

## **Hiring a Forensic Expert Early in a Lost Profits Case Yields High Demand**

In a recent meeting with some of my colleagues in the legal community, the question came up:

Why is the analysis of lost profits deferred until late in the litigation process? One colleague is of the opinion that often the financial issues associated with damages will sometimes take a back seat to liability issues because attorneys will frequently tend to focus on the legal procedures and on discovery procedures. But based on my 20+ years experience in forensic accounting, business valuation and expert testimony, early involvement by the financial expert is often crucial to an effective analysis in a lost profits case—and ensures that all aspects of the lost profits case are covered.

Forensic experts are typically involved in complex commercial litigation where economic damages or lost profits are at issue. They're also involved when a case requires forensic accounting skills such as in a fraud or embezzlement case or the value of a business is at issue such as in a shareholder dispute or marital dissolution. The forensic expert may also be called upon to explain an accounting, tax or financial issue to the judge or jury.

Forensic experts often are also hired by attorneys to provide expert testimony as litigation support consultants. The expert witness can play a variety of roles in lost profits cases including performing damage calculations to coordinating complex research and analysis and creating case strategies. To do this, the forensic expert must select an approach in the pretrial planning phase that helps develop and integrate facts and legal theories presented later in trial testimony. Involving the forensic expert early on in the litigation process helps to ensure that all the financial issues are identified and related documents obtained.

As I've written, forensic experts are sometimes not designated by counsel until late in the lost profits case; often at that point, the discovery process is closed and data that would have been relevant and potentially helpful to the analysis was not obtained. To some attorneys, determining lost profits in a case may seem at times to be relatively straightforward; yet opposing forensic experts can come up with vastly different numbers.

The forensic—or financial—expert may assist legal counsel in identifying the particular financial issues related to the case. The expert may also assist legal counsel in creating discovery requests, preparing for depositions of financial witnesses, or helping with trial exhibits and settlement negotiations. The expert can also help the legal team make a determination of the possible range of recovery before incurring a substantial amount of fees pursuing a claim. Involving the forensic expert early on in the process helps to ensure that all the financial issues are identified and related documents obtained.

The expert must first have a comprehensive understanding of the operations and financial dynamics of the subject company, the markets in which the company operates, and the economics of the related industry. It's the expert's task to gather the relevant underlying evidence, apply the appropriate methodology, and exercise professional judgment. The goal of the expert in the lost profits case is to accurately calculate the most reasonable measurement of damages that also meets the legal standard of "reasonable certainty."

It is also the forensic expert's responsibility to recognize that financial records provided can be inaccurate, incomplete or misleading. Applying the appropriate tests will help the expert avoid relying on any faulty or flawed records. Suffice to say, the forensic expert whose opinions are well-supported by forensic evidence can be effective in serving the case and the client.

I believe that if attorneys truly want to advance their clients' desires to resolve business disputes early on in the process, it is important to focus as early as possible on the key issues associated with damages claims. In business litigation cases, that means an early focus on lost profits claims, because it's those claims that tend to drive whether the case is tried or settled.