Having been retained for a number of significant litigation engagements over the years, Mercer Capital has had the opportunity to observe a variety of theories on the best time for attorneys to retain experts for their lawsuits.

In many lawsuits, the testimony of your business valuation, economic damages, or investment banking expert will be among the more important elements of your case, making it vital that the expert be involved early in the process. However, some attorneys tend to wait until the last minute to hire their experts, ostensibly under the theory that hiring experts late in the game minimizes the overall expense of the case. After all, the thinking goes, if the experts are not hired until it is certain that their expert reports will be needed, then the looming deadline provides an automatic limit to the number of hours that can be billed.

This approach is flawed for a number of reasons. In our experience, it is far better to involve the experts early. The sooner your business valuation, economic damages, or investment banking expert is involved, the sooner the expert will be able to provide you with an economic perspective on the facts of your case or your theory of damages. The longer you wait, the later your expert will be able to provide economic insight, good or bad, and the less time you will have to address any issues raised by your expert.

As an example of the above, Mercer Capital was contacted by an attorney concerning a significant breach of contract case involving a warehouse and distribution business whose business had been damaged when a key supplier cancelled a supply contract. The lawsuit was very well developed by the time we were contacted, and detailed pleadings existed concerning the mechanism by which the plaintiff’s business was damaged and the results of the defendant’s actions. The result of the case as presented to us was that, aside from some distraction and aggravation on the part of the plaintiff, a big piece of the case was essentially a wash, with very little economic damages. It would have been beneficial to the plaintiff’s lawyer to have known much earlier in the process that the damaged part of the operation was essentially breaking even (at best) prior to the breach of contract, and that there were few fixed costs that continued after the breach. The bottom line is that our estimate of damages was far lower than anticipated by either the plaintiff or his attorney.

In addition to the advantages associated with gaining perspective described above, hiring your expert early provides the following advantages:

1. Your expert can help you understand financial and economic concepts that are relevant to the dispute at hand. There are words and concepts that have particular meanings in a legal context that are unfamiliar or even surprising to non-attorneys. Similarly, there are certain elements of finance, accounting, and economics that might surprise those who do not work in these areas.

2. Your expert can help you figure out the discovery and documentation requirements associated with your case. This can help you give your client a better understanding of the overall cost of the lawsuit in terms of time, legal fees, and possible accounting, forensic accounting, or other services that might be required.
3. Your expert can consult with you about economic and financial matters, helping you create a theory of damages that is relevant and calculable. In economic damages cases in particular, it is important that the facts and the law align in such a way that an economic damages expert can provide an opinion that is consistent with the remedies the law allows.

4. Time allows organization and familiarity with the underlying facts and documents of the case. The more organized your experts, the better they will be to get command of all the information in the case relevant to their opinions, and the less likely they will be to be surprised by key documents that may appear to undermine their opinions.

5. Hiring experts early provides additional time to prepare for deposition and trial, which will allow for more effective testimony. Your experts can help you create more effective direct examinations and cross examinations of opposing experts if they have the time to do so.

6. Experts may be able to supply deposition questions for opposing experts and fact witnesses. In some cases, Mercer Capital has provided literally hundreds of questions for opposing expert and fact witnesses that greatly clarified the underlying economic and financial facts of the case. Better depositions of experts enhance the potential for settlement, and better depositions of your experts compared to the other side’s experts enhance your negotiating position. It has been our experience that many cases settle shortly after expert depositions, and we have seen at least a few where another expert completely torpedoed a case.

7. As the case progresses, your expert can vet the work of experts on the other side.

8. Hiring an expert early allows your reports to be prepared at lower effective billing rates. Reports prepared in the normal course of business benefit from data entry and basic analytical functions being performed by professionals with lower billing rates than your expert. If a report is prepared at the list minute, it must typically be prepared almost exclusively by (rather than under the supervision of) higher-rate personnel.

9. The sooner “the team” on the litigation is complete, the better they will work together. This is not to imply that your expert is anything but independent, but rather to point out that the familiarity that comes from working together over the course of an engagement will enhance the communication and rapport between attorney and expert.

10. If you hire your experts early, you generally get a better product. Being hired early allows your expert time to prepare a report, reflect on that report, and then issue a final report. It minimizes the potential for mistakes and last minute changes to the final report, and it also allows your expert to issue a more complete, more cohesive, and better written expert report.

As you can see, hiring your experts early in the process allows the experts to do a better job forming and documenting their opinions, and informing you and the court. While it may seem to be a greater financial commitment from your client, waiting until the last minute could prove to be much more costly. Simply put, the early dollars spent on your valuation, economic, or investment banking expert may be the best dollars. Good things come to those who don't wait.

Brent A. McDade, CBA, BVAL
mcdadeb@mercercapital.com
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