FINANCIAL EXPERT WITNESS COMMUNICATION
A Practical Guide to Reporting and Testimony

BRADLEY J. PREBER

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Financial Expert Witness Communication

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Dedicated to my wife, Lois, and my children, Heather and Cameron, with thanks to the many great professionals I have worked with over the course of my career.
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This book was written to serve as a nonauthoritative educational resource for nonattorney financial experts retained to assist with U.S.-based civil litigation or alternative dispute resolution proceedings. It is based on the author’s experience as a business professional, Certified Public Accountant, and financial forensic specialist. The author is not an attorney and is unqualified to provide legal advice or opinions. Therefore, nothing in this book should be considered, construed, or referenced in any way as legal advice or opinion, or as a substitute for the financial expert’s professional judgment.

The author designed this material to assist the financial expert to provide useful and appropriate communication in connection with commercial disputes and civil actions to be resolved through U.S. civil litigation or alternative dispute resolution. Nonfinancial experts and others may also find this book helpful in connection with business disputes, criminal proceedings, or the communication of matters to boards of directors, corporate officers, or regulatory authorities.

Caution should be exercised when considering the relevance, applicability, and appropriateness of using the author’s approaches, methods, procedures, and practices, as there may be significant differences between his experiences and your own. Assignments, professional services, facts and circumstances, and jurisdictional and forum rules, among other matters of importance, may differ significantly from those described in this book. Accordingly, financial experts and others are encouraged to seek the advice of legal counsel when performing services intended for use in U.S. civil litigation or alternative dispute resolution.

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THE PAGES THAT FOLLOW ARE the product of Mr. Preber’s 30-plus years of experience as an expert witness and reflect his unique ability to both walk the walk and talk the talk. While many professionals possess the requisite intellectual firepower to qualify them as experts, it’s Mr. Preber’s rare combination of intellect, poise, grace under fire, professionalism, and the ability to communicate complex concepts, facts, and analysis in simple, easily understandable terms that sets him apart.

As one of the lead Department of Justice attorneys defending the largest class action ever filed against the United States, with damages estimated in the billions, I was responsible for identifying and hiring the experts who would perform the data analysis, provide the forensics, testify, and otherwise assist the United States and, more important, the court in navigating the complexities of the case. The complaint raised myriad issues involving allegations of breach of fiduciary duty stemming from more than a century of accounting and other alleged financial mismanagement. The data sets and other documents necessary to defend the case, to the extent they existed, were voluminous, were strewn across the country, and few, if any, were available electronically. Anticipating the issues that could arise required us to undertake an analysis that only Rube Goldberg could appreciate.

The process of identifying potential experts was itself daunting, but was one of the most important decisions we had to make in those early stages of the case. When we were ready, or so we thought, we began interviewing dozens of prospective experts. One group stood out from the rest for one principal reason: There was a person on that team who, no matter what we said or what we assumed, kept challenging us. Initially, I didn’t fully appreciate Mr. Preber’s tenacity, but after each conversation, interview, and restless night struggling with trying to make some sense of it all, I came to the realization that Mr. Preber’s intellect, diligence, and his relentlessness in asking again and again “why” was what would, at the end of the day,
cause us to hire his team as our experts and would make him an invaluable member of our defense team and a lifelong friend. Through that case, which started nearly two decades ago in 1996, Mr. Preber drove home one of the most important lessons I’ve learned in my career: you can’t get to how unless you know why.

There are hundreds of how-to books available on the market on topics ranging from how to read financial statements to how to write a winning Supreme Court brief. My observation is many of these so-called expert treatises are filled with clichés and lack useful, practical guidance. This book is different. Each chapter starts with an overview that puts the concepts that follow in context. Each concept is then broken down into its core elements with a concise explanation of each element. Throughout, Mr. Preber explains not just the “how” but the “why” of each concept. The reader is left with an understanding of not only what is required of a successful financial expert and those who support him or her, but why those things are critical to the expert’s, and ultimately his or her client’s, success.

Beyond a guide for financial experts, this book is a must-read for attorneys who engage financial experts. Mr. Preber’s insights, drawn from years of experience in working with attorneys, good and bad, provide a peek behind the curtain of how successful experts prepare, how they work to maximize value, and how they strive to work in partnership with their clients and the court. Mr. Preber’s outlines, checklists, and templates for preparing an expert report, deposing financial experts, presenting testimony at trial and for cross-examination, among others, are a must read (and follow) for every attorney, no matter how accomplished one is in his or her career. This book has already become a critical reference guide that occupies a portion of the precious real estate on the corner of my desk, less than an arm’s length away.

Lewis S. Wiener
Chair, Financial Services Litigation Group
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Lewis Wiener, a corporate defense attorney with more than 25 years of trial and advocacy experience, leads Sutherland Asbill & Brennan LLP’s Financial Services Litigation Team and serves as a member of the firm’s executive committee. Mr. Wiener’s extensive civil litigation and trial experience includes serving as class-action defense
counsel and arbitration counsel, conducting large internal investigations, handling complex litigation matters, and defending entities in connection with investigations and enforcement actions brought by government agencies. Mr. Wiener was a decorated former trial lawyer with the U.S. Department of Justice, twice recognized by the attorney general for special achievement in the handling of significant litigation matters on behalf of the United States. Mr. Wiener was the lead government counsel in the largest class action ever filed against the United States.
This book was written for practitioners having specialized expertise in, without limitation, accounting, auditing, economics, digital forensics, finance, financial forensics, taxation, and valuation, and who are planning on providing, or are currently providing, services in connection with formal litigation or alternative dispute resolution. For ease of reference, I refer to these professionals as financial experts, regardless of whether they serve as expert consultants or expert witnesses. The design of the book is to inform the financial expert about the many things that financial experts learn from the school of hard knocks. In other words, this book alerts the financial expert to the mistakes that I, and others I have observed, have made in the past and the resultant lessons learned. As such, this book is not fraught with technical seriousness and formalities. Instead, it is a book of anecdotal wisdom presented in a casual, accessible way.

The text has been organized into four parts. Part One is entitled “Dispute Resolution and the Financial Expert.” This part of the book provides an overview of U.S. civil litigation and explains how to get engaged, start work, and create value in litigation and alternative dispute resolution. Part Two, “Financial Expert Witness Rules, Case Precedent, and Ethics,” covers the federal rules regarding expert reporting and testimony. In addition, it sets out a number of cases potentially important to the financial expert witness and professional ethics. Part Three dives into the heart of this book, “Financial Expert Witness Reporting and Testimony.” This part of the book provides practical tips and pointers for the financial expert witness related to expert reports and testimony. “Part Four, Alternative Dispute Resolution Services,” explains the provision of services in mediation, arbitration, and neutral decision-making proceedings.
PART I

Part I of this book includes five chapters. Chapter 1 attempts to explain the reasons why a financial expert would want to serve as a consultant or expert witness in litigation or alternative dispute resolution. To do this, it describes the value created by the financial expert in the dispute resolution process. Chapter 2 identifies and explains the roles suited for the financial expert when serving as a consultant or expert witness. Chapter 3 provides insights into the identification and retention of the financial expert. Chapter 4 covers getting started as a financial expert. Chapter 5 provides an overview of the U.S. civil litigation process.

PART II

There are four chapters in Part II. Chapter 6 outlines the Federal Rules of Evidence followed by Chapter 7 on the Federal Rules of Civil Procedure. A number of case studies are included in these chapters to reinforce the meaning of the rules. Chapter 8 gives the financial expert basic knowledge about laws and other rules applicable to the financial expert witness. This chapter includes the *Daubert v. Merrell Dow Pharmaceuticals* and *Kumho Tire Co. v. Carmichael* cases, plus a description of reasonable certainty. Chapter 9 is a summary of the professional ethics obligations attached to the financial expert providing services for litigation or alternative dispute resolution.

PART III

“Financial Expert Witness Reporting and Testimony,” Part III of this book, is made up of nine chapters. Chapter 10 concerns the preparation of the financial expert witness report. It provides practical advice toward the goal of writing a compliant and effective expert report. Chapter 11 covers the task of rebutting an opposing expert witness’ report. Chapter 12 digs more deeply into litigation discovery, describing financial expert witness deposition. Chapter 13 helps the financial expert witness prepare for deposition. Chapter 14 gives practical counsel on financial expert witness deposition testimony. Shifting gears slightly, Chapter 15 describes financial expert witness involvement in motions and hearings. Chapter 16 moves into financial expert witness trial testimony, while Chapter 17 focuses on direct examination and Chapter 18 is dedicated to cross-examination.
PART IV

The final part of this book consists of three chapters on alternative dispute resolution. Chapter 19 is a summary of mediation. Chapter 20 covers arbitration proceedings. Finally, Chapter 21 describes the financial expert’s role serving as a neutral accounting arbitrator.

WHAT IS YOUR STORY?

The objective of this book is to share practical knowledge about financial experts serving clients in litigation or alternative dispute resolution. To communicate this knowledge, subject matter seldom taught by formal education or training is identified and explained. In essence, this book acknowledges that personal experience is one of the best ways to learn how to effectively communicate in connection with dispute resolution services. However, practical knowledge on this subject doesn’t end with the few topics covered here. The story continues with your own individual experiences, mistakes, and observations. So, what is your story?
No one who achieves success does so without acknowledging the help of others. The wise and confident acknowledge this help with gratitude.

—Alfred North Whitehead

There are many to thank for the practical tips and techniques expressed in this book. Learning how to serve sophisticated clients, with world-class legal counsel, in a dispute setting largely comes from real-life experience. There are few books or educational opportunities available to teach what can be learned on the job. That adds significance to the people engaging and supporting you in this business. I am blessed to have had great people guiding my career and caring about my success. For this, I am truly grateful.

Foremost, to my friends and family, thanks for your patience, understanding, and acceptance of the time and effort needed to serve clients in dispute resolution. You were often on my mind and always in my heart. Special thanks to my wife, Lois Preber, and my two children, Dr. Heather Preber and Cameron Preber. I also wish to thank my mother, Mary Preber, my aunt, Jeanette Verre, my mother-in-law, Elizabeth Cowper, sisters-in-law, Ann and Carolyn Cowper, and in-laws Nancy and Ralph Trevino. To my dearest friends, and you know who you are, thanks for listening to my stories and offering unconditional support. For John Blumberg, you have always inspired me with your caring way and values-driven life. Thanks for the life compass.

The professional experience earned in order to write such a book comes from the many opportunities afforded me by my clients and the talented attorneys who
represent them. Thank you for the vote of confidence expressed each time you engaged me. Also, thank you for the chance to learn from so many exceptional professionals. Quality clients and legal counsel made service an honor and pleasure.

Of course, the support and technical talent of my Grant Thornton LLP partners and principals, present and former, assured that my personal shortcomings were minimized and client success reigned triumphant. I would like to thank Stephen Chipman, Grant Thornton LLP’s CEO, for supporting quality, learning, and innovation expressed through a set of global values. Steve Lukens, the national managing principal of Grant Thornton LLP’s Advisory Services, saw the value of this practical guidance to the profession. Many of my Forensics and Valuation Services partners and principals assisted with quality assurance. I am humbled by their skill and grateful for their partnership and “one firm” spirit. In particular, Ed O’Brien was always there to lend a helping hand—he has been a true partner and friend. A special shout-out to Larry Redler, a retired former partner and boss. He showed me that a sense of humor, mixed with encouragement and trust, can make a tough job a little easier.

Thanks also to the Grant Thornton LLP Risk, Regulatory, and Legal Affairs team for keeping me out of trouble with all the legal terminology included in this book. I work often with this group of exceptionally talented attorneys and staff and have never been disappointed by their professionalism and candor.

There is also a group of professionals in the Grant Thornton LLP Phoenix office who deserve recognition. I personally recruited, trained, and nurtured this group. In turn, they made sure the work was top-shelf and beyond reproach. This is a special team of professionals with enormous talent. So, hats off to Mike Fahlman, now my partner at Grant Thornton LLP; Meredith Murphy; Holly Daetwyler; Eric Lee; Zachary Snickles; and Fran Procopio. Of course, there are many others who work with me now, or have in the past, for which I am thankful and eternally appreciative.

My wife is a teacher by profession. Therefore, I could not write an acknowledgment without expressing my sincere appreciation to the many teachers and professors that touched my life. Their caring way and dedication to education sparked lifelong learning that burns as a bonfire for me every day. In particular, thanks to professors John Yeakel and Perry Mori from the University of New Mexico. They were tough but fair, just like life should be.

Finally, I want to thank my profession for a wide range of career opportunities, outstanding peers, and an unparalleled standard of professional excellence. In particular, the American Institute of Certified Public Accountants has been a go-to organization for my professional development, peer interaction, and connection to the profession.
PART ONE

Dispute Resolution and the Financial Expert
WHY BE A FINANCIAL EXPERT WITNESS?

Before reading any further in this book, you must be able to answer this question: Why do I want to be a financial expert witness? For those of you who do not aspire to be a testifying expert witness, this is still the ultimate question as you will likely be supporting someone who will be serving as a financial expert witness. Serving as a financial expert witness, or as a consultant assisting one, is a stressful, challenging, and tough business.

The financial expert witness will be in the public eye, with his or her personal and professional life exposed for the world to see. Personal opinions will be used to assist a trier of fact to decide important disputes. In some cases, those decisions impact the survival of an enterprise, future rights, or the livelihood of others. Let’s not forget grueling deadlines, incomplete data sets, and irrational adversarial disputing parties.

The quality of the financial expert witness’s work product is paramount, as it will be critiqued by opposing experts and attorneys who will be dedicated to finding ways to exclude your opinions. If successful, it could adversely impact the financial expert’s ability to get engaged as an expert witness in the future, depending on the reasons the testimony was deemed inadmissible. The cherry
on top—the financial expert witness is often the last witness to testify at the end of an arduous trial.

But, for the financial expert witness such great responsibilities come with great rewards. Serving as an expert witness is an important role in our society. Expert witnesses are specifically provided for by federal civil litigation rules. Expert witnesses provide necessary assistance to triers of fact to allow them to make well-informed determinations outside their own personal expertise and experience. That is critical for the disputing parties to have a fair trial.

Serving as a financial expert witness also recognizes personal professional expertise. Being qualified as an expert by the court is official recognition of your professional skills, knowledge, education, experience, and training in your field. It is an affirmation that you possess superior expertise compared to the average citizen in your chosen profession. This may enhance your ability to be retained in the future and is a justification to charge premium rates for financial expert witness services.

**VALUE OF THE FINANCIAL EXPERT WITNESS UNDER FEDERAL RULES**

Fortunately for all expert witnesses, including financial expert witnesses, the Federal Rules of Evidence (FRE) and Federal Rules of Civil Procedure (FRCP) describe the value of an expert witness in a federal case. The FRE and FRCP are the official guidance for civil litigation proceedings adopted by the federal courts and numerous state jurisdictions. Among other matters, the federal rules govern expert witness testimony and admissibility. The financial expert witness should be familiar with the FRE and FRCP when performing dispute resolution services in a federal setting.

Under the FRE, Rule 702, Testimony by Expert Witnesses, a qualified expert must have “scientific, technical, or other specialized knowledge” obtained “by knowledge, skill, experience, training, or education” that will “help the trier of fact to understand the evidence or to determine a fact in issue.” Based on this rule, the federal courts are instructed to value the qualifications of financial expert witnesses because they possess technical and specialized knowledge that may be helpful to the trier of fact when making decisions about disputed issues. For financial expert witnesses, that means undergraduate and advanced degrees in accounting, finance, economics, and other areas have value. In addition, professional credentials, like Certified Public Accountant or Chartered