

The Use and Abuse of Financial Experts

HOW TO EFFECTIVELY DEAL WITH THE EXPERT: YOURS AND YOUR OPPONENTS



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What is a Financial Expert?

We all know how Federal Rule 702 defines an Expert

If scientific, technical, or other specialized knowledge will assist the Trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise”.

How does Webster define an Expert?

One who is “very skillful; having much training and knowledge in some special field.

Let’s be Practical

An Expert is someone who can assist you in a specialty area.

Why Would I Need a Financial Expert?

Depends on the Facts and Circumstances of your Case

You need to determine what the issues are in the case at hand. Identification of the issues will determine whether or not you need an expert, as well as what type of expert(s) you need. Keep in mind that this can be a changing environment.

Areas to be Addressed by the Expert

Determine the initial areas where you expect to need an expert. As discussed below, try to line up your expert early in the matter.

What Kind of Financial People are Available to Me?

Certified Public Accountants (CPAs)

CPAs practice in different areas, many of which are useful to the marital litigator. Some CPAs are generalists, while other limit their practice to specific areas. It is important to determine the level of sophistication which is necessary for the matter, in order to determine the expertise necessary on the case. Some of the services which can be provided by CPAs are;



- Tax Advice and Analysis
- Financial Planning
- Alimony & Child Support Calculations (Net Spendable)
- Tracing of Assets
- Business Valuation

The CPA is licensed in a specific State. All CPA's are not equal in terms of training and experience. A CPA who may be a valuation expert may not be current in Tax matters and vice versa. The American Institute of Certified Public Accountants (AICPA) now credentials Business Valuation Experts with the Accredited in Business Valuation (ABV) credential.

Economist

An economist is most useful regarding issues of employment and value of services rendered by a spouse. In some instances economists are used for business valuation and financial planning.

Business Valuators (ASA, CVA, CBA) & / or Brokers

The Business Valuator may have a wide range of background skills, and may be currently providing services to a broad number of constituents. The individual may be active in the brokerage of businesses, in providing day to day management advice, or in providing valuation opinions for use in litigation, tax planning or mergers and acquisitions. The Business Valuation Profession currently recognizes the following designations:

- Accredited Senior Appraiser (ASA) / Accredited Member (AM), American Society of Appraisers There are 1600 members of the Business Valuation Section of the American Society of Appraisers, with approximately 450 holding the ASA designation.
- Certified Valuation Analyst (CVA), National Association of Certified Valuation Analysts. This organization is limited to CPA's, and has approximately 2000 members, of which more than 1000 hold the CVA designation.
- Certified Business Appraiser (CBA) Institute of Business Appraisers. Members of the IBA tend to be business brokers working more with transactions.



How Do I Find the Right Expert?

The Sources are Easier than You Think

The most obvious source is referrals from other attorneys, or from the judges in your jurisdiction, Ask who they have used and for what purposes. Ask other attorneys about experts that they have opposed. Ask other experts who they would recommend if they would not be able to assist on the matter.

Find out which experts in your community have been involved with writing and/or speaking to professional organizations. Since communication skills are critical to the expert witness, take the opportunity to see or hear how the expert communicates.

What am I Looking for in this Expert?

Harold Feder, a noted trial lawyer, in his book *Succeeding as an Expert Witness* has listed the following as the Qualities of the Effective Expert:

- The Expert must **perform a thorough investigation.**
- The Expert must be **personable, genuine and natural.**
- The Expert must have an **ability to teach.**
- The Expert must be **generally competent.**
- The Expert must be **believable.**
- The Expert must **persuade without advocacy.**
- The Expert must be **prepared.**
- The Expert must **demonstrate enthusiasm.**

(See Page 12, Succeeding as an Expert Witness, Harold A Feder, Van Nostrand Reinhold, 1991)

From your perspective you want the Expert to provide you with the following:

- An **Honest and Unbiased** Evaluation of the matter.



- A **Well Reasoned** and **Credible Opinion**.
- The Ability to **Communicate**

How Do I Determine if My Expert Fits the Bill?

Nothing can replace the personal interview. It is YOUR responsibility as the attorney to determine the expert to be used. Don't be embarrassed to ask the potential expert the difficult questions relating to qualifications, prior experiences, and ability to handle the subject matter.

Some of the other information you want to discuss are;

- Prior opinions of the expert which may conflict with the current matter.
- Available time to commit to the matter.
- Estimated Fees and other Costs.

Are There Any Potential Experts that I Might Want to Avoid?

There are several types of potential experts that can be detrimental to your client and should be avoided;

- Beware of the Expert who can provide an opinion on any subject that you may bring up.
- Beware of the Expert that wants to know what final opinion you are interested in obtaining. This is the so called "**Hired Gun**", or the expert who provides "**Made as Instructed**" opinions.
- Beware of the Expert that wants to be an **Advocate** rather than an **Independent Witness**.
- Beware of the current Accountant. The current accountant for the Client may be very competent, but may also be your worst enemy when it comes to providing ultimate credible opinion testimony. The Current Accountant may also be Pandora's box when



it comes to discovery. Use the current Accountant as practical, but avoid having that individual responsible for expert testimony.

What Should I Use My Expert For?

Information and Understanding

You expect your expert be competent, as well as to be a teacher. The first use of your Expert Witness is to have the Expert teach YOU the basics of the issue at hand. You will need this information both to understand the discussions, but also to successfully conduct the direct exam of your expert.

Consultations

Keep in touch with the Expert; ask for his verbal opinions on matters as they relate to his or her expertise.

Alternative Dispute Resolution

If appropriate, use your expert as a neutral mediator in order to settle certain of the issues relating to his or her expertise.

Expert Reports and Testimony

Take advantage of your expert's communication's skills. Have your expert prepare a detailed report of his or her opinions. This may actually enhance the opportunities for settlement.

The Care and Feeding of Your Expert

At the Beginning of the Engagement

- Give your expert a clear synopsis of the matter. Try not to be one-sided.
- Be certain that you have discussed all of the critical dates.
- Provide the expert with copies of all pleadings and answers (if available).

Keep Your Expert Informed



- As the Case changes, make sure that the Expert is informed.
- Send copies of all revised pleadings and answers.
- Provide the Expert with copies of Applicable Case Law.
- Provide the expert with information relating to the opposing sides theories and/or issues.
- Inform your expert who the opposing expert is.

Be Sure YOU Know what your Expert is Doing!

- **You** are in charge of the Case
- **You** have to use the information.
- **You** have to respond to your client as to why the costs are so high.
- **You** have to be certain that the Expert is responding to the issues that you want to have addressed.

Prepare with your Expert Prior to His/Her Deposition

- Discuss with the expert the style of the opposing attorney
- Discuss how you prefer to handle a deposition? Are your objections for the purpose of instructing the witness, or are they only for the record?
- Discuss how much information should be “volunteered” to opposing counsel.

Prepare Yourself and Your Expert for Direct Examination

The Direct Examination should be thought of as a joint presentation. The Attorney is responsible for asking the questions and the Expert is responsible for providing the answers to those questions.

Remember that a **Successful** Direct Examination is the result of communicating to the Trier of Fact, a cogent, well reasoned position. It is up to your Expert to communicate



this information.

The success of **YOUR** Expert's Direct Testimony is directly related to **YOUR** ability to ask cogent questions, and conduct the examination.

- Ask your expert to prepare an outline of the Direct Testimony.
- Both of you need to be comfortable with the outline.
- Be Certain that your expert explains the "terms of art" which you need to use as part of the Direct Examination.
- Be Certain that both of you are comfortable with the types of questions, and how those questions will be asked.
- Discuss what questions are critical to the foundation needed in order to present the ultimate conclusions. Take into consideration that the Court may not allow you all of the time that you would like to have.
- Allow the **Expert** to be the **Star** of the presentation. The Court does not want you to testify. The Court wants to hear your Expert's opinion.
- Make your questions very open ended, allowing the Expert to provide explanations, and convey an understanding of the information.

Let Your Expert Prepare You for His/Her Cross Examination

A good expert knows and understands the potential areas of cross examination as they relate to his report. It is critical that you and the expert discuss these issues so that you can anticipate the potential responses.

Be Certain that you listen carefully to the Expert's Cross Examination. If the expert's responses are not clear, be sure that you bring that up on redirect.

You are responsible for determining what impact the Cross Examination has had on the Court, and determining how much redirect is necessary. Try to limit redirect to only those important issues.



What About the Opposing Expert?

Is the Opposing Expert really an Adversary?

Before you jump to the conclusion that the Opposing Expert is an Adversary, think about what You can do to turn him/her into an asset for your case.

If the opposing Expert is a true professional, your job may be much easier.

Remember, it is easier to work with an independent expert who understands the issues than with a biased, weak expert.

Understand the Opposing Expert's Report and Opinions

This is a great use of your expert. Have your expert compare and contrast the opponents report with your report.

Make sure that you understand and can articulate the differences between the reports, as well as being able to quantify those individual differences.

This information will be invaluable during the Deposition and Cross Examination Process.

Deposing the Opposing Expert

In my opinion, the biggest mistake made by lawyers is not deposing the opposing expert.

Assuming that the opposing expert is competent, you have nothing to gain by not taking the deposition. The truth is you have everything to lose.

A competent, experienced expert probably knows more about the subject than you do, and you are passing up an opportunity to be educated. The less you know about what the opposing expert will say the greater the advantage to that expert.

What do you want to accomplish at the deposition?

- Have the opposing expert teach you everything that he/she intends to teach the Court.
- Ask the questions that you don't know the answers to, so that you will know the



answers during cross examination.

- Give the opposing expert every opportunity to convey information.

If you have your expert at the deposition, (a good choice if your client can afford the expense), let the expert provide follow up questions. You need to let your expert know if you want those questions passed to you currently, or written down and reviewed later.

Cross Examination of the Opposing Expert

With a competent expert, the best Cross Examination is a short cross examination.

Emphasize the similarities between the experts, and at the same time, accentuate the differences. Where those issues are judgmental, see if the opposing expert will concede that they are judgmental, and that reasonable experts can differ in areas of judgment.

Don't give the opposing Expert the opportunity to teach the Court. Just as you should allow Your Expert to be the Star, you don't want the opposing expert to say much more than yes and no.

Make your points and **SIT DOWN.**



Summary

Hire the Expert Early - This Actually May Reduce the Overall Cost

Getting the Expert on board early in the matter can help reduce the overall costs involved. The Expert may be able to assist you in streamlining discovery. Let the Expert assist in analyzing the issues, and allowing potential settlement.

Use the Expert as a Partner

The Expert is a tool, and you should take every advantage of the tool. Share information and listen to the Expert's viewpoint. A skilled, experienced Expert can assist you with the technical issues involved in your matter.

Don't Compromise the Expert's Independence

Remember that you hired the Expert to provide a **Credible, Independent** Opinion. Don't compromise the Expert by trying to have him push his/her opinion to extremes. There is no surer way to invite disaster.

Make Direct Examination a Teaching Experience

Work with the Expert to prepare a joint presentation which conveys to the Court the depth of the underlying research, and the reasonableness of the assumptions and ultimate conclusions. Give the Expert the opportunity to display his/her knowledge to the Court.

Be Careful of Cross Examination

Don't try to win your case on Cross Examination. Competent Experts are dangerous on cross examination. Only in the rare instance where the Expert has made a fatal error can you destroy the Expert on Cross Examination. Carefully plan your Cross to bolster your Expert's opinion.





Robert E. Kleeman is Managing Director of OnPointe Financial Valuation Group, LLC. His practice concentration includes business valuation and litigation support. In addition to being a well-known speaker, he co-authored *The Handbook for Divorce Valuations* and has written several business valuation articles.

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