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LITIGATION

Using Financial Experts Strategically and Cost Effectively

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Reducing the expense and length of commercial litigation is a growing priority for both in-house and outside counsel. Frequently, as a cost-saving measure, counsel will wait until too late in a case to bring financial experts on board.

While well-intended, such delay can be a false economy or, worse, detrimental to a case, particularly if the matter involves potentially significant tax, damages, or other financial issues. Early and ongoing input from financial experts — from establishing the case theme, to investigation and discovery, to executing case strategy — can contribute both to cost-effective representation and a quicker, better resolution, whether the case ultimately settles early or proceeds to mediation, arbitration or trial.

Financial experts can help in setting or evaluating case strategy involving significant liability issues. Equipped with more litigation experience than in-house financial teams typically possess, they can identify categories of potential damages, establish a range of best-case and worst-case trial outcomes and realistic settlement scenarios, and ferret out facts through forensic accounting when needed. Financial experts can also assist in pulling together a coherent presentation that explains technical issues in a nontechnical manner, which is especially important for jury trials, but is also critical in mediation or arbitration settings.

Tips for cost containment: Involve experts early to help identify the strong points and weaknesses of both your case and opposing counsel's case, as well as areas of potential common ground between the parties, and thus avoid wasting time on peripheral or weak issues. Use experts up-front to identify potential stipulations with opponents on foundational financial issues, which can save substantial costs in discovery and for trial. Utilize phased analysis and estimated budgets with experts (for example, Phase I for \$100,000, Phase II for \$50,000) to help align their activity with counsel and with the compa-

ny's cost expectations as the case progresses.

Often, litigators engage financial experts to focus only on a particular issue. Bringing the expert into the broader case strategy, however, can contribute additional value to case preparation, especially in the discovery phase.

Financial experts may recognize or appreciate the implications of tax and accounting issues that are not immediately apparent to counsel or the company. It is critical that counsel and experts collaborate to identify those issues early on to determine what discovery is needed and what is discoverable within the company's own records and files.

Forensic accounting skills may be critical in assessing and quantifying the issues in fraud cases. And, in a securities-related case, the fi-

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ancial expert can provide invaluable assistance in researching and interpreting the underlying complex accounting, financial, or investment issues.

Tips for cost containment: Involve financial experts in creating discovery requests, including those for electronically stored information that zero in on the right type of financial data or reports needed to develop the case. Use experts to analyze electronic data in order to reduce costs significantly compared to the typical manual review of vast volumes of nonresponsive documents, as well as allowing for expedited analysis and early case assessment findings. Draw on the financial experts and their knowledgeable support staff for cost-effective review of detailed data with the company's staff where appropriate, rather than using outside counsel's associates or paralegals exclusively. Take advantage of experts with data-mining skills on electronic financial, accounting, and other data to more effectively quantify the issues or identify potentially new relevant issues.

Most cases are resolved in one of three ways: a dispositive motion granted by the court, a settlement through direct negotiation or mediation, or a trial before the judge or a jury. Litigators can bring credibility to the case by early retention of well-respected and professional financial experts with strong presence, who can have a positive and cost-effective influence on the outcome. Financial experts can help during strategy execution in whichever direction the case is heading. They can assist in calculating the cost-benefit of proceeding with litigation, as well as the range of possible recovery versus the hard expenses and more intangible costs of business disruptions incurred during ongoing litigation.

Financial experts can also serve a valuable role in vetting a mediator if the case has particularly predominate financial issues, as well as attending a mediation or settlement negotiation to assist in presenting damages or other financial analyses.

In cases where the litigating parties have ongoing contractual arrangements, the expert may assist in crafting revised contractual terms as part of a settlement negotiation or mediation.

Tips for cost containment: Use experts to prepare powerful, professional visual representations of key issues and information, which can be highly persuasive during mediation or arbitration, or a bench or jury trial, and thus expedite a positive resolution. Enlist experts to prepare cost vs. benefit scenarios for continuing litigation compared to settlement, as well as calculating the true cost of different settlement scenarios in complex matters.

Waiting until late in a case to involve financial experts can mean you miss out on their valuable input, especially today when crowded court dockets are drawing cases out. Tap their capabilities and insights early, and you can strengthen your hand throughout the life of the case.

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