



Appraisal Economics Inc.
Valuation and Economic Consulting Services

THE ROLE OF AN EXPERT WITNESS



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THE ROLE OF AN EXPERT WITNESS

What is an Expert Witness?

An expert witness is a person who has specific knowledge, training, education, skills, and/or experience that is superior to that of the average person. Federal and state courts permit expert witnesses to testify during cases in order to assist the judge and/or jury in reaching a decision.



The expert witness clarifies, explains, and provides opinions on complex matters that the average person would not typically understand. A skilled expert witness will take technical jargon and complicated situations and explain them in a way that the jurors and others can understand. Expert witnesses can sometimes help evaluate potential cases, as well.

What Are Expert Witnesses Used For?

An expert witness need not be called in every case; however, these men and women can be extremely useful if used effectively. An expert witness can help assess and identify various types of damages and then prepare a preliminary estimate of those damages. This will help the parties involved determine if the damages require or indicate the need to pursue litigation.

Expert witnesses can also help identify which documents need to be requested, and then determine if said documents were germane to the situation. They can then help attorneys prepare questions for interrogations, depositions, and legal testimony.

Finally, expert witnesses can critique and rebut the testimony of the opposing counsel's experts, and then assist in settlement negotiations should that point be reached.

When to Bring in an Expert Witness

Parties should carefully consider when to bring in an expert witness to ensure maximum effectiveness.

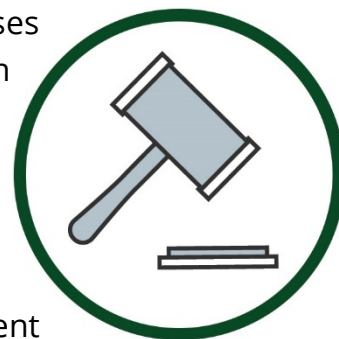
In 2011, *Financier Online* conducted a Q&A session on this subject with Chris Hine, the National Head of Forensic Accounting at RSM Tenon; John Reynard, Executive Chairman of BTG Global Risk Partners; and Derek Malcolm, Partner at Grant Thornton LLP.

Asked when an expert witness should be brought into the process, Hine said they are most appropriately used when “the key areas of the case are those known to be covered by expert evidence.” In forensic accounting, for example, these are cases in which “the issue of quantum is most difficult to resolve and where the calculation of the amounts of damages may be very complex.”

Malcolm referenced the Ponzi schemes that crippled the financial system several years ago and noted that these schemes are “extremely complex to unravel” and are “often difficult to separate from legitimate investments.” Expert witnesses, in these cases, “will be essential to ensure that the evidence is correctly understood.” He also said expert witnesses would be most beneficial in cases of financial disputes that require complex quantification modeling or what-if calculations.

The Extent to Which an Expert Witness Can Help

Asked how experts can help analyze the strengths and weaknesses of a pending case, Malcolm said witnesses can be quite helpful in this regard; however, parties should be careful when said “consulting experts” also create an expert report.



“An expert in a consulting or advisory role may be able to take an advocacy position, for example advising the client on the most beneficial calculation methods, the pros and cons of different options and estimating preliminary high and low ranges of losses. Such advocacy should not, however, extend into preparing an expert report which needs to be impartial and balanced.”

Malcolm added that experts should get involved early in the process because they can help trim litigation costs by determining relevant information quickly.

Hine said a strong expert will always try to add value to the case by identifying areas of improvement and areas of weakness, which will better inform the client.

Can an Expert Witness Affect the Outcome?

Malcolm said it is not an expert’s job to win the case for the client, but a properly qualified expert can help influence the decision, while an unqualified one can have a negative effect.

Reynard said he has seen many cases in which “the legal differences between the parties’ stances have been the dominating factors right up to the final stages when, with court or arbitration looming, attention has turned to the bottom line. How much is this claim really worth? It’s surprising how often it turns out that the expert’s input can lead to a view where the strongest of most intractable legal points turn out to be the ones of least financial merit.”



Hine said experts’ input can be “fundamental to resolving the matter” and “a comprehensive and compelling expert’s report can transform the dynamics of proceedings.”

Cases for an Expert Witness

Now that we know when to call in an expert witness, let’s look over some potential cases in which such a witness could apply his or her expertise.

Federal Tax Cases

Deals with inter-company transfer pricing, pricing, purchase price allocation, gift and estate taxes, company reorganizations, and recapitalizations.

Bankruptcy Cases

Analyzes whether a company represents greater value as a going concern or through liquidation of its assets. This is typically the primary factor in determining if the company should be terminated or continue to survive.

Infringement/Breach of Contract Cases

Analyzes and determines current value of lost income and incremental market value of property, typically in infringement and breach of contract cases. This analysis usually is the key factor in determining damages in these cases.

Dissenting Shareholder Cases

In these cases, stock value can only be allocated to individual shares based on the overall value of the underlying business enterprise.

Condemnation and Eminent Domain Cases

Many local governments in recent years have started to use a much looser definition of the “public good” required to justify “taking” private property under the concept of

eminent domain. Property owners that fall under this category are entitled by law to fair compensation, which the government agency's initial offer does not always contain. An expert witness would determine proper compensation amounts in these cases by compiling a detailed analysis of the property that includes the cash flow of any business operating on it.

Insurance Cases

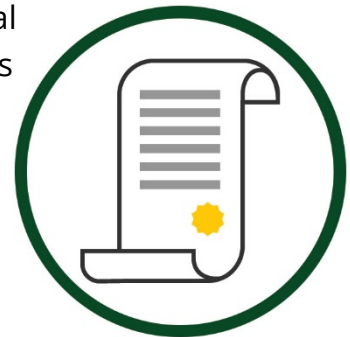
The most precious asset a business can have on hand in cases in which it is required to file an insurance claim, is a robust inventory and appraisal that accounts for the existence, location, and condition of the property involved. These inventories and appraisals are crucial in settlement negotiations and litigation, but they also help companies decide if they have the correct amount of insurance coverage in place.

Ad Valorem Cases

Establish initial assessments and prepare reports that can be used as a basis for expert testimony.

Qualifying an Expert Witness

The law is quite clear on what qualifies an expert witness. Federal Rule of Evidence 702 deals with expert witnesses and determines that to qualify a witness as an "expert," the person must demonstrate scientific, technical, "or other specialized knowledge" that will help the trier of fact understand the evidence or determine a fact in question. Said witness must be qualified as an expert "by knowledge, skill, experience, training or education."



If the person demonstrates these qualifications, then he or she may testify "in the form of an opinion or otherwise" if all of the following conditions are met:

- The testimony is based on sufficient facts or data.
- The testimony is the product of "reliable principles and methods."
- The witness has applied the principles and methods reliably to the facts of the case.

Examples of an Expert Witness for Appraisal Economics

Expert witnesses can also play the role of damage expert, one of the most common

roles in litigation. The expert witness presents financial information and is crucial in helping to determine the appropriate level and amount of damages. The extent of harm that can be linked to an alleged wrongful act is almost always debatable, so experts can be crucial in assessing these situations. Damages theories can be difficult to bring to court before a judge or jury in the absence of an expert witness, because they typically require some estimation of a world in the absence of the allegedly wrongful behavior. In that hypothetical world, would the plaintiff have been better off and, if so, by how much?

In cases where liability has already been established, experts may be used only in the damages phase to quantify the effect of the liability. These expert witnesses often have economic, financial, accounting, or statistical expertise and experience in the appropriate industry.

The expert witness reviews financial statements, annual and quarterly reports, marketing materials, press releases and other documents obtained from the attorney, defendant, or other sources. The expert witness then helps the attorney determine the most effective way to present the financial information to the trier of fact. As part of this review, the expert witness assesses the financial position of the defendant, by reviewing revenues, assets, liabilities, equity, net income, cash flow and dividends.

Therefore, the role of the expert witness in determining damages has increased significantly in providing the pertinent and basic financial information that the trier of facts requires to determine the appropriate level of damages.

It can be risky not to use an expert in these cases, particularly if the other side has one. Trial lawyers would tell you that when the other side has presented expert testimony, you run the risk, even the likelihood, that the trier of fact will accept that expert's findings purely because you have not presented an alternative.

Conclusion

When faced with a situation that requires an expert witness, it is best to consult those with years of experience and the reputation to help achieve the best outcome. [Appraisal Economics](#) has years of experience with a professional team that has testified in U.S. Tax Court, U.S. District Courts, Bankruptcy Courts, Tax Appeals Courts, and before the Federal Communications Commission, and the American Arbitration Association. To learn more, contact Appraisal Economics [here](#).