

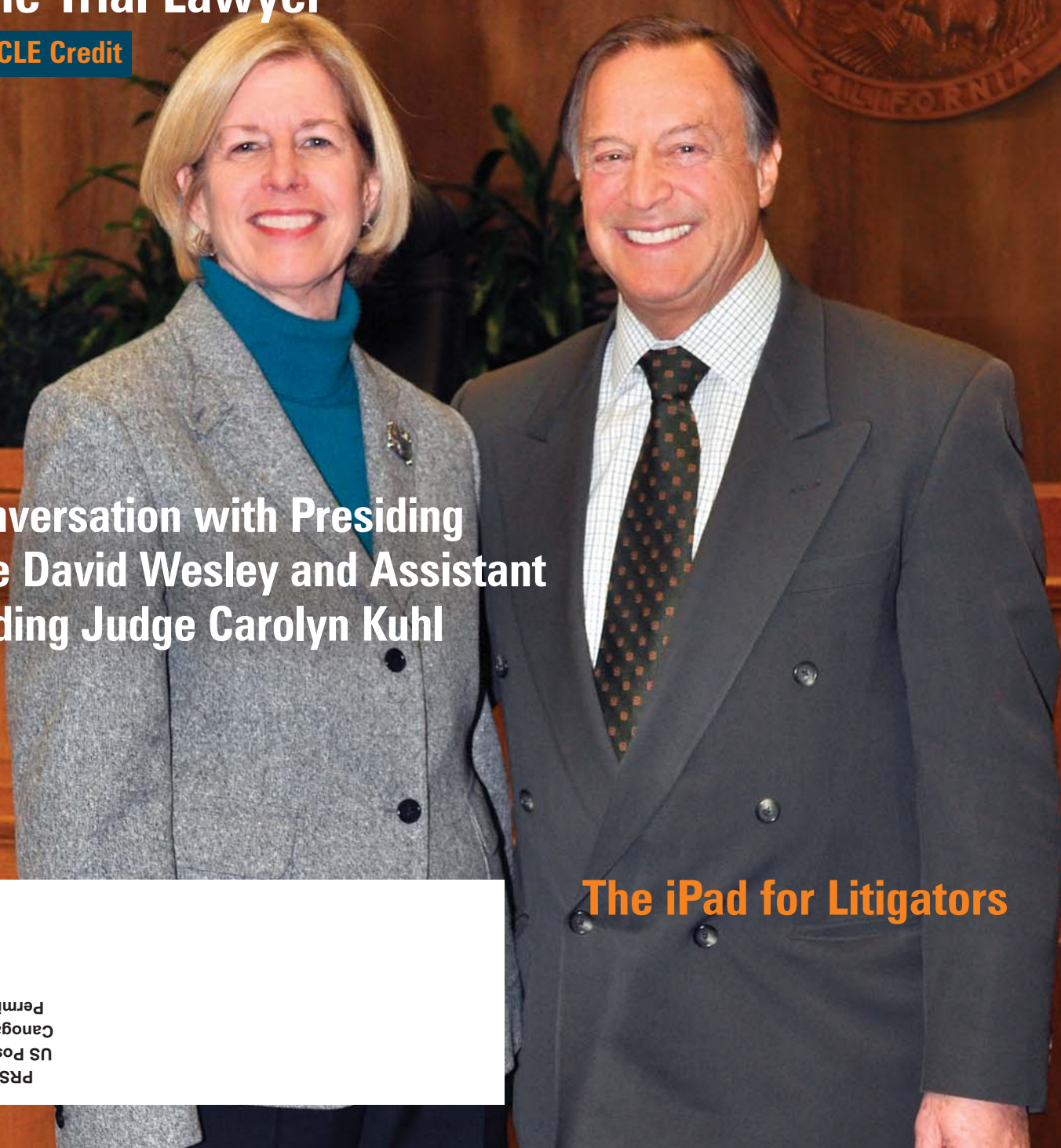
VALLEY LAWYER

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A Conversation with Presiding
Judge David Wesley and Assistant
Presiding Judge Carolyn Kuhl

The iPad for Litigators

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Litigation/ADR



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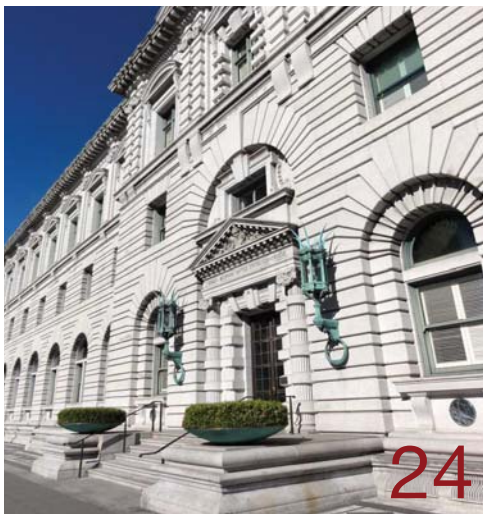
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The Financial Expert: An Essential Addition to the Litigation Team

By Chris Hamilton, CPA, CFE, CVA, DABFA

TO BOTH ACTIVE participants and observers of litigation, it is always impressive when a lawyer is able to orchestrate a sound case and deliver an excellent product. The most effective lawyers are typically those who somehow find a way to assemble, coordinate and execute a unified strategy using disparate persons and skills throughout the process. It is impressive because it is difficult to do.

One of the most versatile tools available to the litigating attorney is an experienced financial expert. A few hours with a financial expert often saves hours of work and assists the lawyer in either settling the case or setting a more efficient and direct course towards trial. In those few complex cases that are destined to go to trial, a financial expert is imperative and can make or break a case when presented to the trier of fact.

Quite often, lawyers would rather settle a case than see it go

to trial due to the large attendant costs and hours of preparation required. An experienced competent financial expert often presents such a compelling case that, with the use of tangible data, both sides are motivated to settle rather than take a chance on an unpredictable jury. Therefore, the selection of the expert is very important both as a resource value to the lawyer and as a formidable force to contend with for the opposing side. The success of the expert over time is not measured by how many trials he or she has been on the stand to offer expert opinions. The real success in a case is to present such a persuasive opinion and support for that opinion, that there is a settlement and the dispute is resolved.

Most cases involving damages, breach of contract, fraud and other financial matters involve economists and accountants (CPAs). Depending on the circumstances of the case, the specialization may be narrower.

Financial experts include forensic accountants, tax experts, fraud examiners, business appraisers and financial accountants. An emerging area of financial experts, to be discussed later, is one who understands information technology while using computers to aid in discovery and analysis of financial evidence.

First, the definition of a financial expert should be clarified. A financial expert is a professional who is diversely experienced in financial analysis and specializes in areas that are relevant to the case at hand. The expert usually has professional designations and licenses to accompany relevant experience. The sidebar on page 39 presents a more specific description of financial experts.

Financial experts can provide a valuable, if not critical, service to the lawyer in the following ways:

- Providing assistance with evaluating a potential client and case
- Giving direction and assistance in the discovery process
- Consulting during trial, as well as providing expert testimony
- Consulting during post-trial and settlement negotiation

Valuation of Potential Clients and Cases

A standing relationship with a financial expert is valuable to a law firm since it allows easy access to consultation before accepting a client or case. With this association, a relationship of professional courtesy and friendship ought to develop as a matter of course. For example, after the lawyer's initial interview with a prospective client, the financial expert should be available to then meet with the law firm to evaluate the case.

The purpose of such meetings is for the financial expert to assist the law firm in determining the following:

- How difficult/easy will discovery of financial evidence be?
- What documents and electronic files are essential to the case?
- What is the real potential for winning the case?
- How complex will the case be? Is it conducive to settlement rather than pressing for trial?
- What are the weaknesses in the case? Do inconsistencies exist in the case?
- What will it cost to present the case? What will the financial expert cost?
- Do potential surprises and blind spots exist?

A good financial expert will not overstep their boundaries, thus confining his or her advice to their area of expertise rather than attempting to “play lawyer.” An expert who has a significant history of case involvement can share the benefit of that experience with you. For example, if the expert was involved in a similar case before, he or she may be able to share valuable insight on mistakes to avoid and strengths of the case to emphasize.

Assistance with Discovery

A financial expert can assist in areas such as the development of a list of relevant witnesses, determination of the expected testimony of those individuals, and assistance with the development of complete interrogatories. The expert should also be utilized in educating the lawyer in the financial concepts needed to perform a complete and efficient deposition.

For example, in a case where there are significant differences between the financial statements and tax returns, an experienced CPA can assist the lawyer in understanding what the differences represent. This allows the lawyer to spend time in deposition discovering evidence rather

There are several types of experts and even more expert designations and licenses. The following will assist attorneys in navigating the world of alphabet soup and identify those professionals who are skilled in the required areas. Included is the location to contact to confirm an expert’s membership and to obtain more information about the designation.

Business Valuation

Professionals with this expertise are also called business appraisers. There is a danger in confusing the meaning of the terms, however. Business appraisers are generally not qualified or skilled in appraising real estate. Most designations require proof of extensive experience in valuation work, passing a comprehensive uniform exam, and continuing professional education on an annual basis. Some of the designations are: Certified Valuation Analyst (CVA), certified by National Association of Certified Valuation Analysts (www.nacva.com); Certified Business Appraiser (CBA), certified by The Institute of Business Appraisers (www.go-iba.org/); Accredited Senior Appraiser (ASA), certified by American Society of Appraisers (www.appraisers.org).

Forensic Accounting

Professionals with this skill are more difficult to locate, although this situation is changing. Certified Public Accountants (CPAs) are licensed by each state and must have extensive audit experience to be certified. While this does not assure the specialized skills needed to complete a forensic engagement, it is a necessary foundation. A relatively new designation, DABFA (Diplomate of the American Board of Forensic Accounting), is conferred by the American College of Forensic Examiners (www.acfe.com) and may make the task of finding a qualified forensic accountant much easier in the future.

Fraud Examination

The professionals in this area range from current and retired law enforcement, internal auditors and private investigators. The Certified Fraud Examiner designation includes accountants, lawyers, auditors, law enforcement and private investigators. The designation is relatively difficult to obtain from the Association of Certified Fraud Examiners (www.acfe.org). The association requires proof of experience in fraud investigation, education and a passing grade on an extensive examination covering procedure, law, accounting and report writing.

than trying to understand the financial information presented. This is advantageous to waiting for deposition since, in deposition, the “teaching” comes from a hostile witness.

Another valuable skill of the financial expert is the ability to assist the lawyer with the compiling a list of financial documents to be requested in the discovery process. In unusual cases, the expert is used to assist with seizing records. The expert should be able to suggest a course of documentation strategy that satisfies the lawyer’s overall intent. For example, if the intent is to shut down a case or force a quick settlement, an experienced financial expert will be able to propose a course of discovery and inquiry that will yield the data relevant to that goal.

In a recent family law case, a financial expert was retained by counsel to assist the “non-moneyed” spouse. The goal was to avoid trial if possible. The expert obtained evidence that the “moneyed” spouse had filed various documents (tax returns, loan applications and income and expense declarations) disclosing a wide variance in income levels. When confronted by the prospect of loan fraud, tax fraud and perjury, the spouse was highly motivated to settle quickly—which he did. The strategy and procedures will be significantly different if the expert is informed that the case is going to trial.

The courts are increasingly cognizant of the fact that relevant financial evidence includes a back-up of the computerized accounting system. A financial expert can many times be used to go into a business and identify which records (hard copy and electronic media) are relevant and assist with the acquisition of this evidence. Using such expertise saves time in sorting through and sifting down volumes of information—often confusing and conflicting information—to arrive at the relevant facts of a case.

Finally, once the requested documents have been received, the adept financial expert can review and analyze the data. Ultimately,

the goal of a financial expert is to convert boxes full of evidence into a solid opinion backed up by relevant evidence and a presentation of that evidence that is clear, concise and understandable. To bring the expert into the process after discovery is inefficient and handicaps the expert’s utility.

Trial Assistance

The financial expert should obviously be able to provide expert testimony. The expert should have the ability to teach the trier of fact the terms and concepts needed to understand the evidence as well as present the opinion and support for the opinion. However, the experienced litigating lawyer knows that the utility of the expert does not end there.

The expert should also be used to analyze the testimony of opposing experts, for example, in developing the line of questioning for the cross-examination of the opposing expert. In a complex financial case, the person who is most likely to pick up on the holes and problems in the opposition’s case would be your own expert. For example, in a recent complex fraud trial, opposing experts introduced a PowerPoint presentation they intended to use the next day during their direct testimony. The presentation included nearly 100 slides. The following morning, prior to the commencement of testimony, the financial expert provided analysis of the slides and an outline for effective cross-examination.

In many cases, the financial component is an important piece but not the central theme of the case. It is imperative that the expert be utilized in such cases to limit the scope of testimony to the appropriate breadth and depth while still communicating the necessary elements. The expert should provide guidance to the lawyer on the use of exhibits and schedules. The experienced expert knows that a simple exhibit is a much more effective communication tool rather than one which only another expert can understand. With that in mind, the expert should know the best way to present visual aids.

In cases where the central theme is financial, experts are often consulted to assist with developing the theme or story structure of the entire case. A lawyer should not be afraid to ask for the assistance of the expert. The expert knows that their ideas on such matters are only suggestions, and the ultimate course will be directed by the lawyer. Certainly, the lawyer should be concerned that there not be any holes or weaknesses in that structure before beginning trial.

Post Trial and Settlement

A financial expert experienced in tax consulting is a valuable tool when negotiating settlements. While tax is always a secondary concern (at least until the tax rate approaches 100%), it can be an important consideration. In

some cases, a wording change in the settlement agreement can completely alter the taxability of settlement proceeds.

The impact is sometimes most pronounced in family court. Decisions made regarding the nature of alimony/support payments can have significant long lasting impact on the parties. For example, in a recent family law case, the language in the settlement agreement inadvertently referred to monthly payments as child support payments. It was the intention of the parties for the payments to be taxable and the financial expert caught the error, recommending a change of the wording to family support (alimony).

In addition, planning the cash flow of a proposed settlement is an important consideration that may

require consultation with a financial expert. Many times the economic value of a proposed award or settlement is materially altered when the impact of delayed payment is considered.

Conclusion

The use of a financial expert can produce many added benefits such as increased litigation efficiency, effectiveness and higher success rate, while often making the lawyer look good. Used properly, a financial expert is an integral part of the litigation team, particularly in cases involving complex financial concepts. A relationship with a financial expert should be cultivated and maintained as preparation for the day when a trusted consultant is necessary.



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