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HOW TO CROSS EXAMINE A VALUATION EXPERT

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I. INTRODUCTION

The cross-examination of a valuation expert represents one of the most significant challenges for a family law attorney. Most family law attorneys are not experts in valuation theory and may have limited educational background in finance. Therefore, in the majority of family law cases involving a community ownership in a business, the attorneys rely on valuation experts to determine and defend an indication of value for the community interest.

A valuation expert's role is not to be an advocate for either party in a dispute. Instead, the valuation expert is an advocate for their opinion and should provide an independent assessment of all relevant factors that combine to establish the value of the appraised interest. Valuation will generally produce a supportable range of value for a business or business interest. However, valuation opinions for family law are typically expressed as a single point estimate of value. As such, given the number of subjective assumptions that are necessary to determine the fair market value of a community ownership interest in a business entity, it occurs frequently that experts conclude at different values. Sometimes, the difference in values can be significant and settlement based on the opposing expert's analysis can have a material detrimental impact on your client's post-settlement lifestyle.

As such, it is important that the cross-examination of a business valuation expert sows doubt in the mind of the judge and/or jury that the opposing expert's testimony is reliable. Cross-examination should serve at least one of three purposes: (1) to obtain helpful admissions of evidence, (2) to contradict or impeach the witness, and/or (3) to create an impression to the trier of fact that your expert is more credible. This article discusses the factors family law attorneys should be knowledgeable of and the issues to consider in preparing to cross-examine a valuation expert.¹

II. PREPARATION FOR CROSS-EXAMINATION

Cross-examining an opposing expert involves extensive preparation well in advance of trial. In fact, the groundwork is laid well before the deposition. The deposition of an opposing expert can be the turning point in a case, and can even facilitate settlement in their client's favor. Thus, every moment spent preparing is a worthwhile investment and can result in saving both time and the risk inherent at trial. A well-researched, well-executed expert's deposition can be critical in winning a case.

As most attorneys are aware, preparation is the key to a successful cross-examination. Each cross-examination needs to be based on the facts and circumstances of the individual case. There is no "one-size-fits-all" template for the cross-examination of a valuation expert, and each attorney likely has their own style for conducting both depositions and cross-examinations.

¹ Note, the article does not focus on the "art" of cross-examination. The intent is to provide the attorney a summary of the main factors to consider in respect to preparing for a successful cross-examination of a valuation expert. Additionally, there are many examples of boilerplate questions that can be used for the cross-examination of a valuation expert. Many of these questions can be utilized during a cross-examination; however, the most critical questions in demonstrating the weaknesses in an opposing expert's valuation analysis are likely to be case specific.

Knowledge of the following factors will assist any attorney in preparing for the deposition and cross-examination of an opposing valuation expert.

A. *Know Your Case*

Once the opposing party has answered discovery, counsel should study the issues including reviewing any relevant literature. Experts often mistakenly assume their superior knowledge in their area of valuation can substitute for knowledge of the facts. To be successful in a cross-examination, an attorney should become intimately familiar with the case. Once an attorney has developed a strong understanding of the facts related to the business, they may have gained a significant strategic advantage over some experts. This knowledge allows an attorney the opportunity to undermine an expert's opinions by showing they may have failed to study the specifics of the case and relied upon their "valuation expertise."

In cross-examination, it can be useful to show a lack of knowledge of the opposing expert in respect to the business in particular and/or the industry in general. This is powerful if there is a contrast between the experts. Many times both experts are speaking a language difficult for either the judge or jury to understand. At the outset, both a judge and jury will likely be neutral and assume each expert is expressing their true beliefs and opinions. Both experts will explain plausible sounding explanations to support their conclusions. Because of all the subjective decisions that the valuator makes during the valuation process, if one expert seems to know the business and the industry better than the other expert, those listening are more likely to accept the conclusion of the expert that shows a deeper knowledge of both the business and industry.

B. *Leverage Your Expert*

The effective cross-examination of a valuation expert requires an understanding of the entire valuation process, from the qualifications of the valuation analyst through the selection of the valuation approaches and methods. The family law attorney should approach the opposing expert's valuation analysis and report as a process in which each step (1) is important to the valuation analysis and (2) builds upon the previous steps. One of the most efficient ways to achieve this approach is to consult with your own expert(s). The valuation expert can assist the attorney in preparing a questioning algorithm to undermine the opinions of the opposing expert. This process should include meetings with your experts to formulate questions that attack the main weaknesses in the anticipated testimony. The attorney should also include in this process the time to learn relevant terminology of both the business and the industry, as well as attaining a clear understanding of the valuation methodologies and approaches used by the opposing expert in their analysis.

The valuation expert should be able to provide a list of potential questions and focus areas for cross-examination of the opposing expert based on the specific facts and circumstances. Cross-examination should be used to zero in on the major weaknesses or flaws in the opposing appraisal report to convince the judge not to adopt that expert's opinion. The valuation expert should advise the attorney about the opponent's valuation and identify significant flaws or weaknesses. The expert can then provide appropriate questions for cross-examining the opposing expert as well as back-up documentation to support the questions to ask during cross-examination. The expert should be involved in the process throughout, including assisting the

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