



Litigation Outlook:
The Ins & Outs of Expert Testimony

Business valuers are frequently called upon to serve as expert witnesses in legal matters surrounding dissolution of marriage, lost profits, breach of contract, wrongful death and personal injury. If you are a lawyer involved in such a case — or the actual plaintiff or defendant — it is crucial that you know how to work with the business valuator during the legal proceedings to ensure that you are making the most of his or her expertise.

The Role of Expert Witnesses

At some point in the legal proceeding, your expert will be called upon to defend the conclusions of the business valuation he or she performed, which may, of course, differ from the conclusions presented by the opposing side.

Experts testify both in depositions and trials. Since most cases settle before trial, the deposition phase is very important. In depositions, experts serve several functions. In addition to actually giving their own testimony regarding the business valuation, experts can be extremely helpful to legal teams as they prepare to depose opposing experts.

For example, the business valuator you've hired can provide input about potential weak spots in methodology or analysis used by the other expert. He or she may also be able to provide background about the opposing expert's reputation or experience, and suggest deposition questions that would highlight weaknesses.

In trials, expert witnesses testify first under direct examination and then under cross-examination. During direct examination, the expert typically testifies about:

- his or her qualifications as an objective business valuation expert,
- the scope of the business valuation under discussion,
- methods used in the valuation, and
- financial conclusions reached.

During cross-examination, the opposing lawyer will attempt to discredit your expert's valuation. Most cross-examinations will focus on discrediting the valuation based on the qualifications of the expert, bias, procedural problems or other issues related to the expert's work and experience. It is the opposing lawyer's goal to convince the judge or jury that your expert's opinion is not the "right" opinion. Good preparation will help your expert field these inquiries with confidence.

Getting the Best Results From Your Expert

Litigation means there's a lot at stake. Take the time to choose your expert carefully and to work closely with him or her in preparation for deposition and trial.

Use experts with litigation experience. This is a specialized field, and you need someone who's comfortable in the legal arena. Look for business valuers who enjoy the specific challenges of this type of work — quick thinkers who are not intimidated by the formality and significance of legal proceedings.

Practice, practice, practice. Conduct rehearsals of depositions and trial testimony so that the expert is prepared to directly and factually answer whatever he or she may be asked, both in direct and cross-examination. Videotaping these rehearsals is often very valuable to hone the testimony.

Review the rules of the road. State rules vary, but some allow experts to testify on subjects that are simply "beyond common experience." In Federal courts, Rule 702 allows

expert testimony when “scientific, technical or other specialized knowledge” will assist in understanding evidence or determining fact. Be sure your expert understands his or her role and limitations.

Keep your distance. Your business valuation expert’s objectivity is key to his or her credibility. Don’t jeopardize it. Although it might be helpful, for example, to have your expert sit with you during your cross-examination of the opposing expert, such proximity may affect the appearance of objectivity.

Keep it simple. A business valuation is not always an easy thing to explain. But Economics 101 is not what the judge or jury signed up for. Streamline your questions so that your expert testimony gets the point across without losing the audience. Remember, you’re counting on your expert not only to complete a first-rate business valuation, but also to convince others of its reliability. It’s an important role, so choose your expert wisely.

The Whole Truth

In giving expert testimony, business valuers must acknowledge two important points about their work on your behalf:

1. **Business valuation is not exact.** Attempting to present a business valuation as flawless and precise begs difficult cross-examination. It is wise to acknowledge that a business valuation involves discretion and judgment. Experts are experts because they are qualified to make such judgments.
2. **Business valuations involve choices.** Each assumption and choice made by your expert during the valuation is subject to question. Was the methodology the absolute best one to choose? Were the financial documents used in the valuation beyond reproach? The expert must acknowledge any potential weaknesses and be ready to defend certain decisions.