

Help Your Client by Helping Your Expert

BY ANDREW M. MALEC

As an expert witness on economic damages, my role is to analyze information that has been provided to me, perform the required economic/financial analysis, and communicate my independent findings in a clear and concise manner. The best way to assist me in helping your client is to be responsive to my requests (e.g., case updates, communicate any changes to the scheduling order, inquiries on the timing of document delivery, updates on legal strategy, etc.), and to ensure that I am fully informed throughout the litigation.

An expert is an important member of the litigation team and should not be thought of as just someone who is “crunching the numbers.” Should liability be found in the matter, then the focus of the case is centered on the amount of reasonable and foreseeable economic damages. The economic damages proffered by the expert witness is a result of a review and analysis of the documents along with economic and financial analyses.

It is important that a litigator communicate upcoming deadlines, the strengths and weaknesses of the case, and legal strategy with the expert in

order to provide the necessary background and time frame to produce the needed work-product. It is also better to hire the expert early in the process to allow the expert ample time to request information, perform an analysis, write a report, and prepare to give testimony. Do not wait until the “tail-end” of fact discovery to retain your expert witness; otherwise, there may be documents and/or information that the expert would like to see but cannot get. This could leave the expert with unanswered questions that will “handcuff” the expert.

In addition, provide your expert with the legal pleadings and deposition transcripts so that he or she knows all of the filings and the testimony that have been produced. There may be information in emails or in testimony that may not seem relevant to the litigator but could impact economic damages. Fully informing the expert allows the expert to “sharpen the pencil” on economic damages, which also assists in providing testimony. Controlling the amount of information given to the expert—although considered a way to keep fees down—may impact the expert’s findings and expose the expert

to cross-examination that he or she may not be prepared to address. When testifying, you do not want your expert to be asked if they saw an important document in counsel’s possession that was not provided to them. The lawyer must weigh the litigation budget against the potential impact lesser information may have on the computation of economic damages. You do not want to achieve “legal justice” but not “economic justice.”

Also, your expert may know the opposing expert (i.e., understand how he or she typically approaches economic analysis, stances typically taken by the expert’s firm, and/or style of testimony). Get input from your expert. This will only help you combat their proffered findings and assist your expert in providing rebuttal analysis.

To summarize, allow your expert to be “The Expert.”



ANDREW M. MALEC, PH.D., Partner and Managing Director at O’Keefe, is the firm’s Chief Economist and head of the firm’s Intellectual Property Practice Group.