

Mock Deposition for a Business Valuation Engagement

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Overall Objectives

- Consider that there is not always a RIGHT or WRONG way to approach things, even in areas where we once thought so
- Recognize the difference between old school and new school approaches to deposition testimony
- Realize that superior technical analysis and raw cerebral horsepower are not the only factors in presenting effective testimony

Chapter One - Deposition Setting

- Establishing boundaries
- Using the clock
- Know your deadlines
- Old School vs. New School - answering only the question asked vs. settlement positioning

Establishing Boundaries

- Set within first half hour
- Attorneys look for weakness to exploit
- Don't let an attorney get under your skin; you will stop thinking clearly and be more likely to misspeak

Using The Clock

- Be up front about time constraints
- It is OK to need to stop promptly at 5:30
- It is not OK not to mention this until 5:25

Know Your Deadlines

- Discuss scheduling orders with counsel
- Don't issue a report at the last minute
- Request interviews well in advance of deadlines
- Document management interview requests

Answering Only the Question Asked vs. Settlement Positioning

- Old School: answer only the question asked with thought of going to trial
- New School: position for settlement and by winning the expert “beauty contest”
- Mediation may follow right behind depositions

Chapter Two – Deposition Procedures

- Dealing with errors up front
- If you are getting beat up, relax
- Comply with the subpoena and keep your file organized
- What to bring(not) with you
- Dealing with direct questions about removal of documents from file

Chapter Two – Deposition Procedures

- Don't worry about consecutive "no's" and "I don't know's"
- Trusting direct examination to remove the sting on problem areas

Dealing With Errors Up Front

- If your report has a miscalculation, be the one to find it, and be the first to mention it
- Provide a revised report
- Mistakes are embarrassing, but they happen, and everyone knows it – the end result depends on your reaction
- Very few “Perry Mason” moments

If You Are Getting Beat Up, *R~E~L~A~X*

- Be calm and truthful
- It is the job of counsel for your client to rehabilitate or mitigate any problems that arise
- Be humble
- Calm is credible
- Credible is calm
- Don't argue

Subpoena and Files

- Per USPAP, your workfile should contain:
 - Name of the client and the identity of any other intended users
 - True copies of any written reports issued, documented on any type of media
 - Summaries of any oral reports or testimony, or a transcript of testimony, including the appraiser's signed and dated certification
 - All other data, information and documentation necessary to support the appraiser's opinions and conclusions and to show compliance with this Rule and all other applicable Standards, or references to the location(s) of such other documentation

What to Bring (Not) With You

- Your workfile should contain any documents you considered in forming your opinions
- Don't keep internal drafts that are not meaningful in some way
- Make a decision about internet file sharing – is it a draft or not?

Dealing with Direct Questions about Removal of Documents from File

- Comply with your own document retention policy
- Removing documents is a serious mistake
- No handwritten notes?
- Missing information may result in a continued deposition

Don't Worry about Consecutive "No's" and "I Don't Know's"

- Common for attorney to position these questions to string them together
- Don't be tricked into speculating
 - If the answer is "no", then it's "no"
- Don't panic
 - show confidence during consecutive "I don't knows"
(remember – it's a ploy)

Trusting Direct Examination to Remove the Sting on Problem Areas

- The attorney's job is to rehabilitate you if "damaging" testimony is given at a deposition
- Most problems can be handled on opening statements, direct examination or closing statements

Chapter Three - Avoiding Tricks and Traps

- Showing confidence with “I don’t know” or “I don’t understand the question”
- Avoid diarrhea of the mouth
- Dealing with exaggerations and outright misstatements
- Avoid absolute words and “lock-in” phrases

Chapter Three - Avoiding Tricks and Traps

- Not being allowed to finish the answer and being told to answer with a “yes” or “no”
- Stick to your area of expertise
- Know the standards
- Don't get angry or argue with the attorney

Showing Confidence With “I Don’t Know”

- Don’t panic if you do not know the answer to a question
- Don’t lie if you do not know the answer to a question
- Most attorneys know hundreds of questions that no one can answer
- It is OK not to know everything, but looks suspicious if you do not know anything

Showing Confidence With “I Don’ t Understand”

- If you don’t understand the question, you can’t answer it
- It is OK to say “Will you repeat the question?”
- It is OK to ask that a question be rephrased if you do not understand it (sometimes you get the question YOU want the second time)

Don't Talk Too Much

- Listen carefully to the question, and answer it as asked
- It is generally best to answer the question asked, not the question that should have been asked
- This advice gets relaxed some in “new school” testimony

Dealing With Exaggerations and Outright Misstatements

- Do not allow the attorney to misstate what your testimony has been
- Pay attention to the exact wording of the question and/or declaratory statements made by the attorney
- Your words may/will be taken out of context at trial

Avoid Absolute Words and “Lock-In” Phrases

- Avoid absolute words such as “always” and “never”
- Often lead to very damaging follow up questions involving counterexamples to show the incorrectness of the deponent
- Avoid being painted into a corner when asked if you have any more testimony to give on a subject or on the entire report

Not Being Allowed to Finish the Answer and Being Told to Answer With a “Yes” or “No”

- You always have the right to finish your answer even if you must answer “yes” or “no” first – Buck up!
- You can use this situation to show your sincerity and confidence

Stick to Your Area of Expertise

Don't know much about history

Don't know much biology

Don't know much about a science book

Don't know much about the French I took

But I do know that I love you

And I know that if you love me too

What a wonderful world this would be

-- Sam Cooke – “Wonderful World”

Know the Standards

- NACVA Standards
- SSVS1
- USPAP
- Etc.....

Don't Get Angry or Argue With the Attorney

- **Never –**
 - Argue (the attorney wins and you lose)
 - Become agitated
 - Raise your voice
 - Lose control (ask for a break)
 - Be cute

Chapter Four - Questions You Have to Be Able to Answer

- Have you ever read Pratt's books?
- Have you ever appraised a widget factory?
- What's on your website and brochures?
- Do you recall the article you wrote for...?
- Who is this person who worked on the job?
- How did **YOU** arrive at **YOUR** conclusion?
- How many times have you testified in...?

Authoritative Treatises

Have you ever read Pratt's books?

- We have all read a number of books on business valuation
- They reflect the opinions of the author at the time they were written
- They reflect the author's understanding of the body of knowledge of the profession at the time they were written
- Opinions change over time

It Feels Like the First Time

Have you ever appraised a widget factory?

I would climb any mountain

Sail across a stormy sea

If that's what it takes me, baby

To show how much you mean to me

-- Foreigner

It Feels Like the First Time

Have you ever appraised a widget factory?

- There are more industries than there are lawsuits
- There are more industries than there are appraisal projects
- It is the norm, not the exception, for a particular case to be the only company you have appraised that does _____, particularly if _____ is narrowly defined

It Feels Like the First Time

Have you ever appraised a widget factory?

- Be able to describe mountains climbed and stormy seas crossed
- Explain why you are able to do the job

Know About Your Own Stuff

**What's on your website and brochures?
Do you recall the article you wrote for...?**

Know Your Employees

Who is this person who worked on the job?

- Is Joe a certified plumber or an apprentice?
- What is Joe's level of education?
- How long has Joe worked for you?
- Does Joe have experience doing this?
- Has Joe ever plumbed a _____ before?
- Who was supervising Joe?

Be Comfortable With Your Opinion

How did *YOU* arrive at *YOUR* conclusion?

- Know the report that was prepared 85% by Joe
- Experts may exercise and rely on judgment which is based on education, training, and experience
- It is OK to offer opinions based on imperfect and finite information
- It is not OK to speculate or guess

Know Your Sources

How did *YOU* arrive at *YOUR* conclusion?

- During the engagement, keep key documents in a separate file
- It can be damaging to have relied on a document that is not listed in your bibliography

Have an Up to Date CV

How many times have you testified in...?

- Keep your CV up to date in the normal course of business
- Publications, speaking engagements, and testimony are required
- Know your CV and your experience

The Top 10 Dos and DONTs For Lawyers Dealing With Experts

DO:

1. Involve the Expert early in the case and allow him to issue a document request list
2. Keep the Expert in the loop of deadlines and date changes!!
3. Allocate as much time to the Expert as he requests
4. Make sure the Expert is paid
5. Understand the business valuation case law and standards of the jurisdiction

The Top 10 Dos and DONTs For Lawyers Dealing With Experts

6. Engage an Expert that will give you opposing viewpoints and will pinpoint weaknesses in the case
7. Expect the Expert to use technology and present convincing, but simple graphs, tables and trial exhibits
8. Allow/expect the Expert to assist with formulating deposition and trial questions for the opposing expert or party
9. Gain an understanding of the financial concepts of present value and discounting
10. Allow the Expert to make a conflicts check (or at least give him the parties' names on the front end) before delivering documents or discussing the case in detail

The Top 10 Dos and DONTs For Lawyers Dealing With Experts

DON'T:

1. Designate an Expert in a case or use his name without first informing and actually engaging him with a retainer
2. Withhold information from the Expert thinking: “what he doesn’t know won’t hurt him”
3. Engage a “hired gun”
4. Assume the valuation analyst has testimony experience
5. Engage a “second tier” Expert expecting to save money

The Top 10 Dos and DONTs For Lawyers Dealing With Experts

6. Limit the Expert's access to the client
7. Assume the Expert possesses all of the necessary documents unless you ask
8. Pretend you understand business valuation if you don't; ask the Expert for a crash course
9. Allow the Expert to use a lot of techno-jargon with you, at deposition or trial
10. Expect a five day turn around