AICPA® Forensic and Valuation Services Section

Another Voice:

Financial Experts on Reducing Client Costs in Civil Litigation

In partnership with

IAALS Institute for the Advancement of the American Legal System, University of Denver

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The AICPA maintains offices in New York, NY, Washington, DC, Durham, NC, and Ewing, NJ.

In addition, members of the 2011–2012 AICPA Forensic and Valuation Services Executive Committee provided review to the authors and AICPA staff for this white paper.

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About IAALS

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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models and will to advance a more accessible, efficient and accountable civil justice system.

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I. Overview

The goal of the United States civil justice system is to provide parties before the court with a speedy, inexpensive and just determination of every action. These goals are set forth in Rule One of the Federal Rules of Civil Procedure (FRCP) and most state rules of civil procedure. Current systems frequently fail to meet these goals and access to the courts is at risk.[1] As a result, there is renewed interest at federal and state levels in exploring the perceived barriers to a speedy, just and inexpensive outcome — prohibitive costs and excessive delays.[2] Attorneys, judges, rulemakers, academics and organizations dedicated to these issues have taken the lead in sparking this conversation and have made considerable headway in identifying and moving forward with potential solutions to the problems. IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, is deeply involved in this effort through its *Rule One Initiative*[3] and in order to broaden this discussion, IAALS is working with additional stakeholders — frequent players in the system — who can provide valuable and unique insight into inefficient practices and potential solutions. Financial experts are one of these stakeholder groups.[4]

[1] One of the major themes to emerge from recent national surveys of attorneys is that the cost of litigation hinders access to judicial case determination on the merits. Corina Gerety, Institute for the Advancement of the American Legal System, Excess and Access: Consensus on the American Civil Justice Landscape 9 (2011).

[2] In May of 2010, federal rulemakers convened the 2010 Civil Litigation Conference at the Duke University School of Law, focusing on access, fairness, cost and delay in civil litigation in federal court. Approximately 200 judges, attorneys, rulemakers, academics and others attended the conference to offer their expertise in civil litigation. Since the conference, federal rulemakers have been focused on advancing amendments to those rules and procedures most in need of reform. Press Release, Third Branch News, May Conference to Be First of Its Kind to Look at Civil Litigation in Federal Courts (Apr. 12, 2010).

[3] The IAALS *Rule One Initiative* advances empirically informed models to promote greater accessibility, efficiency and accountability in the civil justice system. Information on IAALS and its various initiatives is available at iaals.du.edu.

[4] Financial experts frequently provide objective forensic accounting services to parties in civil litigation, work on multiple cases with attorneys and testify in depositions and before judges and juries in court.

The American Institute of Certified Public Accountants (AICPA) — the world's largest association representing the accounting profession — and its Forensic and Valuation Services (FVS) Executive Committee[5] (FVS Executive Committee or Committee) are well aware of the increases in the cost of and delay in civil litigation and the inefficient practices commonly encountered in the pretrial process, and are committed to finding solutions to the problems in order to serve their clients and the system better. The FVS Executive Committee established a Civil Justice Task Force (Task Force) in mid-2011 to leverage the unique perspective of financial experts in the ongoing effort to change this reality. The FVS Executive Committee mandate for the Task Force was to work with IAALS to identify causes and facilitate solutions to the barriers raised by costs and delays encountered in the pretrial handling of civil disputes, and to develop key recommendations for streamlining the civil pretrial process and reducing costs for clients.[6] Based on its mandate, the FVS Executive Committee reviewed and voted to approve the Task Force's findings as the basis for the findings and recommendations of the FVS Executive Committee that are contained in this report.

The FVS Executive Committee and Task Force undertook 18 months of study and analysis, including three two-day in-person meetings and numerous conference calls. It considered the following resources: prior studies of expert witnesses and costs, recent national surveys of attorneys on civil litigation, different approaches to expert discovery in jurisdictions around the country and internationally, and collective Task Force and Committee experience. The FVS Executive Committee and IAALS also administered a survey to AICPA FVS Section members (FVS survey).[7] Section members include certified public accountants who provide forensic accounting and business valuation services, many of whom are frequently retained as expert consultants or testifying witnesses in civil litigation.

The FVS Executive Committee, in conjunction with IAALS, offers judges, attorneys, financial experts, clients and all those with a stake in the civil justice system the following five recommendations to maximize both the effectiveness of financial experts and efficiency of their use in the civil pretrial process:

- Judges should implement early and consistent active case management;
- Clients and attorneys should involve experts early in the process;
- Attorneys should target, focus and streamline expert depositions and discovery;
- Attorneys' *Daubert*-like challenges should be appropriately targeted and acted upon promptly by the court; and
- Attorneys and the court should develop a process for the collaboration and cooperation of opposing experts where appropriate.

Although the expert voice is not typically heard in connection with reforming civil pretrial processes, the financial expert has much to say when it comes to this conversation.

[5] Information on the AICPA and its committees, as well as resources available to the public and members, can be accessed at aicpa.org

[6] American Institute of Certified Public Accountants, FVS Executive Committee Charge (July 2011) (on file with the AICPA). The FVS Executive Committee charge to the Task Force was to develop guidelines or recommendations that would support or occasion the most efficient and effective use of accounting experts during the pretrial and trial process.

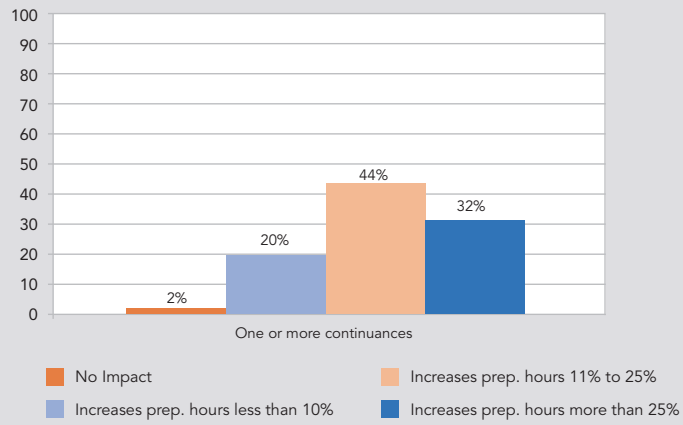
[7] The Forensic and Valuation Services survey was administered by IAALS and the AICPA FVS Executive Committee to members of the AICPA Forensic and Valuation Services Section. The survey was in the field from January 18, 2012, to February 20, 2012. The survey contained the following threshold question: "Are you a Certified Public Accountant with past or present experience as an expert witness providing forensic accounting services in state and/or federal court? For this survey expert witness does not include serving as a consultant." Only respondents answering "Yes" to this question were able to proceed to the full survey. American Institute of Certified Public Accountants, Survey Results & Analysis for Forensic and Valuation Services Survey (Feb. 21, 2012) (on file with the AICPA).

II. FVS Executive Committee Recommendations

A. Judges Should Implement Early and Consistent Active Case Management

The FVS Executive Committee believes that judicial implementation of early and consistent active case management can increase efficiency and decrease unnecessary expenses associated with the use of financial experts. A clear trend emerges from the FVS survey that actions — or inactions — of the judiciary impact time and expense in civil trials in which financial experts participate. The survey results suggest that the work and costs of financial experts are affected by the court's calendar and the timing of its responses to motions. Specifically, FVS survey responses suggest that continuances drive up financial expert witness costs. With respect to how continuances impact the hours spent preparing for a trial, a plurality of respondents (44 percent) said continuances increase the hours of preparation 11-25 percent and about one third (32 percent) said continuances increase the hours of preparation more than 25 percent. Notably, only two percent of respondents reported that continuances do not impact the hours of preparation. See Figure 1.

Figure 1. Impact of Continuances on Hours of Preparation for Trial



FVS survey respondents also perceived an increase in time to trial where one or more continuances had occurred. According to 26 percent of respondents, one or more continuances delay a case one to three months and a plurality of respondents (45 percent) concluded that continuances delay the time to trial more than three months. Considering these results broadly, 96 percent of FVS survey respondents said that their preparation time increased when one or more continuances occurred in the litigation. One respondent called continuances "the bane of the civil system."

FVS survey respondents suggested similar inefficiencies in preparation time and costs due to failure of judges to rule promptly on discovery and pretrial motions. With respect to the impact on hours spent in preparation for trial, a majority of respondents (53 percent) suggested that when a judicial officer does not rule on matters in a timely way the hours of preparation for trial are increased more than 11 percent. In total, 82 percent of respondents agreed that untimely rulings by judicial officers increased the hours of preparation. In the experience of Task Force members, where the judge does not rule on summary judgment or other dispositive motions promptly, parties must prepare for all eventualities, many of which could have been resolved by the court.[8] According to a plurality of respondents (31 percent), where a judicial officer does not rule on matters in a timely way, the time to trial is delayed more than three months. The collective experience of the Task Force suggests this is a growing problem.[9] Even with respect to nondispositive motions, where the judge does

[8] Where there are a variety of financial or damages outcomes dependent on which claims survive, in order to be prepared for all eventualities, each permutation and combination must be addressed until the court rules.

[9] The American College of Trial Lawyers Task Force and IAALS, recognizing that "[j]udicial delay in deciding motions is a cause — perhaps a major cause — of delay in our civil justice system," put forth a similar recommendation in their *Final Report*: "The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." Institute for the Advancement of the American Legal System & American College of Trial Lawyers, Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System 22-23 (Mar. 11, 2009) (rev. Apr. 15, 2009).

not rule in a timely manner it can hold up the case — for example, not receiving an early ruling on the proper standard of value in matrimonial disputes.

Broadly speaking, FVS survey respondents noted a considerable negative impact on time to trial as a result of continuances and delays associated with failure to rule on matters promptly. These findings are largely consistent with findings in recent national attorney surveys on civil litigation[10] that also suggest a likely connection between delay and increased costs.[11] The FVS survey and collective experience of the Task Force reinforce this connection and directly relate these broader issues to the costs of using financial experts. Generally speaking, when expert witnesses prepare for a case, delays in the process — on account of continuances or untimely rulings on motions — require duplication of efforts to get back up to speed after the delay. As a result, rules and procedures that disfavor continuances and promote prompt rulings on motions will likely lead to cost savings in financial expert time.

This recommendation overlaps to a significant extent the recommendations that follow: early judicial intervention and consistent involvement can impact the timing and structure of financial expert witness involvement in cases; assist parties, attorneys, and financial experts in focusing and streamlining discovery; and encourage parties to consider and develop processes for collaboration and cooperation between opposing financial experts.

[10] Majorities of respondents to surveys of the Fellows of the ACTL, members of the American Bar Association (ABA) Section of Litigation and members of the National Employment Lawyers Association (NELA) (83 percent, 65 percent and 53 percent; respectively) agreed that continuances cost clients money. Mathematica Policy Research, ACTL Civil Litigation Survey: Final Report 75-77 (June 27, 2008) (on file with author) [hereinafter ACTL Survey: Final Report]; American Bar Association, ABA Section of Litigation Member Survey on Civil Practice: Full Report 147 (Dec. 11, 2009) [hereinafter ABA Section of Litigation Survey Report]; National Employment Lawyers Association, Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009 42 (Mar. 26, 2010) [hereinafter NELA Survey Report].

[11] More than 70 percent of respondents to the ACTL, ABA and NELA surveys agreed with the statement that "[t]he longer a case goes on, the more it costs." ACTL Survey: Final Report, *supra* note 10, at 75-77; ABA Section of Litigation Survey Report, *supra* note 10, at 148; NELA Survey Report, *supra* note 10, at 42.

B. Clients and Attorneys Should Involve Experts Early in the Process

It is not unusual for a financial expert to be engaged at an advanced stage in the litigation process. However, in the collective experience of the Task Force, involving the expert earlier in the process actually can benefit the parties in terms of more effective case management and lower overall costs. This is one of the major themes to emerge from the FVS survey comments.

Involving an expert early in the process allows the expert to be properly screened and engaged to ensure the best possible fit with the requirements of the specific matter and expertise of the financial expert. From an administrative standpoint, early engagement helps the expert appropriately plan for and staff the case using the best possible balance of staff assignments to bring efficiencies to the overall process and minimize scheduling conflicts for both the expert and the expert's staff. Early engagement also ensures that the expert has sufficient time to do his/her best work. One FVS survey respondent noted that "[a] major contributor to increased costs is the attorney calling the accountant in well after the case has started and then wanting the work rushed." The impact of an expert being able to work with sufficient time between deadlines, uninterrupted and without delay cannot be overstated — picking up a case at the last minute (and putting it down again when a continuance occurs) is probably one of the most inefficient things experts do.

Further, the financial expert can be very helpful in assisting the attorney with tactical decisions at an early stage of the litigation. For example, early engagement means that the financial expert is available to assist with defining economic issues, the approach(es) that will be employed in preparing expert opinions on the defined issues or in evaluating the need for other third-party assistance (such as real estate and equipment appraisals in a business valuation matter or standard of care or other industry expertise) in a timely manner.[12] Early engagement of financial experts in the discovery process can also help inform an attorney's assessment of what information is required and would be most beneficial during discovery.[13] Consider the following examples:

[12] *E.g.*, American Institute of Certified Public Accountants, *Forensic and Valuation Services Section, Serving as an Expert Witness or Consultant,* Practice Aid 10 – 1 27 (2010) (setting forth different methods for computing lost profits and suggesting an expert consultant or witness can "assist in determining which approach is most cost effective by putting the various approaches in proper perspective").

[13] *See id.* at 28-32 (setting forth various ways in which expert consultants and witnesses can assist attorneys in the discovery practice).

- The financial expert's special knowledge of business or a particular industry can help in drafting interrogatories that are better able to inform an attorney's understanding of the opposing party's systems, documentation and structure;

- Experts can review requests for production of documents to ensure that there will not be misunderstandings about which information is being requested, for which periods, and in which format.[14] Doing so ensures timely receipt of the right documents in a useful format and reduces time later spent sifting through inapplicable information or supplementing requests and assimilating information late in the game; and

- With respect to participating in depositions of opposing parties or experts, financial experts can help attorneys detect technical but uninformative answers and can suggest additional questions to identify inconsistencies or expose flaws in testimony.[15]

Because the initial work of financial/damages experts of necessity must be done after foundational fact discovery is available, and frequently after other expert opinions have been published, late expert engagement can negatively impact the discovery process. In certain cases, late engagement of a financial expert can derail the process: for example, when discovery has been completed but specific information required by the financial expert was not produced or was not elicited at an opposing expert's deposition. According to one respondent to the FVS survey, the "[s]ingle biggest issue is retaining [the] expert too late in the process. Often, discovery is complete, or nearly complete, and there is insufficient documentation or data to perform a proper analysis. You spend a lot of time (and therefore money) working around limitations." Such a situation almost always results in the issuance of multiple reports, which is one of the biggest factors in increasing expert costs. Another respondent opined "[m]oney spent avoiding incomplete disclosure requests and last-minute engagement inefficiency is repaid in multiples of upfront costs." There also are cost-saving benefits to early — and realistic — evaluation of damages.[16] Although experts can use estimates to generate an early evaluation of damages, if the case does not resolve the expert will have to do the work necessary for a cross examination-ready report.

The FVS Executive Committee recognizes that, because litigation matters involving financial experts are varied in scope and complexity, in some situations there are legitimate reasons for involving experts at a later stage in the litigation.[17] The benefits in terms of efficiency and effectiveness gained by engaging a financial expert early in a specific litigation matter will be highly dependent on a number of issues, but generally it is the opinion of the Committee that attorneys and clients should focus more attention on the possibility of early engagement of the financial experts. Parties should weigh the often limited cost of early engagement against the potential increased costs of engaging a financial expert witness late in the pretrial process, taking into account both the direct cost of the expert and, more significantly in many instances, the costs of fulfilling the preparation needs of the retained expert in a manner that meets discovery and disclosure deadlines.[18]

[14] The preferred format for financial information is frequently native format (i.e., Excel spreadsheets and accounting records) rather than PDF or TIF files that are typically used for production of other types of documents. Without the production of those types of records in native format, much additional time and money will be spent that could have been avoided with the appropriate early information request.

[15] FVS Executive Committee and Task Force experience also suggests that the presence of the opposing financial expert at an expert's deposition improves candor.

[16] In a recent conversation with the ABA Section of Intellectual Property Law, Chief Judge Randall Rader of the U.S. Court of Appeals for the Federal Circuit suggested "[t]he parties benefit from early damages discussions and disclosures because it can provide a realistic evaluation of both [the] defendant's exposure and [the] plaintiff's damages calculation and further promote early and effective mediation." "Chief Judge urges earlier discovery of—and *Daubert* challenges to—damages evidence in IP cases," BVWire Issue #115-3, bvresources.com/BVWire/April2012Issue115-3.html (April 18, 2012).

[17] Perhaps in some cases the available evidence has not been produced and evaluated to the point necessary to adequately define the proper role and scope of a financial expert or the evidence is evolving in nature and the need for a financial expert has not yet been fully determined. Experts may also be brought into play later in the course of litigation on account of budgetary constraints or party optimism that the underlying claim(s) will be dismissed or settled before a financial expert's opinion is required.

[18] These factors are particularly applicable to financial experts, as the financial issues are intertwined with most elements of the dispute and the resulting findings are dependent on the factual data and frequently on the analysis of other experts.

C. Attorneys Should Target Focus and Streamline Expert Depositions and Discovery

Concerns over the cost of expert discovery are not new.[19] Although expert discovery can be beneficial to attorneys, experts and the parties in general, the discovery process in many civil cases is disproportionately expensive, time consuming, all too often subject to gamesmanship, and not structured to maximize information exchange. Accordingly, the FVS Executive Committee recommends that expert discovery should be targeted, focused and streamlined as a means of reducing costs and maximizing the efficiency of various disclosure and discovery tools.

FVS survey results suggest that depositions can result in unnecessary costs. Respondents were somewhat divided in their opinion about whether attorneys generally ask substantive questions regarding the expert report or opposing expert opinion in the deposition. Fifty-six percent of those expressing an opinion on the issue reported that more than half of a typical expert deposition is dedicated to substantive questions concerning the content of the respondents' expert report and opinion. This would indicate that cutting deposition time to force the attorneys to focus on the important matters might provide the substance needed for case preparation without the cost.

In spite of the cost associated with expert depositions, financial experts recognize the importance of this discovery tool.[20] Respondents to the FVS survey suggested that, when targeted and well thought-out, expert depositions can be a valuable tool for exchanging information, enhancing settlement and reducing costs. Of those expressing an opinion on the subject, about two-thirds of FVS respondents reported both that 1) expert depositions helped the respondent half the time or more in refining the issues for the client, and 2) expert depositions helped half the time or more in helping the adverse party understand the basis for the respondents' opinion(s). Only nine percent of respondents answered that expert depositions neither helped the respondent in refining the issues for his/her client nor helped the adverse party in understanding the basis for the respondents' opinion. Furthermore, almost half (49 percent) of respondents having an opinion on the issue reported that depositions promote settlement "often" or "almost always," and just under one-third (31 percent) reported this occurred "occasionally." One respondent commented: "a good deposition … will bring weakness to light."

Given the benefits of expert depositions, it is not rational to assume that attorneys will or should simply cease employing this tool in order to reduce costs in the pretrial process. Rather, they will continue to use this tool because of its beneficial impact on trial preparation and settlement. In light of this reality, the FVS Executive Committee recommends that attorneys should place a priority on conducting targeted, focused and streamlined expert depositions and — to the extent appropriate — the court should encourage or require them to do so. Expert depositions should be crafted and conducted so as to reduce gamesmanship and promote substantive information gathering, including, for example, asking for specific sources of numbers contained in the report, asking for explanations of calculations and enumerations of assumptions or inquiring whether the expert will be giving testimony about disputed facts and circumstances on liability or causation.[21]

Attorneys also should place a priority on streamlining expert discovery more broadly. For example, the timing of

[19] *See* Thomas E. Willging et al., Federal Judicial Center, Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases (1997); Emery G. Lee III & Thomas E. Willging, Federal Judicial Center, Federal Judicial Center National, Case-Based Civil Rules Survey (Oct. 2009); Emery G. Lee III & Thomas E. Willging, Federal Judicial Center, Litigation Costs in Civil Cases: Multivariate Analysis (Mar. 2010).

[20] Attorneys also recognize the importance of depositions. For example, majorities of ACTL, ABA and NELA survey respondents (76, 72, and 54 percent, respectively) agreed depositions where expert testimony is not limited to the expert report were a "very important" tool. (There is a distinction in the responses to surveys between cases in which the expert testimony will be confined to the report, and those in which it will not.) ACTL Survey: Final Report, *supra* note 10, at 47-48; ABA Section of Litigation Survey Report, *supra* note 10, at 94; NELA Survey Report, *supra* note 10, at 32.

[21] It is the opinion of the FVS Executive Committee that deposition duration should be proportional to the time needed to understand and evaluate the expert's opinion and testimony history.

"[T]he FVS Executive Committee recommends that attorneys should place a priority on conducting targeted, focused and streamlined expert depositions and — to the extent appropriate — the court should encourage or require them to do so."

expert disclosure and discovery should be scheduled to maximize the exchange of information. This may entail establishing — and adhering to — a schedule for expert disclosure and discovery based on the specific needs of the case, ensuring that non-expert discovery is complete before the financial expert is asked to formulate his/her opinion and staggering the exchange of expert reports. Appropriate timing of information exchanges reduces the need for (and costs associated with) supplemental reports. Additionally, because damages claims and supporting legal theories often are not finalized until after non-expert and technical discovery is completed, the FVS Executive Committee recommends differential treatment given the unique procedural needs of these experts.[22]

To a large extent, the recommendation that attorneys target, focus and streamline expert depositions and other discovery reinforces other FVS Executive Committee recommendations:

- Early and active case management can be extremely beneficial in this respect by encouraging parties to narrow the issues at an early stage in the litigation,[23] consider and discuss the issue of expert witnesses early on, and establish a timeline for expert disclosure and discovery — based on the specific needs and circumstances of the case — which in turn maximizes efficient information exchange; and
- Involving financial experts early in the process is consistent with this particular recommendation because financial experts can provide early input on the discovery necessary to assess damages and other issues effectively and comprehensively.

[22] This does not impact the FVS Executive Committee recommendation that clients and attorneys should involve experts early in the process. The Committee still recommends the early involvement of financial experts even though their opinions may be exchanged later in the process.

[23] Taking into account the fact that the plaintiff may need discovery to narrow allegations and legal theories that support demands for compensation.

D. Attorneys' *Daubert*-Like Challenges Should be Appropriately Targeted and Acted Upon Promptly by the Court

The FVS Executive Committee recommends that, when a *Daubert* challenge is raised, it be appropriately targeted, such that the motions are substantively appropriate and timed so as to allow for an adequate understanding of the challenged-expert's opinion through the discovery process. Furthermore, the court should act promptly on these motions to avoid unnecessary cost and delay.

A PricewaterhouseCoopers LLP (PwC) study, Daubert *Challenges to Financial Experts*, analyzed all written court opinions (both federal and state) issued in the 12 years ending Dec. 31, 2011, that included citations to *Kumho Tire*.[24] The PwC study found that the number of challenges against financial experts in its sample has been generally trending upward, averaging 138 challenges each year for the last five years of the study.[25] In the cases in which they were filed, *Daubert*-like challenges to financial experts have succeeded in excluding all or part of the experts' testimony in at least 40 percent of the challenges in each year for the last nine years of the study, with an average of 48 percent of the challenges for the entire 12-year period.[26]

Overall, the PwC study shows a relatively low number of *Daubert*-like challenges, but a relatively high rate of success. FVS survey responses and Task Force member experience show a contrasting picture of higher rates of *Daubert*-like challenges being brought (including motions in limine) but with much lower success rates. The PwC and FVS surveys may differ on this point for a number of reasons: the PwC study only addresses written opinions and is therefore only a sample of overall activity while FVS survey respondents may be addressing a broader universe than just written opinions; or the PwC survey may have elicited different responses because respondents defined a 'successful exclusion' in different ways.[27] Although the FVS survey results differed from the PwC study,

[24] A 1999 decision clarifying that *Daubert* criterion applied to all types of expert discovery.

[25] The PwC study searched all written court opinions that cite either *Daubert* or *Kumho Tire* during the 2000 to 2011 period. Of these, approximately 5,300 cases referenced *Kumho Tire*. *See* PricewaterhouseCoopers, *Daubert* Challenges to Financial Experts: A Yearly Study of Trends and Outcomes 31 (2011).

[26] *Id.*

[27] For example, that they were able to testify on most, if not all, of the substantive issues.

the experience of Task Force members provides evidence that the use of *Daubert*-like challenges can potentially have a significant effect on reducing the length of time and the total costs in litigation involving financial experts.

In order to be effective, this recommendation needs to be combined with others in this report — particularly active case management in the form of prompt resolution of matters by the court. If an expert is not excluded until or just before trial and another expert cannot be allowed to step in and prepare, this can not only result in sometimes exorbitant unnecessary costs, it can also forestall a party's access to the judicial system. Additionally, early expert engagement can be helpful in this respect to ensure parties, attorneys and experts address their understanding of *Daubert*-like issues early in the case and prepare accordingly. The extra steps to prepare reports and testimony with an eye to presenting an adequate basis to defend in *Daubert*-like hearings may cost more on the front end but save costs in the end.

If a *Daubert*-like challenge is brought, it is important that the expert being challenged be notified of the challenge and be given an opportunity to participate effectively in the challenge process. This is crucial from the expert's point of view because the outcome of such a challenge can have a significant effect on an expert's ongoing ability to work successfully on similar matters. The parties also will benefit from the most informed defense of each challenge.

"I have seen very successful situations in which opposing experts were allowed to talk with [the] proviso that nothing said could be used in trial. This method is highly underutilized."

— FVS Survey Respondent

E. Attorneys and the Court Should Develop a Process for the Collaboration and Cooperation of Opposing Experts Where Appropriate

Although the "adversarial" process continues to define the U.S. civil justice system, the process still can include collaboration and cooperation. Attorneys, courts and clients are looking for cost-effective ways of narrowing the issues in dispute and disposing of issues not central to the case. Financial experts are well-positioned to assist with this through collaborative efforts with opposing experts.

The notion of collaboration and cooperation among opposing experts in order to move a dispute closer to resolution is not unique. In some jurisdictions around the world, it is standard practice.[28] In discrete areas of U.S. law, collaborative practices between experts have been used with reasonable success in certain types of cases. Rules governing Colorado Water Court cases provide for a meeting of (typically technical) experts, followed by a jointly submitted written statement intended to narrow the issues and clarify matters that remain in dispute. Collaborative approaches have also been adopted in the family law context and with respect to commercial disputes. Cooperation among parties — whereby disputants and their lawyers share active involvement in problem-solving and efficiently finding common ground — is a welcome paradigm shift in many contexts.[29] The ABA Section of Antitrust Law's Task Force on Economic Evidence recommended experimentation with mechanisms "to encourage or require testifying experts to clarify their differences," including allowing experts to cross-examine one another or requiring a joint report that clarifies differences among experts.

FVS survey results support the use of collaborative practices among opposing financial experts. A majority of respondents expressing an opinion on the issue (71 percent) said that allowing experts to talk with one another in the pretrial process without attorneys present would decrease the number of hours necessary to prepare for trial. This number increases to 75 percent of respondents when considering only the responses of those who have served as an expert witness in 10 or more civil cases within the last five years. One respondent noted: "I have seen very successful situations in which opposing experts were allowed to talk with [the] proviso that nothing said could be used in trial. This method is highly underutilized." When asked, "If you could change any one rule

[28] For example, in France, Germany and Italy single experts are chosen by the court to represent both parties. In England and Wales — where it is common for each party to retain its own experts—the Civil Procedure Rules adopted just over a decade ago exclude expert depositions but provide a process that allows for a direct discussion between experts, allowing them to identify expert issues and discuss areas of agreement and disagreement. In Australia, joint pretrial expert conferences and concurrent expert testimony, including the questioning of each expert by the other, are commonly used to narrow the issues in dispute and increase efficiency during the pretrial and trial process.

[29] R. Paul Faxon & Michael Zeytoonian, *Prescription for Sanity in Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case*, 5 Collaborative L. J. 2 2 (Fall 2007) (analyzing a corporate restructuring case in which the parties and their attorneys utilized a collaborative law approach, including the use of joint experts).

or procedure in the pretrial handling of expert witnesses in civil cases to achieve a more timely and cost-effective process, what would it be and why?" another respondent answered: "Mandatory meeting of the experts to discuss areas of opinions where there is substantial discrepancy. Focus of [the] meeting [is to] come to consensus on as many issues as possible, so as to narrow the disputed issues at trial …."

Collaboration and cooperation among experts is available in many forms and can occur before and after the exchange of expert reports. Furthermore, although this recommendation deals specifically with cooperation among experts, the impact of cooperation among all those involved in litigation can be very powerful in terms of decreasing cost and delay. Many attorneys recognize the efficiencies generated and costs saved when opposing counsel are professional and collaborative.[30] In all instances of cooperation, the willingness to cooperate is central to achieving cost savings. With an unwilling or resistant attorney or financial expert witness there are no guarantees that collaborative efforts will give rise to an early resolution or cost savings for the litigants.[31] A willingness to collaborate also assumes that counsel and parties want to resolve — not extend — the dispute and are not seeking to use the process as a tool to deplete the opposing parties' resources. To facilitate and promote constructive collaborative processes, a good starting point may be the establishment of a model set of ground rules, with the ultimate goals of improving the pretrial process and reducing overall expert time. Specific procedures that may be considered include determining if or how such information obtained can be later used at trial, exchange of trial strategies and time limitations, if any.

The benefits of collaborative approaches are obvious to the attorneys and financial expert witnesses who have used them, and the FVS Executive Committee hopes those familiar with such practices will be vocal in advocating for their use in cases in which collaboration would be both appropriate and beneficial. The Committee recognizes that generally only sophisticated clients would suggest the use of or not be threatened by collaborative practices as a means of delegating resolutions of certain aspects of the dispute to financial experts. The impetus to consider and implement these cost-saving practices, therefore, rests largely with attorneys and expert witnesses themselves, and while looking to the expert for ideas on collaborative techniques is relatively rare, experienced experts may identify opportunities for and suggest implementation of such techniques. The FVS Executive Committee urges attorneys and expert witnesses who are unfamiliar with such approaches to explore the issue — with one another and the client — to determine whether and what forms of cooperation might be appropriate to narrow issues or otherwise reduce costs.

[30] Over 95 percent of attorney-respondents to the ACTL, ABA, and NELA surveys agreed with the statement that "[w]hen all counsel are collaborative and professional, the case costs the client less." Gerety, *supra* note 1, at 14. *See also* The Sedona Conference®, The Sedona Conference Cooperation Proclamation (July 2008).

[31] Trust among attorneys is imperative for successful cooperation and collaboration during the pretrial process. *See, e.g.,* Faxon & Zeytoonian, *supra* note 29, at 7.

III. Where Is This All Going?

A. Continuing the Conversation

Even with a comprehensive view of the judicial system and repeat interaction with attorneys, courts and the civil pretrial process, financial experts are not typically asked to evaluate the process or recommend cost-effective changes to procedure. Although professional organizations such as the AICPA, and individuals within them, circulate best practice recommendations and cost-saving measures as educational efforts within their organization, the AICPA has not formally offered such recommendations to other players in the civil justice system. Therefore, this report represents a unique contribution to the current national conversation about civil process reform. Like the bench, bar, rulemakers and other organizations, such as IAALS, all of which have contributed constructively to this national conversation, the AICPA FVS Section and Executive Committee and IAALS are committed to a civil justice system that meets the needs of its users and is easily accessible by all. It is in the spirit of these goals that the FVS Executive Committee and IAALS offer these recommendations, and it is the partnership's hope that this report will continue the conversation on streamlining discrete practice areas and components of the civil pretrial process.

The Committee also hopes those involved in the civil justice system and dedicated to its ongoing improvement will continue to convene and invite the perspectives of unique stakeholders since each player in the civil justice system offers invaluable insights into how the process might be improved to benefit the ultimate users of the system. For example, the perspectives of various expert witnesses will be valuable to rulemakers as they endeavor to determine the effects of the December 2010 amendments to Federal Rule of Civil Procedure 26(a)(2) relating to privileged communications with experts and the discoverability of draft expert reports. Although many financial experts believe these amendments have, and can, reduce costs by making it easier to (and therefore more likely that the expert will) assist counsel with discovery and depositions, some are reporting that the amendments have generated additional efforts to manage and tailor the experts' opinions, thereby increasing costs. As reports from attorneys come in on the effects of these amendments, the FVS Executive Committee hopes rulemakers will similarly consider the perspectives of expert witnesses in terms of costs generated or saved on account of the rule amendments.

B. Template for Others

One way in which the FVS Executive Committee and IAALS hope this process and report will continue the conversation is by serving as a template for conversations with other types of expert witnesses. For example, anecdotal evidence suggests significant costs are incurred in the use of medical expert witnesses in medical negligence cases and related case types. In some jurisdictions, unique rules of procedure have been crafted for these specific case types in an effort to streamline an often complex (and emotionally charged) process.[32] In determining how such provisions are working in practice, the perspectives of attorneys and judges on the problems and potential solutions are invaluable. While cost savings and efficiencies can most certainly be achieved through the efforts of attorneys and judges (rules changes and case management procedures) the perspective of medical experts working within these rules would provide a unique view of these issues and most certainly suggest different solutions to reducing costs and inefficiencies in the pretrial processes relating to medical experts.

There are similar opportunities for expert witness input in other case types, for example, domestic relations cases, construction and complex litigation cases. Many jurisdictions have developed special rules and procedures for these case types — some governing the use of expert witnesses.[33]

C. Implementation

The FVS Executive Committee and IAALS hope these recommendations will not sit on a shelf, but rather that judges, attorneys and financial experts alike will consider, implement and experiment with them. Judges can move forward with these recommendations by incorporating them into case management practices and pretrial orders, facilitating conversation during pretrial conferences among parties and experts on the issues identified in this report and promoting innovative and collaborative practices among parties and experts. Attorneys can manage their civil cases with an emphasis on identifying financial expert needs early in the case, streamlining and targeting discovery to maximize information exchange while reducing unnecessary costs and appropriately considering and employing collaborative approaches among financial experts to narrow issues. Financial experts should consider ways in which they can reduce unnecessary client costs in their own practice, be vocal about where and when they can effectively assist in the pretrial process and be open to suggesting and participating in collaborative practices that would increase efficiency and effectiveness.

Some of these recommendations are already being tested more broadly in state and federal jurisdictions across the country, where pilot projects or rules amendments are attempting to address the issues of cost and delay in the civil justice system.[34] The FVS Executive Committee and IAALS suggest jurisdictions currently experimenting with or implementing civil justice reforms consider the extent to which their potential solutions can be applied to maximize efficiencies in the use of financial experts, and the extent to which the recommendations set forth in this report might be incorporated into the overall experiment. In those jurisdictions developing or considering pretrial process reforms, these recommendations may form the basis for broad and/or case-type specific civil process reforms.

[32] For example, in Arizona, state rule of civil procedure 26.2 sets forth case type-specific procedures for the exchange of records and discovery limitations in medical malpractice cases, including a timetable for disclosure. Ariz. R. Civ. P. 26.2 (2012). Parties in medical malpractice cases are also presumptively limited to one independent expert per side on an issue, except upon a showing of good cause. Ariz. R. Civ. P. 26(b)(4)(D).

[33] For example, Colorado Rule of Civil Procedure 16.2 sets forth a uniform procedure for resolution of issues in domestic relations cases, including expert disclosure and discovery procedures. The rule also suggests parties must attempt to select one expert per issue. Colo. R. Civ. P. 16.2 (2012).

[34] In particular, early and active case management and streamlined discovery.

D. Outreach and Education

The FVS Executive Committee and IAALS will facilitate the consideration and implementation of these recommendations by undertaking broad outreach and education efforts. The partnership's general outreach plan includes the following key stakeholder groups:

- legal professional institutions and organizations, including rules committees, courts and bar associations;
- sophisticated parties to civil litigation and their in-house counsel;
- AICPA members providing forensic accounting services and outside accounting and financial organizations;
- professions and organizations outside the legal profession that participate in and are affected by civil litigation;
- publications dedicated to the law and legal issues; and
- other individuals and groups who are interested in learning more about these issues.

Education will also comprise a significant component of the partnership's next-step plans. The Committee — as a whole and its individual members — and IAALS representatives will seek to share and discuss these recommendations at meetings, professional education courses and conferences proactively and at the request of interested individuals and groups.

IV. Conclusion

The FVS Executive Committee and IAALS commend those judges, practitioners, rulemakers and organizations that have participated constructively in this conversation. Although diverse, these groups all have a stake in a civil justice system that is true to the goals of Rule One. Similarly, these stakeholders can each offer unique perspectives on the process, identifying problems and offering solutions. We share a common responsibility to the system and there are steps each of us can take to ensure it remains accessible to all. The Committee and IAALS hope this report will contribute to the national thinking on civil process reform and will also encourage other stakeholders to become engaged. In the end, it is all about assuring a healthy, accessible and trusted civil justice system, and we all have a stake.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