Best Practices

Intangible Asset Economic Damages Due Diligence Procedures

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Forensic analysts are often asked to measure economic damages to intangible asset owner/operators related to either breach of contract claims or tort claims. There are generally accepted methods and procedures related to quantifying economic damages within a litigation environment. However, before the forensic analyst begins the quantitative analyses, the analyst will collect relevant data and documents and perform reasonable due diligence procedures. This discussion summarizes those economic damages-related due diligence procedures.

Introduction

Forensic analysts are often asked to identify and quantify economic damages related to either breach of contract or tort disputes. These economic damages sometimes relate to an alleged wrongful act committed against an owner/operator's intangible assets. The breach of contract claim could relate to a breach of a license, franchise agreement, or some other contract right. The tort claim could relate to an infringement, breach of fiduciary duty, expropriation, interference with business opportunity, or other claim.

Depending on the nature of the particular damages, the forensic analyst could estimate lost profits, a reasonable royalty rate, or lost value/cost to cure damages. However, before performing any quantitative analysis, the forensic analyst will assemble data and documents and perform reasonable due diligence procedures.

The due diligence procedures conducted in an intangible asset economic damages analysis may be more difficult to perform than the due diligence procedures in an intangible asset valuation analysis. This is because the economic damages analysis is usually performed in a litigation or other contrarian environment. This fact adds at least two complications to the forensic analyst's due diligence process.

First, there may be more documents for the analyst to review in an economic damages analysis. These documents are principally litigation-related documents. Such documents include the litigation filings (e.g., complaint, answer, and amendments to either), discovery documents (e.g., interrogatories and answers to interrogatories), and evidence documents (e.g., deposition transcripts and documents produced in discovery).

Second, in the litigation environment, at least one party is going to be less than fully cooperative with the analyst. The opposing litigant may produce only the documents and data requested—and no more. The analyst would not expect the opposing litigant to volunteer supplemental information, personal opinions, or data not prepared in the normal course of business. For purposes of this discussion, the opposing litigant is the party in opposition to the analyst's client.

Furthermore, in a litigation environment, the opposing litigant is not likely to suggest a damages methodology to the analyst. In fact, the analyst should be suspect of any damages methodology suggested by any party to the litigation.

The forensic analyst will typically perform reasonable due diligence procedures with regard to all documents and data. To the extent that the analyst accepts certain data or documents without independent verification or documentation, that fact should be clearly disclosed in the analyst's expert report. To the extent that the analyst accepts a certain legal assumption or legal instruction, that fact should be clearly disclosed in the analyst's expert report.

First, this discussion considers the types of documents that the analyst may consider in the intangible asset economic damages analysis. Such documents include the following:

1. Relevant legal claims documents
2. Relevant other legal documents
3. Relevant discovery documents

Second, this discussion next considers the analyst's due diligence with respect to the legal claims, the causation claims, and the damages claims.

Third, this discussion considers the analyst's due diligence procedures related to documents that may be considered to measure the following:

1. Lost profits
2. A reasonable royalty rate
3. Lost business value/cost to cure

Fourth, this discussion considers the analyst's discussions with legal counsel with regard to the selection of an economic damages measurement method. Finally, this discussion considers the analyst's consideration of judicial precedent in the intangible asset economic damages analysis.

Due Diligence of Relevant Legal Claims

The forensic analyst is not the client's legal counsel. And, the analyst should not practice law. That said, the analyst should be generally familiar with the legal claims made in the litigation. That is, the analyst should be generally familiar with the following:

1. What intangible asset is claimed to be damaged
2. Who is alleged to have caused the damages
3. How the intangible asset is alleged to have become damaged
4. When the intangible asset is alleged to become damaged
5. What is the legal claim regarding the intangible asset (e.g., a breach of contract, an infringement, some other type of tort, etc.)

The complaint (or similar legal filing) summarizes the claimant's allegations, including the following:

1. The alleged wrongful actions of the respondent
2. What the claimant wants the finder of fact to order the respondent to do in order to make the claimant whole

The answer (or similar legal filing) presents the respondent's side of the story, including the following:

1. What allegations the respondent admits to
2. What allegations the respondent denies
3. What counterclaims the respondent has against the claimant
4. What the respondent wants the finder of fact to do (e.g., to dismiss the case)

The client's legal counsel will typically instruct the forensic analyst to assume that the defendant's actions were wrongful (i.e., illegal). It is not up to the analyst to make that legal determination. The analyst can be instructed to assume a fact: Alpha Airline did not sell certain landing slots and airport gates to Beta Airline as contractually agreed upon by the parties. The analyst can measure the economic damages related to the failed intangible asset transfer transaction.

Whether Alpha's actions were a breach of contract or were otherwise illegal is a legal conclusion. Ultimately, the finder of fact will make that legal determination.

Until that legal determination is reached, the analyst may operate under a legal instruction to assume the following:

1. A breach of contract occurred.
2. The defendant's action (i.e., the alleged contract breach) was wrongful (illegal).

Therefore, the analyst should be sufficiently informed regarding the allegations in the case to understand who is alleged to have done what to whom when. The analyst should understand what intangible asset damages he or she is being asked to quantify.

Due Diligence of Relevant Legal Documents

The forensic analyst should be aware of any discovery requests that affect the economic damages analysis. Such discovery requests could include requests for admission, interrogatories, and similar requests. Legal counsel may ask the analyst to help draft these discovery requests. Or, legal counsel may ask the analyst to at least provide a list of financial and operational data that the analyst would like to have to perform the damages measurement.

The analyst may be particularly interested in legal filings that directly affect the analyst. An example of such a filing would be a motion to exclude the analyst from testifying or to limit the analyst's testimony in certain areas.

The analyst may also be interested in the counsel's filing of the disclosure regarding the analyst's expert opinions. That is, the analyst will typically be interested in how the legal counsel described his or her damages opinions and the bases for those damages opinions.

Due Diligence of Relevant Discovery Documents

A lot of documents may be produced in the discovery phase of the litigation. Legal counsel may not provide copies of all of these documents to the analyst. However, the analyst should have access to all discovery documents that affect the economic damages calculations.

In some situations, counsel may provide the analyst with password access to the counsel's cloud-based document server. That way, the analyst can sort through all of the discovery documents included in the counsel's database. With such access, the analyst can be relatively assured that he or she has access to all documents that relate to the intangible asset economic damages.

Without that database access, the analyst may not know if counsel is withholding documents that may have an undesirable impact on the economic damages analysis. Of course, even with password access to an automated data room, counsel can segregate discovery documents into the following categories:

1. Those documents that the analyst has access to
2. Those documents that the analyst does not have access to

Ultimately, the forensic analyst may consider that incomplete, inconsistent, or obviously missing (e.g., based on gaps in the Bates numbers) documents may imply that legal counsel is not supplying all of the evidentiary documents related to economic damages. It is counsel's job to request evidentiary documents and to respond to document requests. The analyst may help counsel to prepare such requests and to respond to such requests. However, the analyst has to decide if he or she has sufficient documents and data in order to perform the damages analysis.

With regard to the intangible-asset-related documents produced during the litigation discovery process, the analyst typically considers the following questions:

1. Are any documents missing from within a series of documents? The series of documents could be periodic financial statements, production reports, sales reports, financial projections, etc. A related question is: Are any documents that are obviously just missing from the production (e.g., a copy of a relevant contract, license, permit, intellectual property registration, etc.)?
2. Are any of the documents incomplete? Are pages of a document missing? For example, the analyst can look for instances when a Xerox copy of a two-sided document only includes every other page. Are document exhibits or appendices missing (in particular, are there memoranda or correspondence that refer to missing attachments)?
3. Are any documents contradictory? Do two (or more) different documents purport to be the same set of financial statements, financial projections, contracts, etc.? Do two (or more) different sets of correspondence (e.g., dated on the same or near

dates) present two different conclusions regarding the subject intangible asset?

4. Do the documents produced appear to be draft, final, or revised versions of the purported document? Are the documents, or the associated transmittal correspondence, signed? Are the documents, or the associated transmittal correspondence, dated? Does any transmittal correspondence (or the documents itself) use terms like draft or final or revised or amended?

5. Were multiple documents produced in response to the same discovery request? Do the multiple documents present a consistent response or a contradictory response? Are the multiple documents needed to fully respond to the discovery request? Or, is one document sufficient to respond to the discovery request (and all of the other documents are just superfluous or intended to obscure the essential document)?

6. Are the documents produced, in fact, responsive to the discovery request? Sometimes, the analyst (or the legal counsel) may request documents and data, and the analyst (or legal counsel) is disappointed in the response. The requested documents may simply not exist, or they may present data that are simply not useful to the analyst.

   However, sometimes the documents produced simply do not respond to the discovery request. In fact, that document produced may simply represent subterfuge, produced to disguise the fact that the opposing litigant did not respond to the discovery request.

7. What are the effective dates of the documents and data produced? In an intangible asset valuation, the analyst generally considers all information that was known or knowable as of the valuation date. Subsequent (to the valuation date) information is typically only considered to the extent that such information confirms trends or projections that would have been known or knowable as of the valuation date. In contrast, in an intangible asset economic damages analysis, the analyst generally considers all information that is available up through a current (i.e., expert report) date.

   In a damages analysis, the analyst may perform the damages measurement as of either (a) the damages event date or (b) a current (i.e., expert report) date. In both cases, the damages estimate is brought forward (from the damages event date or the current expert report date) to the date of the trial by the application of a prejudgment interest rate.

8. Were the documents that were produced prepared contemporaneously (i.e., prelitigation filing) or prepared in response to the discovery request? This question does not imply that documents prepared in response to discovery requests (or otherwise prepared after litigation is filed) are unreliable.

   As explained previously, many intangible asset owner/operators do not maintain current financial or operational data regarding their intangible assets. This is because there are few (if any) financial accounting, taxation, or regulatory reasons for an owner/operator to assemble intangible-asset-related data.

   Nonetheless, the analyst may be interested in whether the documents produced:

   a. were prepared historically and in the normal course of owner/operator business operations or

   b. were prepared recently and in response to the litigation discovery request.

9. Were the documents ever relied on by parties independent of the litigation (or were they prepared solely for the purpose of the litigation)? This question does not imply that all contemporaneously prepared documents are somehow not credible or not reliable.

   However, the analyst may be particularly interested in documents that were relied on by parties (e.g., executives, stockholders, contract parties, licensors and licensees, bankers, etc.) at the time that the documents were originally prepared. This consideration may be particularly relevant for financial projections or other prospective financial information related to the damaged intangible asset.

10. Were the documents ever reviewed by parties independent of the litigation (or were they prepared solely for the purposes of the litigation)? As mentioned above, owner/operators rarely prepare contemporaneous financial or operational documentation regarding their intangible assets. This is because there is often no reason to prepare such documentation. The analyst may be particularly interested in intangible asset

documents that were historically reviewed by independent auditors or by other independent parties.

The Basis for the Causation Claims

The damages analyst is typically not the causation analyst. In the damages analysis, the damages analyst will typically assume that there is causation, based on a legal instruction from the client's counsel. Typically, either a fact witness or another expert witness will testify as to the causation issues at the trial.

Typically, the damages analyst working for the plaintiff's counsel relies on a series of legal instructions like the following:

1. The defendant performed a certain act (e.g., a tort or a breach of contract).
2. The defendant's act was wrongful (i.e., illegal).
3. The wrongful act caused the plaintiff to suffer damages.

It is then up to the damages analyst to (1) select the appropriate damages measurement methodology and (2) quantify the amount of economic damages suffered by the claimant (if any).

Typically, the damages analyst working for the defendant's counsel may receive a different set of instructions than the analyst working for plaintiff's counsel. That is, the defendant's analyst may be instructed by counsel to assume the following:

1. The defendant did not perform the alleged act.
2. If the defendant did perform the alleged act, that act was not illegal.
3. If the alleged act was illegal, the act did not cause the plaintiff to suffer any damages.

Alternatively, the defendant's analyst could be instructed by counsel to assume that the defendant did cause the plaintiff to suffer economic damages. Then, it would be up to the analyst to measure the amount of the damages (if any) caused by the alleged wrongful actions.

In any event, the damages analyst is not the causation expert. And, the damages analyst will typically not reach an expert opinion as to causation. Rather, the damages analyst will work under a legal instruction regarding the assumption that there was (or was not) causation.

While the damages analyst is not the causation expert, the analyst should develop a basic understanding of the causation expert's opinion. This way, the analyst can identify and quantify economic damages that are consistent with the causation expert's opinions. And, the analyst can avoid economic damages methods that are inconsistent with the causation expert's opinions.

The Basis for the Damages Claims

The forensic analyst will not prepare the plaintiff's complaint or the defendant's answer in the litigation. However, the analyst should be generally aware of each party's claims in the complaint and the answer (including any amended complaints and amended answers). This awareness is necessary for the analyst to develop a general understanding of each party's claims in the intangible asset litigation. This way, the analyst can perform an economic damages analysis that is consistent with (and not contrary to) the legal claims of the client's counsel.

Based on this general understanding of the legal claims in the litigation, the analyst may prepare a damages analysis that is consistent with (and not contradictory to) the following:

1. The damages event described in the legal filings
2. The damages time periods described in the legal filings
3. The intangible asset described in the legal filings
4. The type of the damages suffered, as described in the legal filings

With regard to this last point, for example, the analyst may decide not to measure damages based on a reasonable royalty rate if the legal filings described the owner/operator's damages event as resulting in either of the following:

1. Lost product sales
2. Expenditures required to cure (i.e., recreation cost) the intangible asset

Lost Profits Documents

Typically, the forensic analyst will not select the damages methodology until he or she (1) assembles all relevant documents and (2) performs all reasonable due diligence procedures.

Nonetheless, in order to consider any of the lost profits measures of intangible asset damages, the analyst will have to gather and review relevant data and documents. These data and documents can be obtained at the following points in the litigation:

1. During the litigation discovery process
2. During the analyst's fieldwork and investigation
3. During the analyst's industry, guideline company, or comparable transaction research

Since the analyst may not have selected the damages measurement method at this stage of the due diligence process, the analyst should be mindful of all generally accepted lost profits measurement methods.

These measurement methods typically include the following:

1. The projections/but-for method
2. The before and after method
3. The yardstick method

For each of these lost profits measurement methods, the analyst will want to assemble and review both financial and operational data regarding the intangible asset. In fact, the analyst typically assembles and reviews documents and data related to three time periods:

1. Historical data (i.e., prior to the damages event date)
2. Current data (i.e., around the time of the damages event date)
3. Prospective data (i.e., prospective financial information after the time of the damages event date)

The analyst may review these data to ascertain whether the lost profits measurements are consistent with the following:

1. The owner/operator's historical results of operations
2. The owner/operator's production capacity constraints or other constraints
3. The industry historical trends and projected outlook

In particular, the analyst may compare owner/operator's historical financial projections to historical results of operations. This comparison may help the analyst to assess whether the owner/operator has a track record of accurately projecting either of the following:

1. The owner/operator business entity results of operations
2. The owner/operator intangible asset results of operations

Virtually all of the lost profits damages methods involve some sort of "but for" analyses. That is, the analyst compares (1) the owner/operator actual results of operations to (2) the owner/operator hypothetical results of operations "but for" the wrongful action to the intangible asset.

Regardless of who he or she is working for in the assignment, the forensic analyst will likely encounter one or more sets of but for financial projections. The but for financial projections may be prepared by the owner/operator. Or, the but for financial projections may be prepared by another analyst working on the same matter. And, that other analyst could be a concurring analyst (i.e., working for the same client as the analyst) or an opposing analyst (i.e., working for a contrarian party in the dispute).

In any event, before relying on such projections, the analyst should subject the but for financial projections to reasonable due diligence procedures. These due diligence procedures may include consideration of the following:

1. Whether the projection variables are internally consistent with each other
2. Whether the financial projections can be reconciled to historical results of operations
3. Whether the projections are mathematically correct (e.g., the projected balance sheet does balance)
4. Whether the projections can be reconciled with industry trends

5. Whether the projections can be reconciled with a recognized independent benchmark
6. Whether the projections contemplate the correct dates related to the dispute (e.g., the damages date, the mitigation date, the end of damages date)
7. Whether the projections consider the plaintiff's mitigation efforts
8. Whether the projections consider the defendant's damages correction efforts
9. Whether the projections consider any maintenance expense or other required investment related to the intangible asset
10. Whether the projections consider the expenses related to correcting the intangible asset damages caused by the wrongful act

Reasonable Royalty Rate Documents

As an alternative to estimating lost profits as a measure of the intangible asset damages, the forensic analyst could conclude a reasonable royalty rate. A reasonable royalty rate is more commonly concluded in infringement (and other tort) claims than in breach of contract claims. Nonetheless, a reasonable royalty rate could be one measure of economic damages related to any intangible asset damages event.

The calculation of a reasonable royalty rate is based on the theory that the arm's-length negotiation of the parties could have avoided the litigation of the parties. Let's assume the defendant wrongfully used (or otherwise damaged) the plaintiff owner/operator's intangible asset.

This estimation of the reasonable royalty rate assumes the defendant should have approached the plaintiff prior to the damages event. Hypothetically, the parties would have negotiated a fair, arm's-length license agreement for the use of the intangible asset. Operating within this hypothetical license agreement, the defendant would have lawfully used the intangible asset. The defendant would have paid the plaintiff a fair license payment for this use license. So, the plaintiff would not have been damaged by the actions of the defendant.

In theory, in order to make the plaintiff whole after the damages event, the defendant should pay the plaintiff the arm's-length royalty that would have been agreed upon by the plaintiff in an arm's-length negotiation.

In such an analysis, the principal task of the analyst is to estimate this hypothetical arm's-length royalty rate. A description of the specific methods for estimating such a royalty rate (e.g., comparable uncontrolled transactions method, residual profit split method, comparable profit margin method, etc.) is beyond the scope of this discussion. However, the analyst typically performs reasonable due diligence procedures with regard to the assemblage of data used to conclude a reasonable royalty rate.

To estimate a reasonable royalty rate, the forensic analyst typically gathers data from various sources, including the following:

1. The owner/operator, such as historical financial statements and prospective financial statements
2. Guideline publicly traded companies, such as historical financial statements
3. Industry financial reporting services, such as industry average levels of profitability (which may be defined at various income levels)
4. Databases regarding intangible asset license agreements, such as online databases that report arm's-length royalty rates
5. The subject intangible asset, such as the historical development cost, a current replacement cost, or a current value estimate

When the analyst confirms that the data are objective and credible, all of these data sources can be used to extract a reasonable royalty rate. For example, the analyst could apply the profit split method to the owner/operator's historical or projected income measures in order to estimate a royalty rate. The profit split percentage is often based on the analyst's functional analysis of the intangible asset (vis-à-vis all other owner/operator's assets).

Likewise, the analyst could estimate a royalty rate by comparing the owner/operator's profit margin to the guideline companies' profit margins. To the extent that the owner/operator earns an excess profit margin and that excess profit margin is attributable to the intangible asset, the analyst may assign some portion of that excess margin as a reasonable royalty rate.

The same type of excess profit margin analysis can be performed by comparing the owner/operator profit margin to a published industry average profit margin. To the extent that the owner/operator earns an excess profit margin and that excess margin is attributable to the intangible asset, the analyst may assign some portion of that excess margin as a reasonable royalty rate.

The analyst can search various databases to identify and select comparable uncontrolled transaction (CUT) royalty rate evidence. Typically, the analyst will search for arm's-length license transactions involving similar intangible assets that are used in similar industries.

After selecting a sample of CUT license agreements, the analyst may adjust the CUT data to make the transactional data more comparable to the subject intangible asset. The analyst selects the royalty rate appropriate to the intangible asset based on the adjusted CUT data.

In the CUT selection process, the analyst typically considers several factors regarding the subject intangible asset (compared to the CUT intangible assets), including the following:

1. Relative age
2. Relative size of market/industry
3. Relative growth rate of market/industry
4. Relative competitive position of the intangible assets and of the owner/operator.

When extracting the intangible asset royalty rate from the selected/adjusted CUT license data, the analyst typically considers several factors regarding the subject intangible asset (compared to the CUT intangible assets), including the following:

1. Relative growth rates,
2. Relative profit margins
3. Relative returns on investment

The analyst can also calculate a reasonable royalty rate by reference to an intangible asset value indication.

First, the analyst starts with a current value estimate for the intangible asset. Typically, this value indication is based on a cost approach method (e.g., the replacement cost new less depreciation method). This is because if data were available to use the income approach or the market approach to value the intangible asset, the analyst could use, for example, a profit split/residual profit method or CUT data to estimate the reasonable royalty rate.

Second, the analyst multiplies the intangible asset value by a fair rate of return of and on the intangible asset. This multiplication product indicates the amount of license income required to produce this rate of return. Third, the analyst divides the calculated license income by the amount of the owner/operator revenue. This division produces a fair royalty rate (expressed as a percent of revenue).

The forensic analyst may consider all of the above-indicated data and documents to conclude a fair royalty rate damages measurement.

Intangible Asset Cost to Cure Documents

As an alternative to estimating lost profits or a reasonable royalty rate, the analyst may calculate a cost to cure as an estimate of intangible asset economic damages. The cost to cure often quantifies the loss in the intangible asset value due to the wrongful event. If the loss in intangible asset value is the only type of damages suffered by the owner/operator, then the cost to cure may also be measured as the loss in business value for the owner/operator.

Finally, if the intangible asset was destroyed as a result of the wrongful act, then the cost to cure could be estimated as the cost to create a de novo (replacement) intangible asset.

This damages method concludes the amount of expenditures required to restore the intangible asset to the condition it was in before the damages event. Of course, this cost to cure the damages includes both direct costs and indirect costs related to the restoring the intangible asset. In addition, the cost to cure method typically includes an opportunity cost component. This opportunity cost generally relates to lost profits suffered by the owner/operator during the time period between the damages event and the full curing of the intangible asset.

In order to estimate the cost to cure, the forensic analyst will typically review data and documents related to the following:

1. The original costs to create the intangible asset
2. The current costs to replace the intangible asset
3. The current costs to restore the intangible asset from its damaged condition to its pre-damaged condition
4. The impact of the damages event (e.g., lost revenue, customers, profits, consumer awareness, first to market industry position; increased expenditures related to maintenance, R&D, selling, and promotion; legal and other litigation-related expenses)
5. The opportunity cost during the time to cure the intangible asset (e.g., any lost economic benefits associated with any intangible asset diminished capacity)

Mitigation Documents

The forensic analyst will typically consider the effects of the plaintiff's mitigation efforts on the measurement of intangible asset economic damages. When the intangible asset is damaged due to the defendant's wrongful acts, the plaintiff still has the obligation to mitigate the effects of the damages. That is, the plaintiff has the obligation to perform reasonable efforts to minimize the amount of the economic damages.

These mitigation efforts often involve the damaged party attempting to do the following:

1. Develop a new (replacement) intangible asset
2. Enter into replacement contracts, licenses, permits, franchises, etc.
3. Find new customers, suppliers, employees, etc.
4. Inform the public about (and, therefore, counteract) the wrongful actions to the plaintiff's patents, trademarks, copyrights, etc.
5. Enforce all other nondisclosure, noncompetition, and other available contractual remedies

Therefore, the analyst typically attempts to obtain data and documents related to any mitigation of the claimed damages, including the following:

1. Amount of any efforts made in mitigation
2. Timing of any efforts made in mitigation
3. Expenditures made in the mitigation efforts
4. Financial impact of the mitigation efforts on reducing the amount of economic damages
5. Date at which the damages are fully mitigated (or mitigated as much as is possible)

The forensic analyst typically considers any mitigation documents and data in the application of the lost profits, reasonable royalty, or cost to cure damages measurements.

Conference with Legal Counsel Regarding Damages Methods

The analyst may perform due diligence by conferring with legal counsel before selecting or implementing a damages measurement method. In some instances, intangible asset damages methods are allowed (or are not allowed) by statutory authority, judicial precedent, or administrative ruling. The damages analyst is not the client's counsel.

The analyst should not research the law or reach legal conclusions regarding appropriate (or inappropriate) damages methods. To the extent there is such statutory, judicial, or regulatory guidance regarding methodology, the client's counsel should provide legal instructions to the analyst.

In such instances, it is the responsibility of counsel to provide legal instructions to the analyst. It is not the responsibility of the analyst to perform legal research. And, it does not impair the analyst's independence to receive and rely on legal instructions from counsel. To the extent that counsel does not provide legal instructions, the analyst should feel free to discuss the proposed damages measurement method with counsel.

If counsel does not object to the analyst's proposed methodology as a legal matter, then the analyst may assume that there are no legal roadblocks to the proposed methodology. To the extent that there is a legal concern about the proposed damages methods, it is the responsibility of counsel to instruct the analyst regarding how to handle such a legal concern.

If the analyst's proposed damages method is not permitted by statute or precedent, it is the responsibility of counsel to instruct the analyst to select another method.

With regard to selecting the appropriate damages method, it is not appropriate for counsel to otherwise substitute his or her professional judgment for that of the analyst. And, it is certainly not appropriate for counsel to recommend a damages method just to allow the analyst to reach a greater or lesser damages conclusion.

However, it is perfectly reasonable for the analyst to confer with counsel with regard to the analyst's proposed measurement method. It is perfectly reasonable for counsel to instruct the analyst as to which damages methods are allowable from a legal perspective. And, it is perfectly reasonable for counsel to instruct the analyst as to which damages methods are not allowable from a legal perspective.

Analyst's Reliance on Judicial Precedent

Unless he or she is a licensed attorney, the analyst should not perform (or rely on) legal research. To the extent that judicial precedent may inform the analyst with regard to damages methodology and related decisions, counsel should do the following:

1. Research and select those judicial decisions
2. Provide those decisions to the analyst

To the extent that the analyst has any questions at all about the applications or implications of the judicial precedent to the subject damages analysis, the analyst should confer with counsel.

The prosecution or defense of an intangible asset damages claim is a team effort, involving several professional disciplines. Counsel should rely on the analyst for economic damages expertise. Likewise, the analyst should rely on counsel for legal expertise.

Accordingly, counsel should provide the analyst with copies of (or summaries of) any relevant judicial decisions. The analyst should not assume that he or she has either the experience or the expertise to identify such relevant judicial precedent.

To the extent that counsel provides the analyst with judicial decisions, the analyst should review that precedent in order to obtain an understanding of the following:

1. The relevant legal concepts involved in the case
2. The allowable (or not allowable) damages measurement methods
3. The procedural adjustments allowed (or required) by the court for income taxes, prejudgment interest, mitigation effects, time period over which damages may be considered, and other methodological considerations

In contrast, the forensic analyst should not expect to extract quantitative damages analysis variables from judicial precedent. In other words, the analyst should not review the judicial decisions with the objective of extracting discount rates, capitalization rates, royalty rates, profit split percentages, and so forth.

The analyst should not use judicial precedent as a source of economic damages measurement variables for the following reasons:

1. The facts and circumstances of each decision are unique to that case.
2. Such variables change over time, with corresponding changes in capital market and other economic conditions.
3. Each litigant intangible asset owner/operator is different.
4. Each litigant's industry is different.
5. The particular court in a particular decision may have reached a poorly reasoned decision (which should not be duplicated).

Accordingly, the forensic analyst may consider legal instructions and judicial precedent as a source of methodological guidance. The analyst should not look to legal instructions or judicial precedent as the source of quantitative damages analysis variables.

Summary and Conclusion

Forensic analysts preparing intangible asset economic damages analysis often perform reasonable due diligence procedures with respect to the documents and data they rely on.

First, the forensic analyst should have a very basic understanding of the breach of contract, tort, or other claims in the case. That way, the analyst can assemble and assess the relevant legal claim documents, litigation discovery documents, owner/operator documents, and subject industry documents.

Second, the forensic analyst should have a very basic understanding of the alleged causation issues as well as the economic damages issues in the claim. That way, the analyst can collect and review data that may be used in various intangible asset damages measurements. These measurements may include lost profits, reasonable royalty rate, and cost to restore damages measurements. As part of the damages measurement analysis, the analyst also considers documents and data related to the plaintiff's mitigation efforts.

Finally, the forensic analyst may confer with counsel about the selection of damages measurement methods. Counsel may provide the analyst with a legal instruction as to which measurement methods are legally permissible and which measurement methods are not legally permissible.

Counsel may also provide copies of relevant judicial precedent to the analyst. Such legal research is counsel's responsibility. Such legal research is not the analyst's responsibility.

The forensic analyst may confer with counsel related to any questions regarding the relevant judicial decisions. In any event, the analyst may review the decisions in order to obtain judicial guidance on the acceptance (or lack thereof) of damages measurement approaches and methods. The analyst should not attempt to extract specific damages measurement variables from such judicial decisions.

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