



Jointly Retained Experts Can Reduce Litigation Costs



By Pat Reilly and Mike Rosten

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

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from accountants, possibly necessitating reconciliation that otherwise would not be necessary.

Benefits from a jointly retained financial expert

Parties to litigation may in certain circumstances benefit from joint retention of experts. The potential benefits include the following:

- Decreased cost, since separately retained experts duplicating each other's efforts would not be needed.
- Enhanced communication with the jointly retained financial expert, and (hopefully) improved responsiveness.
- Lessen the possibility of getting "hired gun" experts that are at risk for inappropriately becoming advocates for the litigants.
- Eliminate dueling experts that may espouse differing damage theories, leading to confusion and possibly lack of comparison.
- Eliminate the risk of differing damage theories founded on hypothetical assumptions received from counsel, or due to excessive control by counsel.
- Eliminate the need for showmanship among the experts, allowing greater focus on their actual findings.
- Possible shortening of proceedings, since there would not be rebuttal reports.

Certain cases are particularly ripe for joint retention of experts. For example, bank deficiency cases lend themselves to the joint retention of an appraiser to value the underlying real property as of the date of foreclosure. Lost profits analyses also lend themselves to joint retention of an expert.

Considerations in using joint experts

Ideally, jointly retained experts will allow a more concerted focus on findings of the expert and on fully educating the trier of fact, lessening the possibility of misunderstanding by the judge or jury, which may lead to ill-informed or flawed decision making. Cooperation among counsel is paramount to garnering the many benefits from a jointly retained financial expert, including the initial selection process.

As always, the devil is in the details. Joint retention of an expert is an issue that needs to be raised early in discovery, a time in the case where party litigants (and their attorneys) are often reluctant to agree on anything. Defendants should also be very careful when agreeing to jointly retain an expert, so as not to appear to the trier of fact that they are conceding liability as to any issue. For example, joint retention of a "lost profits" expert may be efficient, but it may also suggest that the defendant is conceding liability on the merits.

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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