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Dollars and Times: Is the Business Valuable?

Matthew H. Connors

Rocky Mountain Advisory
Salt Lake City

Shelly L. Cuff

Development Specialists, Inc.
Los Angeles

Brad E. Dempsey

Faegre Drinker Biddle & Reath LLP
Denver

Hon. Joseph G. Rosania

U.S. Bankruptcy Court (D. Colo.)
Denver

Craig K. Schuenemann

Bryan Cave Leighton Paisner LLP
Denver

**DOLLARS AND TIMES – YOUR BUSINESS IS
VALUABLE**

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DOLLARS AND TIMES – YOUR BUSINESS IS VALUABLE

Modern Resources Valuation Experts May Rely on When Valuing Businesses

The following is a non-exhaustive list of common resources that might be used by those performing a valuation. This list of resources is not intended to be an endorsement as each valuation expert should independently evaluate and assess the appropriateness of the resource prior to reliance.

Valuation Basics, Approaches & Methodology

Resources to describe the various approaches and application of business valuation.

1. Koller, T., Goedhart, M. H., Wessels, D., Copeland, T. E., & McKinsey and Company. (2005). *Valuation: Measuring and managing the value of companies*. Hoboken, N.J: John Wiley & Sons.
2. Damodaran, A., (2011) *The Little Book of Valuation: how to Value a Company, Pick a Stock and Profit*. New Jersey: John Wiley & Sons, Inc.
3. Damodaran, A., (2015) *The Dark Side of Valuation: Valuing Young, Distressed, and Complex Businesses*. Ft Pr.
4. Damodaran, A., (2001) *The Dark Side of Valuation: Valuing Old Tech, New Tech and New Economy Companies*. New Jersey: Prentice Hall, Inc.
5. Brealey, R., Myers, S. & Allen, F. (2020) *Principles of Corporate Finance*. McGraw-Hill Education
6. Pratt, S. P., & Niculita, A. V. (2008). *Valuing a business: The analysis and appraisal of closely held companies*. New York: McGraw-Hill. The go-to valuation guide for 40 years authored by Shannon Pratt “the father of business valuation”. 6th edition to be released in March 2022.
7. Pratt, S. P., & Grabowski, R. J. (2014) *Cost of Capital: Applications and Examples*. New Jersey: John Wiley & Sons, Inc.
8. Pratt, S. P. (2009) *Business Valuation Discounts and Premiums*. New Jersey: John Wiley & Sons, Inc.
9. Shaked, I. and Reilly, R. (2017) *A Practical Guide to Bankruptcy Valuation*. North Carolina: American Bankruptcy Institute.
10. Palepu, Healy & Bernard, (2000) *Business Analysis & Valuation*. Ohio: South-Western College Publishing.
11. Thomas, R., & Gup, B. (2010) *The Valuation Handbook: Valuation Techniques from Today's Top Practitioners*. New Jersey: John Wiley & Sons, Inc.

Professional Organizations

There are several professional organizations that valuation experts can look to for professional standards guidance and COVID-19 updates.

1. American Institute of Certified Public Accountants' (AICPA)
 - a. If a valuation expert is an accountant or holds an accounting certification, the AICPA Code of Professional Conduct (AICPA Code of Professional Conduct) governs all services rendered by Certified Public Accountants (CPAs) who are AICPA members.
 - i. AICPA members and their employees are required, at a minimum, to adhere to the Statement on Standards for Consulting Services Section 100, Definitions and Standards (CS Section 100) when performing litigation support services. CS Section 100 specifically subjects litigation support engagements to Rules 1.300.001, 1.310.001, and 1.100.001 of the AICPA Code of Professional Conduct.
 - ii. Also see Statement on Standards for Forensic Services No. 1 FAQs
 - b. Valuation Services¹
 - c. COVID-19: Valuation Services Resources:²
 - i. DiNatale, Nathan; Hitchcock, Ethan; Maloney, Shaun; Reck, Thomas; Rutecki, Maureen; Shilts, Josh and Wapner, Paul (2020, June 2). *Valuation Considerations related to the CARES Act*. AICPA.³
 - ii. Considerations when valuing distressed or impaired businesses FAQs
2. National Association of Certified Valuators and Analysts (NACVA).
 - a. CS Section 100: Standards for Consulting Services⁴

¹ <https://www.aicpa.org/topic/valuation-services>

² <https://www.aicpa.org/category/resources/valuation-services/covid-19-valuation-services>

³ <https://www.aicpa.org/resources/article/valuation-considerations-related-to-the-cares-act>

⁴ CS Section 100 establishes and defines certain terms and types of services applicable to AICPA members holding themselves out as CPAs when providing consulting services. Specifically, CS Section 100 defines the "Consulting Services Practitioner," the "Consulting Process," and "Consulting Services." CS Section 100 also defines certain services that qualify as consulting services for purposes of the standard, including "consultations," "advisory" services, "implementation" services, "transaction" services, "staff" and other support services, and "product" services. Litigation services, including the preparation of expert reports, are

- b. Rule 1.300.001: Accepting and Performing the Engagement⁵
- 3. American Society of Appraisers (ASA)
- 4. CFA Institute
- 5. American Bankruptcy Institute (ABI)
- 6. Association of Insolvency and Restructuring Advisors (AIRA)
- 7. Turnaround Management Association (TMA)

Market Analysis Various databases containing data useful for market research and analysis, cost of capital development, relevant transactions, and comparable company identification as well as analyst insights. Many of these resources enable the valuation expert to capture expectations and information at the time of the valuation date.

- 1. Capital IQ – data platform with market and financial data, analytic capabilities and repository for extensive research.⁶
- 2. Ibbotson SSBI Yearbooks – Annual publication of historical U.S. capital markets data. Includes returns, index values, and statistical analyses of U.S. large-company stocks, small company stocks, long-term corporate bonds, long-term government bonds, intermediate-term government bonds, U.S. Treasury bills, and inflation from January 1926 to present (monthly).⁷
- 3. Damodaran online – NYU Stern Professor Aswath Damodaran’s website with material from his classes, writings and data compiled including estimates of equity risk premiums and costs of capital.⁸
- 4. Analyst reports – available through platforms such as Capital IQ, Argus, Thompson Reuters or directly from the authoring firm.
- 5. Moody’s economy.com - global economic analysis, data, forecasts, scenarios, models and advisory services.

classified as transaction services by the AICPA, or services in which the practitioner’s function is to provide assistance related to a specific client transaction, generally with a third party.

⁵ CS Section 100 requires practitioners engaged in litigation support services to comply with the “general standards” of the accounting profession as promulgated by AICPA Rule 1.300.001. Rule 1.300.001 requires that practitioners possess professional competence, exercise due professional care in the performance of their work, adequately plan and supervise the performance of staff, and obtain sufficient relevant data to afford a reasonable basis for conclusions reached. The expert report, in turn, should also contain relevant information supporting compliance with these standards.

⁶ <https://capitaliq.com>

⁷ Now available through Duff & Phelps

⁸ <https://pages.stern.nyu.edu/~adamodar/>

6. SEC EDGAR database – public filings including 10Ks, 10Qs, 8Ks⁹
8. News Media

Academic Research & Publications

Many peer-reviewed academic journals contain publications on specific financial, economic and valuation topics that professionals can look to for guidance. The following is by no means an exhaustive list but a starting point for scholarly articles and research.

1. Journal of Financial Economics¹⁰
2. The Journal of Finance¹¹
3. The Review of Financial Studies¹²
4. International Review of Economics & Finance¹³
5. Journal of International Money and Finance¹⁴
6. Annual Review of Financial Economics¹⁵
7. American Economic Review¹⁶
8. Journal of Banking and Finance¹⁷

Government Resources.

Government authorities and publications for use in various components of valuation including identifying the risk-free rate and tax rates used in a Weight-Average Cost of Capital analysis, general economic conditions to evaluate systematic risk. Like the market analysis resources, the following government resources can assist the valuation professional in determining the expectations and information at the time of the valuation date. Government resources can also

⁹ <https://www.sec.gov/edgar/search-and-access>

¹⁰ <https://www.sciencedirect.com/journal/journal-of-financial-economics>

¹¹ <https://afajof.org/journal-of-finance/>

¹² <https://academic.oup.com/rfs>

¹³ <https://www.journals.elsevier.com/international-review-of-economics-and-finance>

¹⁴ <https://www.journals.elsevier.com/journal-of-international-money-and-finance>

¹⁵ <https://www.annualreviews.org/journal/financial>

¹⁶ <https://www.aeaweb.org/journals/aer>

¹⁷ <https://www.journals.elsevier.com/journal-of-banking-and-finance>

offer guidance on the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)¹⁸ and the related Paycheck Protection Program loans (“PPP”) for consideration in valuations during the COVID pandemic.

1. Internal Revenue Service (IRS)¹⁹
 - a. Coronavirus Tax Relief²⁰
2. U.S. Department of the Treasury²¹
 - a. Covid-19 Economic Relief²²
3. U.S. Bureau of Economic Analysis (BEA)²³
 - a. Covid-19 and Recovery in BEA Data²⁴
 - b. COVID-19: Spending Estimates²⁵
4. Bureau of Labor Statistics (BLS)²⁶
5. U.S. Census Bureau²⁷
6. The Federal Reserve
 - a. Monetary Policy Reports²⁸
 - b. Economic Research²⁹

¹⁸ Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>

¹⁹ <https://www.irs.gov/>

²⁰ <https://www.irs.gov/coronavirus-tax-relief-and-economic-impact-payments>

²¹ <https://home.treasury.gov/>

²² <https://home.treasury.gov/policy-issues/coronavirus>

²³ <https://www.bea.gov/>

²⁴ <https://www.bea.gov/recovery>

²⁵ <https://www.bea.gov/recovery/estimates-from-payment-card-transactions>

²⁶ <https://www.bls.gov/>

²⁷ <https://www.census.gov/>

²⁸ <https://www.federalreserve.gov/monetarypolicy.htm>

²⁹ <https://www.federalreserve.gov/econres.htm>

7. International Monetary Fund³⁰
8. 8. U.S. Department of Housing and Urban Development³¹

Industry and business type classification

If either comparable company or transaction information is being utilized in the valuation, the valuation professional can look to widely accepted classifications of various industries to identify comparable data.

1. North American Industry Classification System (NAICS) – the “NAICS system was developed for use by Federal Statistical Agencies for the collection, analysis and publication of statistical data related to the US economy.” The NAICS replaced the Standard Industrial Classification system in 1997 to establish a North American standard.³²
2. Standard Industrial Classification (SIC) – A system established in the United States in 1937 for classifying industries by the primary line of business of a company. The SIC system is also used by certain foreign government agencies.³³

Appraisal Resources

Resources for use in valuation of real estate assets and third-party appraiser registers should the valuation professional opt for the use of a subject matter expert.

1. National Registry of Appraisers – Appraiser Registry of State certified and licensed appraisers who are eligible to perform appraisals in federally related transactions maintained by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.³⁴
2. Appraisal Institute – professional association of real estate appraisers. The institute also publishes the Valuation magazine and The Appraisal Journal.³⁵
3. City and county assessor websites – for use in determining property assessment information and transaction history.

³⁰ <https://www.imf.org/en/Home>

³¹ <https://www.hud.gov/>

³² <https://www.naics.com/>

³³ <https://siccode.com/>

³⁴ <https://www.asc.gov/National-Registries/NationalRegistry.aspx>

³⁵ <https://www.appraisalinstitute.org/>

ABI Valuation Panel Discussion

What Experts Need to Get You the Best Report/Testimony

Sufficient Relevant Data

1. Certified Public Accountant (“CPA”) practitioners are required by the American Institute of Certified Public Accountants (“AICPA”) general standards rule to gather *sufficient relevant data* on which to base their opinions.
2. Accredited Senior Appraisers (“ASA”) governed by the Uniform Standards of Professional Appraisal Practice (“USPAP”). The Scope of Work Rule under USPAP requires that, “the scope of work must include the research and analyses that are necessary to develop credible assignment results.”
3. There is no template of information the analyst needs. Generally, an “initial document request” is provided. Then on review of that information and based on information the analyst gathers, additional documents may be necessary. A generic example of documents an expert can collect and discussion points that can be covered is included as “Sample Document Request.” Similar lists are relatively easy to find for the valuation analyst.

Timing and Level of Expert Involvement

1. Involve your expert sufficiently early in the matter to allow them to gather the information, analyze it, conduct interviews if necessary, perform site visits if necessary, ask follow-up questions, and submit their draft report.
2. An expert who doesn’t know the case well is not going to be prepared when cross examined. The expert will likely not know where opposing counsel’s questions are leading. If the valuation work is key to your case, think twice before limiting the scope of what your expert is told or the amount of documents they are provided the opportunity to review.
3. If the case budget does not allow for the expert to be as involved, and without impairing your expert’s objectivity, educate your expert on what the opposing counsel might try to get him/her to say to turn the expert into their witness.
4. Expect your expert to be in the documents and data.
5. The extent to which the expert can be given the opportunity to review documents and depositions or attend key depositions is helpful in having that expert prepared so that opposing counsel has a more difficult time turning them in to their own witness.
6. Keep your expert informed of deadlines as far out as you know them.

Scope of Work and Reporting Requirements

1. Work with your expert to set the scope of the valuation work to be performed so everyone is clear from the outset what discounts will apply. Be familiar with

the differences between control v. non-control, and marketable v. non-marketable.

2. Your expert should understand their reporting requirements, but either way, it is a discussion to have.
3. Reporting requirements may allow the valuation analyst to scale the scope of the engagement to fit the circumstance of a bankrupt entity:
 - a. AICPA Statement on Standard for Valuation Services No. 1 (“SSVS1”) indicates that, “A valuation performed for a matter before a court, an arbitrator, a mediator or other facilitator, or a matter in a governmental or administrative proceeding, is exempt from the reporting provisions of [SSVS1]. The reporting exemption applies whether the matter proceeds to trial or settles. The exemption applies only to the reporting provisions of [SSVS1]. The developmental provisions of [SSVS1] still apply whenever the valuation analyst expresses a conclusion of value or a calculated value.
 - b. ASAs are subject to the sometimes more stringent USPAP requirements. Reporting requirements under USPAP fall within Standard 10 of USPAP. USPAP indicates that “When the intended users include parties other than the client, an Appraisal Report must be provided. When the intended users do not include parties other than the client, a Restricted Appraisal Report may be provided.” Reporting requirements differ between an Appraisal Report and Restricted Appraisal Report as detailed in USPAP Standard 10.
 - c. The Jurisdictional Exception Rule may allow non-compliance with USPAP.

Use of Experts in Depositions

1. Consider whether it is appropriate to have an expert either assist prepare questions for deponents who are key to their work or attend in person or via Zoom or the like.
2. Consider how comfortable you are with the accounting material such as identifying the financial records need to be asked about and this may impact whether the expert is asked to attend in person.
3. Your expert should be able to assist you ask not only the best questions to elicit information, but also the best follow-up questions if an accounting-informed witness is being evasive.

Preparing Business Valuation Experts

The outcome of many bankruptcy cases depends on the value of the assets in question. Valuation is critical many high profile cases turn on the value of real estate assets of the debtor’s business enterprise value. Asset and business valuations drive creditor recoveries and solvency determinations. More often than ever, valuation is the subject of extensive litigation

in today's bankruptcy cases. As a result, valuation disputes often become a battle of the experts, the reasonableness of their assumptions, and their relative credibility. Choosing the right expert and preparing that expert, is key to you winning the valuation battle and the larger case. This article is aimed at providing resources to help you choose and prepare the right valuation expert for your case.³⁶

Selecting the Expert

A methodical approach to selecting the right valuation expert will yield the best results. Counsel should also be cognizant of the rules of evidence and rules of civil procedure when conducting the search for the right expert. Rule 702 of the Federal Rules of Evidence requires an expert to have appropriate "knowledge, skill, experience, training, or education" to "testify in the form of an opinion or otherwise" on the subject matter at issue. The interview process should focus on an expert with the appropriate degree of knowledge, skill, and experience, but other factors are equally critical. An expert that has extensive valuation experience in the wrong business sector may not be a good fit. Similarly, intangible items such as the expert's ability to clearly convey his findings or his credibility with the judge presiding over the case are also important.

The following is a list of potential items to consider during the process of searching for the right valuation expert:

1. Conflicts. The expert must be able to testify in the case.
2. The Expert's general academic and business credentials. The expert must be qualified to provide the opinion and meet *Daubert* requirements.
3. Industry experience.
4. Bankruptcy experience and other valuation experience.
5. Client base on past engagements: Creditors, Debtors, or a mix.
6. Availability. The expert should have sufficient time to address the questions at issue in the case and be available for discovery and trial.
7. Referrals. Colleagues are often the best source for good valuations experts.
8. Prior qualification, challenges, or disqualifications.
9. Prior deposition experience.
10. Prior testifying experience.
11. Track record. Has a court rejected the expert's opinions or analysis in the past.
12. ☐ Any published decisions involving expert.

³⁶ This article relies upon and builds upon the information provided in the article by Steven T. Waterman, Bruce B. Bingham, Eric J. Held, David M. Hillman, Preparing Expert Valuation Reports, 030117 ABI-CLE 81, March 1, 2017 American Bankruptcy Institute 81 (specific cites omitted).

13. Aspects of any opinions challenged/questioned by a court.
14. Experience before this judge or in this particular court in the past.
15. Previous work for or against other side (and their counsel).
16. Previous work with opposition expert.
17. Previous work for or against client.
18. Relevant publications.
19. The expert's preliminary thoughts on how he would approach the case and his retention by the client.
20. The expert's ability to work with the client and the client's business practices.
21. Alignment and ability to work with other experts in the case.
22. Fee structure.
23. The expert's ability to testify persuasively and stand up to a rigorous cross-examination.

Finally, attorneys should consider their own bias in selecting the appropriate expert - whether you are seeking to retain a qualified expert or seeking an expert who will testify favorable to the position you advocate plays a role in the evaluation process. Counsel should attempt to find the right expert to support the client, not just an expert that will adhere to counsel's perspective on the case.

Disclosures and Discovery

The expert offering testimony to convince the judge that his opinion on value is the correct one is the ultimate goal and reason for hiring an expert in the first place. To reach the point where the expert delivers his opinion on value to the Court, the expert and counsel must satisfy several requirements along the way. Apprising the expert of those requirements and adequately preparing the expert to meet those milestones must be part of the preparation process in any case. In most cases, those milestones include:

1. Disclosure
 - a. Parties must disclose the identity of expert witnesses. *See* Rule 26(a)(2)(A) of the Federal Rules of Civil Procedure ("Fed.R.Civ.Proc.").
 - b. Parties must exchange expert reports signed by the experts. *See* Fed.R.Civ.Proc. 26(a)(2)(B).
 - c. It should be noted that the disclosure and expert report requirement applies in adversary proceedings, but not in contested matters unless the court orders otherwise. *See* Fed. R. Bankr. P. 9014(c).
2. Reports

3. Fed.R.Civ.Proc. 26(a)(2)(B) provides that an expert report must contain:
 - a. a complete statement of all opinions the witness will express and the basis and reasons for them;
 - b. the facts or data considered by the witness in forming them;
 - c. any exhibits that will be used to summarize or support them;
 - d. the witness's qualifications, including a list of all publications authored in the previous 10 years;
 - e. a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
 - f. a statement of the compensation to be paid for the study and testimony in the case.
4. Fed.R.Civ.Proc. 26(a)(2)(D)(ii) provides that, absent a court order or stipulation between the parties, experts may file rebuttal reports.
 - a. A rebuttal report is supposed to respond to or contradict another expert's report, and not inject a new or revised opinion.
 - b. If the rebuttal report is not a true "rebuttal," the report could be stricken and the expert could be precluded from testifying to the substance of the rebuttal report.
 - c. The Court may also authorize Reply reports or Supplemental reports as it sees fit.
5. Discovery
 - a. In addition to providing an expert report, experts are subject to discovery.
 - i. Disclosure of materials relied upon and considered by the expert must be provided to opposing counsel upon request.
 - ii. Draft expert reports are not discoverable. *See* Fed.R.Civ.Proc. 26(b)(4)(B).
 - iii. Communications between an expert and counsel are not discoverable under Fed.R.Civ.Proc. 26(b)(4)(C).
 - b. Experts are also subject to deposition and should be prepared to provide testimony supporting their opinions and conclusions in their depositions.

Proactive management of discovery and disclosure obligations is the responsibility of both counsel and the expert. Counsel must ensure that the expert is aware of the obligations and the deadlines to address those obligations. The expert needs to be responsive and ready to provide the disclosures and reports as they become due. When depositions are scheduled, counsel and

the expert should work closely to ensure the expert is ready to testify in a manner that supports the client.

Orienting the Expert Witness

When approaching either the expert's deposition or trial, counsel needs to properly orientate the expert witness to set the expert up for success. How much time should be spent on this orientation depends upon the expert witness's level of experience and the particulars of the case at hand. The orientation should include going over housekeeping matters, briefing on law and procedure, explaining the likely goals of opposing counsel, and general guidance on the case and the valuation they have been asked to do.

1. Housekeeping
 - a. General housekeeping and administrative items may not seem important, but are in fact important. Ensuring that the expert is on top of housekeeping matters will serve to minimize distractions and allow the expert to focus on matters of substance. The following are some of the administrative items that should be addressed:
 - i. When and where to appear.
 - ii. The posture of the hearing or deposition.
 - iii. The anticipated length of the hearing or deposition.
 - iv. Logistics and parking.
 - v. Who will be present for the hearing or deposition, including how many attorneys and other experts will be around.
 - vi. Court reporters, videotaping, and format.
2. Law and Procedure
 - a. The law, procedure, and practices of the Court are also important. Time should be dedicated to educating the expert on these subjects. How much time to spend on these items depends upon the expert witness's experience. The expert should understand:
 - i. Opposing counsel's role and the restrictions (or lack thereof) on what opposing counsel can ask at the deposition or hearing. Experts can get annoyed and frustrated when asked seemingly irrelevant questions. This can detract from the expert's performance.
 - ii. The role of counsel should also be discussed. The expert needs to understand the implications of counsel's actions such as a decision to not ask certain questions or what to do when an objection is made.

- b. Counsel should also provide the expert an understanding of the proceedings that are taking place and the expert's role in those proceedings. A lack of understanding of the rules and procedures can be as damaging to an expert as a lack of substantive knowledge in some instances.
- 3. Opposing Counsel's Goals and Strategy
 - a. The expert witness needs an orientation to the likely strategies and goals of opposing counsel in this case. At a minimum, your expert witness should understand the following:
 - i. Opposing counsel's position with respect to the expert's testimony and how that position will play out in cross-examination.
 - ii. Opposing counsel's likely avenues for impeaching the expert witness.
 - iii. Opposing counsel's potential attacks on the expert's character or credibility.
 - iv. Opposing counsel's anticipated style of questioning.
 - b. Coaching and practice to counter opposing counsel's approach will raise the expert's confidence and allow the expert to perform at his best.
- 4. General Guidance for the Expert
 - a. At a minimum, the expert must have a firm understanding of the following:
 - i. Expert witnesses are to tell the truth. This is their legal and ethical duty.
 - ii. Listening skills are as important or more important than communication skills. The expert should focus on the precise question asked.
 - iii. Opposing counsel is not the expert's friend. Opposing counsel is asking questions to discredit or impeach the experts work. They are not your friend and testimony is not conversation.
 - iv. The expert should stick to the opinions and conclusions set forth in his expert report.
 - b. Preparation is the key to success for a testifying expert. Whether the testimony is going to be given at a deposition or at trial the expert should be prepared to dedicate significant time to reviewing both his expert report and any material opposing counsel could use to cross examine him.

Elements of an Expert's Opinion on Value—Establish the “Basics”

When an expert offers a valuation opinion, regardless of whether the opinion is provided in his written report or during testimony, the expert needs to be prepared to address several basic items. The following is a list of items that the expert should be ready to address:

1. A knowledge and understanding of the case law pertaining to valuation opinions in the applicable jurisdiction.
2. Compliance with rules and standards that relate to the expert's report or testimony.
3. An understanding of the client's goals and reason for the expert valuation report.
4. The definition and standard of value applicable to the case.
5. Fair value, fair market value, treatment of discounts and premia.
6. Going concern value and how it may be impacted by orderly or forced liquidation, hypotheticals.
7. Various approaches to valuing the items in question.
8. Income, cost, market definitions.
9. An explanation for why certain approaches to valuation were employed and others were omitted.
10. The valuation date and its importance to the case.

The Expert's Role in Preparation

Counsel bears the burden of ensuring the expert is properly prepared to offer his opinion in the case. That being said, experts, as professionals in the case, also have significant responsibilities to ensure they serve the client's needs. Some of an expert's responsibilities include:

1. Properly defining the expert's role in the case at retention.
 - a. Ask for a clearly defined scope of engagement.
 - b. Ensure an adequate engagement letter is provided.
 - c. Ensure that there are no conflicts that could impact the expert's ability to participate in the case.
 - d. Check availability for the engagement.
2. Obtaining adequate information from counsel.
 - a. Ask for and review background, case information and reliance documents.

- b. Request discovery of documents not available from client.
 - c. Dictate breadth/scope of discovery (do not rely solely on counsel to guide or on what counsel provides).
 - d. Perform an early analysis.
- 3. Employ the appropriate analytical methods, and adjust when appropriate.
- 4. Apply the correct standards in harmony with professional literature, professional organizations, case law, etc.
- 5. Reach an independent conclusion (your opinion, not counsel's) in time to adjust based on additional information or an opposing experts theories.
 - a. Prepare an expert report that accurately sets forth the opinion and supports that opinion.
 - b. Prepare to support the conclusions in the expert report at deposition and trial.

Selecting and preparing a valuation expert is a process that involves extensive interaction and cooperation between counsel, the client, and the expert witness. Open lines of communication and adequate planning are necessary to give an expert the best chance of succeeding in his role. All parties involved should develop a comprehensive strategy to address valuation early in the case and ensure that the strategy implemented as the case develops. The checklists and guidance provided above is intended to aid practitioners and expert witnesses in their efforts to provide the best possible expert testimony they can to the Courts.

Effective Presentation of Expert Testimony in Bankruptcy Proceedings

The presentation of expert testimony can often be critical in a bankruptcy contested matter or adversary proceeding. Bankruptcy judges as fact-finders must routinely make critical findings on value, feasibility, solvency, an appropriate cramdown interest rate, industry standards, or determining aspects of foreign law. In preparing for trial on these matters, counsel should pause to carefully consider the most effective and impactful ways to present such testimony to the court and thus provide the court with all the tools necessary to increase the likelihood of a favorable ruling in their client's favor.

When the bankruptcy judge serves as the fact-finder, what is the most effective way to present to a bankruptcy judge the expert opinion testimony of an appraiser, a financial advisor or/investment banker, a forensic accountant, or an expert on unique attributes of the debtor's business or industry that impact valuation?

Be Prepared – Proactively Develop Expert Relationships in Advance

Unlike traditional civil litigation, bankruptcy cases can often require the need and use of expert testimony on a moment's notice and on an exceptionally accelerated schedule. Bankruptcy counsel that has proactively worked to build relationships with potential experts in advance as a matter of their own practice development will not lose critical time searching and vetting potential experts. Rather, such proactive relationship building will enable counsel to quickly

engage and prepare a known and vetted expert and devote precious time prior to trial to sharpening their expert's testimony and response to cross-examination.

Consider the Needs of the Audience – Craft Your Presentation to Provide All Factual and Legal Tools for the Court to Decide the Issue in Your Favor

When the bankruptcy judge is the fact finder and there is no jury, there is rarely a need to devote resources to prosecute *Daubert* challenges to exclude expert testimony. With no need to be a gatekeeper for a jury, bankruptcy judges often deny *Daubert* challenges in favor of receiving the testimony at trial and determining the weight to place on such testimony depending on the direct and cross-examinations.³⁷

Most importantly, counsel must put themselves in the shoes of the bankruptcy judge to understand the factual and legal requirements the court must apply in the specific matter and to clearly understand and anticipate the specific tools the judge needs within the evidentiary record to prepare specific findings and conclusions for a decision in their client's favor. Unlike general verdicts rendered by juries in other civil litigation, bankruptcy judges are required to detail their findings and conclusions supporting their judgment. *See* Fed. R. Civ. P. 52, made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7052. Accordingly, as they make their findings and conclusions, bankruptcy judges must have two things:

- a. a clear and specific opinion from the expert and a detailed explanation of the methodology and facts upon which the opinion is premised, and
- b. clear testimony in the record from other witnesses to provide a foundation and a supporting bridge to the expert's opinion and any potential deviations from the expert's opinion that the court may apply.

In the recent case of *In re Lakeview Dev. Corp.*, 632 B.R. 697 (Bankr. D. Colo. 2021), Bankruptcy Judge Elizabeth E. Brown highlighted the following rules that bankruptcy judges as fact-finders must follow when relying on opinion evidence in their decisions:

1. A court may disregard the opinion of an expert and use its own judgment in arriving at a decision on an issue, however it may not reject opinion evidence and make arbitrary findings on the issue that are not supported by any substantial evidence.
2. When a court receives conflicting valuation evidence from two parties, it is free to choose either valuation, neither valuation, or a value somewhere in between the two values offered.

³⁷ Although *Daubert* motions are rare in bankruptcy proceedings, they are not extinct. In *Weinman v. Crowley (In re Blair)*, 588 B.R. 605 (Bankr. D. Colo. 2018), Bankruptcy Judge Thomas B. McNamara granted a motion to exclude the expert testimony of the chapter 7 trustee's expert in the area of accounting and insolvency. While the Court found the expert qualified as an expert and purported to employ an accepted methodology, the court found the expert's opinions to be unreliable as the expert did not have sufficient facts or data to apply the method and failed to properly apply the method to the collected facts and data.

- a. When it does, the court's value will be subject to an abuse of discretion standard. But it abuses its discretion if it fails to articulate why it has selected the value ascribed and where the court's valuation finds no support in the record. In other words, the court's finding of value must be tethered to the evidence admitted.
- b. The court may base its findings on the credibility of experts, the credibility of lay witnesses, documentary support, or any combination of the same. But it cannot arbitrarily "split the baby" or select a different figure without articulating its basis in reliance on the evidence admitted.

In her opinion, Judge Brown included the following example provided by another court:

3. For example, if wife's expert determines that the value of a marital asset is \$10 million and the husband's expert testifies that the value is \$5 million, the court cannot on that evidence alone set the value at \$7.5 million. However, if wife's expert testifies that husband's expert used an improper multiplier in reaching his valuation and then provides an opinion as to the proper multiplier, the court could use either multiplier in determining valuation, thereby reaching a differing value supported by the evidence.

Winning the Battle of Experts at Trial –Presentation Considerations

Given the often critical importance of expert testimony, counsel should be sure to dedicate adequate time prior to trial to (1) prepare to prepare the expert for trial, (2) prepare the expert for trial, (3) prepare careful direct and cross-examinations for the experts.

1. **Preparing to Prepare the Expert:** Counsel should thoroughly review and understand the expert's report (to a level such that counsel could theoretically testify as the expert). Counsel should know and be able to articulate as well as the expert the methodology employed to reach the expert's opinion. Such understanding helps in developing the outline of direct examination and the most effective and impactful framing of questions. It also generates ideas on potential summaries or demonstratives visual aids that can be used to clarify, highlight, and promote confidence in the expert's opinion. Thorough understanding also develops awareness of potential vulnerabilities on cross and a proactive opportunity to prepare credible and persuasive responses to address any weaknesses. If counsel hasn't read the report several times and independently worked the math and analysis, all later trial preparation and presentation will be less effective and impactful.
2. **Prepare the Expert:** Counsel should carve out sufficient and dedicated time to carefully focus on preparing the expert for their trial testimony and cross-examination. Even the most seasoned experts that routinely testify require focused preparation to present the most credible, illustrative, persuasive, and effective version of their testimony. Seasoned but unprepared experts quickly lose their efficacy and influence if they fumble and/or can't recall facts, appear as though they have been sloppy, lazy, or disinterested in providing a careful, clear and effective briefing to the court on their opinions, methodology, and review of and understanding of the facts necessary to form their opinions.

Adequate time should also be dedicated to working with the expert on developing visual aids to enhance the testimony.

3. Preparing Careful Examinations: As early as possible when preparing the expert, counsel should be preparing draft outlines for direct examination, anticipated re-direct examination, and cross examination of the other party's expert. For best results, counsel and the expert should devote time to practicing the direct examination, practice the use of all visual aids, and work to fine-tune the presentation to establish rapport during the examination, eliminate weakness in the questions or responses, and generate a confident and clear presentation. Counsel should also familiarize the expert on the particularities of the judge, the potential for the judge to ask questions in addition to cross-examination, and strategies to establish strong rapport with the judge, such as improving eye contact, volume and speed of speech, etc. The following topics should be part of the direct examination of the expert but tailored to the specific needs of the matter at issue, the time permitted to present the expert, and the need to offer the court alternative options to decide the issue:
 - a. Expert's background, professional credentials, and other testimony to establish expert qualification. In some circumstances, the court may not require or want too much trial time devoted to credentialing the expert, preferring for a brief background and submission of a resume/CV into evidence.
 - b. Expert's specific opinion(s). Such opinions should be crisply and confidently stated such that the court takes specific note of the opinion(s).
 - c. Facts reviewed and considered, individuals interviewed, property inspected, documents and other materials reviewed, assumptions employed and basis for assumptions, currency of information used/reviewed, time spent conducting their review and preparing opinions. Rather than providing mere generalities of categories of information reviewed, the expert should be prompted to provide specific details of the information reviewed (*e.g.*, I toured the property, and I spent 4 hours last week examining all 55 rooms of the hotel, the spa, fitness center, and swimming pool facilities, the restaurant and kitchen, the management offices, the garage, the laundry facilities, the parking lot, etc.). Providing specific and vivid information can help differentiate your expert's level of diligence and win the war of credibility and reliability.
 - d. Methodology employed and application of the facts to the methodology. This testimony is critical and should be carefully planned, revised, tested, and rehearsed. As before, counsel and the expert should carefully organize the presentation, signpost the key waypoints by which the expert will guide the court through the analysis, and use well-designed demonstrative tools to help the court understand and gain confidence in the expert's analysis and results.

- e. Cross-Examination: The effective prosecution of focused cross-examination can serve to bolster your own expert's credibility while also eroding the efficacy and reliability of the other party's expert. A sharp and influential cross-examination takes time to research, prepare, develop potential exhibits, and practice. Areas of potential effective cross-examination include:
 - i. Weak or limited qualifications
 - ii. Conflicting prior opinions
 - iii. Rejection of prior opinions on *Daubert* challenge or by the court in prior cases
 - iv. Weak or extremely limited review of facts, documents, or property at issue (i.e., pointing out the expert's opinion is premised on a drive-by appraisal rather than full inspection)
 - v. Weak or misapplied methodology
 - vi. Use of weak, wrong, or out-of-date comparables
 - vii. Manner of packaging the assets for valuation (single lot, real estate and personal property, or other packaging and basis therefore)³⁸
 - viii. Assumptions used and extraordinary assumptions used (or not used) and basis for and integrity of such assumptions
 - ix. Specificity and currency of all aspects of the opinion and assumptions (i.e., a fresh, detailed report or vs. a warmed over "copy and paste" boilerplate effort)
 - x. Over-extension beyond the expert's actual area of expertise³⁹
 - xi. For forward-looking projections, the existence, quality, and veracity of evidence in the record to support such projections (there is a big difference between probability (not purely speculative) vs. possibility (impermissibly speculative))

³⁸ See, e.g. *In re Twin Pines, LLC*, No. 19-10295-j11, 2021 Bankr. LEXIS 209 (Bankr. D.N.M. Jan. 29, 2021) (noting that the experts packaged the car wash assets differently and the impact on the credibility and reliability of the opinions).

³⁹ See, e.g. *In re Gerke*, No. 21-14171 EEB, 2021 Bankr. LEXIS 3188 (Bankr. D. Colo. Oct. 28, 2021) (testifying outside of his area of expertise, the court noted that the longer the bank's expert testified, the clearer it became that [he] was willing to say anything to support the bank's position, thereby losing his credibility with the Court.”).

4. Lack of independence and bias. Parties electing to use their own financial advisor for expert testimony are vulnerable to and must address independence issues to preserve credibility and influence of their expert's testimony.

Faculty

Matthew H. Connors, ASA, CPA, ABV, CFE is a managing member at Rocky Mountain Advisory, LLC in Salt Lake City and leads the firm's business and intellectual property valuation practice. His expertise includes expert witness services in complex commercial litigation disputes and valuing equity securities in and outside of litigation disputes. Mr. Connors has testified in federal and state courts multiple times. He is an expert in calculating economic damages, business valuation, intellectual property valuation, intangible asset valuation and damages related to such intangible assets. Mr. Connors has expertise in preparing and rebutting expert opinions in the above areas. His practice also includes the valuation of intangible assets, intellectual property and goodwill for purposes of post-transaction financial reporting. Mr. Connors has experience investigating fraud schemes of various types and has spent significant time investigating alleged fraud schemes including Ponzi schemes, misappropriation of assets, Foreign Corrupt Practices Act investigations, and evaluating business solvency. He received a B.S. in accounting and a B.S. in information systems, both *magna cum laude*, and his M.B.A. from the University of Utah.

Shelly L. Cuff, CPA is a director in Development Specialists, Inc.'s Los Angeles office and has 12 years of experience in insolvency, restructuring and operational services. She has worked on various bankruptcy and distressed corporate matters, including debtor and creditors' committee advisory engagements, and has provided valuation, insolvency analyses and forensic accounting services related to litigation. Ms. Cuff's experience includes static pool analyses to evaluate portfolio collections, preparing integrated financial models, addressing operational issues, facilitating sale processes, facilitating wind-down scenarios involving the liquidation of assets, cash-flow forecasting, fund-tracing analyses, claims resolution and pursuing causes of action. She received her B.B.A. in finance from The College of William and Mary.

Brad E. Dempsey is a partner with Faegre Drinker Biddle & Reath LLP in Denver and helps financial institutions and other organizations resolve high-stakes disputes. An experienced trial lawyer and leader of the firm's Colorado finance and restructuring litigation team, he focuses on bank litigation, bankruptcy litigation (contested matters and adversary proceedings), receiverships, negotiation of workout, forbearance and restructuring agreements, real property and Article 9 foreclosures, FDIC and bank failure matters, real estate litigation, appeals and other complex financial matters. Mr. Dempsey has handled numerous cases before state, federal, bankruptcy and appellate courts, and has represented creditors in complex bankruptcy cases throughout the U.S. He also represents clients involved in complex disputes and litigation involving homeowners associations and Colorado's Common Interest Ownership Act (CCIOA). Mr. Dempsey participated in the enactment of Colorado's recent HOA reform legislation and has developed significant knowledge and skill in HOA governance, management and CCIOA compliance through a decade of service to complex residential and resort communities in Jefferson County, Summit County and Eagle County. He also has experience working with domestic and international clients operating in the wine industry. Mr. Dempsey is admitted to practice before the U.S. District Court for the District of Colorado, the Tenth Circuit Court of Appeals and the U.S. Supreme Court. He received his B.A. in 1995 from the University of Colorado Boulder and his J.D. in 1998 from the University of Colorado Law School.

Hon. Joseph G. Rosania, Jr. is a U.S. Bankruptcy Judge for the District of Colorado in Denver. Previously, he was a shareholder of Connolly, Rosania & Lofstedt, P.C. (CR&L), where he focused on bankruptcy-related litigation, and clerked for Hon. Jay L. Gueck, former U.S. Bankruptcy Judge for the District of Colorado. He also ran a successful solo law practice concentrating on bankruptcy and related litigation. Judge Rosania was a member of the Panel of Private Trustees for the District of Colorado from 1985-2015. He also served as a chapter 7 and 11 trustee, an examiner in three cases including a securities fraud case, and as counsel to unsecured creditors' committees in several cases, and he represented chapter 11 debtors. A frequent speaker, Judge Rosania has taught business law classes at the University of Colorado and Colorado State University. He received his J.D. from the University of Colorado School of Law, where he was in the top 20 percent of his class.

Craig K. Schuenemann is an associate with Bryan Cave Leighton Paisner LLP in Denver, where he represents national banks, real estate investment entities, energy companies and corporations in proceedings before federal bankruptcy courts. He specializes in representing secured creditors in all facets of the bankruptcy process. He also routinely appears on behalf of unsecured creditors, committees and foreign trustees and has achieved victories for several clients in adversary proceedings brought by chapter 7 and 13 trustees. In concert with his bankruptcy practice, Mr. Schuenemann often counsels clients on receiverships, workouts and distressed transactions, and he represents commercial clients in the complex litigation of tort, breach-of-contract and construction actions. He also has experience with a variety of financial services litigation matters, including the recovery of collateral, enforcement of guarantees and defense of wrongful foreclosure claims. Before attending law school, Mr. Schuenemann was an active duty military officer in the U.S. Navy and deployed overseas as a helicopter pilot several times, including an eight-month deployment to support combat operations in Iraq. While attending law school, Mr. Schuenemann continued his service as an active duty naval officer at the Pentagon, where he served as the military assistant to the General Counsel of the Navy. Mr. Schuenemann has devoted significant time to *pro bono* representation of low-income and veteran clients. Prior to joining the firm, he clerked for Hon. Charles Weller in Nevada's Second Judicial District from 2008-09. Mr. Schuenemann received his B.S. in 1999 from the U.S. Naval Academy and his J.D. in 2008 from The George Washington University.