

# National Litigation Consultants' Review

October 2007

Volume 7

Issue 5

Information, guidance, and resources from the nation's leading testifying, financial experts.

## UPCOMING APPEARANCES

by Members of the Editorial Board

Michael Kaplan

NACVA Litigation Boot Camp  
Commercial Damages-Legal Theory and Case Law  
December 10, Ft. Lauderdale, FL

NACVA Litigation Workshop for CFDs  
Advanced Concepts in Economic Damages—  
Advanced Legal Theory and Case Law;  
Federal Rules of Evidence; Federal Rules of  
Civil Procedure  
October 29-31, Philadelphia, PA

NACVA Expert Witness Boot Camp  
November 1-3, Philadelphia, PA

Lari Masten

NACVA BV Training Center  
Market Approach-Discounts & Premiums  
Advanced Corporate Valuation Theory,  
Case Analysis  
October 18 & 19, Orlando, FL

NACVA CO/WY State Chapter Meeting -  
Compliance Valuation Conference  
Intellectual Property Detection and  
Valuation in Light of SEAS 141, 157, 141R  
November 8

P. Dermot O'Neill

NACVA Webinar  
Be prepared - Handling Daubert Challenges  
and Other Motions in Limine  
November 15

Maryland Society of CPA's  
AICPA course "Advanced Cost of Capital in  
a Changing World"  
December 3

## FEATURE ARTICLE

### The 10 Commandments for Expert Witnesses<sup>®</sup>

BY DANA BASNEY, MSBA, CPA, CUA, CIRA

(This article was the 2006 winner of the AICPA's writing contest on forensic accounting, and was the foundation for chapter 1 of "Expert Witnessing in Forensic Accounting", edited by Walter J. Pagano and Thomas A. Buckhof, R.T. Edwards Inc., 2005, Philadelphia, PA., and has been provided to NLCR readers with the permission of the author. — Ed.)

Here are the top 10 tips for expert witnesses:

1. Tell the truth – be an expert not an advocate.

There is nothing more compelling than the truth and it usually seems to come out in trial. It is the attorney's job to be an advocate for the client, not yours. Most effective expert testimony is factual and supported by logic, not emotion. The expert's job is to base his opinion on an unbiased view of the facts, and then to be an advocate for his opinion, not an advocate for the client. The more the trier of fact sees you as an advocate, the less effective your testimony will be. Recently, I had a divorce case in which I was charged with determining the respondent's income available for support. I started with the tax return

and made appropriate adjustments, explaining the reason for those adjustments to the court. The income I derived was significantly higher than what my client had shown in his income and expense declaration due to the add-backs I made to income. The opposition expert appeared to ignore the law in many areas, counting proceeds from loans as income available for support, imputing income from the individual's retirement accounts and imputing income based on the value of the respondent's home to come to a very large number. The court when asked why it adopted my position, rather than my opposition's responded "In reading the Basney

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## BU FOR THE LITIGATION PRACTITIONER

### Rules, Rules, Rules!

#### Playing the Valuation Game on a Litigation Field

BY P. DERMOT O'NEILL, CPA ABU CUA CFFA

As business valuation professionals, we all are familiar with the development and reporting standards required by the various standard setting bodies (ASA, NACVA, AICPA, IBA and USPAP). In a litigation environment, will meeting those standards insure a successful outcome for your report and your testimony? Maybe not! In addition to the accepted business valuation "rules", we must also

consider the litigation "rules." Our valuation report should comply with both.

In a "normal" business valuation report, we must disclose all data and information relied on in detail sufficient to allow another to replicate our process. In the litigation environment we must disclose all information considered.<sup>1</sup> For ex-

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## 10 COMMANDMENTS

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declarations, I find them to be both well reasoned, credible and consistent with the facts indicated to have been relied upon." The court went on to state that the opposing experts opinion "seems more advocacy that credible expert opinion" One sanity check I use when I draft a declaration is to pretend that the opposing party in the case hired you. I ask myself would my testimony be different? If the answer is yes, I revisit the opinions I express and try to get back on track.

2. Don't overstate your credentials or experience. Academic credentials are important, but the trier of fact will be far more impressed with the logic and common sense you use in coming to your conclusions than your credentials.

Although it is important to understand the theory of accounting, it is equally or more important to have had practical experience in the field and to be able to express that knowledge in a logical and concise manner.

Practical knowledge of the industry, business operations, accounting procedures, how paperwork flows within a business, how a business operates, and the interrelationships between income and expense, and cash flow and income is invaluable.

The most important job of the accounting expert is to teach and inform the jury or the court. If the jury understands the expert's opinions, no matter how simply put, you will get a much more favorable result than trying to get them to accept an opinion they don't understand.

Many novice experts think that juries are somehow going to be overwhelmed by their credentials into accepting their opinions; in reality most juries don't care much about credentials. They are more concerned with understanding the basis and the logic of your opinions.

In my experience academicians tend to be poor expert witnesses because they often have problems relating their testimony to real world situations. An ounce of common

sense, expressed in a straightforward manner, is worth a ton of credentials.

3. Check on your opposing expert's credentials with the State Board of Accountancy or other appropriate agency.

Unfortunately, there are experts who don't abide by the Second Commandment above and will overstate their credentials. Always check on the opposing expert's credentials with the State Board of Accountancy. It is not unheard of for people seeking work as experts to overstate their credentials. Check your opposition's professional credentials and references.

In one case I had against the Internal Revenue Service, the opposing expert stated he was a CPA. Having checked his credentials with the State Board of Accountancy I had obtained a letter from the Board stating that the individual in question was not licensed in California and could not represent himself as a CPA. After getting the opposing expert to state he was a CPA on at least five occasions in cross examination, the lawyer for my client entered into evidence the letter I had obtained from the State Board of Accountancy. After reading the letter the judge leaned toward the unfortunate expert who was still in the witness box and stated "Sir you are dealing with federal prosecutors here, you might want to think about taking the Fifth Amendment." Needless to say this didn't help either his client's case or his own career.

In reality, this individual had previously been a licensed CPA for a number of years before he let his license expire three months prior to trial for not keeping current on his continuing education requirement. Had he simply stated that he had been a licensed practicing CPA for many years and had recently let his license lapse because he was too busy to keep up his continuing education requirement, and was slightly delinquent in getting it renewed, nobody on the jury would really have cared. But this individual ignored the Second Commandment above and met with devastating results. In that case the jury was out less than ten minutes when they asked the judge if they could award more money

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than the taxes my client was suing the government to recover. My client got in excess of \$200,000 in fees and costs from the government under the provisions of the taxpayer Bill of Rights in addition to the taxes he was suing to recover.

4. Never let attorneys feed you selective information that screens out information that may be adverse to your client.

Be sure you get all the facts that are pertinent to your testimony. Unfortunately some inexperienced lawyers will try to shape your testimony by giving you only selected facts, which could only lead to one conclusion. Be sure you get all the facts. If you don't get all the facts needed to form a proper opinion, it will only come out at trial and your testimony will be discredited. It will be your reputation that suffers, not the attorneys if you don't get all the facts and are ambushed at trial. Often adverse facts can be minimized by putting them in perspective or by explaining them. Adverse facts should never be ignored, however.

5. Maintain controls over the documents from the very beginning. Always reference your work papers to show where all your data comes from, but never write notes to the file.

Business litigation cases tend to be document intensive. I have had cases with literally millions of documents. It is extremely important to establish a document referencing system as soon as possible in the case. Request that counsel Bates Stamp and index all documents before giving them to you. A common referencing system with each document being Bates stamped greatly facilitates the efficient handling of the case and communications between the expert and legal counsel. A good document control system will keep both the expert and the attorney from spending dozens of hours searching for records.

It is also very important to reference the source of all the information, numbers and statistics that you use in your report. Even though you

may be aware of the source of the information when you do the work, it may be months between the time that you do the work and you are deposed on it. In some cases trials are appealed and remanded for retrial. I have had cases in which I have testified in court several years after having done the work supporting my opinions. There is no way that I could remember the source of all the underlying data used to form my opinion over such a long period. Because the file was referenced in great detail I did not have to rely on memory.

Once, I attended an opposing expert's deposition where the opposing expert could not reconstruct a key calculation, which formed the crux of his testimony. He was forced to go on the record stating that he did not understand where he got the data that went into his calculation and therefore he could not explain his own calculation. Needless to say a motion to exclude his testimony was drafted before the ink on his deposition had even dried. Had he referenced the source of his raw data and how it went into his calculation, he might not have gotten into his predicament.

Most CPAs with audit experience are quite used to referencing work papers, which makes them well suited to working on litigation matters. Most auditors, however, suffer from a compulsion to document their every thought and justify their every action in the work papers. This can prove to be disastrous. If you have 1000 lines of notes and documentation explaining your position in the file, you can be assured that the opposing counsel is not going to compliment you for having such a well documented file while he is examining you. You can also be assured that he will only ask you about the one sentence in a thousand that can be misconstrued, taken out of context, or is ambiguous enough to be used against you. If you write notes documenting all the files that you have requested, you will not be complimented for your thoroughness. Instead you will be asked about the single innocuous document that you requested in writing but did not get. That document will be-

come the most important document in the case on cross-examination.

It is best not to write any notes in the file for the above reasons.

Perhaps the most damaging note I ever saw in a case was where the opposing experts lead schedule had a note written diagonally across it, which stated, "This makes no (expletive deleted) sense." When asked what the note said, the expert turned beet red and professed he could not read it. We immediately had the exhibit blown up to a 3 foot by 5-foot size! Unfortunately the case settled before we could present it to the jury.

In another embarrassing situation, I was working with a very experienced and competent audit manager for the first time. I gave him my usual admonishment about not making any notes in the file. Shortly before my deposition I reviewed the file. The first page of the file contained a note written by this audit manager, which stated "Do not take any notes, and do not put any notes in the file" As I said earlier auditors tend to be compulsive about such things!

6. Bring out the weak points in your testimony in direct exam.

The opposition is sure to bring up these weaknesses in its cross examination. By beating them to the punch, you show that you were aware of these weaknesses and have considered them in forming your opinions. Discussing the weaknesses in your case gives you a chance to explain their significance and to put them in perspective. It is rare to have a lawsuit where there are not some facts adverse to your client's position. If the adverse facts are not brought out in your direct exam and put into perspective, they will only be brought out by the opposition expert and blown out of all perspective.

Some lawyers may be opposed to doing this, as they do not want to bring any unfavorable facts to the attention of the jury. Remember it is your reputation that will be damaged when the opposing expert brings out these facts and puts them in the worse

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possible light. It is always better to steal the other side's thunder in the context of your own testimony.

7. Always use visual displays in presenting your testimony.

Educators will tell you that the vast majority of the population processes visual information much more readily than oral information. In the courtroom there is much to be said in favor of the old adage "One picture is worth a thousand words." The use of Exhibits is very important in getting your message to the trier of fact. Despite the overwhelming evidence regarding the value of visual displays from the educational and psychological communities, amazingly some experts merely pontificate from the stand. It really doesn't matter if they are correct or incorrect in their opinions, because the jury is probably not listening after the first few minutes. Whether we like to admit it or not, accounting testimony is usually not very titillating and it does not grab most peoples attention. A proper visual display can help keep the trier of fact focused on your testimony. I always try to use large exhibit boards that allow me to demonstrate the steps I've used in doing my calculations. If the jury can follow the process and procedures you have used, they are much more likely to accept your number over that of the pontificator who merely states his conclusion without explanation.

Sometimes a visual display can be very dramatic and is virtually irrefutable. Once I had a client, who purchased a very large and luxurious home, only to discover that it had a water seepage problem. I calculated my client's damages using two approaches. The first approach was to calculate the cost to repair the damage. The second approach, which was based on the rescission of the purchase agreement, took the sum that the client was paying for his former, more modest, home and subtracted that from the cost of maintaining the new water damaged home, as well as refunding the monies invested to buy the home. In my examination after I presented this calculation, opposing counsel asked me why I didn't reduce my calculation by the amount that the rental value of the new, much larger and more luxurious home, was in ex-

cess of the rental value of the previous more modest residence. I responded by pointing to an exhibit, which had a large blow up of a photo showing mushrooms growing up through the living room carpet of the home in question and explaining that I was unable to get rental comps for homes with mushrooms growing through their living room carpet! The case settled immediately after the deposition, to a large part based on that single picture that made it impossible to deny that there was a major water problem in the home.

8. Never personally attack an opposition expert in your testimony.

In personally attacking an opposing expert witness you are far more likely to create sympathy for him or her and animosity toward you and your client than to help your case.

Juries recognize that by directing your attack at the individual rather than the expert's opinions implies that you cannot attack those opinions. Remember it is the expert's opinions that you have to attack, not the expert.

I recently had a case where my testimony was limited to opining on the accounting principles, which were relevant to the matter at hand. In order to save cost my client used a non-CPA to trace certain transactions, which formed the actual core of the damages that my clients suffered.

The opposing party was a large insurance conglomerate with an unlimited budget, which hired a very experienced CPA to present their side of the case. The experienced expert went out of his way to point out that his opposing expert was not a CPA and to address his credentials, or lack of them, rather than his testimony. This did not sit well with the jury who liked the less credentialed expert and who understood his testimony because he presented it in a straightforward manner. It caused a backlash against the opposition's expert. The opposition expert would have been far more effective had he addressed his less credentialed opponent's testimony rather than his credentials. Attacking opposing expert's credentials, bias, or experience is best left for the attorneys to do in oral argument; it only cheapens an expert's

testimony to do so. Stick to the opposition's opinions not his qualifications. It will be obvious to the jury how his qualifications compare to yours when each side examines their expert's qualifications, as is customarily done as part of his direct exam.

9. Encourage your clients to bring you into a case as early as possible.

As an accounting expert you will often have unique knowledge that can help in discovery. You can help to identify documents that should exist and can be used to refute the opposition. Some lawyers will bring in the expert in at the last minute to save fees. This can be disastrous when you are brought in after discovery is closed and you find out that the lawyer failed to ask for the documents you will need to form your opinion.

Accounting experts are also problem solvers. Often times a review of the damages and the ability to collect those damages prior to filing litigation can save the client hundreds of thousands of dollars in legal fees and result in early settlement or reconsideration of the merits of the litigation. Accountants are invaluable in analyzing the costs and merits of litigation as well as alternatives to litigation.

10. If you are unsure of what your testimony may be, try to get hired first as a consultant for the client's attorney. Then, if your testimony proves not to be favorable it will be shielded from discovery by the attorney consultant privilege. Never be afraid not to take a case.

Many cases are fairly straight forward, such as determining damages from lost wages, which is usually more of an exercise in math than an exercise in judgment. Other cases, such as cases involving what constitutes the proper accounting for complex transactions, are more involved and you will usually not be able to give an opinion on such cases until after you have done an extensive review of the pertinent facts. Upon doing such a review it is entirely possible that your opinion may in fact be adverse to the party that hired you. If you are hired by the client's counsel as a consultant, your adverse opinion

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will be protected from discovery. Once you are designated as an expert, you may have to disclose an adverse opinion to the detriment of your client's case.

If you are honest and professional in your testimony, you will eventually have a case where your opinions are more favorable to the opposing side than your own client. If you are hired as a consultant you can still do a big service for your client by showing him the weakness

in his position and encouraging him to save the cost of trial by entering into a settlement early in the case.

Not every client you will be asked to represent will be descended purely from the angels. Sometimes you will need to acknowledge wrongdoings by your client, if you are to give honest testimony. Often these wrongdoings can be put in perspective. If your client refuses to accept that some of your testimony may be adverse to him, then you might want to consider leaving the case. Your reputation is your greatest asset; don't sacrifice it to please a

client. You will get other clients, you only have one reputation, and without a good reputation you are of no benefit to any client.

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## RULES, RULES, RULES!

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ample, in developing a discount rate using a build up model and Ibbotson data, did we consider the Duff & Phelps data but decide not to use it? In a "normal" business valuation report we would need to disclose that we used the Ibbotson data, but not necessarily that we considered and did not use the Duff & Phelps data. In litigation business valuation reports some commentators suggest the fact that we considered the Duff & Phelps data needs to be disclosed as well as why we decided not to rely on it.

Federal Rules of Civil Procedure 26(a)(2)(B) requires "The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor..." In a business valuation report, what constitutes our opinions: premise of value, standards of value, valuation approaches? In a "normal" business valuation, standards require we disclose the major elements of premise of value, standards of value, valuation approach, etc. used as well as the fact we considered the alternatives, if we did so. It is clear that in a "normal" business valuation all alternatives are considered and disclosed. In a litigation valuation, more reasoning

and analysis than we typically see in a "normal" business valuation may be required. During cross examination, opposing counsel will certainly consider each decision the expert makes in developing and reporting the results of his/her valuation process to be an "opinion" worthy of inquiry. Potential cross examination questions on developing and reporting issues may be mitigated by strong direct testimony planning and courtroom presentation.<sup>2</sup>

We are all familiar with the Federal Rules of Evidence – Rule 702. Under Rule 702, our testimony (and, presumably, our report since all opinions must be disclosed) requires that our testimony:

- be based on sufficient facts or data,
- be the product of reliable principles and methods, and
- reflect that the principles and methods reliably apply to the facts of the case.

Some illustrations. We are all familiar with the "liquidation" premise of value and the "going concern" premise of value. In ongoing operating companies, under the valuation principle of "highest and best use," the default is generally as a "going concern." In an oppressed shareholder case, the court

has wide latitude in its decision. Assuming the plaintiff is successful, the usual decision is to have the opposing shareholder purchase the shares of the plaintiff at "fair value." It is not unheard of for the court to order the sale of the enterprise. Should our report analyze and reason why the "going concern" premise of value is more appropriate than the "liquidation" premise of value? Obviously, the answer is "yes". A conundrum may be created by the ability of the Court to use any premise of value it decides. This conundrum is often resolved by counsel requesting a supplemental report prepared using the liquidation premise of value to assist the Court in its deliberative process.

Another area of conflict may be the source of data used to employ the Market Approach-Merger and Acquired Companies method. A recent report prepared by an opposing expert, considered the Market Approach-M&A method, solely reviewing Done Deals and negated that data since there were only six transactions reported, none of which were contemporaneous with the valuation date, and in his opinion, not usable. My rebuttal report identified approximately 30 usable transac-

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## RULES, RULES, RULES!

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tions by reviewing other databases such as Pratt's Stats, BIZCOMPS, etc. and used the Market Approach-M&A method in my analysis. In the eyes of a judge or jury, which report contained appropriate analysis and reasoning? In previous cases when the opposing expert on cross was asked, "Why didn't you consider ... in your analysis?" common answers were:

- I didn't know it existed.
- My firm does not subscribe to that service.
- The client did not want to pay the cost for acquiring that data.

In my experience, except in the most egregious instances, courts will liberally apply the Federal rules to permit the admission of a business valuation report. This is so because:

- the business valuation report is usually central to the claims of the plaintiff or the defense of the defendant, and
- any reasoning issues may be clarified during trial testimony.

However, if the reasoned analysis is not brought out during trial, the offending expert risks the Judge's in-

structions to the jury limiting the weight the jury may give the valuation expert's report or testimony.

Another possibility, through no fault of the business valuation expert, may prohibit the report from being accepted as evidence. At a bench trial about two years ago, opposing counsel objected to the admission of my business valuation report since opposing counsel did not receive it until six days after discovery closed. The Judge reasoned that since discovery had been extended several times and the final discovery date was 60 days before trial, my business valuation report should be excluded. However, I was permitted to testify as an expert on business valuation. Fortunately, I was allowed to refer to a copy of my report in the trial books available to the judge and opposing counsel.

### Summary

A well performed business valuation under development standards, and a well written business valuation under reporting standards will go a long way in a litigation engagement; but a business valuation professional needs to consider Federal Rules of Civil Procedure 26(a)(2)(B) and

Federal Rules of Evidence 702 in developing and reporting a business valuation performed within the environment of a litigation support engagement.

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<sup>1</sup> See for example Federal Rules of Civil Procedure 26(a)(2)(B). For purposes of this article, references will be to Federal Rules. Most states have similar rules of evidence and civil procedure.

<sup>2</sup> See for example, Preparing for Direct Testimony on Valuation Fundamentals National Litigation Consultants' Review, November 2006 by John R. Markel.

**I SOLEMNLY SWEAR**

## Lunden's Lessons Learned in Litigation Landmine

**BY CHARLES S. LUNDEN, CPA/ABU, CFE, CLU, FLMI, AND CMA**

The litigation process has often been described as warfare. Many lessons can be learned from battlefield experiences. During the Civil War, at the Battle of Gettysburg, General Longstreet knew that General Lee's strategy for Pickett's Charge was doomed from the start, but he gave the order anyway. General Pickett dutifully marched his men into a crushing slaughter by the Union Army, marking the turning point in the war. On occasion, I see similar futile attempts of-

fered by unprepared, unqualified professionals playing the role of a good soldier, following flawed instructions from their clients. This article offers lessons I have learned watching others stumble their way across the landmines buried in the litigation landscape.

Years ago, I faced an opposing expert, who was an experienced, capable CPA, and had spent most of a long career serving the needs of his small business clients, but he had no

experience in litigation, or in business valuation. He had a personal friend involved in a business dispute, and he tried to help his friend by acting as an expert, preparing a valuation report he felt would help his friend resolve the dispute on favorable terms. We shall refer to the expert as Mr. Pickett, his client as Mr. Longstreet, a shareholder in the Confederate Insurance Agency, and the attorney as Mr. Lee.

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## LUNDEN'S LESSONS

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### Case Background

The Confederate Insurance Agency was formed by a group of insurance professionals to create some synergies in their individual practices. Each shareholder had an area of expertise (group health, property and casualty, life, investments, disability insurance, business insurance). They formed Confederate Insurance Agency to share back office expenses. At the end of each month, all revenue was attributed to each shareholder, expenses were allocated according to each shareholder's prorata share of the common expenses, and the remaining funds were paid out as compensation, allocated according to the revenue generated by each shareholder. Although each shareholder had an equal number of shares, there were never any profits at the end of the year, as all excess funds had been paid to the shareholders as compensation. The agency functioned more like a cooperative than a typical small business, and in five years of operations there were never any profits, nor, of course, any distributions of profits. Shareholder Longstreet owned 20% of the agency, accounted for 5% of the premiums of the agency, became involved with another shareholder's wife, and was asked to leave the Confederate Insurance Agency. A dispute arose as to the value of his shares.

### Pickett's Report

The following facts came out during the three days of Pickett's deposition (spread out over 14 months). This was Pickett's first valuation assignment. He used a fair market value standard of value. Pickett used a software valuation package to prepare his valuation analysis, ignored the results of that package, and valued the agency at 2 times revenue using a rule of thumb he found in a valuation article published in an insurance agency industry periodical. He considered no discounts for lack of marketability or

lack of control even though the standard of value was fair market value.

He could not explain how the valuation software worked, why there were arithmetic errors in the results of the software, how the methods of valuation used by the package differed from one another, or what the term Beta meant, or how it was developed. He refused to acknowledge that the article he relied upon did not advocate the use of a rule of thumb, but rather advocated the use of a discounted free cash flow model for insurance agencies, and only mentioned the 2 time multiple as an unreliable guesstimate.

Although the CPA firm he worked for had the PPC binders on valuation in the firm's library, he did not consult them, and had never even read or glanced through them.

The report was not reviewed by anyone else in his firm, although the firm had individuals with valuation experience.

### Case Outcome

Attorney Lee abandoned his expert at the end of the third day of deposition, realizing Pickett was sure to be slaughtered on the witness stand. Lee convinced Longstreet to accept a settlement offer at 20% of the settlement offer defendants offered at the beginning of the case. Pickett's efforts to help his friend Longstreet cost him dearly.

Lesson Learned #1 - Use Valuation Packages Sparingly

Some valuation professionals use prepackaged software programs as a crutch, without understanding their reliability or methodology. Although there are many quality software programs offered, beware the inexpensive models, and check all programs before use.

Lesson Learned #2 – Do Not Take Cases for Which You Are Not Qualified

The human instinct is to help those in need. This does not make for

good litigation strategy. The best advice to give a referral source may be to obtain the services of a real specialist.

Lesson Learned #3 -Prepare For Depositions

There is no excuse for not being prepared for a deposition. Assume it will occur at the worst possible time in your schedule. Opposing counsel will attempt to obliterate your credibility during the deposition. You should prepare accordingly.

Lesson Learned # 4 - Know Your Report Weaknesses

Seek the assistance of other litigation professionals prior to issuing your report, and to prepare for the deposition, by having them taking an opposing view and attempting to poke holes in your opinions.

Lesson Learned # 5 – Consider Mediation

Some cases are not about the facts or the law, but are the result of bruised and battered egos. Consider mediation as a way to let the parties work through non-legal issues that might impede settlement. The emotions surrounding the Plaintiff's dalliances with another shareholder's wife certainly impeded settlement in this case.

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# Effective Expert Reports

BY LEON A. LAROSA, JR., CPA, CFE, MST

Specializing in litigation support services for the last thirteen years, I have had the opportunity to author over ninety expert reports, and, during this period of time, have read at least the same number of expert reports prepared by opposing experts. The purpose of this article is to provide you with practical suggestions for preparing effective, credible reports.

Litigation and dispute resolution services are rendered by litigation support professionals using accounting, economic, specific industry and other consulting skills to assist in a matter that involves a pending or potential formal legal or regulatory proceeding before a "trier of fact" (a judge, jury, arbitrator, mediator or special master) in connection with the resolution of a dispute between two or more parties. These consulting services typically require significant fact-finding from a myriad of documents obtained through discovery, data analysis, research and forensic investigative techniques. The ultimate key, however, to a successful litigation support engagement is whether our efforts provide effective assistance to the trier of fact.

The key to a successful effort is not measured solely by academic credentials, technical excellence or years of experience, but, also by the manner in which we communicate in our expert report the results and conclusions of our outstanding efforts. Furthermore, the expert's report will become an important document in any contested legal proceeding. The expert report will also become a permanent part of the expert's record. Consequently, a

poorly written report can and will be used to impeach the credibility of the expert for years to come. Conversely, a well-written report may lead to future referrals.

First and foremost, prior to an engagement to prepare an expert report, the expert should be familiar with the legal requirements of an expert witness. Federal Rules of Civil Procedure 26 (a) (2) (B) requires an expert to submit a formal, written report, signed by the expert. The report should include:

- A complete statement of all opinions to be expressed and the bases and reasons for them.
- A list of all data and other information considered.
- All exhibits prepared in summary of or support of the opinions.
- Witness qualifications, including a list of all publications written by the witness within the last ten years.
- Witness compensation.
- A list of other cases in which the witness has testified at trial or deposition during the last four years.
- Signature of the expert (not the firm).

A well-written expert report will have the following elements, outlined as follows:

1. Background and overview of findings.
2. Procedures performed.
3. Assumptions (typically used when computing economic damages).
4. Results.
5. Conclusion (signed by the expert).

## 6. Exhibits

- Financial summary
- Financial schedules
- Charts
- Graphs
- Copies of portions/sections of key documents in evidence
- List of documents inspected and other information relied upon
- Curriculum vitae

It is essential the body of the expert report, that is, background through the conclusion, be presented in simple, short paragraphs, preferably in outline form. Calculations, schedules, etc. should be maintained as exhibits, and clearly cross-referenced to other exhibits or documentation. Additionally, the expert's background and experience should not be in the body of the report (unless required otherwise by jurisdiction), but rather as an exhibit, preferably the last exhibit.

A persuasive effective expert report will have the following:

- A clear, simple, concise style.
- An executive summary.
- Minimum use of technical terms.
- Immediate definition of any technical terms employed.
- Emphasis strictly on the facts.
- Clear basis for methodology and assumptions.
- Use of flow charts and graphs to increase clarity.
- Bolding of key facts and results.
- Use of plenty of "white space" (double, even triple space) to increase readability.

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## EFFECTIVE EXPERT REPORTS

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- References of every key fact, number, etc. to documented evidence.
- References for each number presented in a financial schedule to documented evidence or other financial schedule.

Conversely, a persuasive expert report, will minimize, or not have, the following:

- Unsupported assumptions.
- Adjectives, unless quoting from a source.
- Adverbs, unless quoting from a source.
- Jargon.
- Pompous phrases.
- Speculation.
- Footnotes, unless absolutely necessary. Footnotes have a

tendency to interrupt the reader's thought process. (*This is a matter of personal preference. Other experts believe that extensive footnotes can provide additional detail and clarity that, if contained within the body of the report, might overcome the effort to make the body simple and concise; or provide a better location to tie assumptions and/or other support to particular statements with the report body. For example, see last month's issue of this column, "Expert Reports Made Easy." Ed.*)

- Typographical errors.
- Punctuation errors.
- Nothing directly written or prepared by counsel.
- Technical terms, unless absolutely necessary.

In summary, a credible and effective expert report will:

1. State the purpose clearly and immediately.
2. Have a forceful style which is clear, active, objective and positive.
3. Include only necessary information and, most importantly
4. Speak the "reader's" language, that is, the language understood by the "trier of fact".

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## BOOK REVIEW

# Foundations of a Bankruptcy Practices Library

BY EDWARD B. CORDES, CPA/ABU, CVA, CFE

Practitioners often get pulled into some sort of bankruptcy work, such as valuing a business for purposes of solvency tests or for sale of the business, forensic examination, fraudulent conveyance or preference action. Upon arriving, they discover some sort of cryptic foreign language where entire sentences and concepts are referred to in some sort of code, e.g., "At the 548 hearing, I heard the debtor's expert has a 327 problem, and they have a ton of time in the 363".

In addition to the specialized lingo in bankruptcy, there are some peculiar procedural requirements, and an occasional special definition applied to a few terms of art.

Although I've practiced in the bankruptcy arena for twenty plus years, our firm has a couple of new professionals joining our practice,

and I thought it time to update our library. I'll share the results of my findings in this forum.

Flush with a budget of the proceeds of one chargeable hour, I turned to the American Bankruptcy Institute's online bookstore at [www.ABIworld.org](http://www.ABIworld.org).

I first chose Bankruptcy Overview: Issues, Law and Policy, Fifth Edition<sup>1</sup> a 189 page paperback updated in 2006 for the 2005 Bankruptcy Abuse and Consumer Protection Act, which was one of the more significant changes to the Code in years.

It more appropriately should be shrouded in yellow and black as it could pass for an exceptionally written "Bankruptcy for Dummies". Its author, Jack Ayer, a former bankruptcy judge, is now Professor Emeritus of Law at the University of

California-Davis. His style of writing is straightforward and direct, avoiding long, qualified sentences and is peppered with examples using humorous characters and situations. This is a very readable book, yet covers the full bankruptcy arena very precisely, from avoidances to withdrawal. I highly recommend this read for all except the most experienced of bankruptcy practitioners, and the cost of the book is less than 5 minutes of chargeable time.

Second, I selected Getting Paid: Retention and Compensation in Bankruptcy Cases: A Guide For Non-Attorney Professionals<sup>2</sup>, a 165 page paperback with a cost of approximately 4 chargeable minutes. Had the debtor's expert referred to in the first paragraph above read this, he would not have had a 327 prob-

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## FOUNDATIONS...

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lem. Section 327 of the bankruptcy code governs the retention of professionals, and, if not properly retained, you may not get paid. In August of 2007, I witnessed a Bankruptcy judge deny an attorney his fees of several days work for failing to get properly retained.

This second book covers the rules on being a qualified practitioner, independence, getting properly retained, structuring your fee arrangement, time records (to the tenth hour), segregating time clearly between matters, and how to make application for payment of fees. Surprisingly, there's no chapter on how you can spend the money! Also included are sample forms for each step of the way. This is a must read for any professional practicing in the bankruptcy arena.

Lastly, I purchased Bankruptcy Business Acquisitions Second Edition<sup>3</sup>, a loose leaf (a cost of 45 minutes to an hour plus, depending on your region) so big they paginate the 37 chapters to avoid disclosing just how many pages they spent discoursing on the subject. This is a serious reference manual for those assisting clients in selling or buying a business (or parts of businesses) that reside in a bankruptcy estate, as well as good resource for the expert who is either preparing or rebutting a valuation in a

bankruptcy context. This also provides excellent reference materials for experts working on litigation surrounding a sale. A special bonus is a data disk filled with forms and checklists.

The book spends the first few chapters in an overview of various types of sales allowed within the bankruptcy venue, including sales of assets free and clear of liens (Section 363), sales pursuant to a plan, and sales outside of a plan. Several chapters are spent on the various parties at interest in a bankruptcy, what their needs and wants might be, and in particular, how the parties can assist or hinder a sale. Numerous chapters are spent on the sales process itself: letters of intent, due diligence, purchase contracts, incentives, procedural requirements, and the like. Several more chapters cover miscellaneous topics such as insight on getting the sale approved while dealing with the various constituencies within the bankruptcy process.

This third book is not a manual on business valuation in the bankruptcy context, and does not address the mechanics of a valuation. Valuation experts will learn a lot about what the various constituencies might be looking for in the valuation methodology, and what factors they will be looking at before they consent to, or move to block, a sale. There are several chapters that address common roadblocks such as getting rid of or reducing lease and loan obligations, successor liability

for claims, and employee/ERISA claims for those times when the expert is called upon to help design the entity emerging from bankruptcy or review management's assumptions underlying its pro-forma.

For the expert hired to determine the appropriateness (or non-appropriateness) of a sale, there are 37 chapters which address the conditions that a variety of noted authors find appropriate. Enough said.

Oh, translation of the quote in the first paragraph: It came out in a hearing about fraudulent conveyances from the estate that the debtors' expert had not been appropriately retained, or had some sort of conflict, which will jeopardize his getting paid for his time, that is really an issue as they had a substantial amount of time involved with selling a part of the business.

This situation is an avoidable tragedy for the informed expert.

**Edward B. Cordes CPA, ABV, CVA, CFE is employed in the Denver office of Cordes & Company, which provides valuation services and insolvency consulting including acting as Receiver and Trustee [www.Cordesco.com](http://www.Cordesco.com).**

1 Bankruptcy Overview: Issues, Law and Policy 5th Edition, Professor Jack Ayer 2006

2 Getting Paid: Retention and Compensation in Bankruptcy Cases A Guide for Non-Attorney Professionals, C.R. "Chip" Bowles, 2005

3 Bankruptcy Business Acquisitions, 2nd Edition, Richard N. Tilton, 2006

## TECHNOLOGY TIPS

# "Show Me the Money!"

## The Revised Federal Rules of Civil Procedure & The Request For Production

BY SCOTT COOPER, CMC, AND ROBERT P. GREEN, CPA/CITP

(Part 5 in a technical series addressing E-Discovery and related Computer Forensics)

Cameron Crowe wrote and directed a movie that contained it. Cuba Gooding Jr. said it. The 90's pop culture made it a catch phrase. And now, the revised Federal Rules of Civil Procedures (FRCP) empowers you to use it.

"Show me the money!" - - which, in the world of e-discovery, translates to: "Show me the data!"

How you demand that data changed December 1, 2006, under revisions to the FRCP that created various impacts and altered procedures. We've discussed them in

chronological sequence in past articles in this series. Assuming that you are familiar with those issues or our previous articles, the next logical action in the chain-of-events sequence is the request for production (RFP).

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## “SHOW ME THE MONEY”

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In concept, the RFP is simple. In it, you seek relevant non-privileged, electronic data. In execution, however, crafting the RFP can be problematic with pitfalls to avoid.

To help simplify the procedures, minimize potential problems, and strengthen your cache of produced Electronically Stored Information (ESI), we've outlined below a two-step approach that provides a reliable procedure to create an on-topic, focused RFP. We've used it successfully during the three decades we've been in business, revising it to conform to the 2006 rule changes. Simply follow the outline, answer the questions, and provide your answers to Parts 1 and 2 in your RFP.

But, a caution: it's not boilerplate. You can't use language and format from one firm, duplicate it and expect it to work for your firm. Nor can you expect the same language and format to work from one case to another even within your own firm. That's because each case is unique. Just as the map for Captain Morgan's buried treasure won't help you find Jack Sparrow's, you must tailor your response to fit your situation and use customized language.

That said, our suggested approach consists of:

Part 1 - a set of definitions of terms that you will need to fully explore and explain as part of the process of creating the RFP. By carefully and accurately defining the relevant terms first, you build a foundation from which to craft a knowledge request. You avoid looking like you're fishing for a universe of data and instead are specific and focused.

Part 2 - the specific production requests. This succinct set of requests, based on your defined terms, enables you to create a more effective RFP that obtains the results you want. Empowered by the FRCP, your demand, "Show me the data!" can get the results you want.

### PART 1 – OVERVIEW AND DEFINITIONS:

The first step is to review the four sections listed below. Use them as a checklist and provide details for each, specific to your case. Then, list the relevant information from all four sections in Part 1 of your RFP.

- Media/storage devices
- Electronic data exists on media.
- Media exists as part of or, is associated with, storage devices.
- Storage devices exist within, connected to and associated with computer devices.
- Computer devices exist in offices, residences, and in the pockets and briefcases of individuals.
- Computer devices include, but are not limited to, servers, workstations, desktops, laptops, personal digital assistants (PDAs like BlackBerry, Palm, Treo, etc.), cell phones, routers, switches and firewalls.
- Storage devices include:
  - 1) Fixed devices such as internal hard drives, CD/DVD drives, tape drives and others.
  - 2) Removable devices such as external hard drives, CD/DVD drives, tape drives, zip drives, thumb or flash USB drives, media cards/sticks and others.

#### Data

- Electronic data can exist in five "spaces":
  - 1) Live space – Current data in usage
  - 2) Deleted space – Data in deleted files
  - 3) Slack space – Small amounts of data clustered at the end of other files
  - 4) Unallocated space – Available storage space that still contains data
  - 5) Wiped space – Data that has been overwritten by special "eradication" programs
- Electronic data can be seen in three "states":
  - 1) Complete files – Files that are intact, including full content, file header, and metadata information
  - 2) File fragments – Portions of files that remain after other

portions have been destroyed or overwritten

- 3) Metadata - Data about data, and typically created by the computer system itself

#### Production Method

The production method identifies the format of the ESI that will be provided to you and the type of media that it will be produced on.

An example of the media type might be: "external SATA 750 GB hard drives."

Examples of the ESI format might be:

- 1) Native file format
- 2) TIFF image format
- 3) DD or EnCase evidence file format

(Please note that you may want some input from your computer forensics expert regarding, at least, the three sections above.)

#### Questions

Collectively, all of the electronic data from all of the storage devices, all five spaces and all three states, represents Electronically Stored Information (ESI), the pool of information from which you want to draw specific data. The relevant and specific ESI you request will be provided according to the information you include in the preservation demand.

That demand must answer the following five questions and define: Who, When, Where, Why and What. These Five Ws were addressed in more detail in the immediate past article, Part 4 in this series, dealing with preservation of evidence.

- Who – The custodians (storage providers) and users (creators, editors and viewers) of data.
- When – The time period during which likely ESI existed. Please note that much of the ESI from the five spaces and three states may not have exact dates associated with it. Thus, it is often preferable to specify excluded date ranges, rather than specifying included date ranges.

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# “SHOW ME THE MONEY”

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- Where – The location of equipment and types of equipment at each location.
- Why – The topics of interest and at issue, such as accounting transactions, emails, internet usage and history, memos, spreadsheets and other documents associated with certain events, such as fraud, termination, misrepresentation or other subjects.
- What – Words and phrases unique to this situation or event.

Once the ESI, Data, Production Methods, and Five Ws are defined with the wording tailored to your current matter (e.g. “Who – John Jones, President; and Sally Smith, Purchasing Manager), then the specific production requests can be written.

## PART II – THE REQUEST FOR PRODUCTION

After completing Part 1 above, Part 2 follows logically and simply. In general, the RFP can be as few as five items, relying on the Five Ws above. Each request will specify that ESI is requested, in what format and how it is to be provided to you.

Your production request would use language that incorporates the following concepts:

- 1) Please produce, for all 5 spaces, for all 3 states, via the production method above, the ESI related to the custodians identified in “Who” above.
- 2) Please produce, for all 5 spaces, for all 3 states, via the production method above, the ESI related to the date ranges identified in “When” above.
- 3) Etc.

Your completed RFP should contain some or all of the foregoing definitions and requests from Parts 1 and 2. But remember, it should not be overbroad and burdensome. It must be customized and tailored to each specific situation, with as much precision as is reasonable. Lacking this, the opposing party is likely to raise sustainable objections that will delay the process.

In summary, once a properly crafted RFP has been delivered, and the demand, “Show me the Data!” has been answered and the results analyzed, your client will hopefully be saying to their opposing party: “Show me the Money!”

*Scott Cooper, CMC and Robert P. Green, CPA/CITP are principals at INSYNC Consulting Group, Inc. (www.INSYNCCusa.com), a multi-location Information Technology professional services firm. Now in its 3rd decade, INSYNC provides Electronic Discovery and Computer Forensics services, as well as Information Management and IT consulting. Clients include the White House, the U.S. Department of Justice and major national law firms and corporations, as well as small- and middle-market companies across the country.*

*The firm uses a team of professionals with diverse backgrounds and experience in the fields of: Information Technology, Law, Accounting and Finance, Business Administration, and other fields. They hold professional credentials as CPA’s, as well as multiple business and technology-based certifications.*

*You can reach Mr. Cooper and Mr. Green at [Scott@INSYNCCusa.com](mailto:Scott@INSYNCCusa.com) and [Bob@INSYNCCusa.com](mailto:Bob@INSYNCCusa.com), respectively.*

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