

Avoiding Common Misuses of Financial Experts at Trial

By: Thomas DeCataldo, Esq., Skoloff and Wolfe, P.C.

Most family law practitioners regularly encounter matters requiring the assistance of a financial expert. In situations involving valuing a business, determining cash-flow, tracing marital assets, or conducting a lifestyle analysis, financial experts play a regular and recurring role in our practice. Practitioners are tasked with the challenge of determining how best to use financial experts when a case proceeds to trial, whether through the court system or arbitration. In order to answer this question, I surveyed nine financial experts that regularly provide litigation support in New Jersey family law disputes to gain insight on ways family practitioners can make better use of their services.¹ Here is what they had to say:

What is the most common mistake(s) you see attorneys make in terms of effectively utilizing accountants at the time of trial? What could be done differently?

This question drew nearly a unanimous response among those surveyed, all relating to the time and preparation attorneys spend with their experts in advance of trial, as well as the level of understanding attorneys have of an expert's report. Whether attempting to understand an expert's report or preparing for direct and cross-examination, nearly every accountant surveyed suggested attorneys should expend more time with experts when preparing for trial. Various experts noted that attorneys are "*devoting minimal or no time to trial preparation,*" are "*not preparing far enough in advance,*" and are "*not making the time to have a prep session.*" Other common mistakes observed by these experts included:

- "Not understanding the report and the mechanics of it."
- "Not taking the time to understand our opinions and our basis for arriving at such opinions."
- "There can always be more preparation time...We are most often asked to testify only as to our reports, but if the attorney understands a little more about the underlying support, there may be greater opportunity for more effective direct and cross-examination."
- Not "actively listening to our answers under direct and cross-examination."
- "Not having the expert sit in on the testimony of the other expert to save money is a critical mistake."
- "It is very helpful for the attorney to sit with the expert to go through the attorney's outline for the expert's direct testimony. Ask questions on the key issues and listen to the expert's responses. This allows the expert to evaluate his own responses and work on improving them. Most experts testify only 1 to 2 times a year, if that much, so walking through a question and answer period is always helpful."
- "Your expert can prepare outlines for direct examination and areas of cross." "Not using the expert to help in preparing the cross examination outline by providing questions...the expert can provide important follow up questions to the attorney in these instances."

Hot Tip: BE PREPARED AND AVOID SCRIPTS. *Financial issues are complex and in order to effectively litigate these disputes, it is crucial that a practitioner understand the report being offered on behalf of their client and be able to ask critical follow up questions without relying upon*

¹ At the request of most experts polled and to promote candid responses, the participants are kept anonymous.

a script. The only way to guarantee this occurs is to spend the time preparing with your expert before trial.

How about at a deposition? What could be done differently?

Surprisingly, several experts commented that they are "rarely deposed" in a family case. Those that were, echoed the comments above relating to the time of trial, but also offered the following:

- "If we are asked to assist in preparation of questions for depositions, a common mistake is not taking the time to really understand why we may be asking a set of questions, thus not being able to effectively follow-up."
- If it is your own expert, "make sure the accountant does not box themselves in with absolutes in their answer or guessing/speculating."

Hot Tip: DEPOSE FINANCIAL EXPERTS. Only in the rarest of cases should a matter proceed to trial without a financial expert being deposed. Further, use your expert to prepare for depositions of the other party's expert. This allows you to explore the competing rationales between reports, which will provide fodder for trial testimony. Finally, make sure you understand why you are asking the questions provided to you by your expert so you can effectively follow up.

In business valuation cases, how often does the attorney retaining you ask for an explanation of the weakest conclusions in your own report? How often does this lead to changes in a draft report?

- "This does not always happen, but could lead to additional explanation to further explain the conclusions in a report."
- "In matrimonial cases, only a few attorneys ask to see a draft report and even fewer critically analyze the underlying assumptions that lead to the concluded value."
- "This is a very good question to be asked. I find this is usually done by a few attorneys just before trial, and even fewer attorneys before deposition. Rarely by any attorneys before the report is issued."
- "I normally reiterate to [the attorneys] the subjective areas (not necessarily weak, but areas that are frequently rebutted.)"

Hot Tip: Ask your expert to explain the subjective areas of his or her report that are likely to be confronted at trial. This can lead to more effective direct examinations, enhanced credibility for your expert, and can soften the blow when your expert is subjected to cross-examination.

How often are you asked to review or prepare a schedule highlighting the differences between your report and other reports prepared for the case that impact value?

This question generated a wide array responses, ranging from "always," to "all the time," to "not too often," and even "5% of the time." One expert said that "I have been asked to prepare a 'side by side' analysis on occasion, but not in every case."

Hot Tip: Always ask your experts to provide a side by side analysis differentiating competing reports. This tactic not only helps an attorney clarify the differences in value for the trier of fact, but may often lead to settlements if the experts can discuss the differences in their subjective views and come to a compromise.

At trial, how often are you asked questions during direct examination that call for you to directly critique the other side's report or distinguish your report from the other sides? Should this happen more often?

This question also produced a wide range of responses, including "always," "all the time," and "never." There was an interesting divergence of opinion on this topic among the experts polled:

- "We are asked these questions often...it can be helpful to frame the differences between the two reports." "It can be an effective way to point out differences between the two reports. This can all be planned ahead of time in the prep session" *But also consider:*
- "It should not happen more often, since I have worked for a number of competent attorneys and this is not done. I presume that they don't want to dilute or confuse the message to the Judge."

Hot Tip: Consider whether to address competing reports during the direct examination of your expert. This is an easy way to illustrate for the trier of fact the discrepancies in the report, and to explain why your report is most reliable. However, an attorney should be strategic in doing so and remain mindful of whether this tactic draws focus away from the report offered on behalf of their client.

How often are you asked about your qualifications in comparison to those of the other experts in the case?

Approximately half of the experts polled said that they are "almost never" questioned about their credentials to serve as an expert. However, others felt "it can be important to establish your credentials compared to the other expert."

Hot Tip: You should always *voir dire* your expert when given the chance. Allowing the trier of fact to hear how wonderful and qualified your expert is to assist the Court can only be a good thing.

Finally, Hot Tips from the Experts: Anything else you would like to see attorneys do differently to be more effective at trial?

- "Attorneys should work with their experts to try and understand the numbers. Otherwise, they will have a more difficult time cross-examining an expert."
- "[The attorneys] need to understand how the expert reached the conclusion."
- "I think preparation with your expert on direct testimony and good cross examination questions for the other expert is key."
- "Allow the experienced expert to guide the attorney on their own direct or the adversary's cross. Most experts know where to aim the bullet better than the attorney."
- "For me, it's all about preparation."

Although the context of this undertaking relates to preparing for trial and litigating financial disputes, properly using an expert can also serve as an effective way to resolve disputes. As many practitioners realize, the more effectively a case is prepared for trial, the more likely it may settle if a practitioner exposes flaws in the approach of the other party.

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