

## Focus BUSINESS LAW

# Making good case management better

Early involvement by accounting experts can help in complex matters



**Dan Ross**

On June 24, the Federal Court case management working group issued a notice announcing new measures designed to increase proportionality in the court's proceedings. The notice included the following important recommendations targeted at making litigation more cost-effective for participants and using the court's limited resources more efficiently:

- Limiting documentary discovery to be proportionate to the nature and complexity of the dispute;
- Placing caps on the duration of oral discoveries based on the estimated length of trial;
- Limiting refusals motions to one hour per day of discovery of each party's representative;
- Ending the practice of taking discovery questions "under advisement";
- Encouraging earlier pursuit of mediation and other forms of alternative dispute resolution.

The working group's recommendations emphasize the need for counsel to be organized, efficient and well-prepared. Case management can present significant challenges to counsel, particularly in the context of assessing damages in complex cases with one or more of the following factors:

- Complex products, financial transactions and profit streams;
- Multiple and/or inter-related parties;
- Lengthy or non-recent damage period;
- Incomplete or missing financial/accounting records.



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The early involvement of accounting experts can assist in ensuring that the nature of economic loss is understood, that appropriate financial documents are produced and requested from the opposing side, that proper questions are asked during discovery and that key issues relevant to quantification of damages are identified in a timely fashion.

### Information requests

Imagine the case where parties have exchanged information, discovery has ended and a recently hired expert explains that there is information relevant to their analysis that has not been requested or provided. Counsel should make sure to apply the same focus and due diligence on measurement of damages as they

do in respect of other case issues regarding liability and causation, as it is important to ensure that the information required to support the expert's opinion is obtained and considered in the expert's analysis.

If the accounting expert is hired early on, counsel can ask them to prepare requests for information that will be relevant to their analysis. Accounting experts have a detailed understanding of financial systems, methodologies and terminology. They are able to identify the important financial documents residing in extensive corporate records and to interpret the information to assist counsel in understanding its significance and financial relevance. The expert may bring fresh perspective to a document and offer insights that were previously unnoticed. They can also help organize financial documents that are received and identify instances where information appears to be incomplete, inconsistent, or inaccurate.

The accounting expert can also analyze financial data as it is received — for example, determining the historical pricing of sales transactions, tracing the flow of funds through a series of closely held corporate entities, or deciphering “fingerprints” left by accounting transactions. As financial documents are produced, reviewed and analyzed, the expert is able to identify key areas they will need to consider in performing their analysis.

### Discovery and follow-up

It is imperative for counsel to approach discovery efficiently, particularly with limits on their duration. Discovery that is overly broad or general tends to lead to long days, a myriad of

refusals and missed opportunities. Accounting experts can assist counsel by preparing discovery questions that focus on key financial matters. The expert may even attend at discovery to assist counsel when follow-up and clarification are required regarding financial issues or documents. The accounting expert can help by translating complicated financial jargon and explaining issues relevant to damages in the context of the financial information provided prior to and requested during discovery.

As the case progresses and more information is provided or refused, the expert can also assist in preparing follow-up requests and helping counsel assess whether refused items are relevant to the expert's opinion and analysis.

As counsel proceeds through a case, it is important they share emerging case facts and developing legal assumptions with the accounting expert, without attempting to direct the expert's analysis or persuading or encouraging them to alter their opinions. Courts have repeatedly stressed that the expert's foremost duty is to assist the court, and that the expert must be found to be independent and objective for their evidence to be considered relevant. The earlier the accounting expert is retained, the more they will be able to ensure that the information required to support their opinion is obtained and to help counsel in being efficient and well-prepared for discovery and refusal motions.

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