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Know and Avoid the Minefields and Booby Traps

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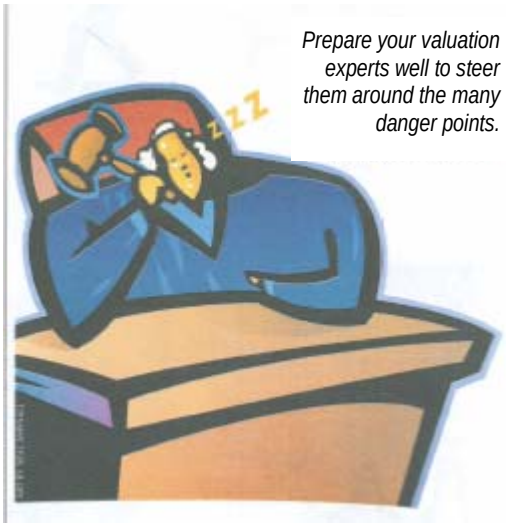

Prepare your valuation experts well to steer them around the many danger points.

The time-honored maxim, "No harm, no foul," simply does not work in the universe of business, the territory of contracts and agreements, or the state of personal relationships. In real life, people usually do not "agree to disagree" on the extent to which they have been harmed by another's acts or omissions. If they perceive their harm to be serious, they journey to the land of litigation to display their pain to a finder of fact— who, in fact, may have no particular expertise or experience in trying to place a value on damages that have been sustained. The parties therefore engage experts to place a value on the type and degree of damage, whether to real property, an enterprise's expectation of profit or an individual.

Litigators face a myriad of challenges in engaging these specialized experts and preparing them to render their opinions. As they walk the road of quantifying damage, valuation experts may stray into minefields, encounter booby traps and risk being damaged themselves.

There are a number of things attorneys can do to help their experts avoid being blown up, shown up or otherwise disabled en route.

Screening the Expert Talent

This article assumes that counsel have located, screened, and selected an expert whose credentials are above reproach, who can withstand a *Daubert* challenge, and whose particular skills are what are needed for the case.

Selecting this expert who possesses the ideal expertise and demeanor has been called choosing "horses for courses." Before signing that engagement letter, the litigator should think through whether she wants a workhorse, a show horse, or a racehorse.

Is the case dependent largely on the quality and sophistication of calculations? Does counsel need a polished courtroom appearance capable of translating arcane formulae and calculations into opinions that will not put a jury panel of mere mortals to sleep? Does the case demand someone with expertise in a highly specialized area, or who can hit top speed when emergencies arise or timelines are tight? Moreover, expert fee rates span a broad spectrum and counsel may have to decide if they want to a pay a premium for the Triple Crown thoroughbred with the heavy reputation whose opinions carry extra weight as a simple matter of stature.

Rules of Engagement

In litigating a dispute, lawyers typically are armed with a set of lenses and filters that are quite different from those of accountants and valuation experts. Yet it is the lawyer's responsibility to make sure that the lawyer and the expert see eye-to-eye at all stages of the engagement.

The lawyer bears ultimate responsibility for creating and maintaining a clear vision of the nature of the controversy, the "deliverables" the expert is expected to provide, the scope of the project and the engagement deadlines and timeframes. In valuation engagements this may be particularly difficult because the damages in a case are so closely tied to an expert's conclusions.

A word of caution: Certainly no lawyer ever intends to booby-trap his own expert, yet it is common for attorneys to press the expert to accept responsibility in areas in which they truly are not qualified, or to urge the expert to include more in his testimony than the expert credibly can support.

This puts the expert at risk, and some have been known to withdraw from the minefield created by their attorneys' zeal. Depending on when the expert checks out, the exit may explode the attorney's chances of success.

Even more important in valuation engagements, the lawyer and expert must define the facts and assumptions — the "givens" — on which the expert will base the evaluation. These facts and assumptions represent the foundation of the expert's opinion, and any expert who undertakes a valuation without having them clearly defined and articulated is on a very slippery slope.

Because valuation experts do not opine about causation, they accept a certain set of assumptions as true, and then develop these "givens" into concise, precise, fully supportable opinions. Therefore, it is essential to discuss and reality-test the facts and assumptions that the expert formally will advance as the basis of the calculations.

When Case is Underway

The expert's job goes beyond merely stating conclusions. He or she must be comfortable articulating the bases for calculations and conclusions, and this, in turn, will require the ability to "deconstruct and reconstruct" the big picture into all its component parts and computations.

While the details of a valuation can be complex, at its root valuation is an exercise in determining two things: benefits expected in the future and the risk of obtaining them. The more directly the expert can relate specific facts and details to these general concepts, the more effective the testimony will be.

Complex litigation often involves multiple key dates, and valuation computations frequently depend on when and in what sequence certain events occurred. The expert will not simply be called on to opine based on a static set of facts. He or she must master the event chronology in the case.

It is noteworthy that future benefits are determined as of the valuation date, so this "future" may very well be in the past at the time of expert testimony. The valuation expert is required to develop an opinion based on the facts and circumstances that would have or could have been known as of the valuation date.

For example, if an expert is asked to determine the value of a business as of a date 10 years ago, he is not supposed to consider events and circumstances occurring after the valuation date.

Opposing counsel will delight in trying to nitpick and corner the expert, grilling him on disparate elements of the case in the hope that the expert will "detonate" due to contradictions or reveal a logical flaw in the explanation of assumptions, computations and conclusions. This is the classic, time-honored principle of "falsus in uno, falsus in omnia" — attacking expert testimony by alleging that an expert's error or misunderstanding in one component renders the entire opinion suspect.

Opposing counsel also may be on the lookout for inconsistencies on key valuation issues as a point of attack on the expert witness. As such, it is critical that counsel and the expert witness review prior court testimony by the witness to be sure he has remained consistent.

Similarly, it is a helpful strategy to review prior testimony by the opposing expert on critical valuation issues. If an expert changes his opinion on the same issue on a case-by-case basis, it raises questions regarding his independence, objectivity and professional credibility. Is the expert providing an independent opinion of value, or is he merely a hired gun?

In addition, counsel should help the expert wrestle with all the facts, even those that are "inconvenient" to the case or valuation opinion. If counsel encourages the expert to put his head in the sand, opposing counsel will be delighted to lop his body off, an event that will not endear the expert to hiring counsel. It is akin to booby-trapping the expert by keeping him in the dark about aspects of the case.

The Weight of Authority

Particularly at deposition or upon trial, an experienced expert should support his opinions with references to authoritative sources and respected third parties. For example, widely published studies and government-generated figures often are seen as highly credible to a finder of fact. On the other hand, "lone-wolf" opinions may suggest to the fact-finder that the expert is winging it.

However, there are numerous areas in the field of valuation where "reasonable minds may disagree." Issues such as what constitutes "equal unity" (under cost-based methods), the degree of comparability of transactions (under market-based methods) and the magnitude of risks specific to the subject being valued (under income-based values) are controversies the expert should acknowledge and discuss in his opinion. Awareness of valuation controversies will keep the expert from sounding dogmatic or uninformed.

Word of Mouth

Great valuations do not necessarily translate into great testimony. In fact, many judges and juries have reported that valuation testimony is as hard to digest as day-old oatmeal.

As such, counsel's role in preparing the witness for testimony is critical, but it also is another potential hand grenade.

At every level, counsel must know what the expert is going to say and in what manner and style. Yet when the opponent asks if the testimony has been rehearsed, the expert must be able to assert under oath that it was discussed — but not coached.

Moreover, all conversations with the expert are discoverable, and if counsel works too hard to "steer" the expert to reinforce counsel's favored conclusions, cross-examination may compromise the expert's position of independence and objectivity. In that case, both counsel and the expert are dead in the water.

It is the attorney's job to make sure that the expert can engage and interest his audience rather than lapse into lengthy monotones weighted down with abstract theories and heaps of numbers.

Many valuation experts love statistical formulas, abstract theories and mathematical frames of reference, and at times can get carried away with minutiae that neither interest the fact- finder nor support the overall conclusion. Good valuation experts support their testimony with demonstrative charts, simple graphs and visually appealing exhibits.

Counsel should check to see if the expert is up to date on the latest software and techniques for visual presentation of testimony. There are many software programs that can make vivid visual imprint with numbers, sequences and orders of magnitude. If the stakes are high enough, and the expert is not familiar with such presentation aids, counsel may want to consider engaging a specialized trial exhibit consulting firm to translate the valuation process and conclusions into dynamic, living color.

The lawyer may have to remind the expert that, although being able to explain the computation process is important to buttress credibility, it is the conclusion that matters most. How much was the building or the trademark or the personal reputation worth?

Without overcoaching, counsel must support the expert's focus on distilling the work into readily understandable concepts that are both technically accurate and supportive of client's position. This is the culmination of any commercial dispute — expert opinion about the value and damages that one side claims the other should pay.

The expert's testimony should answer the core questions about the damage or value that everyone has waited to hear through the fac[illegible]-ment stages of the case. That [illegible] understandable, properly supported by professionally accepted methodology and confidently presented.

In this last regard, counsel also may have to address the expert's demeanor. It is uncomfortable to comment on someone's body language, pitch or timbre of speech, posture, gesture, or dress. At the same time, it is a crucial part of the expert's impact, and many experts unfortunately lessen their impact with demeanor and delivery that appear awkward, hesitant or less than confident.

On the flip side, if the expert shows signs of overconfidence or megalomania, counsel would do well to bring him down to earth before he embarrasses himself on the record. Do not let the expert "bomb" in personal style department because you believe his astute opinions will out weigh the impression.

Marching in Step

It is not unusual for litigators to retain different experts to support different aspects of their case.

As previously noted, good lawyers do not urge valuation experts to overextend their reach, so if counsel is using several experts, they should arrange a meeting or discussion among the experts. This will help various experts' methodologies, approaches and conclusions reflect a common frame of reference and come across as coherent and mutually reinforcing.

Again, this is not about massaging the data. It is about making sure that the experts do not contradict one another, inadvertently impeach one another's methodologies or present widely differing perspectives to the finder of fact.

Know Your Opponent

This may belabor the obvious, but it is also crucial that the valuation expert learn the identity of the opponent's experts and review their reports.

Suggest to the expert that he avoid scorched-earth "shelling" of the opposing expert. It may actually support the client's cause if the expert can show an appropriate degree of respect for the opponent's expert's conclusions — emphasizing only those areas where significant and relevant differences of opinion or technique affect the valuation conclusion. This, of course, requires a timely and comprehensive review of the opponent's opinions.

A Well-Laid Plan

Complex commercial cases are indeed minefields: a lot can go wrong, and missteps are costly and sometimes irredeemable. However, with some planning, discipline and practice, litigators can get better at working with valuation experts and be able both to protect them and speed their passage through potential pitfalls.

Firm and knowledgeable control of all phases of the engagement will ensure that counsel maximizes the usefulness of the expert witness, safeguards him from risk, and actually bolsters the expert's confidence and effectiveness. And if no one can pull the pin from the hand grenade, it is no more dangerous than a paperweight.