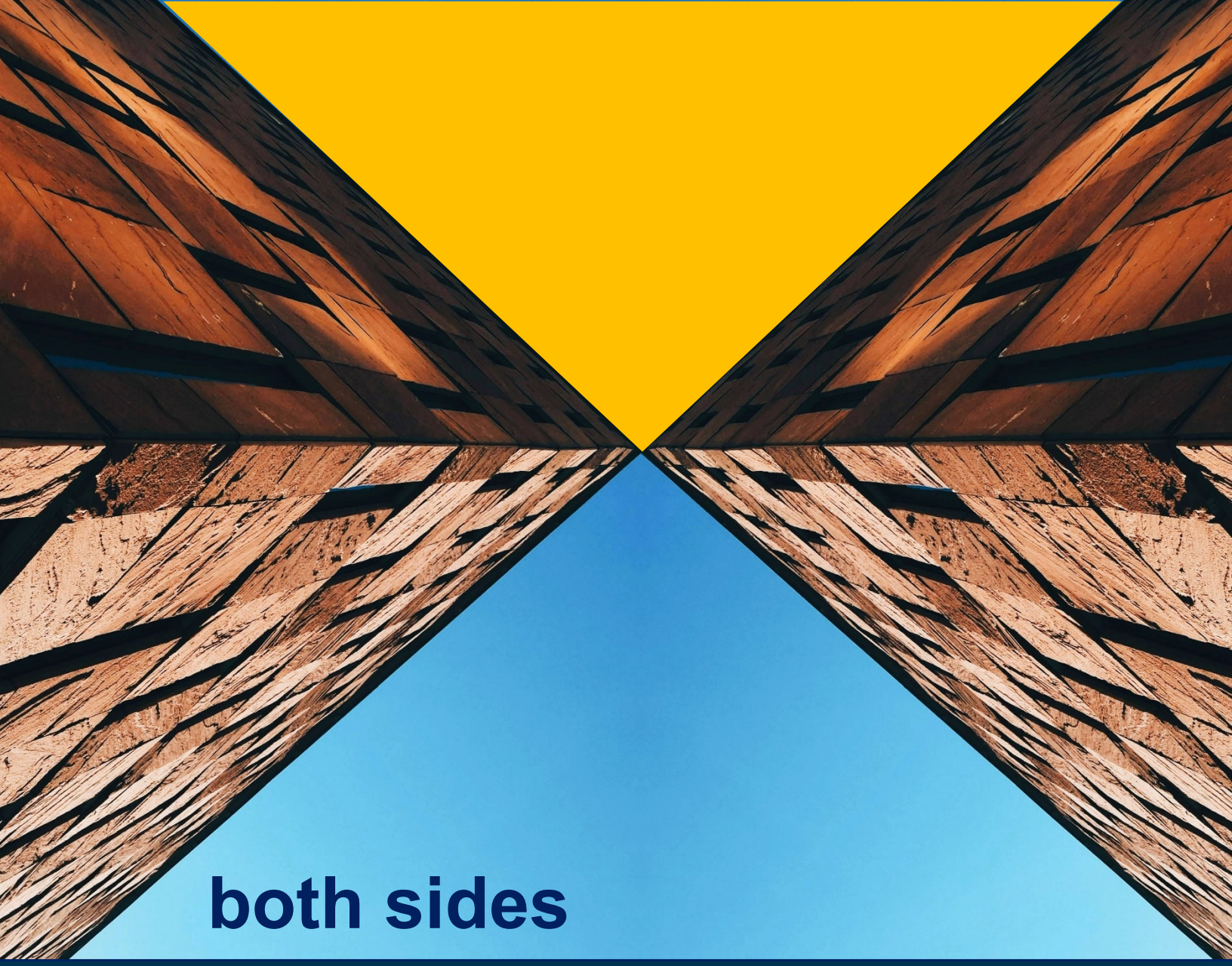

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PF2 Newsletter

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Q&A

In last month's newsletter, we asked litigators what is was that strong experts did well when preparing their reports.

In this edition, we turn the question around and ask it of experts:

Question: "Experts, what are some of the important things you find strong litigators do, or do well, when instructing experts or managing the expert evidence process?"

Answers

PF2 posed the question above to several experts in the US, UK and Australia, and we share with you here four of the insightful responses we received.

OWAIN STONE

Partner, KordaMentha Forensic, Melbourne

"*Strong litigators* come in many different varieties: some are excellent advocates, some strong strategists, others are really good at working through the details hidden in extensive discovery – and the very best are strong in all of these and other departments.

In the instruction and engagement of experts, there is one key aspect that I have frequently observed from those who are generally perceived to be strong litigators: their proactive and on-going engagement with the expert.

They take the time to personally talk to prospective experts – it isn't something they delegate to a senior associate. They understand the different levels and types of experience of experts. They discuss potential questions with the expert to make sure the questions are clear, capable of a concise answer, and that the answers are going to be useful for the legal theory in the case.

They are cautious about being seen as "too close" to the expert, but they are not paralysed by a fear of this; they choose experts who are robust in their answers, and will not give a "helpful" answer that may have to be reeled in in a joint expert conference or under cross-examination.

A strong litigator will discuss with the expert what particular documents, facts or assumptions are driving a particular answer, enabling the litigator to fully appreciate why the expert came to that answer, and therefore the boundaries and risks associated with that answer." ■

"First, strong litigators keep us informed about changes to deadlines or if and when new information is likely to arrive. This means that we can plan effectively and avoid crunching up against deadlines.

Next, they do well to share all relevant material with us, enabling us to best analyse the concepts and justify our own assumptions by way of supporting evidence. This avoids finding out from a reply report (or worse – in court!) that there was a document that could have been provided to us and would have affected our opinions.

Without compromising our independence as experts, strong litigators make the time to hold initial meetings to enable us to understand the context of the work so that we are not writing a report in a vacuum. This enables us to focus on the core issues rather than spending time and money on issues that are of little consequence.

Finally, strong litigators provide clear instructions, including assumptions, at the earliest possible time. They appreciate that small changes to instructions (even a couple of words) can have a major effect on the way in which a report is written..." ■

ALEX BELL

Partner, Grant Thornton Sydney

HANSOL KIM

Managing Director, FTI Consulting, New York

"I have found two traits in common among strong litigators.

Well before the initial salvos are fired, they all conduct sufficient diligence on the subject matter beyond the legal precedents and applicable laws.

It seems obvious, but the strength of the initial arguments has a cascading effect as the matter works its way through its lifecycle. This is especially apparent when experts are called upon to support or enhance, or are restricted by, an initial framework into which she may not have been fully integrated at inception. If the expert is brought into the process too late, a gap may unnecessarily be created between the arguments the litigator wants to put forth and what the expert can actually support.

While it is a self-serving statement, I think it provides a tactical advantage to reach out to potential experts early, and use them as sounding boards as to the effectiveness of the initial approach. When inadequate attention is paid to this step, an unfortunate situation can arise in which the expert is pushed to stray outside of his comfort zone – to accommodate an earlier-taken legal stance – which ultimately does not serve anyone well, including the client.

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This leads to the second trait in strong litigators. They strike the right balance between maximizing the potency of an expert's findings or opinion, and protecting the expert from making arguments that are too strong and may be difficult to defend. By keeping the focus on winning the war and not every individual battle, the ultimate client's interests are protected. There are side benefits too: when this balancing act is deftly managed and recognized by the expert, a sense of trust is created, allowing the expert to enjoy the freedom of exploring a wider range of ideas with the litigation team, confident that they are working together in lockstep at every stage of the journey." ■

RAYMOND DA SILVA ROSA

Professor of Finance, University of Western Australia, Perth

"*Strong litigators are clear about the questions they ask of the expert*. I cannot overstate the value of a clear question. The issue in practice is that identifying the precise "angle of attack" often does not emerge until late in the process. Keeping the expert informed of the general nature of the query and then steadily advising the expert of refinements allows for maximum efficiency and decreases the potential for unhelpful revisions to be needed in the brief to the expert. The point is that the formulation of a clear question likely to yield an answer most useful to the litigator can be a process, and ideally it should be a well-managed process.

They are friendly but maintain appropriate boundaries with the expert. It is important to preserve in both practice and appearance the independence of the expert. Keeping communication to the bare minimum required to conduct business is enormously helpful to ensuring that the expert has true independence of interests and opinion. It also makes it difficult for anyone to claim the expert is conflicted if all correspondence and text messages are solely about the brief.

They ensure the expert expresses an unambiguous opinion and that the expert's report clearly articulates the grounds for that opinion. It is always only the expert's opinion but some experts, particularly academics, can find it difficult to distinguish between an impartial presentation of a nuanced perspective and their actual opinion on the question. A strong litigator will ensure the expert is forthright in expressing a clear opinion and makes it easy for the court to understand how that opinion was reached." ■

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