What Lawyers Need To Know About Intangible Asset Economic Damages Due Diligence Procedures

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The collaboration between the analyst and the attorney is the key to aacurate valuation.

LAWYERS OFTEN call on forensic accountants or other damages analysts to quantify intangible asset economic damages related to certain types of litigation claims. These claims may relate to a breach of contract (such as a license agreement, commercialization agreement, joint development agreement, or a joint venture agreement). Or, these claims may relate to a tort (such as an infringement, lender liability, fraud or misrepresentation, condemnation or eminent domain, shareholder oppression, or other dispute).

Before selecting and applying economic damages measurement methods, the damages analyst ("the analyst") will gather data and perform reasonable due diligence. This discussion summarizes what the lawyer needs to know about the analyst's due diligence procedures.

The lawyer should be aware that the due diligence procedures 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 analyst's due diligence process.

First, there may be more documents for the analyst to review in an economic damages analysis. These docu-

ments 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 or damages methodology suggested by any party to the litigation. This is because all parties typically have an incentive to somehow influence the analyst's opinion to conclude either a high damages estimate or a low damages estimate. For this reason, the analyst should be objective with respect to all data and documents received.

The 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 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 disclosed in the analyst's expert report.

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

- Relevant legal claims documents;
- Relevant other legal documents;
- Relevant discovery documents.

Second, this discussion considers the analyst's due diligence with respect to the legal claims, the causation claims, and the damages claims. This discussion summarizes the analyst's due diligence procedures related to documents that may be considered to measure:

- Lost profits;
- A reasonable royalty rate;
- Lost business value/cost to cure

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

For purposes of this discussion, the term intangible asset includes an owner/operator's patents, copyrights, trademarks, trade secrets, computer software, technology, licenses, franchises, permits, contract rights, customer relationships, supplier relationships, employee relationships, goodwill, and similar intangible personal property.

DUE DILIGENCE OF RELEVANT LEGAL CLAIMS • The analyst is not the legal counsel. And, the analyst should not practice law. This caveat cannot be overemphasized. 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:

- What intangible asset is claimed to be damaged;
- Who is alleged to have caused the damages;
- How the intangible asset is alleged to have become damaged;
- When the intangible asset is alleged to become damaged;

- 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 alleged wrongful actions of the respondent; and
- 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:

- What allegations the respondent admits to;
- What allegations the respondent denies;
- What counterclaims the respondent has against the claimant; and
- What the respondent wants the finder of fact to do (e.g., to dismiss the case).

Counsel will typically instruct the 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. It is a legal conclusion as to whether Alpha's actions were a breach of contract or otherwise illegal. 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 that a breach of contract occurred and the defendant's action (i.e., the alleged contract breach) was wrongful (illegal).

Therefore, the analyst should be sufficiently informed with 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 analyst does not manage the lawyer's document production or management activities. However, the 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. Counsel may ask the analyst to help draft these discovery requests. Or, counsel may ask the analyst to at least provide a list of financial and operational data that the analyst would like 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 counsel's filing of the disclosure regarding the analyst's expert opinions. That is, the analyst will typically be interested in how 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. Counsel may not provide copies of all of these documents to the analyst. Again, the analyst is not responsible for counsel's document management procedures. 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 automated document database. 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 cannot 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 those documents that the analyst has access to and those documents that the analyst does not have access to.

Ultimately, the analyst will have to look for incomplete, inconsistent, or obviously missing (e.g., based on gaps in the Bates numbers) documents that may imply that counsel is not supplying all of the evidentiary documents related to economic damages. It is the 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 intangible asset damages analysis. And, the analyst has to decide if the discovery documents are sufficiently credible to be relied on in 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 valu-

ation, 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 pre-judgment interest rate. In order to decide which damages analysis date (i.e., event date or current date) is most relevant, the analyst may consider all information that is available through the current (e.g., discovery cutoff) date.

8. Were the documents that were produced prepared contemporaneously (i.e., pre-litigation 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 (1) were prepared historically and in the normal course of owner/operator business operations or (2) 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 intangible asset damages analysis, the damages analyst will typically assume that there is causation, based on a legal instruction from the lawyer. 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:

- The defendant performed a certain act (e.g., a tort or a breach of contract);
- The defendant's act was wrongful (i.e., illegal); and

- 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 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 defendant did not perform the alleged act;
- If the defendant did perform the alleged act, that act was not illegal; and
- 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.

Nonetheless, 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 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 (included any amended complaints and amended answers). This awareness is so the analyst can develop a general understanding of each party's claims in the intangible asset litigation. That 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 an intangible asset damages analysis that is consistent with (and not contradictory to):

- The damages event described in the legal filings;
- The damages time periods described in the legal filings;
- The intangible asset described in the legal filings; and
- 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 lost product sales or expenditures required to cure (i.e., recreation cost) the intangible asset.

LOST PROFITS DOCUMENTS • Typically, the analyst will not select the damages methodology until he or she assembles all relevant documents and 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 during the litigation discovery process, the analyst's fieldwork and investigation, or 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 include:

- The projections/but-for method;
- The before and after method; and
- The yardstick method.

A description of these three measurement methods is beyond the scope of this discussion.

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:

- Historical data (i.e., prior to the damages event date);
- Current data (i.e., around the time of the damages event date); and
- 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 owner/operator's historical results of operations;
- The owner/operator's production capacity constraints or other constraints;
- 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 eithe

- The owner/operator entity results of operations; and
- 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 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 whether:

- The projection variables are internally consistent with each other;
- The financial projections can be reconciled to historical results of operations;
- The projections are mathematically correct (e.g., the projected balance sheet does balance);
- The projections can be reconciled with industry trends;
- The projections can be reconciled with a recognized independent benchmark;
- The projections contemplate the correct dates related to the dispute (e.g., the damages date, the mitigation date, the end of damages date);
- The projections consider the plaintiff's mitigation efforts;

- The projections consider the defendant's damages correction efforts;
- The projections consider any maintenance expense or other required investment related to the intangible asset;
- 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 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 analyst typically gathers data from various sources, including:

- The owner/operator, such as historical financial statements and prospective financial statements;
- Guideline publicly traded companies, such as historical financial statements;
- Industry financial reporting services, such as industry average levels of profitability (that may be defined at various income levels);
- Databases regarding intangible asset license agreements, such as automated databases that report arm's-length royalty rates; and
- 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 performing 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 considers several factors regarding the subject intangible asset (compared to the CUT intangible assets), including: relative age, relative size of market/industry, relative growth rate of market/industry, 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 considers several factors regarding the subject intangible asset (compared to the CUT intangible assets), including: relative growth rates, relative profit margins and 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 multiples 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 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 includes an opportunity cost component. This opportunity cost generally relates to any 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 analyst typically reviews data and documents related to:

- The original costs to create the intangible asset;
- The current costs to replace the intangible asset;
- The current costs to restore the intangible asset from its damaged condition to its pre-damaged condition;
- 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);
- 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 analyst typically considers the effects of the plaintiff's mitigation efforts on the measurement of intangible asset economic damages. When the owner/operator's 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:

- Develop a new (replacement) intangible asset;
- Enter into replacement contracts, licenses, permits, franchises, etc.;
- Find new customers, suppliers, employees, etc.;
- Inform the public about (and, therefore, counteract) the wrongful actions to the plaintiff's patents, trademarks, copyrights, etc.;
- 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:

- Amount of any efforts made in mitigation;
- Timing of any efforts made in mitigation;
- Expenditures made in the mitigation efforts;
- Financial impact of the mitigation efforts on reducing the amount of economic damages; and
- Date at which the damages are fully mitigated (or mitigated as much as is possible).

The 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 COUNSEL REGARDING DAMAGES METHODS • The analyst may perform due diligence by conferring with the client's 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 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, 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 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 research and select those judicial decisions and 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, the lawyer 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 the lawyer provides the analyst with judicial decisions, the analyst should review that precedent in order to obtain an understanding of:

- The relevant legal concepts involved in the case;
- The allowable (or not allowable) damages measurement methods; and
- 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 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, etc. The analyst should not use judicial precedent as a source of economic damages measurement variables because:

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

Accordingly, the 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.

CONCLUSION • Counsel often retain forensic accountants or other damages analysts to quantify intangible asset economic damages in breach of contract, tort, or other disputes. Analysts preparing intangible asset economic damages analysis perform reasonable due diligence with respect to the documents and data they rely on.

First, the analyst needs to 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 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 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 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 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 methods. The analyst should not attempt to extract specific damages measurement variables from such judicial decisions.