

Hire an expert witness?

How to determine if your company should work with an expert witness

Unfortunately, the reality of today's business and economic climate is that lawsuits and legal disputes are a "clear and present danger" to virtually every business. Obviously, hiring an experienced attorney to protect your interests is a critical component in resolving any business dispute. But often, hiring an attorney or even a team of attorneys is not enough.

"Hiring the right expert witness on your behalf can often be the difference between winning and losing a case," says Richard M. Squar, newly appointed tax and litigation support director for Glenn M. Gelman & Associates, Certified Public Accountants and Business Consultants.

Smart Business spoke with Squar about the factors to consider when hiring an expert witness to bolster your case.

Under what circumstances is hiring an expert witness beneficial in resolving disputes?

Nothing makes a person angrier than the thought of being cheated, robbed or otherwise financially hurt by the actions of another. Most civil lawsuits arise out of this human desire to reclaim what they perceive they've unjustly lost. But it's not that easy to establish that those damages deserve compensation. It's the job of an attorney to prove his client's guilt or innocence. The financial expert's job is to calculate and justify the amount of those damages. Opposing counsel, of course, fights those claims with equal vigor. While there are many legal hurdles to cross before a decision is reached, an expert witness can help your side effectively navigate those hurdles to reach your desired result.

Without getting into all the 'legalese,' the defendant's actions must be 'the proximate cause' of the damages, 'reasonably foreseeable' by the defendant, calculated with 'reasonable and acceptable certainty,' and reduced by the actions of the plaintiff's efforts to 'mitigate those damages.' Clearly there are several large gray areas contained within that broad scope.

Perhaps the first question in any case is, 'What are the damages?' They often consist of the plaintiff's lost profits. Proving the existence and amount of these losses and, most critically, that they were caused by the defendant, is a key reason to hire an expert witness. Attorneys specialize in understanding and interpreting the law. However, many disputes involve complex issues of fact or the adequacy of evidence presented to establish and validate those facts. An expert is particu-



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larly valuable in applying scientific, technical, financial or other specialized knowledge to situations presented in order to confirm or refute a litigant's position.

The next question is often, 'Can a direct link between the wrongful act and the resulting damages be proved?' The expert's use of careful, systematic methodology can help the attorney establish that link and then quantify those damages. Through the use of accounting, auditing and investigative skills, the financial expert examines and evaluates transactions contained in financial accounting records. Forensic investigation, reconstruction of accounting records and statistical analysis of lost profits are among the tools used by experts. Present value calculations may be called for in making projections.

Another major area where experts can be invaluable is in the pretrial stage. Experts can guide attorneys in the all-important process of discovery and depositions, in formulating the strategy for a case, interpreting and managing the myriad documents related to it and, finally, in counter-balancing any opposing expert representing the other side.

How should you evaluate the qualifications of an expert you may be considering?

Obviously, one's reputation and experience,

particularly as it applies to the actual issues in dispute, are paramount. An expert must be perceived as independent and credible when explaining the methodology and assumptions used to arrive at his conclusions. Those assumptions must not be deemed speculative. Additionally, the expert must be articulate and confident in his or her testimony so that a layperson or judge can understand the essence of what is often a complicated and obscure situation. The expert must not get flustered when confronted during cross-examination by an antagonistic attorney.

What are the risks of using an expert in a dispute?

Nothing could be worse than having an expert who seems less than credible — either because he or she ventures outside the area of expertise, is unprepared or otherwise confuses rather than enlightens the case. How an expert chooses to handle or refute the opinions and positions given by an expert on the other side can discredit his or her own testimony if not done prudently.

What are the key factors in having your expert and attorney on the same page?

The expert's testimony, if done properly, should be seen as impartial and well-substantiated. However, the attorney and expert should and can carefully map out the parameters of the case well before that pivotal moment — first by getting correct and adequate documentation through discovery, investigation, reconstruction and other evidence-gathering techniques, then by organizing and validating the adequacy and strength of the evidence, and finally calculating and justifying the financial consequences of the dispute.

Although financial experts must remain independent, the adversarial environment within the courtroom often makes it appear as if the experts are competing with each other. Those weighing the facts will evaluate the opinions of experts on both sides before arriving at their own determination of any final award. To be truly effective, an expert witness must be as convincing as possible within the larger context of maintaining his or her integrity and credibility before a court of law. <<

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