

WINNING WITH FINANCIAL DAMAGES EXPERTS

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20 QUESTIONS answered by experts

1. What is a Financial Damages Expert?



2. When is a financial damages expert needed?





3. What is the best way to find a financial damages expert?



4. What are the most important qualifications of a financial damages expert?

5. What are the most important traits and characteristics of a financial damages expert?





6. Should litigators hire an academic, practicing accountant, or CPA who is a professional expert?

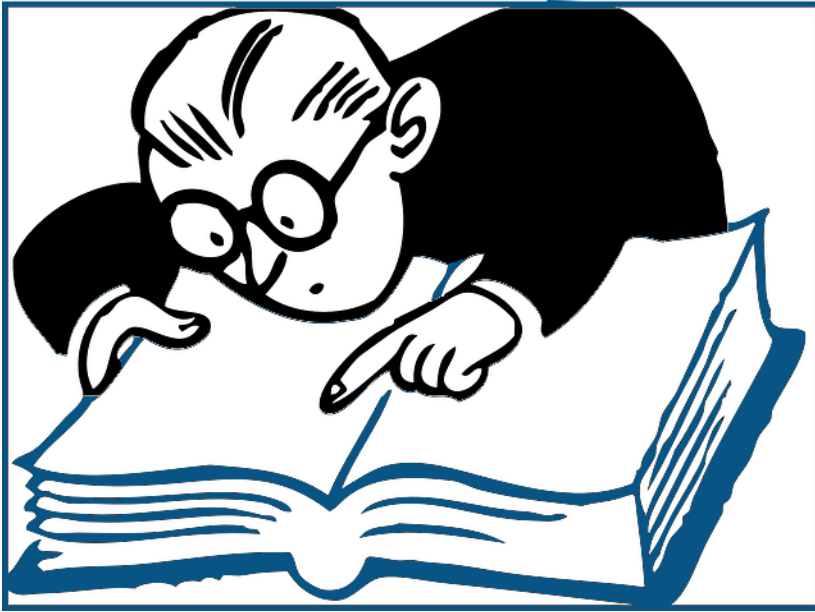
7. In cases involving a particular industry, should the financial damages expert have significant in-depth knowledge of the industry?



8.

**Is it relevant
whether the
expert has
testified primarily
for plaintiffs
or defendants?**





**9. Should litigators
review a financial
damages expert's
previously published expert reports in
evaluating whether to hire the expert?**

10. At what stage

of litigation should

litigators engage

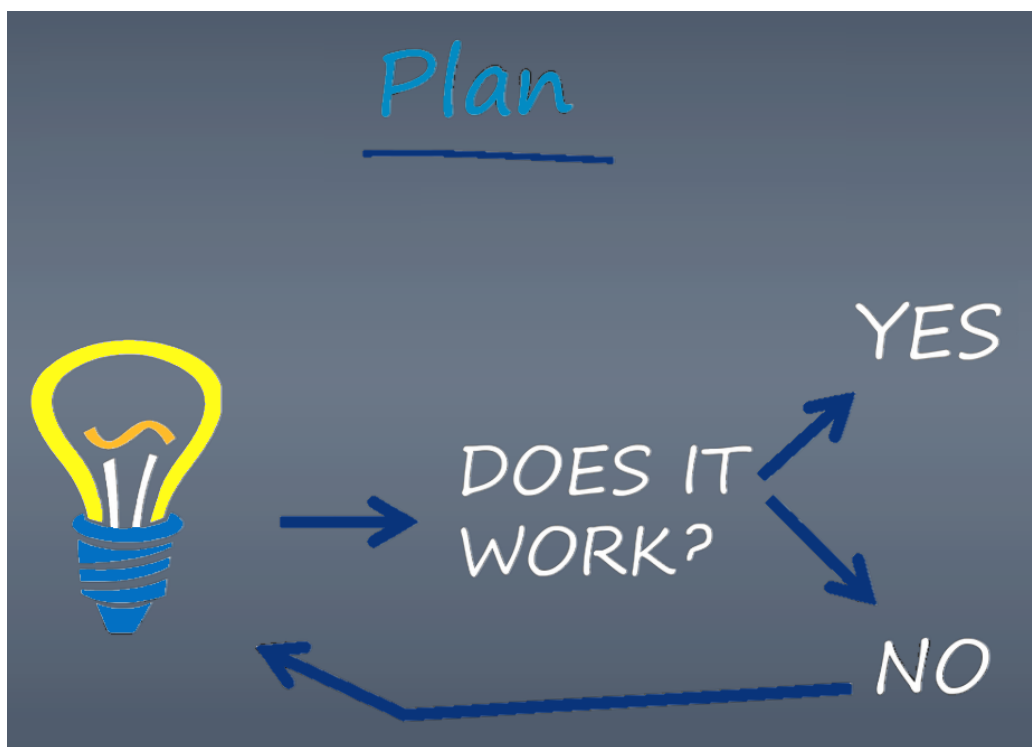
a financial damages expert?





11. Can a financial damages expert be useful at the pleadings stage?

12. Should litigators use financial damages experts to develop litigation strategy?





**13. Should litigators use
financial damages experts
to develop written discovery?**

14. Should litigators use financial damages experts to prepare for the deposition of your adversary's expert?





15. Should litigators use financial damages experts in mediations and settlement conferences?

16. How important is it for the financial damages expert's opinion to appear independent?



17. Should the attorney be involved in drafting the expert report?





18. What are some tips for a financial damages expert to offer compelling testimony at trial?



19. What are some common mistakes made by financial damages experts?



20. What are some common mistakes made by litigators in using financial damages experts?

Speakers



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Discovery Rules - Testifying Experts

	Federal Rules of Civil Procedure	New York	New Jersey
Expert Reports	Expert report must be produced, which “must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness’s qualifications, including a list of all publications authored in the previous 10 years; and (iv) a statement of the compensation to be paid for the study and testimony in the case.” (Rule 26(a)(2)(B).)	Except in Commercial Division matters, experts are not required to produce a written report and attorneys are prohibited from taking expert depositions. Rather, upon request of an opposing party, a party must only produce: (i) the identity of the expert; (ii) the subject matter on which the expert will testify; (iii) the facts and opinions on which the expert will testify; (iv) the basis for those facts and opinions; and (v) the expert’s qualifications. (CPLR 3101(d)(1)(i).) “Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate.” (CPLR 3101(d)(1)(iii).) In Commercial Division matters, “[i]f any party intends to introduce expert testimony at trial, no later than thirty days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure - including the identification of experts, exchange of reports, and depositions of testifying experts - all of which shall be completed no later than four months after the completion of fact discovery.” (Commercial Division Rule 13(c).)	“A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness . . . [and] may also require . . . the furnishing of a copy of that person's report.” (Rule 4:10-2(d)(1).)

Discovery Rules - Testifying Experts

	Federal Rules of Civil Procedure	New York	New Jersey
Draft Reports	Draft reports are protected from disclosure as trial preparation materials, which may be discovered only if “the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” (Rule 26(b)(4)(B) and (b)(3)(A).) However, even when the required showing is made, Rule 26(b)(3)(B) bars disclosure “of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative concerning the litigation.”	See “Expert Reports” above. It has been held that an expert’s draft reports, notes, etc. are subject to disclosure only “where physical evidence is ‘lost or destroyed’ or ‘where some other unique factual situation exists,’ such as proof ‘that the information sought to be discovered cannot be obtained from other sources.’” (<u>Ruthman v. Nardiello</u> , 732 N.Y.S.2d 455, 457 (N.Y. App. Div. 2001).	See “Attorney Communications” below.
Depositions	“A party may depose any person who has been identified as an expert whose opinions may be presented at trial. “[T]he deposition may be conducted only after the report is provided.” (Rule 26(b)(4)(A).)	See “Expert Reports” above.	“Unless the court otherwise orders, an expert whose report is required to be furnished pursuant to [R. 4:10-2(d)(1)] may be deposed as to the opinion stated therein at a time and place as provided by R. 4:14-7(b)(2). Unless otherwise ordered by the court, the party taking the deposition shall pay the expert or treating physician a reasonable fee for the appearance, to be determined by the court if the parties and the expert or treating physician cannot agree on the amount therefor. The fee for the witness's preparation for the deposition shall, however, be paid by the proponent of the witness, unless otherwise ordered by the court.” (Rule 4:10-2(d)(1).)

Discovery Rules - Testifying Experts

	Federal Rules of Civil Procedure	New York	New Jersey
Attorney Communications	Except for the following exceptions, attorney communications are protected from disclosure in discovery: (i) communications concerning the expert’s compensation; (ii) facts or data given by the attorney to the expert to consider in forming the expert’s opinion; and (iii) assumptions provided by the attorney that the expert relies on to form the opinion. (Rule 26(b)(4)(C).)	See “Expert Reports” above.	Discovery of communications between an attorney and testifying expert “is limited to facts and data considered by the expert in rendering the report.” (Rule 4:10-2(d)(1).) “[A]ll other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process, shall be deemed trial preparation materials discoverable only as provided in [Rule 4:10-2(c)]”, which provides that trial preparation materials are discoverable “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” (Rule 4:10-2(d)(1) and Rule 4:10-2(c).) However, even when the required showing is made, Rule 4:10-2(c) bars disclosure “of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

Discovery Rules - Consulting Experts

	Federal Rules of Civil Procedure	New York	New Jersey
Depositions	Except under exceptional circumstances, “a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.” (Rule 26(b)(4)(D).) A party may, by interrogatories or deposition, discover facts known or opinions held by an expert engaged only for trial preparation upon “showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.” (Rule 26(b)(4)(D)(ii).)	Attorneys are prohibited from taking expert depositions. (See “Expert Reports” in Testifying Experts chart.) In Commercial Division matters, attorneys may only depose testifying experts. (Commercial Division Rule 13(c).)	The New Jersey rule is similar to the Federal Rule of Civil Procedure. “A party may discover facts known or opinions held by an expert . . . who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.” (Rule 4:10-2(d)(3).) In addition, Rule 4:10-2(d)(3) states that “[i]f the court permits such discovery, it shall require the payment of the expert's fee [], and unless manifest injustice would result, the payment by the party seeking discovery to the other party of a fair portion of the fees and expenses which had been reasonably incurred by the party retaining the expert in obtaining facts and opinions from that expert.”
Attorney Communications	See “Depositions” above.	Communications between an attorney and expert engaged only for trial preparation are not discoverable under the CPLR or Commercial Division Rules. (See “Expert Reports” in Testifying Experts chart.)	See “Depositions” above.