Clients look to save money any way they can, even when faced with litigation. Offering clients ways to be more efficient and cost-effective may help them make the final decision to pursue the case. As cited in the 2011 8th Annual Litigation Trends Survey Report by Fulbright & Jaworski, LLP, which surveyed senior corporate counsel (405 participants) on litigation experiences and opinions, the number of disputes is expected to increase, along with costs of litigation:

- One-third of the U.S. respondents expect the number of disputes to increase in the next 12 months.
- Stricter regulation leading to increased litigation was cited by 30 percent of the U.S. respondents, compared with 19 percent in the previous year.
- The poor economy was cited by only 21 percent of the U.S. respondents as the reason for increases in litigation, compared with 41 percent in the previous year.
- In an effort to better control costs, 52 percent of U.S. respondents anticipate increasing the use of alternative fee arrangements, such as fixed fees, blended rates, and capped fees.
- Significant increases in litigation spending are planned in the following litigation areas, shown as percentages of all respondents:
  - Electronic discovery (18)
  - Labor and employment (17)
  - Contracts (15)
  - IP/Patents (13)
  - Regulatory investigations (12)

With the recently experienced downward pressure on corporate profits and household incomes, minimizing the cost of litigation should be a recurring theme on the minds of litigation counsel. In fact, conservation of resources makes economic sense for clients. There are a number of ways to achieve overall reduced costs on litigation, including the joint use of document reproduction and imaging services, court reporters, and other common services. In many cases, joint cost-sharing arrangements could also include the use of neutral experts. For example, jointly retained business valuation experts are mandated on family law matters in San Diego County, California.

**Why use joint retention of experts for commercial disputes?**

With respect to forensic investigation, accounting, or economic damages experts, using competing experts is fraught with difficult issues.

- Triers of fact are generally wary of competing “hired gun” experts who sound more like lawyers than experts.
- Such experts may be duplicating the same underlying document review and fact research, resulting in cost increases.
- If these experts possess divergent disciplines, costs will increase even more. For example, economists approach case issues and development of damages in ways differing from...
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Read the last line of the eye chart to discover a website where you can download forensic accounting resources such as a Fraud Prevention Check-up to share with your clients.
Getting agreement on which expert to retain may also be difficult. Attorneys, always mindful of protecting their client’s interests, are naturally suspicious of an expert proposed by their opposing counsel. These are questions of basic human nature, not legal questions, but they are certain to color any attempt to jointly retain an expert witness in litigation.

A checklist of those considerations for retaining a joint expert follows:

- Expert must be agreed-to by all litigants.
- Customized processes for selecting the expert can be designed to maintain fairness, such as:
  - Pool of prospective experts selected by the litigants, with final choice by the judge or other 3rd party.
  - Identification of prospective experts by one litigant, with final choice by the opposing litigant.
  - Agreement between counsel.
- Establish a process for the expert to receive clarification on issues involving scope of work, procedures, reporting, or unanticipated implementation issues.
- Establish a process for the expert to communicate with both counsel, seeking to avoid ex parte communications with one attorney.
- Method and form of reporting: pre-issuance reports, comment periods, and other expectations of the litigants and counsel.
- How to handle direct examination, cross-examination and/or rebuttal testimony.
- Process of compensating the expert.
- Qualify the proposed jointly retained expert by determining prior experience serving in a neutral capacity, as a special master, by court order, or as a neutral functioning without supervision by the Court (e.g., agreed-to settlement process).

In the event there is concern as to the expert’s methodology, adherence to the agreed protocol, and/or professional standards, the litigants may reserve the right to employ a consulting expert to review the expert’s findings and supporting documentation.

A single, agreed expert evaluation lends to greater predictability for the deliberative process and enhances settlement prospects. While the process of obtaining jointly retained counsel may require more additional work up front, the benefits to all parties justify such efforts.

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