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## **Special Problems Presenting Financial Consultants as Expert Witnesses and Ethics Hot Topics**

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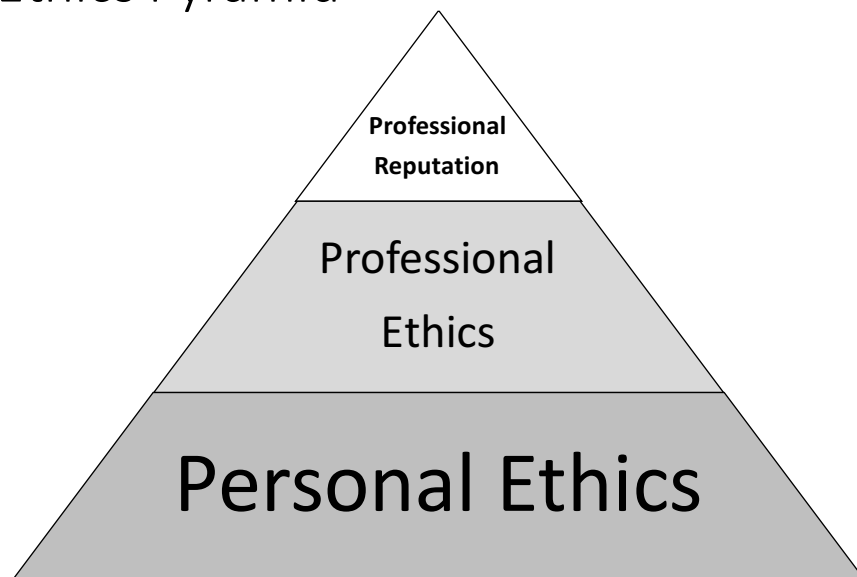
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# Special Problems Presenting Financial Consultants as Expert Witnesses

and Other Ethics Hot Topics

These materials adapted from “Ethics Issues in Valuation” by Prof. Nancy B. Rapoport, Special Counsel to the President, University of Nevada, Las Vegas and Garman Turner Gordon Professor of Law, William S. Boyd School of Law.

## The Ethics Pyramid



## How Do Ethics Issues & Valuation Intersect?

- For lawyers:
  - Using an expert's opinion, *versus*
  - Using an expert to generate the opinion that you hope that the expert will write
  - Dealing with an opinion that is different from what you expected/wanted
  - Preparing the expert for giving testimony
  - Cross-examining an expert

## How Do Ethics Issues & Valuation Intersect?

- For experts:
  - Methodology (and methodological "flexibility")
  - Opinion on issues outside of expert's knowledge or "comfort zone"
  - Being used by lawyer as a tool to accomplish that which the lawyer can't do himself
  - Refusing to admit the obvious

## For lawyers acting as experts...

- Many ethics rules govern representation of clients
  - If you're a witness, you're not representing clients
- Some ethics rules apply to lawyers' conduct even when they're not representing clients
  - Rule 8.4 prohibits (among other things)
    - Violating other ethics rules
    - Committing a crime "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"; and
    - Lying, committing fraud or otherwise engaging in misrepresentation
  - Rule 8.4 is the "two for one rule" – violate any other state ethics rule, and you violate this one, too.

## Two Types of Rules to Consider

- Rules that apply to lawyers when using an expert
- Rules that apply to lawyers when they are experts
- *Pro tip:* Even when ethics rules don't apply directly to your potential expert (who is not representing a client), make sure you do a conflicts check on matters in which your expert has been employed.
  - Rule 1.7 (Current Clients)
  - Rule 1.9 (Former Clients)

## Expert Nightmares ,Part I

- The expert whom you've hired to prove "X" has already testified in other matters that "X" is not correct.
  - Ethics rules implicating competence and diligence
  - It's counsel's job to make sure the choice of expert is appropriate.
- Rule 3.3 (Candor to the Tribunal)
  - Don't offer false evidence – including a hinky expert report – and don't make false statements of fact or law (and don't let the expert do that either)
  - Lying to the court is a career-limiting decision
    - Letting an expert do it isn't any better

## Expert Nightmares, Part I

- Rule 3.1 (Meritorious Claims & Contentions)
  - Don't "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous"
  - Putting on an expert that isn't credible hurts counsel's credibility
- Rule 3.4 (Fairness to Opposing Party or Counsel)
  - Subsection (b) prohibits counsel from falsifying evidence, counseling or assisting a witness to testify falsely, or offering an inducement to a witness that is prohibited by law
  - Doesn't do much for your reputation with the court or opposing counsel

## Competence & Diligence

- Finding a good expert
  - Referrals from people you trust
  - Referrals from experts you have used before
  - Due diligence
  - Personal observation (for example, an opposing expert in unrelated matter)
  - Try to find someone who isn't always testifying for the same side

## Consulting vs. Testifying Experts

- Varying degrees of discoverability of discussions, work product

"Where an expert is a consultant with no potential to be a testifying expert, counsel can act with minimal care (e.g., don't leave expert correspondence on the table in the Food Court at the local mall while standing in line at the Sbarro). But where the consultant holds any real potential to be presented as an expert witness at trial, counsel should treat the witness as a testifying expert from the outset for purposes of planning communication and attempting to deny opposing counsel to sensitive materials. For example, if otherwise privileged documents are used to refresh an expert's recollection or prepare for testimony, most courts will find any privilege waived and will require production of the documents."

DAVID F. HERR, ROGER S. HAYDOCK, & JEFFREY W. STEMPEL, FUNDAMENTALS OF LITIGATION PRACTICE § 3:7 (2011 ed.).

## Experts – Red Flags

- Unusual social network participation\*
- Hard to contact – slow to respond
- Uses a referral service (not his own business) to get expert engagements
- Doesn't ask to check for conflicts of interest
- Sounds like a stuffed shirt, even during first contact
- Uses word "we" incorrectly ("We argued X in the last four cases)," which implies that they view themselves as advocates and not an independent neutrals
- No mastery of facts of the case
- Clings to theories even in light of different facts
- Argues with opposing parties (or the Court)
- Has been found not credible by a Court on the same issue

*\* Ballroom dancing pictures, OK. Pictures of keg-stands, not OK.*

## Experts – Red Flags

- Expert deviates from established conventions on developing his opinion (e.g. calculating value) w/o being able to explain reasons for doing so
- Expert can't explain the opinion in a step-by-step, logical, clear manner.
- Expert can't or doesn't list all sources on which he or she relied to develop the report
- Expert is being paid by contingency fee (or gets an incentive if a particular result is achieved)
- Expert answers questions without stopping to think about what the questioner is really asking

## The Six "C"s of Ethics Considerations

In performing valuations for any bankruptcy-related purpose, the expert should consider:

1. **Compliance** with promulgated professional standards
2. **Competency** to perform the subject analysis
3. **Completeness** of the subject analysis
4. **Correctness** of the analysis and the conclusion
5. **Confusion** caused by the analyst in the analysis
6. **Consistency** with previous positions

Robert F. Reilly, *Analyst Ethics Considerations in Bankruptcy Business/Stock Valuations*, 29-AUG AM. BANKR. INST. J. 56 (2010):

## Expert Nightmares, Part II

- TOUSA
  - Bad compensation structure: "If you say "X", you get \$\$\$\$\$"
  - First, the firm was compensated on a contingency-fee basis: The firm could earn a \$2 million 'premium' *only* upon the issuance of an opinion finding solvency, which dwarfed the amounts payable to the firm on a time and expense basis if it were unable to give an opinion of solvency;
  - Second, the firm relied entirely on projections provided by TOUSA's management and never examined individual divisions or community-level projects;
  - Third, TOUSA failed to revise these projections to account for the collapse in the housing market, of which TOUSA management was well aware, as demonstrated by numerous internal discussions and memoranda. . . .

## Expert Nightmares, Part II

- TOUSA...
  - Fourth, the projections were far more optimistic than those that TOUSA was utilizing internally, with the 'base case' provided to the firm allowing for far higher growth in TOUSA's business than the 'best case' presented to the board of directors in a presentation occurring just four days after the July 31 transaction closed;
  - Fifth, the firm based its valuation on EBITDA multiples, which experts for both the plaintiffs and the defendants agreed was inappropriate and unreliable given TOUSA's business."

\* John C. "Kit" Weitnauer, *Valuation Questions Raised By TOUSA*, 29-MAR AM. BANKR. INST. J. 38, 76 (2010).

## For Court to Admit Expert Testimony

- The Court must decide:
  - "whether expert testimony could assist the trier of fact in understanding the evidence or determining a fact in issue" (which will include questions of reliability and relevance) and
  - whether the expert is qualified to give the opinion.

BANKR. EVID. MANUAL § 702:1 Testimony by Experts—Overview,  
Bankr. Evid. Manual § 702:1 (2010 ed.) (JUDGE BARRY RUSSELL)

## Be Precise

- Is your expert qualified to give an opinion with respect to the particular question at issue (not just generally, but specifically)?
  - Related question: does your expert believe that he or she is an expert in more areas than he or she actually is?
- Do your expert's qualifications match what he or she will be asked about?
  - Related question: if none of your experts have the "perfect background" ...
    - Do you need more than one expert?
    - What are the risks that their opinions or methodology might conflict with each other?
- Have you given your expert everything that he or she needs to be able to form an opinion?
  - Related question - and potentially dangerous practice: Are you preventing the expert from accessing relevant information?

## Be Precise

- Are you "suggesting" in which direction your expert's opinion should go?
  - Related question: do you really want an expert whose opinions can bend that easily?
- Have you prepped the witness for your questions, opposing counsel's questions, and questions from the judge?
  - Related question: have you checked the expert's previous opinions or testimony to make sure that your expert can't be impeached by their past testimony or, if there's a problem, have you dealt with it before your expert testifies?
- IS YOUR EXPERT DOING THE WORK HIMSELF?
  - Is your expert double-checking the work of their subordinates?

## Expert Nightmares, Part III

*Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611 (1989) (production of attorney-prepared expert report not protected work product).

- “The videotaped deposition of Dr. Demko went forward on January 12, 1989, and Mr. Goldenziel concluded the direct examination and Mr. Riordan, on behalf of defendant, had almost completed cross-examination when something quite remarkable occurred. . . .
- Mr. Riordan discovered that Dr. Demko did not write his own Report. Instead, Dr. Demko’s file contained a draft letter, not on Demko’s letterhead, also dated December 20, 1988 [hereinafter “Draft Report”] which was verbatim the same as the Demko Report with one important exception. . . .

## Expert Nightmares, Part III

The Draft Report bore the typewritten legend across the top:

PLEASE HAVE RE-TYPED ON YOUR OWN STATIONERY.  
THANK YOU.”

- **Q:** What’s the only thing worse than drafting your expert’s report and then asking him to retype it and submit it as his own?
- **A:** Lying about it after you get caught
- **Q:** What’s the second worst thing about this?
- **A:** Hiring an expert who would agree to that.

## Expert Nightmares, Part IV

- Single dumbest and most avoidable expert mistake:
  - When a judge asks the expert a question that really is straightforward (and will hurt the expert's side's case) and the expert ducks the question and hems and haws, the expert has lost the judge.
  - Always be honest and concede bad facts – a good witness will be able to put them into context as to why they don't change the expert's opinion or, better yet, why the expert considered those very facts and why they are already factored into the opinion

## What an Expert Isn't: The Lawyer's Alter-Ego

*Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 616 (1989):

- "Experts participate in a case because, ultimately, the trier of fact will be assisted by their opinions, pursuant to Rule 702, Fed.R.Ev. They do not participate as the alter-ego of the attorney who will be trying the case."

## Care & Feeding of Experts

- Be clear about the scope of the assignment
- If you want to cut costs, there are some things your office can prepare, such as a list of all documents transmitted to the expert
- Give the expert enough time to analyze the data and form an opinion. (An “expert emergency” is a failure on the part of counsel)
- Give your expert some reminders:
  - Update and proofread resume
  - Update list of materials reviewed for the opinion
  - Re-read opinion and relevant supporting materials before testimony

## Care & Feeding of Experts

- Prepare the expert for deposition questions such as:
  1. Have you reached any opinions or conclusions not contained in your report?
  2. Have you been asked to form any other opinions?
  3. Do you plan to offer any other opinions?
  4. What additional work, if any, do you plan to perform related to this case?

\* Robert F. Reilly, *Valuation Analyst Guidelines Related to Bankruptcy Expert Reports and Testimony*, 29-OCT 60 AM. BANKR. INST. J. 60 (2010).