



# NACVA/IBA Training Center Special Purpose Valuations Litigation

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## Fundamentals of Writing Expert Reports

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### Course Outline

- Role of the Financial Expert in Litigation
- Federal Rules of Evidence—Expert Reports and Testimony
- Expert Report Format
- Practical Tips for the Expert

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## Why do I need to know this?

- Attorneys and experts are becoming more sophisticated
- An expert must understand how to handle attacks upon their methodology, attacks upon their background and must also learn how to communicate with non-experts

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## Types of Value

- Always Check the Local Jurisdiction
  - Fair Value
    - Common to Shareholder Disputes – No Lack of Marketability Discount!
    - Used in some matrimonial cases
    - Used in some business interruption claims / complete loss of business
  - Fair Market Value
    - Also used in matrimonial
    - Also used in some business interruption claims / complete loss of business

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## Understand the Case Timeline

- Case Filed – Pleadings, Counterclaims, Replies, etc.
- Discovery Period
  - For a determinate period of time
  - Can take depositions, issue subpoenas, etc.
- Discovery Cut-off
  - You cannot compel any additional discovery
- Pretrial
  - Meeting with Judge to decide issues and determine procedure
- Trial

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## Engagement Management

- Understanding the engagement
  - Are you qualified as an expert in this matter?
  - Set reasonable expectations
  - Do not practice law
- Engagement Letters
- Intake forms
- Know case dates – Do you have time?

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## Know Your Role and the Rules

- Know your role – Will you testify?
- Know the rules – Every location is different
- Your reports, actions, et al. must be in acceptable formats
  - Otherwise they may be thrown out despite your good work

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## Role of the Financial Expert in Litigation

- Warning: Too many experts attempt to be both a consultant and a testifying expert
- Can be hired as either a Consultant or Testifying Expert

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## Consulting Expert

- Hired by counsel to assist with litigation
- Not expected to give expert testimony or deposition
- A consulting expert can take more of an advocate role for the position being taken by counsel and the client

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## Consulting Expert's Role in a Litigation Project

Participation in this case can be:

- To initially critique the case
- Advise of weaknesses or strengths
- Assist in the formation of questions for trial or deposition
- Assist in the selection of testifying expert witnesses
- Review the work of other experts to identify strengths and weaknesses

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## Procedural Differences

- Generally everything the testifying expert witness sees, relies , produces and says is discoverable
- The work of a consulting, non-testifying, expert is generally not discoverable
- Caution to experts: when a consulting expert's role changes to that of a testifying expert, all information becomes discoverable

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## Testifying Expert

- Your job is to have an opinion
- To express it in clear, concise language
- Your standard is "reasonable degree of certainty" or "reasonable degree of accounting certainty"
- Is not an advocate for the client – you must have credibility.

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## What is "discoverable?"

- All documents reviewed by the testifying expert
- All information received
- All conversations
- All correspondence
- Best to assume that everything is discoverable by the opposing counsel

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## Effective Report Writing

- Why do we write reports?
  - Federal requirements
  - Assist in settlement negotiations
  - Support for summary judgment
  - In arbitration of other proceedings may be required
  - Introduced into evidence

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### Importance of a Well-Written Report:

- Part of your permanent record
- Can be used to impeach your credibility for years

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### Assistance from Counsel

- Should never allow counsel to write, significantly alter or dictate opinions
  - Vulnerable on cross examination
  - Can impair your credibility

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### Assistance from Counsel

- If opposing counsel can demonstrate that retaining counsel improperly influenced the expert's report, the expert loses credibility
  - Easily done if the valuator circulates a draft and retaining counsel suggested improvements and corrections

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## Draft Reports

- Are discoverable
- Avoid draft reports and refuse to let counsel influence you

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## Undertaking the Assignment, Determine:

- If report is needed
- Type of report—Spreadsheet, Federal Rules of Evidence 26a2b, etc.
- Assumptions
- Documents reviewed
- Issues to be covered
- Your relevant expertise in the subject
- Opinions to be offered

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## Federal Rules of Evidence—Expert Reports and Testimony

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## Rule 703

- Bases of Opinion Testimony by Experts

- Experts may rely on facts or data made known to the expert at or before the hearing
- Facts of data forming the basis of testimony may include:
  - Firsthand observation
  - Information presented at trial
  - Information received by expert outside of court and from outside sources

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## Rule 704

- Opinion of Ultimate Issue

- Testimony is not objectionable because it embraces an ultimate issue to be decided by trier of fact
- ACFE rules prevent you from expressing an opinion as to the guilt or innocence of any party.
- Do not usurp the job of the judge or the jury

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## Rule 705

- Disclosure of Facts or Data Underlying Expert Opinion

- The expert may give his or her opinion before disclosing the facts and data upon which the opinion is based
- The court may require the expert to reveal the underlying facts or data during cross examination.

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**Rule 26 (a) 2 (b)**

- Federal Rules of Civil Procedure
  - Identities of expert witnesses must be disclosed prior to trial
  - Unless otherwise stated, a written report must accompany the disclosure
  - Report should contain:
    - All opinions accompanied by bases, reasons
    - Data considered
    - Supporting exhibits
    - Qualifications of witnesses
    - Publications authored by witness (within 10 years)
    - Compensation paid to expert
    - Listing of cases in which witness has testified (within 4 years)

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**Formatting and Proofing**

- 12 pt. font, easy to read
  - 1 ½ line space
- Topic headings
- Numbered pages
- Executive Summary
- Documents Reviewed
  - Numbered List
  - Alphabetically, chronologically, some logical progression
  - Precisely describe the documents—date, title, author, etc.
  - Do not list documents that were not available

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**Proofreading**

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## Bad Grammar

- Poor grammar in a report can be used to show rushing, sloppiness or ignorance
- Bad grammar can also damage an expert's standing with retaining counsel
- Always have reports proofed for grammar

-“Dr.Davis examination of Mrs. Elderly was timely and complete in the privacy of her own home. Dr Davis, not only a competent community physician but also a close personal friend of the family.”

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## Improper Punctuation

- Punctuation errors can change the interpretation of the report

-“Panda bear: mammal; eats, shoots and leaves.”

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## Typographical Errors

- Typos may indicate that an expert did not take the assignment seriously

-“On June 16<sup>th</sup> the neck mass was much smaller and the patient was instructed not to return in 2-3 months.”

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## Misspelled Words

- 2 people should always proof the report, including the expert
- Any spelling error missed will make the expert appear stupid

-“Bell Forrest Products produced quality board lumber.”

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## Stating the Facts

- Provide detailed and specific information
- Cite sources
- Do not guess about facts
- Be aware of your report’s date
- Beware poor accounting records
- Missing information
- No third party verification

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## Good Report Writing Techniques

- Explain abbreviations
- Use precise language
- Active voice
- Avoid bias
- Do not contradict other reports
- No speculation
- Use objective language
- Do not use argumentative language
- State things clearly and directly
- Beware of wandering into legal territory

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## Good Report Writing Techniques

- Beware of opining future costs
- Do not use boilerplate language
- Avoid absolute words
- Avoid emphatic language
- Use confident language
- Define all technical terms
- Make no comments about the credibility of witnesses
- Do not use "royal we" or "associates"
- Do not state "net" opinions
- Avoid broad, unsupported statements

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## Disclaimers

- Generally, they do not protect you in court
- Do not rely on them to bail you out for a poor diligence effort
- If you rely on other assumptions or experts, state the facts
- They may be used against you
- Be ready to answer all questions regarding your disclaimers

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## Know Your Limits

- You are not an expert in everything, using other experts is acceptable
- Do not use any words you cannot define
- Avoid using legal terms
- Avoid expressing legal opinions
- Stay within your area of expertise

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## Long Format for Report Writing

- **EXECUTIVE SUMMARY**
- **Introduction**
  - Why this report is written, for whom it is prepared, a summary of facts, and chronology of events
- **Scope of Engagement**
  - Include a preamble to state the basis of the claim and a specific assignment.
- **Review of Complaint**
  - Review basis for recovery
- **Brief Discussion of Technical Standards and Practices**
  - Educate on how calculation or methodology is done.

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## Long Format for Report Writing

- **Data Reviewed**
  - Numbered listing of data reviewed. Use a logical grouping. Do not use "including," "including, but, not limited to," "various," etc.
  - Include title, author, edition, publisher and year published.
  - I have reviewed the following documents:
    - 1, 2, 3, etc.
- **References**
  - Technical Handbooks, governmental regulations, and industry standards.
  - Include title, author, edition, publisher and year published. Pinpoint cites include specific page numbers
  - I have reviewed the following references:
    - 1,2,3, etc.

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## Long Format for Report Writing

- **Review of Data**
  - Pull relevant data from data reviewed listing.
- **Review of References**
  - Pull relevant data from references listing.

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## Long Format for Report Writing

- **Discussion**

- Be sure to include Daubert potential challenge issues. Daubert includes
  - Whether theory or technique used by the expert can be, and has been tested.
  - Whether theory or technique has been subjected to peer review and publication.
  - The known or potential rate of error of the method used, and, the degree of the method's or conclusion's acceptance within the relevant scientific community.
- Expert must explain precisely how he went about reaching his conclusions and point to some objective source...to show that he has followed the scientific method.

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## Long Format for Report Writing

- **Conclusion**

- Never use "It seems," "I believe," "We," "Assuming," etc.
- "Based upon reasonable degree of accounting certainty...."

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## Just in Case / Practice Safe Reporting

- "I reserve the right to amend this report based on information received after the issuance of the same."



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## Long Format for Report Writing

- **Curriculum Vitae**
  - 26(a) 2(b) stuff
  - “I am a member of the Association of Certified Fraud Examiners. I have taken 100 hours of professional education in the following fraud related topics
- **Fee Disclosure – standard hourly rate**
- **Other Appendixes – Data, etc**

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## Keep a Listing of What You Have Done

- Keep a catalog of cases that you work on. Include parties, outcome, law firms, judges names, case #, date you testified, etc.

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## Short Format for Report Writing

- Delete the sections from the long report that are not required such as:
  - Executive Summary
  - Introduction
  - Review of Complaint
  - Discussion of Technical Standards
  - Review of References
- But, know what these should be.

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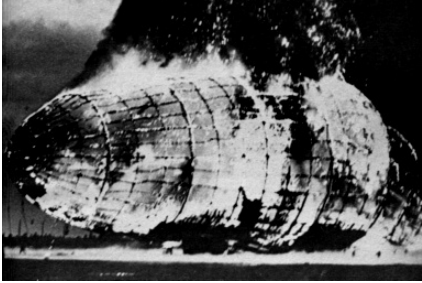
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## Things to Avoid



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## Know the Reporting Standards

- Reporting & General Standards

Be sure to review NACVA and AICPA general and reporting requirements before issuing your report and before giving testimony.

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## Failure to Proofread

- “The business revenues of Williams Construction continued to be above the industry norm.
- The Jones Corporation had a good overall system of internal control.
  - (Report is for Smith Corporation – cut and paste error).
- “I am a member of the Certified Fraud Auditors Association”

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## Problematic Language

Transmittal letter:

"Bill,

Thank you for the opportunity to work on this project.

Please do not hesitate to contact me if you have any questions, comments or concerns."

"Perhaps we can get together with the wives next weekend for dinner?"

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## Calculation Errors

- Undermines expert's authority and testimony

- "10 + 10 + 10 = 31"

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## Problematic Language

- Avoid:

- Signing report as "Expert Witness \_\_\_\_\_"

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## Problematic Language

- “We visited the site and reviewed the manufacturing equipment”

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## Problematic Language

“The trucking equipment is in *excellent condition*.”

-Stay within your area of expertise

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## Problematic Language

- Limitation of responsibility:
  - “We did not audit the underlying financial statements of ABC, had we done so other matters may have come to our attention which could have had a material effect on the opinions expressed herein.”

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## Problematic Language

- Write in First Person
  - Do not refer to yourself in Third Person

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## Problematic Language

- “I” vs. “We”
    - “We have determined Mr. Jones removed \$750,000.”
- Sincerely,
- Robert Smith & Associates CPAs”

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## Problematic Language

- “Including but, not limited to”...
  - We reviewed the following information, including but, not limited to...

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## Problematic Language

- “Authoritative” or “overwhelming preponderance of the evidence”
  - “The preponderance of authoritative sources on financial analysis suggest that to properly value a business, the net cash flows method is preferred.”

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## Problematic Language

“Authoritative”

-Avoid:  
“This analysis considers *The Blackbook of Fraud Examination* as the authoritative source in the industry.”

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## Problematic Language

- “Possibility”
  - “There is a strong possibility that earnings will continue to grow at a 7.5% growth rate over the next five years.”

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## Problematic Language

- “Thorough” or “exhaustive”
  - “We completed a thorough examination of management’s projections.”

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## Problematic Language

- “Appears”
  - It appears the value of Jones Construction is \$175,000.

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## Problematic Language

- “Believe”
  - “Therefore, and based on the foregoing and managements representations on which we relied, we believe the overall intrinsic value of the corporation yields a value of \$250,000.”

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## Problematic Language

- “One would”
  - “When encountering the particular difficulties of estimating the true amount of money removed from the account, one would apply the ratio that possesses the lowest coefficient of variation in a manner consistent with the...”

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## Problematic Language

- “My opinions are based on the financial records provided to me by counsel.”

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## Problematic Language

- “Legal or legally”
  - Leave the legalities to the attorneys and judge
  - Avoid:
    - “Fraudulent inducement is legally defined as ...”

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### Problematic Formatting

- Underlying or **bolding**
  - “Management cannot find a suitable replacement boiler for the mill; it is a special purpose boiler. A new boiler will take months to build resulting in considerable downtime. The costs associated with this downtime adversely affect the profitability of the company.”

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### Problematic Formatting

- “Confidential”
  - Report at bottom of every page says:
    - “CONFIDENTIAL”

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### For Additional Training

- NACVA
  - MAFF Certification Track
  - Forensic Track – Vegas
  - Matrimonial Track – CTI
  - CTI – Many offerings

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## For Additional Reading

- Steven Babinsky, Esq. & James Mangraviti, Jr., Esq.
  - “Writing and Defending Your Expert Report, The Step-by-Step Guide with Models”

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