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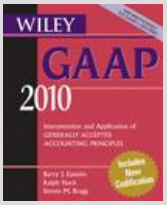

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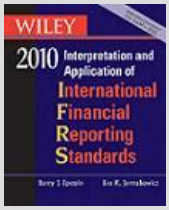

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Using Accounting Experts: Four Tactics to Obtain Full Value

By
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Business litigation is expensive, and the cost of consulting and testifying experts can constitute a significant part of the overall budget. Attorneys who strive to effectively advocate for their clients while being cost conscious should consider the dynamics of the relationship they have with their experts. The following tactics for improving interaction and communication with an expert can reduce overall costs and enhance the value the expert can contribute to the conduct of your case.

Deliver Materials in an Orderly and Indexed Fashion

Auditor malpractice, financial statement fraud, stock option backdating, and white collar crime cases typically are quite document intensive. The underlying actions will often have taken place over extended periods of time, and thus there will be relevant materials, such as working paper files, e-mails, and transactional documents pertaining to multiple periods, all of which must be organized, indexed, and reviewed. Depending on the size of the law firm and its resources, once the documents are Bates stamped they will be arranged into paper files or scanned into sophisticated litigation software. In either case, unless the firm retains the services of litigation support staff to complete this administrative task, the work will likely fall onto the desks of the law firm's paraprofessionals or junior attorneys.

As the case gets underway, opposing counsel's discovery requests will need to be fulfilled. Long gone are the days when paper documents were thrown on the floor, randomly shoved into boxes, and then sent to the opposing law firm – or where one party could give an attorney a key to a large warehouse and told "good luck." Although many would argue that overwhelming a party with massive quantities of electronic documents and burdensome e-discovery requests is the modern form of these tactics, Federal Rules of Civil Procedure, for example, do require attorneys to respectfully

exchange materials with one another that are appropriately organized and in suitable media and format.

While not regulated by law, as are discovery productions, there are a number of good reasons why this same professional practice should be observed when delivering discovery materials to one's own experts. Doing so may avert or alleviate the shock and dismay experienced by the client when it receives its billings, which otherwise may include the experts' charges for many hours of expert time spent "organizing" discovery material – a task presumptively performed, and billed for, by the attorneys themselves. Materials delivered to experts should be organized, catalogued, and conveyed with the same level of care given to discovery produced to opposing counsel.

Furthermore, delivering discovery material in an organized and well-catalogued fashion to your experts will facilitate the experts' review, their ability to reference key documents in the experts' reports, and their ability to provide the court with an accurate list of materials considered or relied upon. This can be accomplished effectively by:

- Placing critical documents in binders, organized by topic
- Providing indexes to all loose and bound documents
- Organizing e-mail communications chronologically in a master file, with possibly several secondary files organized by sender, by recipients, and/or by topic area
- Including abstracts of deposition testimony of key witnesses

Provide All Discovery Materials to the Experts

Controlling the cost of expert consultants often motivates attorneys to limit the scope of materials produced for their experts' review. This can prove penny wise but pound foolish, as the old saying goes.

Consider the following situation. You are involved in a high stakes and complex litigation matter, and have just finished the direct examination of your testifying expert. Your expert was quite articulate in his responses and conveyed a very persuasive set of opinions. You are confident that your case is progressing nicely – but that feeling can quickly change depending on what happens on cross-examination. Therefore, consider what response you would want the judge or jury to hear when opposing counsel reaches the podium and leads off his line of questioning by asking – Mr. Expert, did you review all the evidence produced in this litigation?

Depending on whether the expert's response is "yes" or "no," can have a huge impact on the momentum of your case. It can be quite damaging to your expert's credibility if he is forced to respond that he has not considered all available information that an expert in his field would normally review if it had been made available to him. The obvious implication is that the attorneys withheld disconfirming information – and worse, that the experts failed to perform in an objective, professional manner. With each negative response, it is quite likely that the judge or jury will give that expert's testimony less and less weight. On the other hand, opposing counsel will be precluded from establishing that you placed any sort of scope limitation on your expert if the expert can respond affirmatively to each "did you consider" question.

If the appropriate experts have been retained, there is no reason to fear fully producing all relevant materials to them. They will be then be better able to prepare to respond to any of the disconfirming or mitigating evidence, giving appropriate weight to it, and tailoring their reports and/or testimony to preemptively address it, as warranted. Most critically, the experts will avoid the difficult-to-disguise image of surprise that will accompany the opposing counsel's effective presentation of seemingly important documents that were not reviewed.

Fact finders, whether judge or jury, understand that experts offer opinions, about which reasonable persons may often disagree, but those opinions must be based on a complete review of salient facts. Experts displaying ignorance of the facts will lack credibility in fact finders' eyes. Full access is the only way to be fully prepared.

Retain the Expert Early in the Litigation Process

There are several reasons why attorneys may or may not decide to retain the services of an expert. If the case at hand involves professional malpractice, for instance, an expert's testimony may be required by law, and will certainly be vital as a practical matter. Expert testimony is also necessary to explain complex concepts or to help persuade the finder of fact. After it has been determined that expert testimony will be presented at trial (or in an alternative dispute resolution setting), too often the decision about the timing of the experts' retention will be driven by cost considerations, rather than by strategic case considerations.

In an effort to cap the cost of litigation support and expert work, some lawyers may use a reverse scheduling technique. This involves deciding how much the firm, and its client, is willing to spend for such services. Once a dollar amount is calculated, the lawyer estimates the number of days, weeks, or months it would take for that cost ceiling would be reached. Then the lawyer will contact and retain an expert for that

duration of time; too often, this retention occurs right before a particularly critical deadline, such as close of discovery.

While this tactic can effectively contain the cost that could possibly be incurred – it being impossible to squeeze more than 24 hours out of the day – it can also hinder the quality of service that the experts can provide. This is not logical, considering that the attorneys might have spent weeks, months, and even years becoming familiar with the intricacies of the case, typically without benefit of the insights an expert could have contributed.

A better approach would be to have a budget in mind and to hire the expert as early as possible in the litigation process. The lawyer can and should have a frank discussion with the expert about the complexity of the litigation, the expectations from the expert, the expert's standard fees, and the ability to work within a set financial and time budget. The experts can perform "triage" to determine whether these expectations and constraints are reasonable, and advise on what strategy would be suitable given existing cost or other constraints.

Engaging in such upfront and open communications with an expert will enable both parties to enter into an arrangement that is satisfactory and, most important, likely to prove successful for the client.

Regularly Communicate With the Experts

Lawyers should make it a practice, in a manner analogous to the rules of professional conduct regarding regular communication with the client, to regularly communicate with their expert. There is no reason, once an expert is hired and given discovery materials to review, for the attorney to wait until immediately before the expert report is due to place the next call or e-mail. When an attorney retains an expert, the lawyer reserves that expert's time and skills for use not only at trial, but before the trial, too.

Lawyers who utilize their experts throughout the litigation process will be better advocates for their client. This is particularly probable when the attorney must prepare to depose and cross-examine opposing experts, since the attorney typically will not have subject matter expertise, even if experienced at trying, e.g., financial reporting fraud cases. Too often, attorneys overlook their own experts' ability to prepare effective deposition and trial outlines, being of the view that this is properly "lawyers' work." Experts having experience in drafting such outlines, however, can provide a wealth of detailed guidance on these matters.

Communications should also include key dates (e.g., summary motions, in limine motions, key witness depositions, transcript deliveries), which might even stimulate suggestions from the experts based on experience in other matters, beyond what the formal terms of engagement require. Ultimately, in order for experts to produce the most compelling reports, and for the attorneys to construct the most powerful arguments, lawyers and their experts need to have open and frequent communications. This will create the environment in which brainstorming can best be fostered.

Attaining Maximum Value from Your Expert

When employed, the foregoing tactics can facilitate an attorney's ability to build an optimal working relationship with an expert. Attorneys who understand that when they retain an expert they are adding another professional individual to the litigation team will strive to maintain a cooperative and open relationship with their expert. Beyond merely offering expert opinion at trial, an expert can be an invaluable resource and team member throughout the litigation process.

***About the Authors**. Barry Jay Epstein, Ph.D., CPA, (bepstein@RNCO.com) is Partner in the Chicago, Illinois firm, Russell Novak & Company, LLP, where his practice is concentrated on technical consultations on GAAP and IFRS, and as a consulting and testifying expert on civil and white collar criminal litigation matters. Dr. Epstein is the author of the RIA Handbook of Accounting and Auditing, co-author of Wiley GAAP 2010, Wiley IFRS 2010, Wiley IFRS Policies and Procedures, and other books. Elaine Vullmahn, MBA, CPA, CIA is a Senior Litigation Accountant with Russell Novak & Company, LLP, specializing in internal control matters and litigation consulting. Ms. Vullmahn is also a J.D. candidate at the John Marshall Law School, class of 2011.*