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Business Valuation and
Forensic & Litigation Services Section

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Some states reject the *Daubert* ruling and continue to use the *Frye* ruling to determine the reliability of an expert's testimony. A few more states use a combination of both rulings. Here's a summary of the *Frye* ruling.

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AICPA

The Failed IPO Study: Insight Into the DLOM

By Gregg S. Gaffen, CFA, ASA

Should some level of discount for lack of marketability be applied in the valuation of a controlling ownership block of stock in a closely held company?

Today's CPAs routinely work on a variety of projects for clients in both the public and private sectors. These projects often require CPAs to research and use pertinent marketplace data. Although financial and other information is abundantly available regarding the public marketplace, meaningful information regarding the private marketplace is more difficult to obtain. This article provides some insight for CPAs involved in analyzing private companies, particularly related to initial public offering (IPO) activity.

"Valuation analysts regularly look to public stock market pricing and rates of return when valuing shares of closely held companies."[1] When doing so, valuation analysts must consider and adjust for one of the primary valuation differences between the shares of a closely held company and those of a company with an established public market—the ready marketability of the publicly traded shares.

Valuing a Business: The Analysis and Appraisal of Closely Held Companies, defines marketability as "the ability to quickly convert property to cash at minimal cost."[1] All other factors being equal, an investment is more valuable if it is easily marketable and, conversely, less valuable if it is not easily marketable. The degree of marketability—or liquidity—is often one of the most important issues in the valuation of a closely held security.

An IPO creates an active and efficient marketplace for the exchange of common stock that was previously closely held. In other words, a successful IPO greatly increases the degree of liquidity of the subject common stock.

Valuation analysts often (and unconsciously) fail to apply a discount for lack of marketability (DLOM) when valuing controlling ownership interests in closely held companies. Furthermore, the Internal Revenue Service (the "Service") has argued that the application of a DLOM when valuing controlling ownership interests in closely held companies is inappropriate. In such cases, the Service claims that such controlling ownership interests should be valued as if they were readily marketable (or, effectively, publicly traded).

The rationale that is often presented for not applying some level of DLOM in the valuation of controlling ownership interests is the hypothesis that a controlling owner can cause the subject company to pursue an IPO, thereby creating liquidity for the common stock. To investigate the empirical validity of this hypothesis, Willamette Management Associates developed its "Failed IPO Study."

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[1] Shannon P. Pratt, Robert F. Reilly, and Robert P. Schweihs, ***Valuing a Business: The Analysis and Appraisal of Closely Held Companies,*** 4th ed. (New York, NY: McGraw-Hill, 2000), p. 913.

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Introduction to the Failed IPO Study

The Failed IPO Study examines companies that filed an IPO registration with the Securities and Exchange Commission (SEC) on Form S-1. Primarily, the Failed IPO Study compares the number of these companies to the number of companies that successfully completed their IPO.

The Failed IPO Study, to date, is based on quarterly stock market data from 1990 through 2002. The results of this study can be observed on a quarterly, annual, and total period basis. Furthermore, the data are compiled both by industry classification and on an aggregate (all industry) basis.

The key data gathered in the Failed IPO Study include:

1. The number of IPO SEC registration filings
2. The number of completed IPOs
3. IPO failure rates
4. The elapsed time from the IPO registration filing date until the date of the successful IPO

The Failed IPO Study also analyzes the successfully completed IPOs for which the subject stock is no longer publicly traded. In such cases, the study considers the length of the time period from the IPO date until the date at which the stock was no longer publicly traded and the reason that the stock is no longer publicly available.

Furthermore, the Failed IPO Study compares IPO activity, including the number of IPO SEC registration filings and IPO failure rates to stock market/merger & acquisition (M&A) transaction data. These market data include stock market index pricing data and merger and acquisition volume.

Intent of the Failed IPO Study

Willamette Management Associates developed the Failed IPO Study in order to gain insight into the IPO process and, particularly, the likelihood of a closely held company successfully completing an IPO. Understanding historical IPO failure rates can be useful to the analyst valuing the common stock (and particularly a controlling ownership block of common stock) of a closely held company.

The Failed IPO Study analyzes IPO data for a variety of time periods and industry classifications. These data classifications should allow valuation analysts to use the data that are most meaningful to their subject analyses. That is, valuation analysts will be able to consider timely IPO failure rates and trends and focus on IPO data for a specific industry.

Furthermore, the comparison of IPO activity to other stock market/M&A transaction data, mentioned above, can be used to recognize leading IPO activity indicators as well as correlations between IPO activity and certain market data. This insight can help the valuation analyst form reasonable expectations regarding near-term IPO opportunities for the subject closely held company.

The Failed IPO Study is primarily intended to help the valuation analyst answer the question: should some level of DLOM be applied in the valuation of a controlling ownership block of stock in a closely held company? In other words, is there a relative lack of liquidity related to a controlling ownership interest in a closely held company as compared with publicly traded shares? A related question is, "What is the probability of a liquidity event occurring with regard to the subject closely held company?"

Similarly, the Failed IPO Study is intended to test the null hypothesis: The controlling owner of a closely held corporation can create a liquidity event (i.e., convert stock into cash) by implementing an IPO at a certain price, at a low transaction cost, and in a relatively short time frame.

Study Insights

The following are the summary results, to date, of the Failed IPO Study:

- From 1990 through 2002, approximately 8,100 companies filed IPO registration statements with the SEC.

Continued on next page

- Approximately 1,800, or 23.3 percent, of those companies did not complete the IPO. [2]
- The lowest IPO failure rate, by year, was 10.0 percent for companies that filed registration statements in 1991.
- The highest IPO failure rate, by year, was 53.7 percent for companies that filed registration statements in 2000.
- The fewest IPO registrations, totaling 163, were filed in 2001.
- The most IPO registrations, totaling 1,040, were filed in 1996.
- The agriculture, forestry, and fishing industry had the lowest IPO failure rate at 5.3 percent. That IPO failure rate is based on 19 IPO registrations.
- The construction industry had the highest IPO failure rate at 32.5 percent. That IPO failure rate is based on 80 IPO registrations.

Valuing Controlling Ownership Interests

The generally accepted business valuation approaches are the market approach, the income approach, and the asset-based approach. Common valuation methods with regard to each of these three business valuation approaches are the guideline publicly traded company method, the discounted cash flow method, and the asset accumulation method, respectively. Of course, these business valuation methods are also used in the process of valuing the common stock.

The market data typically used in the application of these valuation methods lead to common stock value indications at a level of marketability similar to that of publicly traded stock. This is because these three generally accepted business valuation methods rely heavily on capital market data (that is, publicly traded stock price or rate of return). As such, only the opportunity for the subject company to successfully complete an IPO at a known, certain price, at a minimal cost, and within a short time period would cause the value indications from these three valuation methods to appropriately value closely held common stock absent the application of a DLOM.

The summary results of the Failed IPO Study, presented above, clearly illustrate that even once a registration is filed with the SEC, successful completion of an IPO is highly uncertain. The study also indicates that even successful IPOs occur, on average, approximately three months following the IPO registration filing date. Lastly, the investment banking fees charged for the successful completion of an IPO are typically 7.5 percent of the initial market capitalization for the stock. This percentage does not include the other professional fees and costs incurred during the IPO process.

Therefore, the common stock owners of even a successful IPO candidate experience the following elements of illiquidity:

1. An uncertain IPO stock price
2. A significant transaction cost
3. A significant time lag to achieve amortization.

Other Sources for Creating Liquidity

The argument that controlling ownership interests in closely held companies should be valued as if readily marketable is also premised on the availability of other sources for creating liquidity. These potential sources of investment liquidity primarily include an arm's-length, third party sale of the subject company and the creation of an employee stock ownership plan (ESOP).

However, even the successful sale of a closely held company requires the seller to incur a substantial amount of effort, time, and transaction cost. For example, the company's financial statements must be brought up to date. The company owners (and other management personnel) are distracted from their regular responsibilities to assist in the sale process, such as during the prospective buyers' due diligence processes. Legal and other professional fees (including fees for a business broker) are incurred during the sale negotiation process and at the time of the transaction closing.

In addition, the seller may encounter undesirable income tax consequences as a result of a sale of the closely held company. Or, if the selling shareholder is less than a 100 percent owner, that controlling stockholder may encounter dissention from other (non-selling) shareholders.

Also, the sale of a closely held company usually takes at least six months, and it can often take more than a year to complete.

The creation of an ESOP, although providing a favorable income tax consequence for the selling stockholders, also involves substantial effort, time, and transaction costs. Furthermore, the potential inability of the company to obtain the necessary transaction financing, the potential limitations on ESOP contributions by the company, and the restrictions on qualified ESOP participants often limit the opportunity for the sale of a closely held corporation to an ESOP.

DLOM for Noncontrolling Ownership Interests

The Failed IPO Study can also provide insight when valuing noncontrolling ownership interests in closely held companies. Some analysts argue that the valuation of the closely held common stock of a near-term IPO candidate company should reflect the potential increased marketability. This argument is implemented through the application of a significantly lower than normal DLOM or no DLOM.

While a noncontrolling owner cannot cause an IPO, some analysts argue against a DLOM when (1) the controlling owner has expressed an interest in an IPO or (2) the subject company is simply a strong candidate for an IPO.

Continued on next page

[2] As some registrations had been "pending" for several years as of the date of our most current data, we considered a registration to be "failed" if it had been more than 18 months since their filing. Most successful IPOs occur less than a year after filing an IPO registration statement. We believe that our 18-month cut-off period allows ample time to complete a successful IPO.

Continued from page 3

The current evidence providing empirical support for the DLOM for noncontrolling ownership interests falls into two categories: studies of restricted stock transactions (that is, "restricted stock studies") and studies of private stock transactions in companies that subsequently had an IPO (that is, "pre-IPO studies").

The aforementioned studies are based on prices of common stock that later became either unrestricted and tradable or readily marketable as the result of a successful IPO. For the restricted stock studies, it was known at the time of the transaction that the subject common stock would become readily marketable at some time within the next two years. For the pre-IPO studies, at the times of the private transactions in the subject common stocks, the subject companies were probably, at least, considering pursuing an IPO. As such, any anticipated increases in marketability were factored into the private transaction prices. Therefore, the discounts for lack of marketability calculated from these studies set the minimum DLOM that should be used for valuing the common stock of a closely held company, subject to case specific circumstances.

The restricted stock studies are quite consistent in indicating an average DLOM of approximately 30 percent. The pre-IPO studies provide support for a somewhat higher DLOM of approximately 45 percent.

The information derived from the Failed IPO Study, combined with empirical evidence from the above-mentioned DLOM studies, provide the valuation analyst with the data necessary to assess the DLOM to apply in valuing a noncontrolling ownership interest in a company that is likely to pursue an IPO in the near-term.

Furthermore, the overall to date IPO failure rate of 23.3 percent, combined with the data used in the DLOM studies, refutes the argument that stock valuations of IPO candidates should include a significantly lower than normal DLOM or not include a DLOM.

Summary and Conclusion

The Failed IPO Study initial results clearly indicate that there is a wide range in (1) the annual number of IPO registration filings and (2) IPO failure rates, both by year and by industry. These variances support the use of time-period-based and industry-based analyses when incorporating the Failed IPO Study into a DLOM analysis.

The IPO failure rates indicated by the Failed IPO Study, along with the price uncertainty, transaction costs, and elapsed time required for an IPO, invalidate the null hypothesis that controlling ownership interests in closely held companies should be valued as if readily marketable (that is, without the application of some DLOM).

The price/transaction uncertainty, transaction costs, and elapsed timing related to other sources of liquidity-creating events also support the application of some DLOM when valuing a controlling ownership interest in a closely held company. Furthermore, the IPO failure rate combined with the data used in the DLOM studies support the application of a DLOM of at least those indicated by the studies when valuing a noncontrolling ownership interest in a closely held company.

It should also be noted that the Study estimates failure rates for companies that filed an IPO registration with the SEC. Obviously, many companies seriously consider, and even begin, the process of filing for an IPO but never reach the registration step of the process. As such, the "failure rate" when including all companies that at least consider pursuing an IPO is far greater than that when including only those companies that actually file an IPO registration statement. However, measuring this incremental IPO failure rate is impractical.

The Willamette Management Associates Failed IPO Study is an ongoing process. As additional transactional data become available over time, additional analysis will be performed. We anticipate that these analyses will identify more and longer-term IPO-related trends than have been observed to date. We will continue to update the Failed IPO Study and to present the results of these Failed IPO Study updates as they become available.

—Gregg Gaffen, CFA, ASA, is senior manager at Willamette Management Associates, Chicago. He can be contacted at gsgaffen@willamette.com and 773-399-4330.

Complying with Ethics Interpretation 101-3: *Nonattest Services*

As of December 31, 2004, practitioners are required to comply with Ethics Interpretation 101-3: *Nonattest Services*. The documentation requirement applies to all nonattest services in process on or commencing after December 31. The documentation requirement became effective for new engagements on December 31, 2003 but was deferred until December 31, 2004. The AICPA has developed additional resources to help members fully understand their professional responsibilities in complying with the new rules. These resources include FAQs, articles, background documents, and other tools and can be accessed at *www.aicpa.org.*

Daubert Application in the Fifty States

At the federal level, trial courts and courts of appeal broadly apply and interpret four principles to determine the reliability of an expert's scientific theory or technique. The four principles are:

1. *Testing.* Can the theory or technique be tested?
2. *Peer review.* Has the theory or technique been subject to peer review?
3. *Error rates.* Are there established standards to control the use of the technique?
4. *General acceptance.* Is the technique generally accepted in the relevant technical community?

These principles, usually referred to as the *Daubert* guidelines, were articulated by the U.S. Supreme Court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.* (113 S.Ct. 2786, 125 C. Ed. 2d 469 (1993)). Federal trial courts apply the guidelines in their gatekeeping function of determining the reliability and relevancy of expert testimony.

State courts may or may not be influenced by the *Daubert* guidelines. Alan Ratliff, a Managing Director with Huron Consulting Group (*www.huronconsultinggroup.com*) has classified into five groups states that:

- *Accept the Daubert principles.* Twenty-six states either accepted the Supreme Court's decision or they already used a similar test.
- *Are open to Daubert.* Four states are willing to reconsider the rule they apply to scientific testimony in light of the *Daubert* guidelines.
- *Reject Daubert.* Ten states have rejected *Daubert*, at least temporarily. They prefer to follow the guidelines established in *Frye* v. *United States* (54 App. D. C. 46, 293 F. 1013 No. 3968 Court of Appeals of District of Columbia). See the sidebar "The Frye Ruling" on page 6.
- *Follow an alternative state standard.* Seven states follow guidelines based on their state code of evidence.
- *Modified Daubert.* Four states apply a combination of *Frye* or *Daubert*.

On its Web site, Huron Consulting Group provides Ratliff's report, which includes a list of states in each category, along with a matrix of states in each category, and a list of cases for each state. Visit *www.huronconsultinggroup.com* and click on "Resource Library" in the upper right of the page to access the report.

Dealing with *Daubert* Challenges

Here are some resources that can help expert witnesses to understand the impact of and how to avoid or deal with *Daubert* challenges:

- "Guidelines for Guarding Against *Daubert* Challenges To Expert Testimony," by Robert F. Reilly, CPA/ABV, ASA, CFA, *CPA Expert* (Summer 1999)
- "The Path to Credibility: Preparing to Withstand Daubert Challenges," by Rob Shaff, *CPA Expert* (Fall 2001).
- "Daubert, its Progeny, and Their Effect on Family Law Litigation in State Courts" by Stewart W. Gagnon, Fulbright and Jaworski LLP, Houston. This article is available on the American Association of Matrimonial Lawyers Web site at *www.aaml.org/Articles/2000-6/GagnonDaubert.htm*.
- "Daubert, Disability, and Worklife Expectancies," by David S. Gibson, Vocational Econometrics, Inc., Louisville, Kentucky. Available at *http://www.vocecon.com/technical/ftp/bibliography/daubwle.PDF*.

Sons of Daubert

In the Summer 1999 *CPA Expert*, Robert F. Reilly, CPA/ABV, ASA, CFA, dubbed federal court decisions "sons of Daubert" in that they expanded on the guidelines:

- *General Electric Co. v. Joiner* (118 S. CT.512 139 C.Ed. 2d 208). In this case, "the Court concluded that federal courts of appeals must apply an abuse-of-discretion standard when they review a trial court's decision to admit or exclude expert testimony. . . The Supreme Court also concluded that whether the specific Daubert factors are appropriate measures of reliability in a particular case is a matter the law grants the trial judge broad latitude to determine."
- *Frymire-Brinati v. KPMG Peat Marwick,* 3F. 3d 283 (7th Circuit, 1993). "[The] Court of appeals excluded the testimony of a CPA valuation expert. . . . the expert used only one valuation method . . . to value the subject partnership interests. . . . the Court of Appeals specifically noted that the CPA valuation expert 'conceded that he did not employ the methodology that experts in valuation find essential.'"
- *Kumho Tire Company Ltd., et al. v. Patrick Carmichael et al.,*(119 S. Ct. 1167 (March 23, 1999). "[The] Supreme Court clearly ruled that the Daubert factors—and the trial court's gatekeeping functions regarding the admission of expert testimony—apply not only to scientific experts, but also to all 'technical' or 'other specialized' experts."
- *Target Market Publishing, Inc. v. ADVO, Inc. 136* F. 3d. 1139, 1998 U.S. App. Lexis 2412. "The Court of Appeals concluded that the Daubert factors apply to valuation and economic damages testimony."

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The Frye Ruling

As Mr. Ratliff reports (see Daubert Applications in the Fifty States, p. 5), four states follow a "modified *Daubert*" along with the ruling in *Frye v. United States* (54 App. D. C. 46, 293 F. 1013,No. 3968, Court of Appeals of District of Columbia). Ten states have rejected *Daubert* in favor of *Frye*, which was decided more than 80 years ago on December 3, 1923. The *Frye* opinion is surprisingly brief and is bare of citations.

At issue is the admissibility of an expert witness's testimony. The following is are excerpts from the opinion:

" . . . . In the course of the trial, counsel for defendant offered an expert witness to testify to the result of a deception test made upon defendant. . . .

" . . . the theory seems to be that truth is spontaneous, and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure. The rise thus produced is easily detected and distinguished from the rise produced by mere fear of the examination itself. In the former instance, the pressure rises higher than in the latter, and is more pronounced as the examination proceeds, while in the latter case, if the subject is telling the truth, the pressure registers highest at the beginning of the examination, and gradually diminishes as the examination proceeds.

"Prior to the trial, defendant was subjected to this deception test, and counsel offered the scientist who conducted the test as an expert to testify to the results obtained. The offer was objected to by counsel for the government, and the court sustained the objection. . . .

"Counsel for defendant, in their able presentation of the novel question involved, correctly state in their brief that no cases directly in point have been found. The broad ground, however, upon which they plant their case, is succinctly stated in their brief as follows:

'The rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.'

"Numerous cases are cited in support of this rule. Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

"We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."

Divorce Court: Three Pitfalls CPA Experts Should Avoid

By William Barrett III, CPA

Nearly half of all recent first marriages will end in divorce, according to projections from the National Center for Health Statistics.[1] With a 50-50 chance of divorce facing newlyweds, many may eventually need to turn to CPAs for expertise. We will be called upon more and more to help clients navigate through divorce actions, but to represent clients fairly, even the most seasoned of CPA experts must be aware of three divorce court traps: valuation of equitable distribution, lengthy written reports, and a professional mindset on the stand.

Equitable Distribution

Larry Diehl does not excite easily. The veteran divorce attorney, scholar and true Luddite—a fax machine is the closest he comes to communication technology—does however get all toasty and tingly when he hears a testifying expert utter the word "discount."

Diehl, who wrote much of the Code of Virginia statutes on divorce, has had his hand in many of the Commonwealth's biggest divorce cases. "When I hear the opposing expert opine about discounts for lack of marketability or a minority interest, it is 'dead-on-arrival' for the other side. To me, it is the greatest pitfall that an expert can fall into."

The standard of value used in valuing entities for marital dissolution varies among states. Under Virginia Statute § 20.107.3, the term "fair value" is called for in equitable distribution matters. However, fair value is not defined. To many accounting and legal practitioners, the first valuation standard that comes to mind is "fair market value." But there is a big difference in valuing closely held businesses and professional practices for equitable distribution in Virginia.

In Revenue Ruling 59-60, the IRS established fair market value (FMV) as the standard to use for a hypothetical "arm's length" sale. FMV uses the concept of a free-market transaction where a property exchanges hands, on a certain date, from a willing seller to a willing buyer. Both parties are under no compulsion to transact and each has knowledge of all relevant facts. Therefore the value established reflects the labors of the seller and the risks of the new buyer. The risks of the buyer are evaluated and then discounted against the seller's value, arriving at a fair market value. In other words, both the buyer and the seller are fairly represented in the final transaction price.

In Virginia divorce actions (I say Virginia because many states still mandate the FMV standard in divorce), a newer concept is being perfected—the business will not be sold. Therefore, another standard —intrinsic value—is required to ascertain value as of a certain date. Intrinsic value is the value of a business to a specific owner based upon the worth to husband and wife, and the value to the marital partnership that the court is dissolving (Code 1950, § 20-107.3, subd. A). Intrinsic value is the real worth of the business, as distinguished from the current market price of a business for sale.

The most recent and precedent-setting case in Virginia is the 1998 Circuit Court decision and 2000 Appellate Court affirmation in *Howell v. Howell*. This complex case was truly "a classic battle of the experts" and hinged on the marital value of the husband's partnership interest in a large law firm. The husband's expert stated that the value was the net of his capital account plus his share of the firm's net income, discounted for minority status, marketability and other issues.

The spouse's expert, Virginia CPA Bob Raymond, used intrinsic value to make his case. He took no discount because no sale or transfer of partnership interest was foreseeable, and no individual or group within the firm exercised majority control. The courts agreed.

"In light of *Howell*, it is reasonable to conclude that use of the term 'fair value' in Virginia is not as a valuation term of art, but as a substitute for the term 'intrinsic value.'"[2]

The Written Report

Carl Witmeyer is another veteran divorce attorney who has also served as a commissioner in chancery (a court-appointed individual who rules on fault issues, and in many Virginia jurisdictions rules on equitable distribution). Witmeyer believes form over substance in the written report is a huge problem.

"When I see that the other side's expert has handed in a 50-plus page report, I know the trier of fact is going to tune out somewhere in that pile," Witmeyer said. "Judges want the basis and the merits of an expert's opinion, yet many experts go off-target in their written reports and in testimony before the judge."

Carl also cites the *Howell v. Howell* case. "*Howell* was heard before a commissioner, a circuit court judge, and the judges of the Virginia Court of Appeals. The husband's expert had a door-stopper-size report. The wife's expert had a report that illustrated the

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[1] Kreider, Rose M. and Jason M. Fields. "Number, Timing, and Duration of Marriages and Divorces: 1996." U.S. Census Bureau: 2002. *www.census.gov/prod/2002pubs/p70-80.pdf.*

[2] Raymond, Robert R., "Valuing Closely Held Businesses for Virginia Equitable Distribution," *VAB News Journal*, Vol. XXIX, No. 7, 2003.

issues and methodology to arrive at a marital value. Bob [Raymond] stuck with the facts in the case and presented them in a manner that could be easily reviewed."

Since equitable distribution is so case-specific in Virginia, the written report, like live testimony, takes more than specialized expertise to withstand challenge by the opposing attorney and experts, and be understood and relied upon by the judge. Sometimes it comes down to the art of the expert intuitively knowing what and what not to say in the moment of writing and speaking.

As Terry Batzli, a Virginia lawyer who specializes in divorce valuation litigation, points out, "You can be the most knowledgeable valuation expert in the world, but if you cannot communicate properly in this tumultuous environment, you will not prevail."

Professionalism

A third pitfall seems to plague the most novice and most senior of experts: professionalism on the stand.

In one of the first divorce cases I testified in, I asked the attorney for her thoughts on my testimony. She responded that the testimony itself was spot-on. However, she said, "You didn't need to be so mean to the other attorney. He was just doing his job."

It is a revelation that still haunts me. The attorney was essentially saying, "This is not about you; it is about how others perceive your professional opinion!"

Subjectively, I was "discounting" the value of the opposing attorney's questions. At the time, I thought the answers I gave were straightforward explanations of neutral opinion supported by case facts. While the explanations may have been, the delivery was not.

I picture the judge, silently listening, seasoned by years of hearing divorce experts testify. He is saying to himself, "Everyone else here is just doing his job. But this guy is taking it personally."

In the National Association of Certified Valuation Analysts' *The Valuation Examiner,* John Marcus, a nationally known valuation expert, stated, "My [attorney] friend shared her frustrations with me. She said that she could either find an analyst with integrity and no testimony experience, or an 'expert' with much courtroom experience and no integrity at all."

Note: The author wishes to thank the following attorneys for contributing to this article. Each is a distinguished member of the American Academy of Matrimonial Lawyers: Lawrence D. Diehl, Attorney at Law, Hopewell; Carl J. Witmeyer, II, Witmeyer & Allen, PLC, Ashland; and Terrence R. Batzli, Barnes & Batzli, PC, Glen Allen.

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