

In today's marketplace, competition is fierce and the stakes are high.

Bitter business disputes often arise inflicting significant damage to companies. The most common types of business disputes arise when a company's operations are prevented or interrupted.

To successfully win your case, you will need an expert to provide an opinion on your company's lost profits arising from the business dispute. It is vital that your expert's opinion meet certain criteria or you could lose your case. Every court in the United States is the gatekeeper to the admissibility of your expert's opinion.

The following are four practical tips in assisting litigation counsel, in-house counsel, and C-level executives.

1. COMPLY WITH THE EVIDENCE CODE

Whether you are in State or Federal Court, your expert's testimony must comply with the corresponding evidence code for that jurisdiction. First, you must select an expert that is qualified as an expert by knowledge, skill, experience, training, or education.

Rule 702 of the Federal Rules of Evidence requires that your expert's testimony pass the following test:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

In many states, the evidence code is similar to Rule 702 of the Federal Rules of Evidence. In California, an expert's opinion must also be perceived by or personally known to the witness, or made known to him at or before the hearing. (California Evid. Code, § 801, subd. (b).)

The Federal Rules of Evidence prescribe the minimum requisites. It is important to understand that the value of your expert's opinion rests not in the conclusion reached but in the factors considered and the reasoning employed in reaching that conclusion. (*People v. Coogler* (1969) 71 Cal. 2d 153, 166.

2. BASED ON SUBSTANTIAL EVIDENCE

You must make certain that your expert's opinion is based on substantial evidence. A common pitfall parties want to avoid tumbling into is their expert basing their opinions on assumptions which are

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FOUR PRACTICAL TIPS ON MAKING A SUCCESSFUL LOST PROFITS CLAIM

Mhare O. Mouradian
Murchison & Cumming, LLP

not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural. If this is the case, a Court would undoubtedly rule that your expert's conclusions have no evidentiary value and exclude their testimony. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal. App. 3d 325, 338-339. In those circumstances, the expert's opinion cannot rise to the dignity of substantial evidence and the verdict or decision in your favor becomes susceptible to being appealed.

When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based upon improper or unwarranted matters, the judgment must be reversed for lack of substantial evidence. For example, in the California case *In re Marriage of Hewitson*, the expert attempted to determine the value of a closely held corporation by using the selling price/book value ratio of publicly traded corporations. Due to the differences in the two types of companies being compared, the analogy was improper and the judgment based upon the expert's testimony was not supported by substantial evidence. (*In re Marriage of Hewitson*, supra, 142 Cal. App. 3d at pp. 885-887). Courts have also reversed a determination of the value of a business because the lower court accepted the testimony of an expert who had relied upon false assumptions and improper factors, and who had failed to consider all of the relevant factors that established value.

3. ASCERTAINED WITH REASONABLE CERTAINTY

Where the operation of an established business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits

that otherwise might have been made from its operation are generally recoverable.

Your expert's opinion must, however, also be ascertained with reasonable certainty. Reasonable certainty is established through past volume of business, historical data and other provable data relevant to the probable future sales.

On the other hand, if you are not an established business, your expert will have more work to do to prove your lost profits claim. Lost profits for an unestablished business may not be recoverable if your business has no clear track record because it is too uncertain, contingent or speculative. (*Grube v. Glick*, 26 Cal.2d 680, at 693. However, if your expert is able to establish lost profits with reasonable certainty using economic and financial data, market surveys and analyses, business records of similar enterprises and the like, you still may be able to successfully prove your loss of profits claim for an unestablished business.

Furthermore, you are not required to show the amount of lost profits with mathematical precision so long as your expert's opinion is ascertained with reasonable certainty. (*Berge v. International Harvester Co.*, 142 Cal. App. 3d 152 (1983).

4. TRUST BUT VERIFY

President Ronald Reagan's signature phrase "trust but verify" also applies to your expert. You should meet with your expert and have him verify the information you provide. Your expert should not rely just on deposition testimony of where objective evidence existed, but should also consider effects of competition on opinions on lost profits. Expert testimony can be excluded if it is based on the assumption that there are no potential competitors. See *Heary Bros. Lightning Protection Co. v. Lightning Protection Inst.*, 287 F. Supp 3d 1038 (D Ariz 2003).

If your expert follows these four practical tips, you are well on your way to successfully proving your lost profits claim in your bitter business dispute and recovering damages.



Mhare O. Mouradian, a partner at Murchison & Cumming, LLP, is a member of the firm's Business Litigation and Business & Real Estate Transactions practice groups. Mr. Mouradian has a broad

range of experience encompassing all aspects of business law and litigation. Most recently Mr. Mouradian served as co-chair and successfully represented a U.S. national franchise in a 10-day breach of contract bench trial and obtained a decision in excess of \$850,000 in favor of his client. He has also negotiated numerous favorable settlements for his clients.