

OUT_{of} ORDER

Opinion • Commentary • Humor

5 Tips for Choosing the Right Accounting Expert

by GAVIN R. VILLAREAL

Math intimidates many lawyers. And yet, in almost every large commercial lawsuit, math is unavoidable because it is integral (pun intended) to damages.

Given the complexity of the damages models in some cases and the difficulties that may arise in proving or challenging damages, an accounting expert is frequently indispensable in most high stakes litigation.

LITIGATION

Most attorneys are familiar with the basics of choosing an expert, such as reviewing past testimony, reading materials the expert has authored and searching for issues that may undercut the expert's credibility. But in addition to these steps, lawyers should consider some additional issues when choosing an accounting expert.

1. What's the accounting expert's role? Before the search begins, spend some time thinking about the accounting expert's role. Like lawyers, accountants have a wide variety of specialties and certifications. An expert with the right credentials for the job can be a convincing witness.

Does the case involve allegations of fraud or internal wrongdoing? If so, perhaps a certified fraud examiner or an expert certified in financial forensics is needed. If the dispute involves a business valuation, an expert accredited business valuation might be appropriate. Taking time early on to figure out how to use an accounting expert will help narrow the search for the right person and will save money in the long run.

2. Ask how the accounting expert can help. Experts help explain complicated subjects, but don't wait until trial to put an expert's skills to the test. Ask potential candidates at



the outset how they can help.

Accountants often can suggest new approaches or tactics that an attorney might not have considered. Early brainstorming sessions can assist the attorney in figuring out what working with the accounting expert will be like.

3. Consider the audience. While an accounting expert may have the credentials to perform the work, a litigator always should consider how the fact-finder in the case—whether a judge, arbitrator or jury—will view

Accountants often can suggest new approaches or tactics that an attorney might not have considered. Early brainstorming sessions can assist the attorney in figuring out what working with the accounting expert will be like.

an expert's background.

For instance, if the lawsuit revolves around the application of an accounting standard or rule, an accounting professor or similar academic might make the best impression. A former regulator who was charged with enforcing the rule could also be very persuasive.

In a lawsuit involving a business transaction, though, someone with real world business experience might be a better choice. For example, if the suit involves a claim for lost profits from the sale of microprocessors, an auditor with experience auditing the financial statements of microprocessor manufacturers might be right for the job. Another alternative might be a former chief financial officer of such a company, who could opine on damages while providing first-hand perspectives on the business issues built into the damages model.

4. *Can the expert testify effectively?* Don't become so focused on an expert's credentials that you lose track of an equally important attribute: the expert's ability to testify clearly and convincingly.

An accounting expert retained on a consulting-only basis may be helpful and useful without ever having to testify. But if testifying is on the expert's to-do list, it is vitally important to find someone who can do so effectively.

Depending on the complexity of the issues, some of an accounting expert's testimony may go over the head of a judge or jury unless communicated properly, in easy-to-understand, nontechnical language. All the degrees and certifications in the world are of little help if the expert can't explain accounting concepts to the average juror. Similarly, an expert who gets flustered under cross-examination may do more harm than good.

5. *Who really will do the work?* The amount of information and documents that an accounting expert must review in many complex commercial lawsuits can be daunting. As a result, some experts employ teams to help with document review, factual analysis and even writing initial drafts of expert reports.

Using assistants may be the most cost-effective approach or may be necessary given time constraints. But if an expert intends to use others for any part of his work, the attorney must know that in advance. Understanding the expert's work plan to review and analyze the case information is also critical, particularly if the expert employs tools, testing and sampling.

Meeting and vetting team mem-

bers can be as crucial as choosing the right expert. The expert's team can serve as consultants to a great extent, allowing counsel to vet ideas or theories without polluting the expert.

But don't allow an expert to delegate away so much of the detail work that they can't persuasively argue their opinions (or open the door to a challenge based on the limited amount of time they have worked to develop those opinions). When called to testify, the expert must know all of the critical documents in the case and be able to support every opinion expressed. An expert's credibility will suffer if he can't explain the basis for an opinion because he didn't do the work.

A good accounting expert can substantially impact the damages recovered through settlement or trial. Considering these issues will help ensure litigators choose the best expert for the case. ■■■



Gavin R. Villareal is a litigation partner in Baker Botts in Austin. He focuses on complex commercial litigation and co-chairs the Professional Liability litigation Committee for the American Bar Association's Section of Litigation.