Using Financial Expert Witnesses in Business Litigation

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What an expert witness should accomplish

- In *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 S.C.R. 748 at 780 at para. 62, the Court stated:
  - Experts, in our society are called that precisely because they can arrive at well-formed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses the right to deference when it is not defensible.
- The points we will discuss apply to business litigation in Ontario Courts. Similar rules and evidentiary principles apply before the Federal Court of Canada, in commercial arbitrations and before administrative tribunals.

Determining when to use a financial expert

- Business litigation is usually about numbers.
- The first question is to ask is whether you need an expert at all.
- An expert witness is required when conclusions must be drawn from facts which require skill, experience and knowledge that the trial judge does not or cannot be expected to have.
- An expert will provide an opinion on the facts to enable the judge to make inferences about matters on which expertise is required.
- Are there financial issues about which opinions and conclusions must be drawn? Is a valuation of shares or an appraisal of property required? There are many possibilities and many experts with expertise in different fields.
- The decision whether to hire an expert could also be affected by economic factors of the case. How much money is at stake? What are the prospects for success? How much will the expert cost? Will the cost of the expert make the litigation prohibitively expensive? Can this case succeed at trial without an expert witness?

What kind of financial expert do you need? #1

- If you select an expert who is not qualified to provide the opinion on the correct issue, the expert evidence may not be admissible.
- Even if the expert's evidence is admitted, the trial judge may reject it in favour of the opposing party's better-suited expert.
- Selecting an expert with the appropriate expertise is critical. It requires a carefully considered strategy and good research.
- Ask yourself this question: "What inferences must the trial judge draw from the facts on matters which s/he is unlikely to know or have experience in for my client to succeed?" The answer to this question will dictate the type of expert and the scope of the opinions you require.
- Interview the proposed expert to satisfy yourself about the scope of his/her expertise. A forensic accountant who specializes in family law and personal injury damages may not be best suited for your business loss of profits case.
- Research the cases the expert has done previously and ask the expert about his/her background. Check the expert's web profile and articles s/he has published.

What kind of financial expert do you need? #2

- Ask colleagues for recommendations of an expert. Ask about expertise, experience, cost, report writing skills and ability to testify.
- Some experts prepare excellent reports but are not good witnesses. Some business valuators and forensic accountants are very professional witnesses.
- Even when you get a good reference about an expert, there is no substitute for thorough research. Just as you must research the law and understand the facts, you must conduct internet research about your proposed financial expert.
- Similar cases may provide insights about whether you need an investment analyst, an economist or a portfolio management consultant.
- Read articles by potential experts to identify the kind of cases about which they have opined. Interview the potential expert before engaging him/her. The expert could be the most important witness in your case.

Types of financial expert witnesses

- As counsel, you know that your case requires some "number-crunching" but what kind of expert should you hire? The question could be difficult to answer because there is a panoply of financial experts.
- In a fast CanLII search, I found nearly 1,200 cases where there was some type of financial expert witness. Since 95% of cases settle before trial, this is just the tip of the iceberg of cases using financial experts.
- Here are some of the types of financial experts:
  - Forensic Accountant, Business Valuator, Fraud Examiner
  - Economist, Actuary, Pension and Benefits Consultant
  - Real Estate Appraiser, Equipment Appraiser, Jewellery and Art Appraiser
  - Investment Analyst, Stock and Investment Portfolio Analyst
  - Tax Expert, Merger & Acquisition Expert, Entrepreneurship Analyst
  - Management Accountant, Cost Accountant
  - Workers Compensation Consultant
  - Industry-specific Consultants, e.g. Gaming, Automobile dealers, etc.
- There are also other, less common financial experts.

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Factors to consider when hiring the expert

- When hiring an expert, consider these "red flags" for experts who may not be helpful to your client's case.
- With rare exceptions, be very cautious about hiring an expert:
  - Who has any connection with your client --- even if your client insists that s/he is the best person for the case. The lack of independence and apprehension of bias could be devastating.
  - Who is doing his/her first case ever – unless the case is very small.
  - Whose fees are likely to be out of proportion to the amounts at issue.
  - Who is unlikely to be a good match for the opposing party's expert as to title, experience, knowledge, publications, stature in the professional community.
  - Who was found to be not credible in a reported case.
  - Who is not specialized in the kind of expertise you need for this case.
  - Who had a previous connection or dispute with the opposing party.
  - Who oversells and advocates for the success of your client's case.

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New developments in presentation of expert evidence #1

- There are some new developments in how expert evidence is presented.
- Judges and arbitrators sometimes encourage
  - Hiring a single expert for all parties
  - Expert conferences where common issues are discussed
  - "Concurrent Expert Evidence", where the experts testify in a roundtable.
- Expert witness conferences allow the Court to streamline the issues and focus attention on the points of disagreement between the experts.
- "Hot-tubbing" (concurrent expert evidence) allows experts to testify at trial in a conference setting so that instant responses may be given by opposing experts on contentious points. This process, developed in Australian patent cases, has now been used in Canadian courts: *Apotex Inc. v. Astrazeneca Canada Inc.,* 2012 FC 559 para 6.
- Under the 2010 amendment of the Ontario Rules of Civil Procedure, Rules 50.07 (1)(c) and 20.05(2)(k) allow the Court to order experts to "meet on a without prejudice basis" to identify areas of agreement and disagreement.
- The Court also has the power to appoint its own expert: Rule 52.03(1) but the power is rarely exercised. More about this later in this presentation.

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New developments in expert evidence #2

- Ontario Rules of Civil Procedure, Rule 4.1.01(1) requires every party-appointed expert (a) to provide opinion evidence that is fair, objective and non-partisan; (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. Rule 4.1.01(2) provides that the duty prevails over any obligation owed by the expert to the party.
- In arbitrations, rules vary depending on the applicable procedure. A party can also appoint its own expert. The *UNCITRAL Arbitration Rules,* Art. 29, permit the tribunal to appoint an expert after consulting the parties with safeguards to ensure fairness and the right be heard.
- IBA Rules on the *Taking of Evidence in International Arbitration*, Art. 5, deals with party-appointed experts, including what the report must contain and what must be disclosed. Art. 6 deals with tribunal-appointed experts just like the *UNCITRAL Arbitration Rules:*

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Litigation privilege relating to expert reports #1

- Under Rule 31.06(3), a party may obtain disclosure of relevant findings, opinions and conclusions of a party-appointed expert, including the expert's identity on discovery, but the party being examined need not disclose the information or identity of the expert where,
  - the findings, opinions and conclusions of the expert were made in preparation for contemplated or pending litigation; and
  - the party undertakes not to call the expert as a witness.
- Once an expert begins to testify, s/he is no longer characterized as offering advice to a party. S/he is offering an opinion for the court's assistance. As such, the opposing party must be given access to the foundation of the opinion to test it adequately: *R. v. Stone*, 1999 CanLII 688 (SCC), para. 99.
- Draft reports, preliminary findings and opinions must be disclosed prior to trial if demanded: *Conceicao Farms Inc. v. Zeneca Corp.,* 2006 CanLII 25345 (ONCA), para. 38. In light of this, both counsel and the expert should be careful about the contents of a draft report.

Litigation privilege relating to expert reports #2

- Litigation privilege governs an investigation undertaken by legal counsel for the purpose of giving legal advice, but does not cover all investigations in which lawyers play a lead role: *Prosperine v. Ottawa-Carleton (*2002) 37 CBR(4th)135.
- If the client retains the expert, all of the expert's work product must be produced because litigation privilege does not apply. Typically, the lawyer hires the expert and the client agrees to pay the expert directly. Care should be taken that emails about draft opinions are sent only to counsel.
- Admissibility of expert evidence is unaffected by illegality or breach of ethics with few exceptions. Evidence obtained by a lawyer through a private investigator who interviewed an opposing party is still admissible even if obtaining the evidence contravened *the Rules of Professional Conduct*: *Cowles v. Balac* (2006) 83 OR (3d) 660 (ONCA) para. 198.
- Of course, the admissibility of the improperly-obtained evidence does not prevent the Law Society from disciplining the lawyer. So, this is not a recommended strategy.

Conflicts of interest and disclosure

- Experienced business valuators, forensic accountants and other financial experts tend to be very sensitive about their duties to be independent even though they are engaged by a party. A finding of bias in reasons for judgment could be career-damaging for the expert.
- Prior or ongoing connections between you or your client and the expert must be disclosed. Some prior connections may be irrelevant.
- By disclosing a prior connection, counsel and the expert avoid the risk of embarrassment, inadmissibility and presumption of bias which might be elicited in cross-examination.
- If the prior connection is too close, the expert may be unable to accept the engagement.
- If the expert has a prior or ongoing connection with the opposing party or its counsel, the expert cannot accept the case. The opposing party would object on the basis that the expert might be relying on information obtained in confidence, even if there is no legal privilege.

Best practices for qualifying a financial expert #1

- Before an expert witness testifies at trial, there are two requirements:
  - The expert must deliver a timely report which complies with the many requirements of Rule 53.03; and
  - The expert must be accepted by the trial judge as qualified to give evidence in the relevant field of expertise.
- "…the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify." *R. v. Mohan, 1994 CanLII 80 (SCC).*
- Before the witness testifies, the Court holds a *voir dire* in which counsel calling the expert presents the witness' qualifications and opposing counsel cross-examines on the qualifications.
- The judge then rules on whether the expert's evidence is qualified and states the scope of the expert's qualifications.
- Acceptance of the expert's qualifications to testify on a particular topic does not mean that the judge accepts the expert's conclusions.

Best practices for qualifying a financial expert #2

- Preparation for the *voir dire* begins long before the trial. Counsel must use due diligence not only to identify a witness who is competent on the required topic but whose qualifications will be impressive when compared to those of the opposing expert.
- When done correctly, the qualification voir dire is not a long process.
- Don't lose sight of your objective: to persuade the judge that the expert is competent in the relevant field or sub-field. The judge will not decide reliability at this stage but a poor first impression could be costly.
- Counsel should not be content to refer to the expert's resume alone. Search for internet references and other cases in which the expert has testified on related matters. Identify cases on which his/her evidence has been accepted.
- Research for what judges have said about this expert's evidence in related cases. If you cannot find cases, ask the expert to provide details. Ask the expert if there are any "skeletons" which might come up in cross-examination.

Best practices for qualifying a financial expert #3

- Review the opposing party's expert report and resume and discuss it with your expert. Is the opposing expert more competent or experienced in some aspects of the relevant topic? Discuss with your expert how to anticipate and neutralize this distinction.
- If your expert business valuator has never valued the shares of an auto dealership, your expert might be at a disadvantage if you find out the opposing expert is the "guru of auto valuation". This emphasizes the importance of selecting your expert wisely.
- Anticipate the cross-examination on your expert's qualifications and prepare your expert for it. The cross-examination will focus on the shortcomings of your expert's experience, credentials or position in relation to the opposing expert. Discuss with your expert how the qualification voir dire was conducted in other cases.
- Remind your expert that this is not the time to get into the merits of the case nor for the expert to tell the judge about a big case s/he was on. You might be surprised how many experts can't wait to tell the judge about their big case.

Limits on admissibility of expert evidence #1

- Expert evidence may be inadmissible on four grounds:
  - Failure to serve all opposing parties with a timely report which complies with Rule 53.03 or under Rule 36.01(4) (in the case of examination of an expert before trial with leave of the court)
  - Failure to be qualified as having expertise to give an opinion on the material subject-matter
  - Irrelevancy of the evidence
  - Unreliability of the evidence
- An expert's evidence may be partly inadmissible, (to the extent that the expert exceeded his competence). The Court refused to admit the expert's opinion the expert resorted to independent fact-finding: *820823 Ontario Ltd. v. Kagan,* 2003 CanLII 24295 (ON SC).
- Counsel must ensure that the expert understands the requirements of Rule 53.03 and limits the report to the scope of his/her expertise. A report which exceeds the expert's competence may be less persuasive even if it is admissible.

Limits on admissibility of expert evidence #2

- In *R. v. Mohan* 1994 CanLII 80 para 17, the Supreme Court of Canada said that to be admissible, expert evidence must be
  - relevant to the issues in the case;
  - necessary in assisting the trier of fact;
  - there must not be any exclusionary rule present; and
  - the expert must be properly qualified.
- The test for necessity is whether the expert is able to assist the judge by giving information beyond the judge's knowledge and experience.
- The court will also consider the expert's independence and objectivity. A biased expert is unlikely to provide useful assistance: *Alfano v. Piersanti,* 2012 ONCA 297 para 104-105.
- Admissibility is not automatic. In an 11-year American study by PwC, 48% of financial expert reports were ruled inadmissible. See references.
- Even if the evidence is admissible, the judge must still weigh the opinion evidence and determine if it is credible, independent and commercially reasonable and draw his/her own conclusions.

Limits on admissibility: Trial judge as "gatekeeper"

- *In R. v. J.-L.J.,* 2000 SCC 51, the Court held that the trial judge should take the role of "gatekeeper" seriously. The admissibility of the expert evidence should be scrutinized when proffered, and not admitted too easily on the basis that all frailties could go to weight rather than admissibility.
- The trial judge must do the following analysis to exercise his/her discretion about admissibility of the expert opinion evidence:
  - "The subject-matter must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge";
  - Daubert-like analysis for science, with special scrutiny for novel science;
  - The extent to which the expert opinion approaches the ultimate issue to be decided by the court;
  - The absence of any exclusionary rule;
  - Proper qualification of the expert; and
  - Relevance of the proposed expert evidence to the issues in the case; and
  - Necessity in assisting the trier or fact.

Limits on admissibility: Rule 53.03 requirements

- To be admissible under Rule 53.03(2.1) of the Ontario Rules of Civil Procedure, an expert's report must contain the following information:
- The expert's name, address and area of expertise.
- The expert's qualifications and employment and educational experiences in his or her area of expertise.
- The instructions provided to the expert in relation to the proceeding.
- The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
- The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
- The expert's reasons for his or her opinion, including,
  - a description of the factual assumptions on which the opinion is based,
  - a description of any research conducted by the expert that led him or her to form the opinion, and
  - a list of every document, if any, relied on by the expert in forming the opinion.
- An acknowledgement of expert's duty (Form 53) signed by the expert.
- The expert's report must be served at least 60 days before the pre-trial conference under Rule 53.03(3).

Limits on admissibility: Scope of Rule 53.03 and evidence beyond accepted qualifications

- Rule 53.03 applies only to "litigation experts" who have not been involved with the parties. It does not apply to "treatment experts", who were witnesses of events and have expertise and opinions which will assist the Court.
- If your client's auditor or accountant testifies about the financial statements and provides opinions about events witnessed by him/her, these opinions may be given without complying with Rule 53.03: *Continental v. J.J.'s Hospitality*, 2012 ONSC 1751 paras. 38-37.
- This is useful law when you have an expert who was also a fact witness. However, your client's auditor does not take the place of a forensic accountant where loss of profits must be proved.
- Where an expert has been qualified on a particular topic but gives opinions beyond the scope of his/her expertise, the evidence may be admissible in a criminal case, if the expert actually has the expertise to give the opinion: *R. v. Marquand*, 1993 CanLII 37 (SCC) para. 37.
- The rule is narrower in civil cases and the expert may have to be re-qualified or the extraneous evidence will not be admissible: *Ault v. Canada (A-G)*, 2007 CanLII 55358 (ON SC) paras. 19-22.

Limits on admissibility: "the ultimate question"

- Expert testimony is admissible even if it relates directly to the ultimate question which the trier of fact must answer.
- In *R. v. Burns*, 1994 CanLII 127, the SCC stated:
  - While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court. . .
- But, as the SCC held in *R. v. Marquard*, 1993 CanLII 37 (SCC) para. 49, "oath-helping" is not admissible:
  - "[i]t is a fundamental axiom of our trial process that the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion."
- See also *R. v. D.D.,* 2000 SCC 43 and *R. v. Bryan*, 2003 CanLII 24337 (ON CA) para. 17.

Limits on admissibility: Independence of the expert #1

- The expert's independence should be raised at the *voir dire*.
- However, the trial judge will usually not usually decide the independence issue on the *voir dire*:
  - "When a challenge to expert evidence is based on the expert witness having a connection to a party or an issue in the case or a possible predetermined position on the case, the essence of the challenge is that the evidence is not reliable because the expert has tailored his evidence to suit the position of the particular party or the expert's personal views. This kind of reliability is not an admissibility issue.":
  - *See Gallant v. Brake-Patten* 2012 NLCA 23 para 86-93; *Henderson v. Risi*, 2012 ONSC 3459 para. 14.
- On the other hand, there are cases where the trial judge will refuse to qualify the expert on the grounds of lack of independence.

Limits on admissibility: Independence of the expert #2

- In *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, the expert for the doctor was a former CVO administrator, who was terminated and sued CVO for wrongful dismissal. ONCA held at para 21:
  - It is up to the trier of fact to qualify a proposed expert witness. The party tendering the proposed expert witness must satisfy the trier that he or she possesses not only the necessary expertise, but the requisite independence as well. For example, the trier may refuse to qualify a person of unquestioned expertise who is closely related to the tendering party.
- The CVO Discipline Committee found the expert "strayed from the function of an expert" and had taken on "the role of advocate and possibly the role of the trier of fact." The Committee refused to qualify the expert because when the person rendering the evidence assumes the role of advocate, s/he "can no longer be viewed as an expert in the legally correct sense". ONCA agreed with the conclusion as a proper basis for not admitting the expert.

Limits on admissibility: Daubert principles

- *Daubert* (1993), *Joiner* (1997) and *Kumho Tire* (1999) are a trilogy of US Supreme Court cases concerning admissibility of expert evidence.
- *Daubert* dealt with assessment of the reliability of scientific evidence. The four methods of validation are by evidence of testing, peer review, error rates, and "acceptability" in the relevant scientific community.
- *Kumho Tire* went further to hold that *Daubert* principles also apply to experts who are not scientists to the extent they are relevant. Some expert evidence relies on the experience of the expert. The court may enquire whether the opinion is based on methods which are reliable and generally accepted before admitting the expert evidence.
- *Daubert* and *Kumho Tire* principles have been applied in Canada. In *R. v. Abbey*, 2009 ONCA 624, para. 112, the Court emphasized that a flexible approach was appropriate for non-scientific expert evidence, whose reliability depends heavily on the knowledge and experience of the expert rather than on the methodology or theory behind it.

Preparing the financial expert to testify at the hearing #1

- Your expert has probably testified at trial several times. Ask him/her about past experiences. Has s/he testified before this judge before?
- The first aspect will be the qualification *voir dire*. If the expert is not qualified, s/he will not be permitted to testify. Discuss how the expert has dealt with qualifications in previous cases.
- What aspects of the expert's experience and credentials should be stressed to address the expert's opinions in this case? What should be highlighted to make the expert appear more authoritative than the opposing expert?
- Review the opposing expert's credentials to identify differences in expertise with reference to the opinions required in this case. Discuss with the expert how to deal with these difference most persuasively.
- Review any independence issues opposing counsel could raise and decide how to deal with them. Review other qualification issues opposing counsel might raise. Anticipate potential problems in qualifying the expert and raise them in examination-in-chief where possible to soften their impact.
- Role play. Make the *voir dire* succinct, interesting and persuasive.

Preparing the financial expert to testify at the hearing #2

- After the expert has been qualified, s/he will have to testify about the issues in his/her expert's report.
- The expert's report was prepared months before trial. Are there are any errors in calculations or changes in conclusions? The report may have been prepared by a manager in the expert's firm. The expert will have to fully inform him/herself about the assumptions and conclusions.
- Calculation errors discovered on the eve of trial could devastate the expert's opinion and even more so, if they arise during cross-examination.
- Are there are any changes or new developments which should be discussed or disclosed? How will these affect the conclusions?
- An expert may have developed a new idea since the expert report was prepared or feel less comfortable with an opinion in the report. Discuss these topics and determine what should be disclosed and how to deal with new developments.
- Ask what issues the expert is concerned about in his/her opinion. Discuss what potential cross-examination questions the expert is concerned about.

Preparing the financial expert to testify at the hearing #3

- Review the expert's report and the opposing expert's report. Identify areas of disagreement on assumptions and opinions.
- Discuss how the assumptions which underlie the expert's opinions will be proved.
- Discuss how to deal with any assumptions which cannot be proved by witnesses or documents, or which have changed. An opinion based on unproven assumptions will not be accepted by the court.
- Discuss opinions which go beyond the written report or the expert's expertise. These may be not admitted in evidence. Discuss whether an opinion which goes beyond the report should be given at all.
- Role play cross-examination on difficult questions opposing counsel will ask. Try different approaches dealing with possible weaknesses.
- Remind your expert that precision and understatement are far more persuasive than "beating around the bush" and acting like an advocate.

Preparing for cross-examination of the opposing expert #1

- Your expert should help you prepare for cross-examination of the opposing party's expert. Preparation will differ if you are acting for the plaintiff or the defendant. The defendant's expert report is already a critique of the plaintiff's expert report.
- Attacks on the opposing party's expert fall into five categories: 1) Qualifications and specific expertise; 2) Independence; 3) Assumptions; 4) Methodology and 5) Conclusions.
- Remember the objective of your cross-examination is not to beat the opposing expert to a pulp. Limit your preparation to casting enough doubt about the opposing expert opinion that the Court prefers your expert opinion. The process is relative not absolute.
- Discuss with your expert where you are likely to score the most points with the opposing expert. Focus your cross-examination on your strongest points. You do not have to cross-examination on everything.
- This topic lends itself to a presentation of its own. See paper by I. Ellyn and V. Pileggi, *Cross-Examining the Forensic Accountant*.

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Preparing for cross-examination of the opposing expert #2

- You have two opportunities to cross-examine the opposing expert. Focus your cross-examination for each occasion.
- Decide early whether your objective on the *voir dire* is to render the opposing expert's evidence inadmissible or just to make him/her sound less authoritative than your expert.
- Limit cross-examination on qualifications, competence or independence to matters which will assist your main objective, namely, to persuade the judge that your expert's opinion is the most authoritative and reliable one.
- When cross-examining on qualifications, highlight the strengths of your expert's credentials. Seek admissions that the opposing expert considers your expert's publications authoritative. Emphasize a publication by the opposing expert in which s/he supported your expert's methodology in a similar case.
- It is unpersuasive to attempt to discredit the opposing expert on small points on independence or qualifications when the opposing expert is obviously qualified to give the expert evidence. It could do more harm than good. "Keep your powder dry" for attacks on methodology and conclusions.

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Preparing for cross-examination of the opposing expert #3

- Cross-examination on the opposing expert's opinions should be prepared with the assistance of your expert. Ask your expert for assistance in formulating the questions to cast doubt on the opposing expert's opinions on the five avenues of attack.
- The expert is not trial counsel. You have to develop the cross-examination questions but the expert should provide the ammunition.
- At trial, your expert should be present to assist you with issues that come up during the opposing expert's examination in chief.
- Review the opposing expert's assumptions. If they have not been proven by fact witnesses, this could be fertile ground for invalidating the conclusions.
- Secure admissions that if certain assumptions are proved differently, your expert's conclusions are correct. Be sure to propose assumptions which your witnesses have proved or which will be proved by later evidence.
- If the methodology of the experts differ, understand the differences. "Slice and dice" the methodology to identify as many points of agreement as possible. Then, with your expert's assistance, attack the reasonableness of the points of disagreement.

The Court or Tribunal's right to appoint an expert

- Under Rule 52.03 of the Rules of Civil Procedure, a judge may, at any time, appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the action. The expert shall be named by the judge and, if possible, agreed on by the parties.
- This jurisdiction is rarely exercised. The more common practice is for the judge to encourage the parties to engage one expert if they agree to do so.
- If the court has only one expert's opinion evidence to consider, it is highly likely that the court will accept the expert's opinion unless it contains an obvious flaw or is found not to be independent.
- There are dangers with appointing a single expert. If one party does not like the opinions or assumptions of the expert, it is too late to hire another expert. The single expert may just not like you or your client. A single expert may favour the counsel s/he knows better. The expert might draw unwritten conclusions about your client's credibility which will affect the conclusions.
- Despite the party-appointed expert's primary duty of independence, engaging your own expert still affords opportunities for advice and discussion, commentary and providing the assumptions on which the expert should base his/her opinion. There is also the benefit of litigation privilege.

Counsel's role in the content of the expert's report #1

- Counsel must present the facts to the expert fairly and thoroughly.
- Counsel provides the preliminary assumptions to the expert.
- Counsel and the expert should discuss how to frame provable assumptions so that a proper factual foundation for the expert's opinion exists. If the assumptions are faulty, the opinion may be valueless.
- Counsel must provide all relevant documents to the expert. A surprised or uninformed expert will not be a persuasive trial witness.
- Counsel should make fact witnesses available for the expert to interview, including a request to interview opposing parties where necessary.
- Where a valuation is necessary, a visit to the plant or business location is important. The more detached the expert is from the facts, the less reliable her/his opinions may be.
- Counsel should ensure that draft reports are sent to her/him only. If draft reports are sent to the client, litigation privilege will not protect the draft report from disclosure if counsel decides not to serve this expert's report.

Counsel's role in the content of the expert's report #2

- Counsel should propose corrections to statements of fact and typographical errors to the expert.
- Counsel may also review the assumptions and discuss with the expert how they affect the expert's opinion. Are the assumptions correct? Will all the assumptions be proved at trial?
- The expert could be cross-examined about discussions with counsel and the client. If either counsel or the client tried to sway the expert's opinion, it could affect the expert's independence.
- Counsel may question the reasonableness of expert's methodology but the opinions in the expert report must always be the expert's alone.
- If an expert accepts counsel's instructions to give opinions which came from counsel, the expert's independence is compromised and counsel is breaching his duty of integrity to the court and to the opposing party.

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Conclusion

- Financial expert evidence has become the norm in business litigation.
- The concepts applicable to expert financial evidence are simple enough: The judge is the gatekeeper, who must ensure that opinions of proferred experts meet certain criteria before the expert opinions are considered admissible and persuasive. The criteria are:
  - Expert financial evidence must be given by independent, qualified witnesses whose opinions are, necessary, reliable and relevant;
  - Specific time and documentary requirements must be fulfilled.
  - The assumptions on which the expert's opinions are based must be proved by fact witnesses.
- Implementation of these concepts is much more complicated. How well counsel and expert do this will affect the outcome of your client's case.

Thank you for your attention.

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