuse of discretion."[8] Finally, *Kumho Tire Co. v. Carmichael*[9] ("*Kumho Tire*") "extended a trial judge's gatekeeping obligation to "technical" and 'other specialized knowledge'" and effectively "brought *Daubert* into the realm of financial damages."[10]

Different states have varied in their adoption of *Daubert, Kumho and Joiner*[11]. However, these cases, along with FRE 702, are widely viewed as the cornerstone for expert witness admissibility within federal courts. "When an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, Daubert and Rule 702 mandate the exclusion of that unreliable opinion testimony."[12]

Subsequent to the rulings in these cases, different authoritative sources have weighed in on the primary factors to be considered in relation to expert admissibility. The Federal Judicial Center has recognized additional factors beyond the *Daubert* Criteria that may be relevant in making reliability determinations for expert witnesses, including but not limited to:

"Whether the expert has engaged in improper extrapolation (i.e. drawing an unsupported conclusion from an accepted premise)
Whether the expert took into account possible alternate explanations...
Whether the expert is being as careful as he or she would in regular professional work, outside of paid litigation consulting
Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give"[13]

While these cases and authoritative literature have formed the foundation in matters involving motions to exclude the testimony of the opposing expert (often referred to as *Daubert* motions), the *Daubert* landscape is constantly evolving as courts and experts alike become more educated. The *Xerox* ruling provides recent evidence of this evolution.

Xerox: A Closer Look

The three experts engaged by Plaintiff were asked to opine on several aspects of the price inflation that was allegedly due to Xerox's misrepresentations. Below is a description of the involvement of each expert and the court's conclusion relating to each.

Expert 1

Expert 1, a professor from New York University's Stern School of Business, was asked to "quantify any 'artificial inflation' in the stock price caused by the allegedly false and misleading statements made by Xerox."[14] To do so, Expert 1 employed several statistical analyses including an event study for the period from October 23, 1997 through the three months after the Class Period (January 7, 2000) to quantify the effects of the statements made. Based on an in-depth statistical analysis, Expert 1 "estimated that from the beginning of the Class Period until September 15, 1999, the price of Xerox common stock was inflated by $8.72 per share ($4.84 plus $3.88)." He estimated that, from the period of September 16, 1999 through October 7, 1999, the price was inflated by $4.84 per share."[15]

Expert 2

Expert 2, an investment banker and financial advisor, was asked to determine whether Xerox's restructuring had material impacts on Xerox's operations and, if so, whether these effects were known or should have been known by the Defendants. In formulating his conclusions, Expert 2 reviewed press releases, internal correspondence, and other documentation. Expert 2 then provided a narrative description of the surrounding events and ultimately concluded that "the CBO reorganization had material negative impacts on Xerox's operations during the class period," and that the statements made by Xerox were "misleading in terms of the nature of the information presented as well as the information regarding the adverse effects of the CBO reorganization which was omitted."[16]

Expert 3

Expert 3 was asked to opine as to whether "Xerox's Class Period public statements regarding the impact of the 1998 restructuring fairly described the effects of such restructuring, and, if not, whether Xerox failed to report adverse restructuring efforts which resulted in false and misleading Class Period public statements." Expert 3 was also asked to opine as to whether Xerox's management "knew of or recklessly disregarded any discrepancies"[17] Expert 3 pointed to several inappropriate accounting practices and misstatements in concluding that Xerox "continuously concealed significant adverse restructuring effects in its Class Period public statements. As a result, such public statements were unreliable and deceptive because they deprived investors of vital information."[18]

Court s Findings

The Defendants attacked each of the three experts on several grounds and made a number of assertions regarding the inadmissibility of their opinions due to their alleged failures to utilize appropriate methodologies, employ non-subjective approaches, and base opinions on sufficient facts and data. In filing their Motion to Exclude, the Defendants outlined their positions relating to each of the three experts. The court took the motion under advisement and responded for each individual expert separately.

In response to Defendants' claim that Expert 1's methodology was overly subjective, the court importantly noted that "even a statistical event study involves subjective elements. A researcher performing an event study must identify which company-specific events to study, and in the process, categorize those events as fraud or non-fraud related." Further, the court found that Expert 1 did review all relevant documents and news releases necessary to formulate a reasonable event study, as indicated by his comprehensive list of documents considered contained with his report.

Relating to the opinions offered by Expert 2, Plaintiff contended that as an investment banker and financial advisor, Expert 2 had often "reviewed and commented on business documents including prospectuses, registration statements, SEC filings and disclosure statements" and therefore met the requirements for "accurately describing a company or transactions." However the court noted that Expert 2 had never been employed in an operational role at any company and he had never worked in a position where he had been required to make a public disclosure. Further, he had never made a determination of materiality, accuracy, or completeness of disclosed information until his involvement in this case. As such the court found that Expert 2 "is not qualified as an expert by ***knowledge, skill, or experience***. Nor has he proffered testimony based on sufficient facts or data or the product of ***reliable principles and methods***."[19] ***(emphasis added)***

While Defendants argued that Expert 3 should be excluded because his report did not contain a discussion of academic literature, standards, or accounting provisions, the court noted that the record indicated that Expert 3 had in fact "employed his professional experience and methodology routinely relied upon by professionals in his field of expertise when investigating possible fraudulent financial reporting and disclosures." Defendants further claimed that Expert 3 relied on incomplete and unreliable data, however the court importantly noted that to the extent the expert fails to consider a particularly important item in evidence, "that is proper subject for cross examination, as opposed to a ground for excluding [his] testimony."[20] As such, to the extent the Defendants' concerns regarding Expert 3 had any merit, the court concluded that these concerns went more to weight than admissibility.

Ultimately, the court granted Defendants' motion to exclude the testimony of Expert 2 but denied its motion for exclusion of Experts 1 and 3.[21]

Conclusion

The court's ruling in Xerox reinforces the foundation established by earlier decisions regarding expert admissibility. The first hurdle for any financial or economic expert is often to offer proof that he or she has the appropriate level of demonstrated experience and expertise in the relevant field. As evidenced by the exclusion of Expert 2, this is an important factor considered by courts in determining whether to admit an expert's testimony. When an expert offers opinions based on inadequate experience and inappropriate methodologies, the court may exclude that expert from offering testimony.

Further, experts must demonstrate they have applied principles and methodologies consistent with generally accepted methodologies in their field of expertise. The expert should also demonstrate that the methodologies employed and assumptions utilized are consistent with his or her own prior experience. Further, the expert must offer evidence that he or she has performed a comprehensive review of the available information and appropriately considered all relevant facts in forming his or her conclusions. While there may be subjective elements inherent in a financial or statistical analysis (such as in the analysis employed by Expert 1), the expert must show that subjective assumptions or conclusions were made in a reliable and reasonable manner.

Further, Xerox reaffirms that a difference in factual interpretation is not always grounds for exclusion. While the parties may disagree on the interpretation or weight of certain data in evidence, this is more appropriately a matter of cross examination as opposed to expert exclusion.

[1] 165 F. Supp 2s 208 (D. Conn. 2001), Ruling on Motion to Exclude the Proffered expert testimony of [Expert 1], [Expert 2], and [Expert 3]("Ruling on Motion to Exclude")

[2] Federal Rules of Evidence. Published by the Legal Information Institute, Cornell Law School, December 2009.

[3] 509 U.S. 579, 113 S.Ct. 2786 (1993).

[4] Ellen Keefe-Garner, "Gatekeepers In Michigan Courts," *Michigan Bar Journal*, February 2009.

[5] "The Impact of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* on Expert Testimony: With Applications to Securities Litigation," Stephen Mahle, April 1999, www.daubertexpert.com.

[6] Federal Rules of Evidence Rule 702, Published by the Legal Information Institute, Cornell Law School, December 2009.

[7] 522 U.S. 136 (1997).

[8] Schaeffer, Ogulnick, and Schaeffer. 2008. "Challenges to the Admissibility of Expert Financial Testimony: 2005-2008."

[9] 526 U.S. 137, 119 S.Ct. 1167 (1999).

[10] Nancy Fannon and Jonathon Dunitz, "Keeping Your Financial Damages Expert in the Case," *For the Defense*, March 2010.

[11] As stated in "Challenges to the Admissibility of Expert Financial Testimony: 2005-2008," (see above) "only nine states have adopted the full *Daubert* trilogy... Six states have adopted Daubert and Kumho Tire but have not adopted Joiner. Eight States have adopted *Daubert* (at least in part)

but have not adopted Kumho Tire and/or parts of Joiner. Six states, while not adopting *Daubert*, have utilized part of its holding to develop their own tests."

[12] *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002).

[13] Federal Judicial Center, Manual for Complex Litigation Fourth Edition (2004), in reference to the committee note to amended Rule 702.

[14] 165 F. Supp 2s 208 (D. Conn. 2001), Ruling on Motion to Exclude.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] Note that the court did exclude Experts 1 and 3 from offering opinions as to scienter (the defendants thoughts, motives or states of mind)

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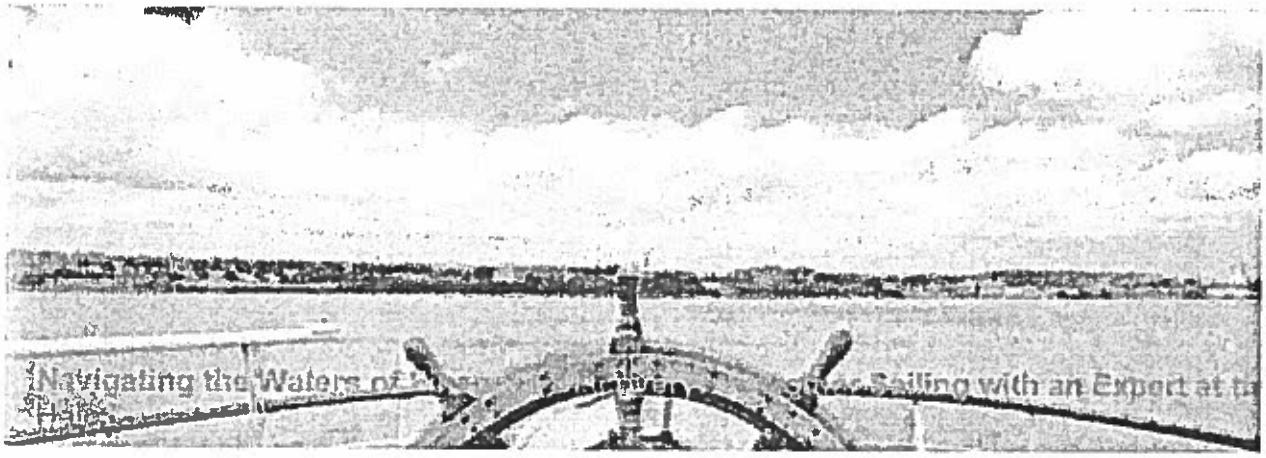

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For any expert witness, acquiring accurate, timely, and complete information is an important component in assembling a supportable opinion. However, for a valuation or forensic expert in a divorce case, having timely access to the true "universe" of relevant information is paramount. Given the personal and often contentious nature of divorce, navigating the sometimes murky waters of discovery can be challenging, even for the most seasoned veteran of the courtroom. Involving a financial expert early and throughout a case is a proactive measure an attorney can take to ensure the proper questions are asked, the correct documents are requested, and, sometimes most crucial in family law cases, that any information that has been withheld does not go unnoticed.

This article addresses some of the challenges encountered during the discovery phase of divorce cases and presents a case study showing how involving a financial expert can assist an attorney in protecting the best interests of his client by identifying important opportunities and ensuring key information does not slip through the cracks.

Challenges During the Discovery Process

While many attorneys recognize the need to engage financial experts "at some point" during an asset-intensive divorce, determining *when* that point is can be a pivotal factor in both the quality and quantity of information requested and received. Some common points at which experts are engaged include:

1] When counsel has become inundated with a flood of data
2] When an attorney is unfamiliar with the type of financial information that would be required by an expert, or when he realizes that the response to an initial document request is incomplete
3] Finally, and potentially most damaging for a client's case, when the discovery cutoff date has passed and not all relevant information has been requested or provided

As a result, an attorney may find himself in one of the following situations:

Too Much – If overly broad or nonspecific discovery requests are initially issued, the result may be a broad and burdensome amount of data provided. When a deluge of information arrives, it becomes important to sift through everything provided to separate what is relevant from what is extraneous. At this point, either the attorney can attempt this undertaking himself, or it can be delegated to an expert and his or her engagement team. In either case, receiving too much of the wrong information can bog down the litigation progress, decreasing efficiency of all parties, and increasing the professional fees as this information is cataloged, analyzed, and ultimately disregarded.

Too Little – It is also common for an expert to be engaged after counsel realizes he is not familiar with the information that will be required to complete a financial analysis or when he recognizes that not all pertinent information has been provided. At this point, an attorney has the option of hiring an expert to determine what additional information is required, or devoting his own valuable time to learn more about financial analysis and valuation to determine what documents would be required to perform them.

Too Late – The analysis a financial expert performs depends largely on the fact pattern of each case and the documentation to which she has access. In nearly all cases, as more information is acquired and analyzed, more facts come to light. When this happens, it becomes clear that additional information is required to properly reach a supportable conclusion. If an expert is not hired sufficiently in advance of a discovery cutoff date, the opportunity to request information that is potentially vital to a sound analysis may be lost. A valuation adage states "garbage in, garbage out," meaning that if the information and assumptions that go into an analysis are faulty or incomplete, so too will be the conclusion. In court, the judge may understand the difficult situation one litigant's expert has faced by arriving late in a case; however sympathy will only go so far if the opposing expert was privy to key documents the other side never even requested.

Utilizing an Expert Throughout the Discovery Process

To paraphrase a retired NFL coach, *if they want you to cook the dinner, they ought to let you shop for the groceries*. While an expert can usually "make do" with certain limited information, it is undeniable that the expert, as the proverbial cook of the analysis, has a unique perspective regarding the grocery list of information that will be required to reach accurate and supportable conclusions.

The following case study walks through several ways in which a financial expert can be an invaluable resource to an attorney and his client.

Case Study – The Smith Divorce

Background

Mr. Smith is a 33% owner in Polytech, Inc., a manufacturing entity that grosses $10 million in annual revenue. Along with another 33% owner (collectively the "Conspirators"), Mr. Smith has been fraudulently removing $800,000 to $1 million annually in Polytech profits through fake vendors they created. These funds are transferred to offshore accounts held by the Conspirators' fake vendors. Effectively, Mr. Smith and his partner are defrauding both the U.S. government (by underreporting income) and the silent third shareholder by leading him to believe there is minimal net income available to be distributed to the shareholders. The Conspirators also own a holding company that owns the land and building in which the company operates. Polytech pays rent of $300,000 annually to this holding company.

Mr. and Ms. Smith live in an affluent suburb and both drive luxury vehicles. Prior to the divorce, the Smiths vacationed three to four times per year at an approximate cost of $15,000 per trip. When they traveled Mr. Smith always paid with cash, but in and around their hometown, both Mr. and Ms. Smith regularly paid with credit cards. In his initial answers to interrogatories ("Answers"), Mr. Smith claimed his annual income to be $150,000, consistent with his W-2 wages, and indicated the only liquid accounts he has are $10,000 in a Chase Bank savings account and $150,000 in his 401 (k).

Ms. Smith tells her attorney, Mr. Thompson, that she remembers overhearing her husband on a telephone conversation a few years ago in which he told someone to "move it to the Caymans." The night before he filed for divorce, Ms. Smith saw Mr. Smith burning several CD's from the family computer, but when she looked at Mr. Smith's "Documents" folder after she was served with the divorce complaint, the folder was empty. Suspicious of Mr. Smith's interrogatory answers, lavish lifestyle, and odd behavior, Mr. Thompson engages, Ana Lysis, a well-respected local financial expert, and describes the situation.

The Approach of a Multi-disciplined Expert

In a case with possible hidden assets and a spouse committed to obstruction and obfuscation, many requests and subpoenas will likely be required as new facts come to light. As these facts are analyzed, new questions are raised and additional documentation must be requested to provide answers. Because of this "**request, analyze, repeat**" procedure, it is often said that discovery can be a **highly iterative** process.

The following paragraphs illustrate how an expert like Ms. Lysis may approach the problem of discovering the true net worth of Mr. and Ms. Smith.

Initial Review – Ms. Lysis' first steps would be to review any financial documents provided thus far. Mr. Thompson had already received the couple's tax returns (1040s) and Polytech's financial statements (income statements, balance sheets, cash flow statements), all of which seem to support Mr. Smith's story of a struggling company and personal income of $150,000. However a careful review of the Smiths' 1040 from the previous year might show interest and/or dividend income from financial institutions other than the one Chase account Mr. Smith identified in his Answers. If this is the case, Ms. Lysis would add statements for these accounts to her first list of information to be requested.

Financial Data Request – After reviewing the few documents initially supplied, Ms. Lysis' next step would be to prepare a comprehensive list of documents she would require to better investigate the unreported bank and investment accounts, the spending patterns of the Smiths, and finally the detail (invoices, general ledgers, purchase orders, etc.) behind the previously-provided financial statements of the business. Ms. Lysis can assist the attorney in preparing a document request tailored to the Smiths' unique situation.

Review of New Documents and Follow-up Data Request – It is rare that all documents an expert requests are provided immediately, or upon first request. Furthermore, sometimes the absence of documents from production can be just as telling as the information actually provided. For instance, Mr. Smith's inability or unwillingness to produce invoices for certain questionable vendors may be yet another clue in helping to prove the bogus nature of hundreds of thousands of dollars in expense deductions.

After the expert receives the document production, a new list will likely be created to highlight those documents not yet provided and request any additional follow-up information to address new issues identified.

Mr. Smith's Deposition – If Mr. Smith is to be deposed, it can be very helpful both to the attorney and Ms. Lysis to have her prepare a list of questions and a document production request ahead of time and attend the deposition to supply follow-up questions based on Mr. Smith's answers.

If the moneyed spouse's deposition can be taken in two or more parts over a period of weeks or months, this would afford the expert the opportunity to request documents based on the deponent's answers and then follow up with additional questions once the information has been supplied.

Discussion of Other Services – At this point, a cross-disciplined expert may be able to recommend other important complementary services during the discovery process. In the case of the Smith Divorce, the fact pattern suggests that a "lifestyle" analysis, a computer forensic "acquisition," a real estate appraisal, and a marital net worth statement may all yield valuable results for the client.

A lifestyle analysis tracks and categorizes the funds spent by Mr. and Ms. Smith over a period of months or years. Typically all bank, investment, and credit account statements are analyzed for cash outflows and each transaction is entered into a spreadsheet or personal accounting software. If, for example, a lifestyle analysis indicates Mr. and Ms. Smith spend $350,000 per year, yet the husband claims to be earning only $150,000, this is strong evidence that there are other unreported sources of income, possibly totaling $200,000 or more. Additionally, during the process of analyzing each account, large or irregular transfers or payments may help identify other accounts that would require further discovery.

A computer forensic "acquisition" and analysis involves a computer forensic analyst who, with specialized equipment and training, creates an identical copy of a computer hard drive, cell phone, Blackberry, or other device.[1] This analysis can unearth documents, email, and text messages believed to be deleted, and in the Smith case, may recover whatever information Mr. Smith intended to remove permanently from the family computer. Again, sometimes the information that is withheld can be the most telling.

An additional service that may be appropriate for the Smiths is a real estate appraisal for the land and building in which Polytech operates. Such an appraisal is important to the marital net worth statement in two ways: first, Mr. Smith's ownership in the real property holding company would be directly stated on the net worth statement; and second, and more subtle, a comprehensive appraisal commissioned to be utilized in conjunction with a business valuation will include a "market rental rate" that may give rise to an adjustment in the valuation of the company. For example, if Polytech is paying $300,000 in rent when only $100,000 would be reflective of a market rate, a valuation adjustment to decrease the expenses of Polytech by $200,000 may be appropriate.

If a real estate appraisal will be required, it is important to identify the need before the discovery cutoff deadline has passed so the appraiser can request any information required for his opinion. Furthermore, there are several advantages of selecting a real property appraiser with whom the business valuation expert has familiarity. For instance, not only will the valuation expert request a market rent analysis be prepared, but she can share with the appraiser the rent methodology (e.g., triple net, gross rent, etc.) that should be utilized to ensure the figure is consistent with the valuation. Other benefits of involving the valuation expert in the selection of a real estate appraiser are the sharing of relevant documents, a reduction in the number of discovery requests issued, and the coordination of deadlines so the appraisal is completed with enough time for the valuation expert to utilize the results in her analysis.

Marital Net Worth Statement – The three financial tasks in a typical divorce are to: 1) identify the couple's assets and liabilities; 2) place a value on those assets and liabilities; and 3) equitably divide the net worth resulting from subtracting the liabilities from the assets. While discussions of the second and third goals are beyond the scope of this article, the first goal is a natural extension of the expert's work and involvement in the discovery process. As part of her valuation assignment, an expert may already be reviewing individual income tax returns, bank, investment, retirement, and credit account statements, as well as other real and personal property lists and appraisals. This leads to intimate knowledge of the financial documents and facts of a case, and places the expert in a unique position to assemble a "master list" representing the marital net worth statement without a significant additional commitment of time and other resources.

It should also be noted that in addition to identifying the couple's current assets, in cases where one or both of the parties held material assets or liabilities before the marriage, an expert can assist in compiling, and even valuing, a list of possible **separate or pre-marital property**.

Conclusion

There are a myriad of ways in which a financial expert can be a valuable addition to a client's professional team above and beyond simply providing a business valuation. Engaging an expert to be involved "early and often" during the discovery process helps to proactively address the challenges of having too much or too little information, and ensures that discovery deadlines do not expire without the "cook" of the analysis ever having had a chance to create her shopping list. Furthermore, a multi-disciplined expert who can focus on financial discovery will allow the attorney to dedicate more time to the legal issues involved in the case, and will be engaged early enough to suggest other services that may provide significant benefits to the client.

[1] Please research local statutes and case law before initiating a computer forensic acquisition.

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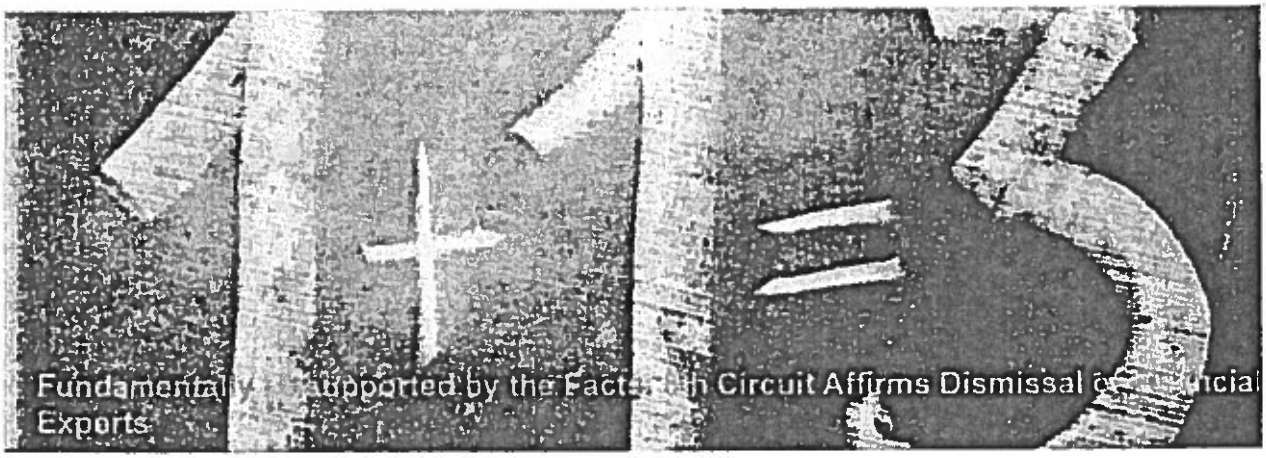

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Fall 2010

Case Background

In December 2002, Gregory Cole ("Cole" or "Plaintiff") entered into an oral distributor and dealer agreement with Homier Distributing Company, Inc. ("Homier" or "Defendant") for Homier's "Farm Pro" tractor line. This agreement provided for Plaintiff to establish dealerships and sell assorted Farm Pro products in return for exclusivity throughout Missouri. From 2002 through 2004, Plaintiff established over 30 dealerships and complemented its sales with online auction sales.

In September 2004, Cole and Homier memorialized their earlier oral agreement in the form of two written agreements. The agreements maintained exclusivity for certain products and could be terminated for cause with 90 days notice.

From 2005 to June 2007, Cole's and Homier's sales had sharply declined. Cole attributed this decline to failures on the part of Homier with respect to providing tractors and parts. Homier cited Cole's failures to develop a dealership network and, in June 2007, sent Cole notice of its intent to terminate the Distributorship Agreement in 90 days. Cole alleged that during the 90 day period prior to the official termination, Homier violated the terms of the exclusivity provisions of the agreement.

In July 2007 Cole filed suit against Homier in Missouri State Court alleging:

Count I & II – Breach of Contract
Count III – Tortious Interference with Contracts and Business Expectancies
Count IV – Fraud
Count V – Constructive Termination of the Distributorship Agreement without 90 days notice

On March 20, 2009, the U.S. District Court, Eastern District of Missouri, Eastern Division issued its Memorandum and Order in which it granted Defendant's Motion of Summary Judgment and dismissed Plaintiff claims with prejudice. Further, it ordered Plaintiff to exclude the testimony of its damages expert after finding the conclusions reached by that expert to be unsupported and speculative. Plaintiff appealed to the United States Court of Appeals, Eighth Circuit.

Appeals Court Review and Findings

On March 29, 2010, the United States Court of Appeals, Eighth Circuit ("USCOA") issued its findings with respect to Plaintiff's appeal. In its order, the USCOA addressed Cole's claim that the district court erred in granting summary judgment and whether the district court properly excluded Cole's proffered damages expert, essentially requiring the summary judgment ruling on several counts.

Factual Flaws

In reviewing the findings of the district court, the USCOA first discusses factual flaws in the expert's work. Plaintiff expert's damages relied on the premise that Cole lost the ability sell Farm Pro equipment when Defendant terminated the Distributorship Agreement. To the contrary, however, the

evidence indicated that the termination letter transmitted by Defendant did "not apply to [Plaintiff's] status as a dealer of Homier Farm Pro product lines." The USCOA notes that these factual flaws rendered the expert's report "of little to no assistance to the jury."

Plaintiff had indicated that the district court should rather focus on whether the expert's work was based on sound accounting methods requesting that the issue be decided by the jury based on weight rather than admissibility. Again, the USCOA notes that "where, as here, the expert's analysis is unsupported by the record, exclusion of that analysis is proper, as it can offer no assistance to the jury."

Speculation

Next, the USCOA evaluated the issue of speculation. The district had earlier noted that "'Under Missouri law, '[l]ost profits related to a breach preventing performance are recoverable provided the loss is the natural and proximate result of the breach, is ascertainable with reasonable certainty, is not speculative or conjectural, and was within the contemplation of the parties when the contract was made.' Structural Polymer Group, Ltd. v. Zoltek Corp., 543 F.3d 987, 997 (8th Cir. 2008) (quoting Farmer's Electric Co-op., Inc. v. Missouri Dep't of Corrections, 59 S.W.3d 520, 522 (Mo. 2001))." It went on to note "The general rule under Missouri law is that anticipated profits of a commercial business are too remote and speculative to warrant recovery. They can only be recovered when they are made reasonably certain by proof of actual facts, with present data for a rational estimate of their amount."

The expert had utilized, among other things, a projection of 25 years of lost profits and an assumption that sales will continue thereafter with an annual increase of 3%. The district court found these assumptions to be "entirely speculative and without foundation."

In reviewing the findings of the district court, the USCOA referred to the contract between the parties noting the availability of termination with 90 days notice. It noted "there are simply too many future uncertainties for us to say that the district court abused its discretion by excluding as overly speculative a twenty-five year forecast – based solely on the age and ability to qualify for government benefits – even if the Distributorship Agreement required cause for termination." The USCOA agreed with Plaintiff that lost profit damages not be calculated with extreme exactitude but rather with reasonable certainty. "However, in a spectrum ranging from speculation to exactitude, [Plaintiff expert's] report is too close to the former for us to find that the district court abused its discretion."

USCOA Findings

The district court, in its Memorandum and Order, had indicated "[Plaintiff Expert's] report is fatally flawed because he relied on stale and incorrect data and failed to properly analyze the information provided to him." Further, it had ruled to exclude the testimony of Plaintiff's expert and granted summary judgment on several counts as a result. Affirming these findings, the USCOA held that "the district court did not abuse its discretion in finding that [Plaintiff's expert] was flawed both factually and methodologically."

Conclusion

The role of a damages expert extends beyond simply applying the information provided by a client without review, critique, validation, professional skepticism, or confirmation. It is an expert's responsibility to review available documents which may impact the expert's opinions or conclusions. In many cases, document review is an iterative process that also results in requests for additional documents or data before formation of expert opinion and the issuance of a written report. In this instance, the expert appears to have failed to adequately evaluate the reasonableness of the facts he was presented.

Further, an expert projecting lost profit damages must understand the risk associated with the projected lost profits. In many instances appropriately measured discount rates can be applied to compensate for the risk of receiving future cash flows, thereby mitigating the concerns of the courts related to speculation. Alternatively, in certain cases, an adequate level of factual substantiation can be provided to reasonably determine the likelihood of ongoing business relationships.

Ultimately, a financial expert should rigorously test his / her methods, review, and carefully consider the factual record of the case, and consider the variability of assumptions that contribute the calculations of both historic and future lost profits.

PRIVILEGED AND CONFIDENTIAL

DATE

NAME
NAME OF LAW FIRM
ADDRESS
CITY, STATE, ZIP

RE: CASE OR MATTER NAME (the "Matter")

Dear NAME:

On behalf of EXPERT FIRM ("our", "us", "we", or "firm") I am pleased to confirm the arrangement under which we will provide certain services OR FURTHER DEFINE AS CONSULTING V. TESTIFYING to LAW FIRM ("you" or "your") in your capacity as legal counsel for NAME OF CLIENT (the "Client") in the Matter.

Our Services and Scope

Our understanding is that your Client has given you the authority to direct our engagement (including the scope of our work) and to approve the performance of our services on behalf of your Client. Accordingly, we will work and communicate directly with you, but ask that you keep your Client advised of the work we are performing on their behalf so that their expectations of us in this engagement are met.

We will perform services or tasks requested by you that are within our scope of practice. While our work may involve analysis of accounting records and other financial information, our engagement does not include an audit in accordance with generally accepted auditing standards.

Staffing

This engagement will be under the overall supervision of NAME; however, other members of the firm will assist in the engagement. In the event it becomes necessary to reassign this engagement to another professional, we will notify you promptly and give you an opportunity to evaluate with us the appropriate professional whose skill sets and experience most closely match the requirements of the engagement.

Your/Client's Responsibilities

In order for us to maximize the value of our work and to keep the project on schedule, it is important for us to be provided with information we request from you and your Client promptly. Additionally, if you or your Client are or become aware of other relevant information necessary to the proper completion of this Matter, you agree to provide us with this information. Specifically, you and your Client acknowledge that the successful delivery of our services, and the fees charged, are dependent on: (i) you and your Client's timely and effective completion of your responsibilities; (ii) the accuracy and completeness of the assumptions and information provided to us; and (iii) timely decisions and required approvals by you and your Client.

It is important for you to notify us of any motions, filings, or hearings, including a Daubert motion, related to our direct involvement or ability to provide testimony in this Matter immediately upon notification of such action.

Fees, Expenses and Billing Arrangements

Fees

Our fees are based on our time incurred plus out-of-pocket expenses. Our hourly rates are based on experience, training, and level of professional achievement. It is often necessary to consider other factors such as the complexity of the work, prior experience, and engagement timing in establishing staffing for the engagement and our fees. Current hourly rates for our professional staff range from $ to $. Our standard hourly rates are reconsidered annually with changes effective January 1 of each year.

Our invoices will be issued directly to CLIENT NAME with a copy to you. Though we are providing a copy of our invoice to you, we acknowledge that the responsibility for payment of our retainer and fees is CLIENT NAME's and not yours. We will submit our invoices on a monthly or other periodic basis as our work progresses. In all cases, all fees must be paid prior to our issuance of reports or rendering of deposition or trial testimony. Should CLIENT NAME fail to remit payments for past due invoices, we may discontinue services and terminate this agreement, in which case we will not be responsible or liable for any resulting loss, damage or expense connected with such suspension, termination or refusal.

Additionally, in the event we are required to respond to a subpoena (e.g., producing documents in our possession, providing testimony, cooperating with your legal counsel, etc.) related to this engagement (regardless of whether such subpoena is served during or subsequent to the completion of our work), we will invoice you at our standard hourly rates applicable at the time such services are rendered. We will also invoice you for our related out-of-pocket expenses, including, but not limited to, copying charges, courier fees, travel expenses and attorney fees.
Our fee is not contingent upon the final results of our work, and we do not warrant or predict results or final developments in this Matter.

Expenses

During the course of our work we may be required to incur out-of-pocket expenses for items such as research, overnight or expedited delivery, postage, photocopying, facsimile transmission, travel, meals, and other costs. These costs will be billed at actual amounts incurred.

Our fees do not include taxes. Your Client agrees to be responsible for and pay all applicable sales, use, excise, value added and other taxes associated with the provision or receipt of our services, excluding taxes on our income generally.

Retainer

As is standard practice for an engagement of this type, we require a retainer in the amount of $AMOUNT before commencing work. In the event that this Matter is resolved prior to our involvement, X%/$AMOUNT of this retainer will be considered non-refundable. The retainer may be applied to any invoice at our discretion or to our final invoice at the conclusion of the engagement. If the retainer is drawn against to satisfy or reduce an invoice, the retainer shall be promptly replenished by the Client. If at any point in our engagement the retainer balance reaches zero, we reserve the right to cease work until such time as the retainer balance has been sufficiently replenished to its initial amount. By "cease work", we mean that we may refuse to make our employees available to the Client and/or its advisors. We will notify you if the retainer balance is nearing zero so that the Client has sufficient time to replenish the retainer and keep the engagement moving on schedule. At the end of our engagement, any unused

portion of the retainer will be promptly refunded to the Client. This retainer is not intended to be an estimate for the total cost of work to be performed. An invoice for the retainer is enclosed.

Billing

It is important to our relationship that our bills be paid on time. Invoices will be presented once per month or as case matters dictate. Invoices are due upon presentation and will be considered past due thirty (30) days after the invoice date. Amounts past due for more than 30 days will be subject to a late charge of 1.5% per month from the date of invoice. We reserve the right to defer rendering further services until payment is received on past due invoices.

In the event that you or your Client disagree with or question any amount due under any invoice, you agree to communicate such disagreement to us in writing within thirty (30) days of the invoice date specifying the question or reason for the disagreement. Any claim not made within this time period will be deemed waived.

If any uncontested bill remains unpaid for thirty (30) days after invoicing, we may, at our sole discretion and right, send the matter to a collection agency. If we do, in addition to the invoice amount, late charges, and any other expenses, we shall be entitled to receive a collection fee equal to one-third of the outstanding bill.

You and your Client agree that we will have a lien on all files in our possession, and their contents, until we have received payment in full of all amounts due. Also, if money judgment is rendered in this Matter, we will have a lien on all proceeds thereof in the amount of any unpaid fees or expenses for our services.

Relationship Review

We have performed an internal search for potential conflicts based on the names of the parties you have provided. We have not found any situations which, in our view, constitute actual conflicts of interest and which would impair our ability to objectively provide assistance in the Matter. We take no responsibility for monitoring for possible conflicts that could arise during the course of this engagement, though we will inform you promptly should any come to our attention. We reserve the right to resign from this Matter at any time if conflicts of interest arise or become known to us that, in our judgment, would impair our ability to perform services objectively.

The value of our firm's service to you and your Client is founded, in part, on our reputation for professionalism and integrity. Our firm has worked with a number of law firms and it is possible that we or our employees are or have worked with firms representing clients adverse to your Client in this Matter. Your engagement of our firm is expressly conditioned on your agreement not to use the fact of our current or previous engagements with opposing counsel in other matters as a means of enhancing or diminishing our credibility before a trier of fact.

Work-Product Privilege

Any reports or work papers that we prepare in connection with this engagement will be maintained in accordance with our document retention procedures and will be construed as personal and confidential, to be used only for this engagement, and no other use, disclosure, or dissemination of them is to be made. Furthermore, all work that we perform in connection with this engagement will be construed as attorney work product. Except as may be required by law, regulation, or valid judicial or administrative process, we will not disclose to anyone, without your permission, the content of any oral or written

confidential communications received during the course of this engagement, nor any information gained from the inspection of any records or documents provided by you that are identified as confidential.

Ownership of Property and Retention of Documents

Upon full payment of all amounts due us in connection with this engagement, all right, title and interest in our deliverables will become your sole and exclusive property, except as set forth below. We will retain sole and exclusive ownership of all right, title and interest in our work papers, proprietary information, processes, methodologies, know how, and software, including such information as existed prior to the delivery of our services and, to the extent such information is of general application, anything which we may discover, create or develop during our provision of services for you (collectively "EXPERT FIRM Property"). To the extent our deliverables to you contain EXPERT FIRM Property, we grant you a non-exclusive, non-assignable, royalty-free license to use it in connection with the subject of the engagement and for no other or further use without our express prior written consent.

When this Matter is over and our engagement has ended, if you so request, we will return any original documents or other materials provided by you; otherwise we will retain the file in accordance with our file retention policy. If you wish to obtain copies of other documents in our file, we will provide copies of such documents (other than internal work product or administrative records) at your expense.

Email Correspondence

We each acknowledge that we may correspond or convey documentation via Internet e-mail and that no party has control over the performance, reliability, availability, or security of Internet e-mail. Therefore, no party will be liable for any loss, damage, expense, harm or inconvenience resulting from the loss, delay, interception, corruption, or alteration of any Internet e-mail due to any reason beyond its reasonable control.

Indemnification and Limitation of Liability

Your Client agrees to indemnify us, our owners, directors, employees and agents against all costs, damages and liabilities (including reasonable attorneys' fees and costs) associated with any third party claim or proceeding, relating to or arising as a result of or in connection with this engagement, other than as determined through arbitration to have been caused by our own gross negligence or willful misconduct.

In no event will we be liable to you or your Client, whether a claim be in tort, contract or otherwise, for any amount in excess of the total professional fees paid pursuant to this agreement to which the claim relates, or for any consequential, indirect, lost profit or similar damages relating to our services provided under this agreement, except to the extent finally determined to have resulted from our gross negligence or willful misconduct.

Jurisdiction

Any controversy or claim arising out of or relating to this agreement, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Rules then in effect before a sole arbitrator. The award shall be issued in accordance with Michigan law. The prevailing party shall be entitled to an award of reasonable attorney fees as well as costs and fees incurred. Except as may be required by law, neither party may disclose the existence, content, or result of any arbitration hereunder without the prior written consent of both parties. Judgment on the award may be entered in any court having jurisdiction thereof.

* * * * * * *

If you and your Client agree to the terms of this letter, please sign below and return this letter to my attention. Specifically, by signing this agreement, your Client acknowledges its understanding of the terms of this agreement, its responsibility for payment of our fees, and the fact that our fee is neither contingent on nor negotiable as a result of the outcome of the Matter. Please note that the terms of this offer will expire 60 days from the date of the letter.

We appreciate the opportunity to be of service to you and look forward to working with you on this engagement.

Very truly yours,

NAME OF EXPERT FIRM

By: _____

Signature Name
Title

Agreed:

NAME OF LAW FIRM

By: _____

Title: _____

Date: _____

Agreed:

NAME OF CLIENT

By: _____

Title: _____

Date: _____

Hypothetical Fact Pattern

John Smith ("Smith") worked as a new BMW car sales representative at ABC Automotive Dealership ("ABC") until June 30, 2013. On July 1, 2013 Smith abruptly left ABC and immediately began working as a used car sales representative at XYZ Automotive Dealership ("XYZ"), which sells a variety of domestic and imported used cars. Soon thereafter, ABC learned that prior to Smith's departure he copied all pertinent sales and lease renewal information of ABC's customers. ABC presumes that Smith intends to use this information to contact these customers at an appropriate time to entice them to purchase or lease their next vehicle from XYZ. Indeed, several customers have reported to ABC that they were contacted by Smith almost immediately after he started at XYZ. Smith is bound by an employment agreement that contains a non-compete and confidentiality clause governed by New York law. The clause reads as follows:

The parties hereby agree that Smith shall not directly or indirectly compete with ABC during the period of six months following termination of his employment, notwithstanding the cause or reason for termination. Smith acknowledges that ABC, in reliance of this agreement, may provide Smith access to trade secrets, customer lists, customer data and other confidential information concerning ABC's business during his employment. Smith agrees to maintain the confidentiality of any such data indefinitely and hereby agrees not to utilize it for any reason, or disclose the same to any third party.

ABC files suit against Smith and XYZ for breach of contract, breach of fiduciary duty, misappropriation of trade secrets and conversion seeking lost profits as well as injunctive relief.

After conducting extensive discovery, and on the day before final witness lists must be filed, ABC's counsel realizes he failed to identify an expert.

HARVEY B. BESUNDER

Mr. Besunder was admitted to the practice of law in 1967, and from 1991-2010 had had his own law practice in Suffolk County. In September 2010 he merged his firm with that of Bracken & Margolin, to form Bracken Margolin Besunder LLP. Prior to that time, he was a member of the firm of Cruser, Hills, Hills & Besunder, an Assistant County Attorney for Suffolk County in the Condemnation Department, a member of the Suffolk County Attorney's Office and a Law Assistant in the Suffolk County District Court.

From 1993-1994, Mr. Besunder served as President of the Suffolk County Bar Association, and has been a member and/or Chair of that Association's Condemnation Committee, Grievance Committee, Judiciary Committee, and Bench-Bar Committee.

Mr. Besunder is also an active member of the New York State Bar Association. From 1993 to 1997, he served on the Executive Committee of the Association's Real Property Section, and was a member of the Association's House of Delegates, Committee on Lawyer Discipline, By-Laws Committee and the Nominating Committee. From 1996-1999, he served as Chair of the Committee on Lawyer Discipline.

From 1988 to 1996, he served as a member of the Grievance Committee for the Tenth Judicial District, and in 1997, he was appointed to serve on the Judicial Salaries Commission and served on the Independent Judicial Qualifications Commission from 2007-2011. He is currently a member of the Committee on Character and Fitness.

He has lectured extensively on behalf of the Suffolk Academy of Law, on such topics as ethics and the disciplinary process, real property issues, and for the State Bar on Condemnation valuation issues.

Mr. Besunder has received several awards of Recognition including a Special Award of Recognition, as well as two awards for Pro Bono service. In 2010 Mr. Besunder received the prestigious Presidents Award for Service to the Legal Profession.

HARVEY BRUCE BESUNDER
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EDUCATION

Brooklyn Law School
LL.B June, 1967 (By permission of the State of New York, this degree is now changed to Juris Doctor).

Adelphi University
Bachelor of Arts, History, 1964

ADMISSION

New York (Second Department), December, 1967.
U.S. District Court, Southern District of New York, February, 1973.
U.S. District Court, Eastern District of New York, February, 1973.
United States Supreme Court, May, 1974.
U.S. Court of Military Appeals, May, 1993.
U.S. Court of Federal Claims, May 1993.
U.S. Court of Appeals for the Federal Circuit, July 1993.

EMPLOYMENT RECORD

Bracken Margolin Besunder--- Partner-2010-Present

Law Offices of Harvey B. Besunder, P.C. 2006 - 2010

Partner, Pruzansky & Besunder, LLP, 2001 - 2005

Law Offices of Harvey B. Besunder, 1993 - 2001

Partner, Besunder and Burner, 1991 - 1993

Partner, Cruser, Hills, Hills & Besunder, 1979 - 1990

Partner, Bazell & Besunder, 1975 - 1979

Assistant County Attorney, Condemnation Department, Suffolk County Attorney's Office, 1972 - 1979

Assistant County Attorney, Chief, Family Court Department, 1971 - 1972

Judicial Law Clerk, Suffolk County District Court, 1969 - 1971

AFFILIATIONS

Suffolk County Bar Association
Member, Suffolk County Bar Association

President	1993 - 1994
President Elect	1992 - 1993
First Vice President	1991 - 1992
Second Vice President	1990 - 1991
Treasurer	1989 - 1990
Secretary	1988 - 1989
Director	1986 - 1988

Condemnation Committee	1978 - present
Member	1978 - present
Chairman	1978 - 1980

Grievance Committee	
Co-Chair	1982 - 1984
Overall Chair	1984 - 1986

Judiciary Committee	
Member	1982 - 1986

Bench Bar Committee	
Chair	1991-1993
Member	1993-present

Professionalism Committee and Ethics	1998 - present

New York State Bar Association
Member, New York State Bar Association

Member, Condemnation and Tax Certiorari Committee of the Real Property Section

Real Property Section, Executive Committee	
Member	1993 - 1998

House of Delegates	
Delegate	1990 - 1994
	1996 - 1998

Committee on Lawyer Discipline	
Member	1999 - present
Chair	1996 - 1999

By-Laws Committee	
Member	1999 - 2003

APPOINTMENTS

Tenth Judicial District Grievance Committee	
Member	1988 - 1996
Judicial Salaries Commission	1997 – 1998
Character and Fitness Committee	2006-Present
Independent Judicial Election Qualification Commission	2007-2011
Commercial Division Advisory Council	2013

AWARDS-

Awards include several awards of Recognition of the Suffolk County Bar Association, Two Pro Bono Awards, A special award of Recognition and the President's Award in 2010; Suffolk County Bar Association Lifetime Achievement Award (2014)

LECTURES & PROGRAMS

Suffolk Academy of Law

- Legal Ethics and Disciplinary Process
- The Effect of New York State Wetlands Act on Valuation in Condemnation
- Valuation of Special Purposes Properties
- Trial Demonstration of a Condemnation Involving Wetlands
- Contested Wills and Estates
- A General Law Practice, a lecture on the general practice of law to high school students and for adult education programs given by the Lions Club and Kiwanis Club, Suffolk County Chapters
- Judge, New York State Bar Association Moot Court Competition
- Tax Grievance Procedure, Suffolk County Women's Bar Association
- Basics of Eminent Domain

Association of the Bar, City of New York

- Effect of Eminent Domain Procedure Law on Villages, Towns and Cities

Lorman Education Services

- Trial Preparation and Trial-Eminent Domain

NY State Bar Association

- Ethics
- Condemnation

FARRELLFRITZ
BECAUSE SUCCESS MATTERS

Hillary A. Frommer

Estate Litigation

Counsel | [redacted]

LOCATION: [redacted]

Hillary A. Frommer focuses her practice in litigation, primarily estate matters including contested probate proceedings and contested accounting proceedings. She has extensive trial and appellate experience in both federal and state courts. Ms. Frommer also represents large and small businesses, financial institutions and individuals in complex business disputes, including shareholder and partnership disputes, employment disputes and other commercial matters.

Q: As a litigator, how do you help your clients overcome challenges?

A: In addition to carefully and clearly explaining the legal aspects of the case, one of my basic approaches to client management is to instill both comfort and confidence in me and our firm. One approach I take with my clients who might find litigation stressful is to respect and relieve their concerns and assure them that they are, indeed, in very capable hands.

[redacted]

Q: Describe a turning point in your career.

A: I consider the turning point for me was when I won my very first trial with a jury verdict in my client's favor. It was then that I realized that I had the ability to think quickly on my feet, and to make persuasive legal and factual arguments. My success in court continued, never losing any of my subsequent jury trials.

Q: What is it about Farrell Fritz that makes clients choose this firm rather than another?

A: The attorneys at Farrell Fritz are knowledgeable, talented and recognized experts in their fields. My colleagues on the legal team with whom I work all have the ability to examine a case from the particular details to the big picture and to convey that to the client. Moreover, to Farrell Fritz, every client is important. It is the attention to our clients by partners, counsels, associates and paralegals – combining individual expertise and collective knowledge that makes Farrell Fritz stand out.

Q: How do you give back to the community?

Office
New York City
370 Lexington Ave, Suite 800
New York, NY 10017

Practice Areas
[redacted]

Education
Chicago-Kent College of Law (JD)
Cornell University (BA)

A: I do a significant amount of pro bono work. It is important to me personally and to the firm. I provide my pro bono clients with the same intensity and focus their matters deserve. While I, of course, contribute financially to several charitable organizations, I think giving one's time and effort is just as important. I am a very active and involved member of the Board of Directors of the Parent-Child Home Program, a research-based early childhood literacy charitable organization, and I devote time as a committee member to the Child Abuse Prevention Society. Additionally, I act as a mentor to young women in the local universities and colleges, giving them support, guidance and advice about their education and careers.

Attorney Advertising

SRR
STOUT | RISIUS | ROSS

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Director
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eshampnoi@srr.com

Education
J.D.
Touro College Jacob D. Fuchsberg Law Center

B.S.
Mercy College
Criminal Justice and Paralegal Studies

Professional Affiliations
American Bar Association - Litigation Section

American Bar Association - Women Advocate Committee

American Bar Association - Dispute Resolution Section, Co-chair, Advocacy Committee

National Association of Professional Women

New York City Bar

New York State Bar Association - Commercial and Federal Litigation Section

New York State Bar Association - Corporate Counsel Section

New York State Bar Association - Dispute Resolution Section, Executive Committee, CLE Co-chair

New York State Bar Association - Intellectual Property Section

Women's Leadership and Mentoring Alliance

Elizabeth J. Shampnoi, Esq. is a Director in the Dispute Advisory & Forensic Services Group. She regularly provides litigators, in-house counsel and senior executives with a broad range of business advice concerning cost-effective and timely alternative dispute resolution. Many times this involves identifying which cases are appropriate for mediation or arbitration, proper forum selection, drafting clauses pre-dispute and post-dispute, selecting the arbitrator or mediator, rule interpretation/enforcement and best practices in advocacy. Additionally, Ms. Shampnoi advises counsel in the selection of experts and consultants for a variety of matters, including, but not limited to, commercial disputes, internal and external investigations and business valuations.

Prior to joining SRR, Ms. Shampnoi was an Associate Director at Navigant Consulting, Inc., where she advised clients in the selection of experts and consultants; worked with clients to identify emerging issues and trends; developed innovative strategic business initiatives; and prepared tactical responses to market developments. She also focused on building and strengthening relationships between law firms, companies, associations, government agencies and Navigant's professionals.

Before entering consulting, Ms. Shampnoi was an attorney at the law firm of Storch Amini & Munves PC. Her primary areas of practice included complex commercial litigation, arbitration, and mediation. She represented individuals, partnerships, corporations and educational institutions concerning disputes involving a variety of issues and industries including breach of contract, defamation, misappropriation, trademark infringement, fraud, real estate, factoring, entertainment and transportation. Ms. Shampnoi's practice also involved the drafting and negotiating of various types of agreements including confidentiality, non-compete, non-disclosure and employment agreements, as well as domestic and international dispute resolution clauses.

Earlier in her career, Ms. Shampnoi was the District Vice President of the New York region of the American Arbitration Association for several years. She advised advocates, in-house counsel and neutrals concerning all procedural and substantive aspects of domestic and international alternative dispute resolution. Ms. Shampnoi has spoken extensively on the subject of alternative dispute resolution and conducted numerous arbitration and mediation training seminars.

Ms. Shampnoi is admitted to the bar in the States of New York and Connecticut as well as the United States Eastern and Southern Districts of New York and the United States District Court of Connecticut. She has served as a board member for the Association for Conflict Resolution of Greater New York and the New York State Dispute Resolution Association and she was named a *Rising Star* in Dispute Resolution by *Super Lawyers* in 2011.

SRR
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Elizabeth J. Shampnoi

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Publications:

"The Importance of Selecting an Arbitrator with Construction Industry Expertise," LORMAN EDUCATION SERVICES CONSTRUCTION UPDATE, January 23, 2006 and "The Importance of Selecting an Arbitrator with Industry Expertise," LORMAN EDUCATION SERVICES LEGAL UPDATE, January 16, 2006.

"The CPA in Mediation and Arbitration: The Arbitrator Selection Process and New Ethical Standards," THE CPA JOURNAL, December 2005.

"The Growing Popularity of ADR," THE METROPOLITAN CORPORATE COUNSEL, August 2005 (Interview).

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Glenn C. Sheets, CPA, CFF, CIRA, CGMA

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Education

B.A.
University of California at Santa Barbara
Business Economics

Professional Designations

Certified Public Accountant

Certified Forensic Financial

Certified Insolvency & Restructuring Advisor

Chartered Global Management Accountant

Glenn C. Sheets is a Managing Director in the Dispute Advisory & Forensic Services Group. He has extensive experience providing a broad range of business and financial advice to trial lawyers and in-house counsel throughout the dispute process. Many of these matters involve breach of contract, tortious interference, disputes related to business transactions, post-merger and acquisition disputes, product liability and warranty / recall claims, trade secrets disputes, non-compete claims, employment and labor disputes, insurance claims, personal economic claims, shareholder disputes, fraud examinations, alter ego assessments, preference and fraudulent transfers. Additionally, Mr. Sheets has significant experience providing financial and litigation expertise to parties-in-interest involved in distressed and under-performing businesses. Mr. Sheets has assisted clients through out-of-court restructurings, bankruptcy proceedings, and profit improvement initiatives, including: viability and feasibility studies, cash flow management, creditor negotiations, debt restructuring, mergers and acquisitions, divestitures, and liquidations. Mr. Sheets has testified as an expert in various state and federal court proceedings, including the U.S. Bankruptcy Court, CCAA proceedings, arbitrations, mediations, depositions, and International Arbitration hearings.

Mr. Sheets' experience encompasses a wide array of industry sectors including manufacturing, retail, sales and distribution, wholesalers, transportation and logistics, insurance companies and agencies, information technology, medical devices and products, chemicals, commodities, real estate and hospitality, professional service companies, not-for-profit organizations, and a variety of service firms. Mr. Sheets has significant experience within the automotive sector, including OEMs, automotive suppliers, commodities, service providers, automobile dealers, and after-market sales and services.

Mr. Sheets has lectured and presented continuing education seminars on a variety of subjects related to financial, economic, accounting, and business issues present in the resolution of disputes. He was the Chairman of the Litigation / Business Valuation section of the Michigan Association of Certified Public Accountants.

Prior to joining SRR, Mr. Sheets was a Director of Litigation and Claims Services for Coopers & Lybrand's.

Mr. Sheets is a member of the American Institute of Certified Public Accountants, the New York State Society of Certified Public Accountants, the Michigan Association of Certified Public Accountants, the Association of Certified Fraud Examiners, the Association of Insolvency and Restructuring Advisors, the American Bankruptcy Institute, and the Turnaround Management Association.

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Testimony Experience:

FMReps, LLC v Ford Motor Company, State of Michigan in the Circuit Court for the County of Wayne, 2013

I-Fusion Technology, Inc. v. TRW Safety Systems Inc., et al., State of Michigan in the Circuit Court for the County of Macomb, 2013

Greenman-Pedersen, Inc. et al. v. Berryman-Henigar, Inc. and Bureau Veritas North America, Inc., Supreme Court of the State of New York, County of New York, 2013

Macy's, Inc. and Macy's Merchandising Group, Inc. v. Martha Stewart Living Omnimedia, Inc. and J.C. Penney Corporation, Inc., Supreme Court of the State of New York, County of New York, 2013

Faurecia Automotive Seating, Inc and Faurecia Sieges D'Automobile v. Target Steel, Inc., State of Michigan in the Circuit Court for the County of Oakland, 2012

General Motors Corporation v. Albert Weber GmbH, U.S. District Court, Eastern District of Michigan, 2012

Nissan North American, Inc, v. Johnson Electric North America, Inc., U.S. District Court, Eastern District of Michigan, 2012

Chrysler Group International, LLC v TWS Worldwide S.A. DE C.V., American Arbitration Association, Michigan, 2011

SOS Express v. Bank Of America, N.A., U.S. District Court, Eastern District of Michigan, 2011

Qimonda North America Corporation v G2 Technology, Inc., American Arbitration Association, California, 2011

MFS & Company, LLC v. Caterpillar, Inc., U.S. District Court, Eastern District of Michigan, 2010

The CAO Group, Inc. v. Federal-Mogul Corporation, et al., U.S. District Court, Eastern District of Michigan, 2010

Fox Hills Chrysler Jeep, Inc. v. Chrysler Group LLC, American Arbitration Association, Michigan, 2010

Westminster Dodge, Inc. v. Chrysler Group LLC, American Arbitration Association, Massachusetts, 2010

Wissler Motors, Inc. (dba Wissler Chrysler-Jeep) v. Chrysler Group LLC, American Arbitration Association, Pennsylvania, 2010

Eagle Auto-Mall Corp. v. Chrysler Group LLC, American Arbitration Association, New York, 2010

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Testimony Experience:

Terry Chrysler Jeep, Inc. v. Chrysler Group LLC, American Arbitration Association, New York, 2010

B.G.R. LLC (dba Deland Dodge) v. Chrysler Group LLC, American Arbitration Association, Florida, 2010

Bob Taylor Jeep, Inc. v. Chrysler Group LLC, American Arbitration Association, Florida, 2010

1099 LLC (dba Venice Dodge) v. Chrysler Group LLC, American Arbitration Association, Florida, 2010

New Center Stamping, Inc. v. GAZ U.S. Inc. and LLC "Automobile Plant GAZ", International Arbitration, Michigan, 2010

U.S. Securities and Exchange Commission v. Delphi Corporation, et al., U.S. District Court, Eastern District of Michigan, 2009

Broadspire Services, Inc. v. Lumbermens Mutual Casualty Company, American Arbitration Association, 2009

Zimmer Melia & Associates, Inc., et al. v. Kirkland Stallings, et al., U.S. District Court, Middle District of Tennessee, Nashville Division, 2009

Old Carco LLC (fka Chrysler LLC), et al., Debtor, U.S. Bankruptcy Court, Southern District of New York, 2009

Andrew LLC v. EMS Technologies, Inc., American Arbitration Association, 2009

Fields Medical Corporation, et al. v. Kirkland C. Stallings, et al., State of Kentucky, Jefferson Circuit Court, Division Ten, 2009

Jernberg Industries, Inc., et al v. Republic Engineered Products, Inc., et al, United States Bankruptcy Court, Northern District of Illinois, Eastern Division, 2009

Getrag Corporation v. Sabo USA, Inc., et al., State of Michigan, Circuit Court for the County of Wayne, 2009

Oxford Biomedical Research, Inc. v. Invitrogen Corporation, U.S. District Court, Eastern District of Michigan, Southern Division, 2009

Hutchinson FTS, Inc. v. Chrysler LLC, State of Michigan, Circuit Court for the County of Oakland, 2009

TS Wixom Management, L.L.C. v. WixKix Properties, L.L.C. et al., American Arbitration Association, Michigan, 2009

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Testimony Experience:

Dawn A. G. Kulongowski, D.D.S., et al. v. David L. Brower, D.D.S., et al., American Arbitration Association, Michigan, 2008

PBR Knoxville, L.L.C. and PBR Columbia L.L.C. v. Intermet Corporation, American Arbitration Association, Michigan, 2008

Computer Business World L.L.C. v. Thomas, et al., American Arbitration Association, Michigan, 2008

Franklin Management Industries, Inc. v. Far More Properties, et al., American Arbitration Association, Ohio, 2008

Kenneth Eid v. Saint-Gobain Abrasives, U.S. District Court, Eastern District of Michigan, Southern Division, 2008

Sunshine Gas Producers, L.L.C., v. Browning-Ferris Industries of California, Inc., U.S. District Court, Central District of California, Western Division, 2007

Exelon Generation Company, LLC v. General Atomics Technologies Corp., U.S. District Court, Northern District of Illinois, Eastern Division, 2007

Exelon Generation Company, LLC v. Nuclear Fuels Corp., U.S. District Court, Northern District of Illinois, Eastern Division, 2007

City of Detroit v. Crown Enterprises, Inc., State of Michigan, Circuit Court for the County of Wayne, 2007

Franklin Management Industries, Inc. v. Motorcars Acquisition, LLC, et al., American Arbitration Association, Ohio, 2007

Robert C. Wilson, et al. v. EarthTech, U.S. District Court, Eastern District of Michigan, Southern Division, 2007

Levy Indiana Slag Company v International Union of Operating Engineers, Local 150, AFL-CIO and Edw. C. Levy Company Inc. v. International Union of Operating Engineers, Local 150, AFL-CIO, U.S. District Court, Northern District of Indiana, Hammond Division, 2007

Tyco Electronics Corporation v. Illinois Tool Works Inc, et al. State of Illinois, Circuit Court for the County of Cook, 2007

Power Tools and Supply, Inc. v. Cooper Power Tools, Inc., U.S. District Court, Eastern District of Michigan, Southern Division, 2007

Zimmer Great Lakes, Inc.; Zimmer US, Inc.; and Zimmer Austin, Inc.; v. Biomet, Inc.; Biomet Orthopedics, Inc.; Marc Vreede; Corey Bair and Carl Graham; and Marc Vreede v. Zimmer Austin, Inc.; State of Michigan, Circuit Court for the County of Wayne, 2006

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Testimony Experience:

Dana Corporation et al. v. Sypris Solutions, Inc. et al., International Institute for Conflict Prevention and Resolution, 2006

Thomas v. La-Van Hawkins and Melvin Butch Hollowell, State of Michigan, Circuit Court for the County of Wayne, 2006

G. Jeff Mennen, et al. v. Onkyo Corporation, et al., U.S. District Court, Southern District of Florida, Southern Division, 2005

H. Richard Fruehauf, Jr. v. Fruehauf Production Company, LLC, American Arbitration Association, Michigan, 2005

The Service Source, Inc. v. Office Depot, Inc., U.S. District Court, Eastern District of Michigan, Southern Division, 2005

The Clarkston Medical Group v. Mid-Oakland Medical Center, LLC, State of Michigan, Circuit Court for the County of Oakland, 2005

D. Ray Nunn, et al. v. Ready, Sullivan & Ready, et al., State of Michigan, Circuit Court for the County of Monroe, 2005

MICREL, Inc. v. TRW, Inc., U.S. District Court, Northern District of Ohio, Eastern Division, 2005

Downriver Blow Molding, Inc., et. al. v. Plastech Engineered Products, Inc., State of Michigan, Circuit Court for the County of Wayne, 2005

Forklift Liquidating Trust v. Spicer Clark-Hurth, U.S. Bankruptcy Court, District of Delaware, 2005

Jim R. Sapp, et al. v. Brett Miller, et al., State of Indiana, Superior Court for the County of Marion, 2005

Hayes Lemmerz International, Inc. v. Epilogics Group and Kuhl Wheels, LLC, U.S. District Court, Eastern District of Michigan, Southern Division, 2005

Forklift Liquidating Trust v. Dana Corporation, U.S. Bankruptcy Court, District of Delaware, 2005

Robert Price v. Robert Clark, M.D., American Arbitration Association, Michigan, 2004

Estate of Connolly v. Pearl Leather Finishers, U.S. Bankruptcy Court, Eastern District of Michigan, Southern Division, 2004

Berger, et al. v. Kilmer, et al., State of Michigan, Circuit Court for the County of Washtenaw, 2004

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Testimony Experience:

National Steel Corporation v. Hayes Lemmerz International, Inc., U.S. Bankruptcy Court, Northern District of Illinois, Eastern Division, 2004

Lourdes Assisted Living Corporation v. Elness Swenson Graham, Inc, American Arbitration Association, Michigan, 2003

Venture v. Autoliv, U.S. District Court, Eastern District of Michigan, Southern Division, 2003

Tekonsha Engineering Co., et al. v. C.W. Industries, Inc., U.S. District Court, Western District of Michigan, Southern Division, 2003

Brandon Bone v. YMCA of Metropolitan Detroit, et al., State of Michigan, Circuit Court for the County of Wayne, 2003

A.G. Simpson Technologies, Inc., Ontario Superior Court of Justice, 2001

MVP v. Richard Hanson, et al., State of Michigan, Circuit Court for the County of Oakland, 2001

Camrose Technologies, LLC, U.S. Bankruptcy Court, Western District of Oklahoma, 2001

Safeway Transport v. OT Transportation, State of Michigan, Circuit Court for the County of Wayne, 2001

Emanuel Hull LLC v. Hull Brothers Construction, et al., American Arbitration Association, Michigan, 2001

J.O. Galloup v. Slomski, State of Michigan, Circuit Court for the County of Macomb, 2000

Wacker Silicones v. ABACO, U.S. District Court, Eastern District of Michigan, Southern Division, 2000

Saad v. Davis, State of Michigan, Circuit Court for the County of Wayne, 2000

Johnson v. City of Saline, et al., U.S. District Court, Eastern District of Michigan, Southern Division, 2000

Belle Isle Grill Corporation v. City of Detroit, State of Michigan, Circuit Court for the County of Wayne, 2000

Albert Panyard v. Roy Dean Corporation, State of Michigan, Circuit Court for the County of Oakland, 2000

Stone Mountain Partners v. Integra Printing Company, American Arbitration Association, Michigan, 1999

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Testimony Experience:

Oink, Oink, Inc. v. Liberty BIDCO Investment Corporation, State of Michigan, Circuit Court for the County of Wayne, 1999

Matvest, Inc. v. Motorola, Inc., State of Michigan, Circuit Court for the County of Wayne, 1999

International Container Corporation, Inc. v. Walbro Corporation, State of Michigan, Circuit Court for the County of Wayne, 1998

Ashley v. Blue Cross Blue Shield of Michigan, U.S. District Court, Eastern District of Michigan, Southern Division, 1998

Robinson, et al. v. Wasserman, et al., State of Michigan, Circuit Court for the County of Wayne, 1998

Walter Norris v. City of Taylor, State of Michigan, Circuit Court for the County of Wayne, 1998

Eagle Ottawa v. Yorkshire Americas, U.S. District Court, Western District of Michigan, 1998

National Boatland, Inc. v. ITT Commercial Credit Corporation, American Arbitration Association, Michigan, 1998

Local 1038 v. Action Distributing, U.S. District Court, Eastern District of Michigan, Southern Division, 1998

Fischer v. Fischer, State of Michigan, Circuit Court for the County of Oakland, 1997

Allmond Associates, Inc. v. Hercules, Incorporated, U.S. District Court, Eastern District of Michigan, Southern Division, 1997

Delcor Construction, Inc. v. CED Construction, Inc., American Arbitration Association, Michigan, 1997

Chrysler Corporation v. Ford Motor Corporation, et al., U.S. District Court, Eastern District of Michigan, Southern Division, 1996 & 1997

VanElslander v. Michael Assarian Builders, et al., American Arbitration Association, Michigan, 1996

Victoria Banks, et al. v. Manuel J. Moroun, et al., State of Michigan, Circuit Court for the County of Oakland, 1995 & 1996

Gerber Products Company v. FBI Foods, Ltd, et al., U.S. District Court, Western District of Michigan, 1995

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Publications:

"Building a Best in Class Corporate Compliance Program," *The SRR Journal*, Fall 2010

"When the Chain Breaks... Assessing Damages in Cases Involving Disruptions to Complex Supply Chains," *The SRR Journal*, Fall 2010

"Putting a Caliper on Automotive Disputes – Assessing Economic Damages in a Troubled Industry," Member Publications, WorldServicesGroup.com, January 2009

"You Want Me to Pay Back What?" *The SRR Journal*, Fall 2007

"Litigation: Automotive Suppliers Deliver More than Parts to Their Customers," *The SRR Journal*, Spring 2004

"Time Value of Money and the Economic Timeline," *Litigation Section of the State Bar of Michigan's 'The Litigation Newsletter,'* Spring 2000

"Professional Designations and Appropriate Methodologies: Items to Consider When Naming an Economic Expert," *Litigation Section of the State Bar of Michigan's 'The Litigation Newsletter,'* Fall 1999

"Kumho Tire Clarifies 'Gatekeeping' Role," *MACPA 'The Leaders' Edge,'* August/September 1999

"Understanding Incremental Costs and How They Affect the Measurement of Lost Profits," *Litigation Section of the State Bar of Michigan's 'The Litigation Newsletter,'* Summer 1999

Speeches and Seminars:

"Managing Difficult Evidence Problems in International Arbitration: The ICDR Guidelines for Arbitrators Concerning the Exchange of Information", presented at the 11th Annual International Centre for Dispute Resolution's Miami International Arbitration Conference, 2013

"Use of Interest in Litigation Damages," Panelist, Michigan Association of Certified Public Accountants (MACPA) Litigation and Business Valuation Conference, June 2011

"The Automotive Industry: What A Long, Strange Trip It's Been," presented at the AIRA Annual Conference, June 2009

"Corporate Fraud in the Current Economic Climate," Panel Moderator, joint presentation with the Association for Corporate Counsel and Financial Executives International, April 2009

"Adequate Assurance in the Automotive Supply Chain," presented at the OESA Chicago Regional Meeting – Financial, Legal and Market Strategies for Suppliers, February 2009

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Speeches and Seminars:

"Supply Risk Management: The Changing Environment and Early Warning Signs," presented at the TRW Automotive Law Conference, 2007

"Economic Damage Considerations in the Theft of Trade Secrets," presented at the Strategies and Solutions for Protecting Proprietary Information Conference, 2006

"Mock Trial: Using Valuation Experts in Litigation," presented at the MACPA/ICLE: Litigation Mock Trial (Plymouth, Michigan), 2003

"Utilizing Business Income Tax Returns in Litigation," presented to the Cleveland Bar Association, 2003

"Growth Issues of Businesses in a Recovering Economy," presented at the Risk Management Association- Michigan Chapter; Spring Conference, 2002

"Measurement of Economic Damages," presented at the Michigan Association of Certified Public Accountants; Annual Litigation and Business Valuation Conference, 2000

"Research on the Internet," presented at the Michigan Association of Certified Public Accountants; Annual Litigation and Business Valuation Conference, 1999

"Tax Traps for Litigators," presented to the Macomb County Bar Association (Clinton Township, Michigan), 1999

"Measurement of Economic Damages," presented at the Dinsmore & Shohl LLP; Litigation CLE Conference (Cincinnati, Ohio), 1999

"Rules of Evidence and Civil Procedure," Michigan Association of Certified Public Accountants; Annual Litigation and Business Valuation Conference, 1998

"Consulting a Financial Expert Early in the Dispute Process," Michigan Bar Association- Litigation Section; Annual Summer Conference, 1997

"Mock Trial Panel Presentation," Michigan Association of Certified Public Accountants; Annual Litigation and Business Valuation Conference, 1997

"Alter Ego- Piercing the Corporate Veil," Michigan Bar Association- Litigation Section; Annual Summer Conference, 1996

"Using a CPA in Shareholder Disputes," Michigan Association of Certified Public Accountants; Annual Litigation and Business Valuation Conference, 1996

"Research on the Internet," Michigan Association of Certified Public Accountants; Annual Litigation and Business Valuation Conference, 1995