

BUSINESS FRAUD

Forensic accountants make it add up

Bringing an expert on board early can help toward trial or facilitate settlement.

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SPECIAL TO THE NATIONAL LAW JOURNAL

CORPORATE FRAUD, insider trading, the Sept. 11, 2001, attacks, intellectual property infringement—the list goes on and on as to instances in which parties have committed acts resulting in financial losses. The legal challenge in proving financial wrongdoing is a minefield in itself, but what steps need to be taken when documenting economic damages?

Many insurance companies, law firms and attorneys have begun to retain forensic accountants to help guide them through that minefield. Getting a forensic accountant on board early on in the case can make a big difference in resolving the issues involved in quantifying financial damages. Forensic accountants can be utilized in either an expert or consultant role. An expert would be used to render an opinion before a trier of fact, and his or her work is potentially discoverable. A forensic accountant retained as a consultant advises the attorney and client as to facts, issues and strategy. Since consultants are not retained to testify as experts, their work product is generally protected from discovery.

If a damages expert is brought on board early enough, he can assist counsel in requesting pertinent documents and asking appropriate questions during dis-

covery. A good forensic accounting expert can also quickly analyze the other side's demand for damages and identify inherent weaknesses in their damage measurement that might not be apparent to the client—information that may prove useful at depositions or at trial—or in fostering an early settlement. An opponent enlightened as to the weaknesses in its case has greater incentive to settle the matter sooner and at a number that more closely reflects the true damages.

When using a forensic accounting expert at trial, attorneys should be aware that diligent opposing counsel will research past testimony of the expert in an effort to expose testimony contradictory to his or her current opinion. Consistent application of accounting theory is imperative in providing candid and credible testimony.

Ethical-conflict issues can also arise for potential experts. An independent and truthful expert can be a strong expert witness in convincing a judge and the jury about his or her opinions in the legal proceeding. While a good expert will listen to input from the attorney regarding the case, it is very important for the expert first to identify the strengths and weaknesses of theories put forth by the client. The expert must then formulate his or her own opinion, independent of the attorney, and feel comfortable in communicating the opinion to all parties. An expert who is retained simply to communicate the opinions of the client will usually be recognized as such during

his or her testimony.

Since the ruling in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the challenges regarding whether an expert witness is truly an expert have intensified. A simple review of a potential expert's curriculum vitae will usually not provide the comfort level an attorney requires to make sure the expert's testimony will stand up to a *Daubert* review. Most experts are more than willing to spend a few hours with an attorney to find out more about a case, enabling the attorney to conduct a thorough interview of the potential expert's qualifications. There are several important topics to discuss when retaining a forensic accounting expert.

The expert should have a list of testimony provided over the past four years, and a list of all articles authored for the past 10 years. The attorney should discuss the high and low points of the expert's testifying experience, and determine how these experiences have helped the expert to provide consistent and coherent testimony. It is common to ask the potential expert what percentage of testimony is provided for plaintiffs vis-à-vis defendants—rest assured opposing counsel will ask this very question.

The attorney should also determine whether the expert has experience in the specific industry of the parties involved, which can help the expert's credibility.

In addition, the attorney should consider potential approaches to the case. Knowledgeable, quick-thinking experts will show their strengths by offering

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potential ideas to the damage issues faced in the particular matter. Without going into specific details, a forensic accounting expert should be able to gauge the strengths and weaknesses in the damage aspect of the case.

A budget should also be considered. After the potential expert is given a brief background into the case, as well as a scope of the testifying requirements, he or she should be able to provide a range of cost expectations. It is common for a retained expert to outline his or her rates and the anticipated scope in an engagement letter, as well as disclosing a retainer required to start the assignment.

Finally, the attorney should ask for a list of testimony references including a list of attorneys the expert has worked with, and be sure to follow up with a few of the references to get the other attorneys' opinions regarding the level of work performed by the expert.

While technical expertise is very important to a forensic accounting expert, perhaps the most important characteristic of the expert is his or her ability to communicate both verbally and in writing, both to the attorney as well as to a judge and jury. While accounting and economic concepts tend to scare most laypeople, they can and should be presented in simple, understandable terms. An accounting expert with good communication skills can greatly strengthen a complex litigation proceeding.

Consider graphics

Graphs and charts help outline relationships, events and economic trends

in the case. A simple chart can assist both the damages expert and the attorney in tying relevant factors together to prepare for trial. Here are examples of items to include:

- Key events.
- Both sides' estimates of damages.
- Simple explanations for the major differences between both sides' estimates of damages.
- Sources of relevant data.
- Crucial missing documentation.
- Summary of damage-measurement methodology.

Such a chart can also be utilized at trial to summarize the important points to make to a judge and jury.

A written report from the forensic accounting expert will be required in federal court and is subject to disclosure as outlined in Rule 26 of the Federal Rules of Civil Procedure. While the final report is normally provided to the opposing side, any preliminary draft copies may be subject to discovery, pursuant to a ruling provided in *Trigon Insurance Co. v. United States*, 204 F.R.D. 277 (5th Cir. 2001). Based upon this case, draft reports that are shared with other experts during the course of the assignment can be subject to discovery. Not all draft expert reports are required to be produced during discovery, especially if the expert is working alone in developing proper language and charts for the expert's ultimate opinion. Considering this ruling, it is imperative that the attorney retain a damages expert who can effectively and simply communicate his or her opinions without third-party assistance.

An effective communicator is essential during cross-examination in a trial. While there will always be differences of opinion in matters regarding economic losses, a skilled damages expert will listen to points made by the opposing counsel and will know when and how to contrast those points from his or her opinion. A good expert will not be argumentative and belligerent, but will acknowledge a valid theory if presented.

When selecting a forensic accountant, the attorney should provide him or her with a list of parties involved in the litigation, including the attorneys and any underlying insurance, if applicable, to check for potential conflicts of interest.

Finding the right expert, who has the requisite expertise and abilities, is an art in itself. While following the suggestions outlined above will help, ultimately the attorney and forensic accountant must work well together as a team to be successful. Effective communication between the attorney and the expert, combined with a compelling presentation of the damages expert's opinions, will go a long way toward convincing the opposing attorneys or judge and jury of fact that the damage quantification is the correct measurement. **NLJ**

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