

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CREATIVE DIMENSIONS IN : CIVIL ACTION
MANAGEMENT, INC. :
 :
v. :
 :
THOMAS GROUP, INC. : NO. 96-6318

MEMORANDUM ORDER

Defendant has moved to exclude much of plaintiff's proffered expert testimony on damages from Jennifer Tallow and Stephen Scherf.

Someone with expert knowledge, skill, experience, training or education may offer an opinion in his or her area of expertise which is relevant to the case and which would assist the trier of fact to understand the evidence or to determine a fact at issue. See Fed. R. Evid. 702. The opinion of an expert, however, must be based on reliable methodology or analysis and not on subjective belief or unsupported speculation. An expert must have "good grounds" for his or her opinion. In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717, 742 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995); Robert Billet Promotions, Inc. v. IMI Cornelius, Inc., 1998 WL 721081, *10 (E.D. Pa. Oct. 14, 1998). See also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-95 (1993). The touchstone for admissibility is essentially reliability. See Kumho Tire Co., Ltd. v. Carmichael, 119 S. Ct. 1167, 1176 (1999).

Ms. Tallow has a masters degree in business administration and has worked in the management consulting field, including several years for the plaintiff. The portion of Ms. Tallow's testimony which might be helpful to a jury in determining any damages sustained by plaintiff is speculative, unreliable and not based on good grounds. The portion of her testimony which is supportable is not necessary to assist the jury in understanding the evidence or in determining any fact at issue.

Ms. Tallow opines that plaintiff would have closed on 50% to 80% of referrals by defendant and that 50% to 80% of defendant's clients would have also purchased the jointly marketed product. She bases this opinion on her personal knowledge of the capability of plaintiff's principal, Iris Martin, on her personal knowledge that in the early 1990s of three or four "strong" referrals, plaintiff closed on three, and on the synergy she assumes would have resulted from a joint marketing effort. At the same time, she states that a typical closing rate on routine referrals would be "one out of four maybe."

Ms. Tallow acknowledged that she does not know the actual number of solicitations by plaintiff at any time, let alone whether they followed "strong" referrals or resulted in closure. She engages in virtually no analysis or discussion of

market demand and competition with the exception of one reference at her deposition in which she acknowledges that the field has become more competitive since the early 1990s. Her assumption that because plaintiff closed on three of four strong referrals in the early 1990s in the United Kingdom she would have closed on 50% or more of all referrals from the defendant in the United States in 1996-98 is speculative and unsupported by any reliable analysis or methodology.

At her deposition, Ms. Tallow identified three colleagues in the management consulting field she spoke with about her conclusion. She states, however, that she did not rely upon anything they related in formulating her own opinion but did feel that what they said verified her opinion. When one examines her testimony as to what these people said, it is most difficult to find verification for Ms. Tallow's 50% to 80% projection. They suggested that her figure was "relatively in the ballpark." One stated "we get 50% of our business from contract extensions and referrals." Even assuming a full 50% of that person's business comes from new referrals alone, this would not remotely substantiate that his business obtains contracts from 50% of those who are referred. To amplify the point, a firm may have obtained five of its ten clients through referrals. This would be 50%. Those clients, however, may be five of a hundred firms which were solicited.

At court proceedings on the motion to exclude, plaintiff's counsel attempted to recast Ms. Tallow's opinion. He suggested that Ms. Tallow had identified five accepted criteria for projecting closing rates in the management consulting industry and had related that a firm which meets all of the criteria will enjoy a 50% closing rate. There is simply no support in Ms. Tallow's report or deposition for this characterization of her opinion. The only discussion of criteria by Ms. Tallow consists of a brief reference at her deposition to the criteria utilized in framing an effective sales pitch. She simply never opined that there are five criteria from which a closing rate can be reliably projected and did not purport to tie her 50% estimate to any set of criteria.

The jury will not need an expert witness to confirm or clarify that plaintiff closed on three or four prospective contracts in the United Kingdom or that three out of four equals 75%.

Ms. Tallow may testify, if plaintiff wishes, as a fact witness about her personal observations of Ms. Martin's capability. Otherwise, defendant's objections are well founded and Ms. Tallow's testimony as reflected in her report and deposition will be excluded.

Mr. Scherf is an accountant. He takes the 50% to 80% closure rate from Ms. Tallow and multiplies each by the number of

firms which contracted with the defendant for its services during the contract period at a cost of \$1,000,000 or more and multiples this by the \$500,000 required initial payment per contract and multiples this by plaintiff's profit margin to derive projected lost profits from the alleged breach of the parties' joint marketing agreement. He calculates the lost profits from the lack of introduction to defendant's clients by again using 50% and 80% closure rates multiplied by 24 introductions for each year of the contract term multiplied by \$1,500,000 assumed for each prospective contract and then multiplied by plaintiff's profit margin. Finally, Mr. Scherf adds an additional \$1,287,000 on the assumption that every projected client would have also engaged one of plaintiff's "behavioral resultants," apparently at a cost commensurate with what TGI offered to pay for a particular behavioralist full-time for a year.

The jury does not need an expert to comprehend evidence that \$500,000 was a required initial contract payment, that defendant executed million dollar contracts with 32 entities during the contract period, that defendant had 72 clients and thus potential references during the period or that \$1,500,000 was the representative contract price charged by plaintiff for its services. It is reasonable to assume that 32 parties who executed million dollar contracts with defendant during the relevant period would have been prospective customers for a

jointly marketed integrated program, but again this is something a jury can readily comprehend without being told such by an "expert."

Mr. Scherf acknowledges that he simply accepted the 50% to 80% closing rate figure from Ms. Tallow without any independent analysis or consideration on his part. That figure is no less speculative and unsupported when used by Mr. Scherf as when devised by Ms. Tallow.

There also is no basis for an assumption that each prospective contractee would have also purchased the services of a "behavioral resultant." The contract did not require that defendant market or recommend the utilization of these people.

Mr. Scherf's essential methodology is arithmetic. He multiplies numbers which a jury can readily ascertain from the evidence and multiply for itself once it finds from competent evidence the number of third parties, if any, who would have contracted with the plaintiff or for a jointly marketed integrated product.

Plaintiff's likely profit margin is important in calculating any losses. Mr. Scherf derives this from an analysis of plaintiff's tax returns and industry norms. This was reasonably sound and he may testify to it. He may also testify regarding his opinion about lost profits from unpaid royalties which defendant does not challenge. His testimony will otherwise

be excluded.

ACCORDINGLY, this day of April, 1999, upon consideration of defendant's motion to exclude expert opinion testimony and after an opportunity for a hearing and argument thereon, consistent with the foregoing, **IT IS HEREBY ORDERED** that said motion is **GRANTED** except as to testimony of Mr. Scherf regarding plaintiff's profit margin and any testimony of Ms. Tallow plaintiff may wish to offer regarding Ms. Martin's capability.

BY THE COURT:

JAY C. WALDMAN, J.