

## Consultants' Training Institute

5217 South State Street, Suite 400

Salt Lake City, Utah 84107

Phone: (801) 486-0600

E-mail: [info@theCTI.com](mailto:info@theCTI.com)

Website: [www.theCTI.com](http://www.theCTI.com)



Master Analyst in Financial Forensics (MAFF) Workshop

# Litigation Bootcamp for Financial Experts

**Co-Sponsored by:**  
**National Association of Certified Valuers and Analysts**  
**the Financial Forensics Institute**



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# CTI On-Site Support Evaluation Form



ON-SITE REPRESENTATIVE \_\_\_\_\_ DATE: \_\_\_\_\_

LOCATION: \_\_\_\_\_

Your assistance will allow us to continue to provide you with the highest quality learning experience and to more closely satisfy your professional needs and expectations in the future. Thank you.

|   | N/A | Poor | Fair | Good | Very Good | Excellent |
|---|-----|------|------|------|-----------|-----------|
| Representative's availability (at sign-in table each morning, at breaks, at Headquarter's sponsored lunches, at class end): | 0   | 1    | 2    | 3    | 4         | 5         |

COMMENTS: \_\_\_\_\_

|                               | N/A | Poor | Fair | Good | Very Good | Excellent |
|-------------------------------|-----|------|------|------|-----------|-----------|
| Attitude and professionalism: | 0   | 1    | 2    | 3    | 4         | 5         |

COMMENTS: \_\_\_\_\_

|   | N/A | Poor | Fair | Good | Very Good | Excellent |
|---|-----|------|------|------|-----------|-----------|
| Ability to respond adequately to questions/concerns (including follow-up if research was required): | 0   | 1    | 2    | 3    | 4         | 5         |

COMMENTS: \_\_\_\_\_

|   | N/A | Poor | Fair | Good | Very Good | Excellent |
|---|-----|------|------|------|-----------|-----------|
| Daily introductory comments and explanations: | 0   | 1    | 2    | 3    | 4         | 5         |

COMMENTS: \_\_\_\_\_

|  | N/A | Poor | Fair | Good | Very Good | Excellent |
|--|-----|------|------|------|-----------|-----------|
| Ability of Headquarter's representative to interface with hotel personnel on room set-up/amenities/problems: | 0   | 1    | 2    | 3    | 4         | 5         |

COMMENTS: \_\_\_\_\_

|   | N/A | Poor | Fair | Good | Very Good | Excellent |
|---|-----|------|------|------|-----------|-----------|
| To what degree did the training location meet with your overall expectations: | 0   | 1    | 2    | 3    | 4         | 5         |

COMMENTS: \_\_\_\_\_

|   | N/A | Poor | Fair | Good | Very Good | Excellent |
|---|-----|------|------|------|-----------|-----------|
| To what degree were the software preview(s) useful: | 0   | 1    | 2    | 3    | 4         | 5         |

COMMENTS: \_\_\_\_\_

May we use your comments?  Yes  No

If yes....Name \_\_\_\_\_ Member Number: \_\_\_\_\_



**Contributing Author  
and  
Instructor Bios**





## In s t r u c t o r   B i o g r a p h y

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### **Michael G. Kaplan**

CPA/ABV/CFF, CVA, MAFF  
Kaplan, Abraham, Burkert Associates  
350 South Figueroa Street, Suite 900  
Los Angeles, California 90071  
P: (818) 888-0066  
E: michael@kaplanforensics.com

**Michael Kaplan** has more than 37 years of experience in the areas of forensic accounting, business valuation, and litigation consulting. He is a cofounder of Kaplan, Abraham, Burkert Associates, Forensic Valuation Consultants. Mr. Kaplan is called upon regularly to serve as a forensic expert in litigation matters, including business litigation, professional malpractice matters, fraud and embezzlement, intellectual property, marital dissolution, loss of earnings, employment matters, and partner and shareholder disputes. He has qualified to testify in court as an expert witness in approximately 250 matters. Mr. Kaplan has also served as a court-appointed expert and accounting referee.

Mr. Kaplan is actively involved in the educational field. He has served on the faculty of the Marshall School of Business and Leventhal School of Accounting at the University of Southern California. He has lectured to various bar association groups, CPA groups, appraiser groups, and other professional organizations. Mr. Kaplan has also lectured at regional and worldwide conferences of international associations of accounting firms. He has developed and presented continuing education programs in financial and management accounting, economic damages, forensic accounting, business valuation, and the CPA's role in litigation. He has also authored publications in the areas of business valuation, lost profits, litigation practice marketing, valuation practice management, and expert testimony.

Mr. Kaplan is a principal member of the training development team of the National Association of Certified Valuators and Analysts (NACVA) and the Consultants' Training Institute (CTI). Mr. Kaplan is the recipient of NACVA's "Circle of Light" award (the highest distinction awarded to NACVA instructors), "Instructor of the Year" award, "Instructor of Exceptional Distinction" awards, and "Outstanding Member" award.

Mr. Kaplan is president of NACVA's Financial Forensics Institute and the American Institute for Expert Witness Education. He is the lead instructor of the *Litigation Bootcamp for Financial Experts, Cornerstones of Financial Forensics*, and *Expert Witness Bootcamp*. July 2012

### **Instructor for:**

Foundation of Financial Forensics

Expert Witness Bootcamp

Master Analyst in Financial Forensics Workshop™

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## I n s t r u c t o r   B i o g r a p h y



### **Rebekah A. Smith**

CPA, CVA, MAFF  
GBQ Consulting LLC  
230 West Street, Suite 700  
Columbus, Ohio 43218  
P: (614) 221-1120  
E: [rsmith@gbq.com](mailto:rsmith@gbq.com)

**Rebekah Smith** is a Director and Member of GBQ Consulting focusing on the areas of business valuations, forensic accounting, economic damages, and litigation consulting. She has experience rendering services in litigation matters and has qualified to testify in court as an expert witness on business valuations, accounting and financial matters, economic damages, asset tracing, as well as many other matters. She has also served as a court appointed expert.

Rebekah has rendered expert and consulting services in litigation matters such as commercial damages related to contract disputes, breach of fiduciary duty, shareholder disputes, violation of non-compete agreements, new business start-ups, and other disputes; business interruption claims due to natural disasters and fire, and personal litigation involving wrongful termination, breach of fiduciary duty, wrongful death, and personal injury. She has testified in court about economic damages. Rebekah is a lecturer and instructor on business economic damages. She is the lead instructor for the Certified Forensic Financial Analysts (CFFA) training presented by NACVA and also developed and teaches a two-day class on Advanced Economic Damages for NACVA.

Rebekah has been involved in forensic accounting cases related to misappropriation of assets, tracing of marital assets, and tracing of business assets and funds. Her experience includes an investigation of a public company's accounting practices for the Securities and Exchange Commission and the Department of Justice. She was also the court appointed expert in a forensic accounting project involving 10 years of business and accounting records and approximately 20 related business entities. She has testified in a criminal proceeding related to bank fraud and wire fraud.

She has also performed business valuations for both litigation and non-litigation purposes. Rebekah has provided business valuation services for a variety of purposes including gift and estate taxes, transactions such a shareholder buyout, financing transactions, shareholder disputes, divorce, as well as for financial reporting purposes. Rebekah has qualified as an expert to testify on the value of business. Rebekah is a lecturer and instructor on business valuation courses to other accountants and lawyers.

Rebekah was elected to NACVA's Executive Advisory Board which is the oversight board for all of NACVA. She is a past chair and member of the Litigation Forensics Board which has the responsibility for evaluation the content of NACVA's litigation and forensics-related curriculum and to oversee credentialing criteria for the CFFA designation. She is also on the Editorial Board of the National Litigation Consultants Review, a national litigation publication.

### **Professional Associations and Memberships**

American Institute of Certified Public Accountants (AICPA)

Ohio Society of Certified Public Accountants (OSCPA)

Association of Certified Fraud Examiners (ACFE)

National Litigation Consultants Review—Editorial Board 2006—present

National Association of Certified Valuation Analysts:

*Executive Advisory Board Member – 2010 - present*

*Litigation Forensic Board (past member), Chair 2009-2010*

July 2010

### **Instructor for**

MAFF: Business and Intellectual Property Damages Workshop

Foundations of Financial Forensics

MAFF: Economic Damages



## **I n s t r u c t o r   B i o g r a p h y**

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### **Howard Zandman**

CPA/CFF, MAFF  
Habif Arogeti & Wynne LLP  
Five Concourse Parkway, Suite 1000  
Atlanta, Georgia 30328  
P: (404) 814-4915  
E: hzandman@hawcpa.com

**Howard Zandman** is a Partner in the Litigation Support Services Group of Habif, Arogeti & Wynne, LLP, a top 50 US accounting firm. He has more than 35 years' experience in forensic accounting, auditing, consulting, taxation, and financial analysis in both industry and the public sector. During his career, Howard has specialized in insurance loss and complex damage claims, including business interruption (lost profits), review of financial condition relative to motive for arson or fraud, employee dishonesty, and third party product liability claims. Other areas of involvement include intellectual property, internal investigations and class action wage and hour matters. Howard has also been involved in broker-dealer disputes typically resolved through testimony in FINRA hearings.

A 1973 cum laude graduate of Long Island University, Howard is a frequent public speaker and has made presentations for NACVA, ICLE-GA, PLRB, Southern Loss Association, Georgia Society of CPAs and the Federation of Defense and Corporate Counsel (FDCC). Howard has testified as an expert witness, on numerous occasions, in both Federal and state jurisdictions, FINRA hearings and has served as an appraiser and umpire in alternative dispute resolution forums.

Howard is the current chair of National Association of Valuators and Analysts' (NACVA) Executive Advisory Board and is also active on various local community boards. In addition, Howard regularly presents programs to accounting groups, law firms, the insurance industry, and corporations on various topics, including business damages, punitive damages, business interruption, accounting records and analysis, thefts, financial fraud, property valuation, cooperation between insured and insurer, cyber investigations and electronic discovery. September 2013

### **Instructor For**

MAFF: Business and Intellectual Property Damages Workshop

Foundations of Financial Forensics

MAFF: Economic Damages

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**Litigation Bootcamp for Financial Experts**

# **Lost Profits and Valuation in Financial Forensics**

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# Consultants' Training Institute Instructor/Course Evaluation Form



COURSE TITLE: Litigation Bootcamp: Lost Profits and Valuation in FF LOCATION: \_\_\_\_\_

INSTRUCTOR: \_\_\_\_\_

Your assistance will allow us to continue to provide you with the highest quality learning experience and to more closely satisfy your professional needs and expectations in the future. Thank you!

| INSTRUCTOR  | N/A | Poor | Fair | Good | Very Good | Excellent |
|---|-----|------|------|------|-----------|-----------|
| How would you rate the instructor's overall presentation/teaching skills? | 0   | 1    | 2    | 3    | 4         | 5         |
| How would you rate the instructor's knowledge of the subject matter?      | 0   | 1    | 2    | 3    | 4         | 5         |
| If applicable, were individual instructors effective?                     | 0   | 1    | 2    | 3    | 4         | 5         |

| COURSE   | N/A | Poor |   | Fair |   | Good |   | Very Good |   | Excellent |    |
|--|-----|------|---|------|---|------|---|-----------|---|-----------|----|
| Were stated learning objectives met?   | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were stated prerequisite requirements appropriate and sufficient?                                      | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were program materials accurate?   | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were program materials relevant and did they contribute to the achievement of the learning objectives? | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Was the time allotted to each learning activity appropriate?   | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were the handouts or advance preparation materials satisfactory?                                       | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |

Comments: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Would you recommend this course to your colleagues and/or other professionals?  Yes  No

If no, explain why? \_\_\_\_\_  
 \_\_\_\_\_

In what other ways could this course be improved or made more valuable to you? \_\_\_\_\_  
 \_\_\_\_\_

Which aspect(s) of this course did you enjoy / value the most? \_\_\_\_\_  
 \_\_\_\_\_

Rate your experience in this field.  None  Nominal  Modest  Seasoned  Extensive

What can we do in the future to assist you in your career/professional development? \_\_\_\_\_  
 \_\_\_\_\_



May we use your comments?  Yes  No If yes, please provide your member number \_\_\_\_\_  
 We are unable to use your comments without knowing who you are.

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**Contributing Author**

Rebekah Smith, CPA, CVA, CFF, MAFF  
Howard Zandman, CPA, CFF, MAFF

# Master Analyst in Financial Forensics™ (MAFF™) Workshop

## Lost Profits and Valuation in Financial Forensics

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## Agenda

- ▶ Morning
  - Introduction to Citrus and layout of the 3 day course
  - Recap of Key Concepts from the Tracks
  - Overlap of Specialties
- ▶ Afternoon
  - Work session on Citrus assignment
  - Deposition and Trial Testimony

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## Citrus Communications Corp v. Kaplan Porter LLP

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### The Case: Parties

- ▶ Plaintiff
  - Citrus Communications Corporation (“Citrus”)
    - Technology company
- ▶ Defendant
  - Kaplan, Porter LLP (“Kaplan Porter”)
    - International law firm

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### The Case: Facts and Timeline

- ▶ 2/19/12 – Kaplan Porter was retained by Citrus to file all patent applications
- ▶ 3/15/12 – Preliminary patents granted
  - Permanent protection applications due no later than 9/15/13
- ▶ 4/1/12 – Meeting held in which Citrus implemented “Fast-Track” development plan.
  - Ms. Smith (rep from Kaplan Porter) was in attendance and agreed to the terms of the Fast-Track plan
- ▶ 9/1/13 – Permanent protection patent able to be filed
- ▶ 9/3/13 – Citrus informed by Kaplan Porter senior partners that Ms. Smith was no longer with the firm.
  - Representation would be terminated effective 8/1/13 unless total balance due (\$4.5m) paid immediately
- ▶ 9/15/13 – Temporary patent protections expired
- ▶ 9/15/13 – Citrus’s debt lender filed an involuntary bankruptcy petition
- ▶ 9/15/13 – Employees of Citrus resign and start work on Smart Watch at competitor

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## Your Assignment



- ▶ Divide into Plaintiffs and Defendants Group
- ▶ Damages report due Thursday at noon
  - The report should adhere to 26(a)2b report requirements.
- ▶ Depositions will occur Thursday afternoon
  - Each team needs to pick an expert to be deposed.
- ▶ Friday is trial
  - Each team needs to pick a testifying expert who should be different than the expert who is being deposed.

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## Review



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## LOST PROFITS



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## Lost Profits



1. Is a measure of damages
2. Is not an independent cause of action
3. Is a remedy that a business can recover
4. Types of cases
  - Torts
  - Breach of contract
  - IP infringement
  - Catastrophes (Business interruption)
  - Maritime claims

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## Lost Profits



### Common Elements

1. Lost profits were caused by the conduct upon which the claim is based (*proximate cause*)
2. That the parties contemplated the possibility of lost profit damages (or that the damages were a foreseeable consequence of the conduct) (*foreseeability*)
3. Lost profit damages are capable of proof with reasonable certainty (*reasonable certainty*)
4. Mitigation
  - ❖ Either mitigating income or mitigating expenses

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## Lost Profits



### Methods to Calculate

1. Lost Profits ("But-For" Approach)
  - Before-and-After Method
  - Yardstick Method
  - Sales Projections (Hypothetical Profits) Method
  - Market Model Method
2. Lost Business Value
  - Business Valuation (**Note:** *This course does not cover how to perform a valuation however, this course will discuss the differences between valuation and lost profits*)

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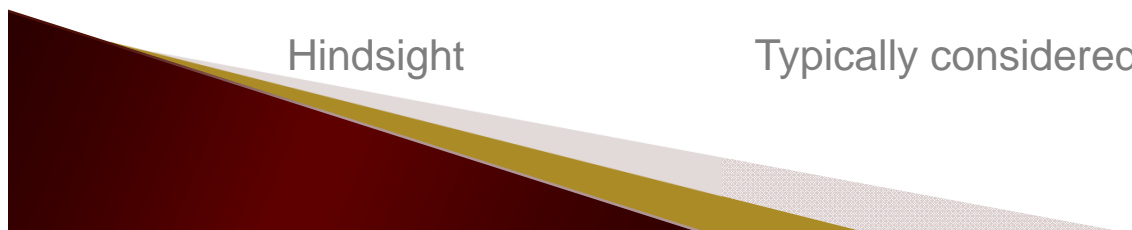
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# Business Valuation vs. Lost Profits



| Attribute                          | Lost Profits  | Business Value   |
|------------------------------------|---|--|
| Income                             | Incremental   | Net after tax  |
| Income                             | Before income tax   | Typically after income tax   |
| Income                             | Typically limited lifetime  | Into perpetuity  |
| Valuation Methods                  | Lost revenues less incremental expenses, discounting and including prejudgment interest | Discounted net income or net cash flow model, support by other valuation methods |
| Discount rate                      | Based on risk assessment, risk free rate, use of funds                                  | Risk assessment, cost of capital   |
| Prejudgment/post judgment interest | Considered  | Not considered   |
| Hindsight                          | Typically considered  | Seek guidance  |



## Lost Profits



### Other Considerations

- ▶ Causation
- ▶ Damage Period
- ▶ Discounting
- ▶ Lost Profits vs. Lost Business Value

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## Lost Profits



### Other Considerations (continued)

- ▶ Evidence
- ▶ ESI
- ▶ Business Interruption as a form of Lost Profits
- ▶ New Business Rule
- ▶ Various industry considerations

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## Lost Profits



### Daubert Factors

1. Whether theory or technique used by the expert can be, and has been tested.
2. Whether theory or technique has been subjected to peer review and publication.
3. The known or potential rate of error of the method used, and,
4. The degree of the method's or conclusion's acceptance within the relevant scientific community.

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## BUSINESS VALUATION IN LITIGATION

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### BV Reporting and Challenges in the Litigation Environment

- ▶ Reporting and Environmental issues for business valuations
- ▶ Premise of Value and Standards of Value in different litigation environments
- ▶ Review and challenge opposing experts' business valuation reports and assist counsel prepare for cross
- ▶ Opposing experts without standards and how to challenge them
- ▶ Tax issues in business valuation litigation

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### BV Reporting in Litigation

#### BV Standards in Litigation

- ▶ BV Professional Standards
- ▶ Rules of Evidence
- ▶ Rules of Civil Procedure

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# FORENSIC ACCOUNTING

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## financialforensics®

Our Mission Statement:  
To spearhead forensic accounting innovation  
in civil, criminal, and combat matters ®  
(financialforensics® October 2002)

The definition of forensic accounting is:  
The art and science of investigating people  
and money ©  
(financialforensics® Newsletter, Circa 1993)

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## 7 primary outcomes for this session:

1. To serve as a "starting point" for accountants to establish their own forensic accounting skill set;
2. To serve as generalized and/or specific guidance to accounts involved in valuation, litigation, auditing, tax, writeup, etc.;
3. To provide a framework through which forensic accounting techniques and methods can continually be refined;
4. To serve as a technical reference to those performing forensic accounting services on less than a full-time basis;
5. To ensure consistency of forensic accounting delivery, thus enhancing the results of service delivery;
6. To serve as a training tool for those entering the forensic accounting arena, and;
7. To enhance forensic accounting testimony credibility before triers of the fact.

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## MATRIMONIAL LITIGATION

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### Matrimonial Litigation

"Family Law – or divorce litigation – is recognized as a sub-niche of litigation services, the concepts of which embrace the fundamentals that are typically associated in these areas.

Though the terms of domestic relations, matrimonial dissolution, and domestic relations are used, the term family law is the more recognized term that refers to the financial services assistance that CPAs provide to attorneys."

Source:  
<http://bvfls.aicpa.org/Resources/Family+Law/Overview.htm>

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### Matrimonial Litigation

- ▶ The role and types of experts
- ▶ Alimony/ Child Support
- ▶ Property distribution

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## Matrimonial Litigation



Understand the court you are in:

- ▶ You are in a court of equity!!
- ▶ NOT a court of law.

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## Matrimonial Litigation



Overview of Divorce Litigation (see Ch. 19 FLHS)

- ▶ Complaint and Answer
  - Filer is the Plaintiff (Petitioner)
  - Other Spouse is the Defendant (Respondent)
    - Preliminary Steps
      - Initial financial affidavits are filed
      - Temporary (Pendente Life) alimony and/or child support award
- ▶ Discovery
  - Request for documents
  - Interrogations
  - Subpoenas
  - Depositions

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## Matrimonial Litigation



Overview of Divorce Litigation (Continued)

- ▶ Motions and Negotiations
  - Request for ruling on matters prior to trial or settlement, some common motions;
    - Pendente Life motions for alimony and child support
    - Attorney and expert fees
    - Freeze assets
    - Compel discovery

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## Matrimonial Litigation



### Collaborative Divorce

- ▶ Parties and counsel agree in writing to attempt to resolve dissolution of marriage without judicial intervention;
- ▶ Parties counsel may not serve as litigation counsel should the process fail;
- ▶ The team consists of counsel for each party, mental health coach for each party, one financial expert and if needed, a child advocate.

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## Matrimonial Litigation



### Alimony (Spousal Support)

- ▶ Types of Alimony
  - Pendente Life (temporary)
    - Paid until final settlement
  - Rehabilitative Alimony
    - Short duration – designed to get spouse back on his or her feet – into workforce

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## Matrimonial Litigation



### Child Support

- ▶ Federal Support Act of 1988 required states to apply guidelines;
- ▶ Beginning in 1992 they must be reviewed every four years;
- ▶ Bases support on combined income of both spouses;
- ▶ Provided automatic wage withholding;
- ▶ Public Law 100-485, the Family Support Act of 1988, emphasized the duties of parents to work and support their children, underscoring the importance of child support as the first line of defense against dependence.

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## Matrimonial Litigation



### Separate Property

- ▶ Acquired before the marriage, from inheritance or gift during the marriage, and after separation;
- ▶ Excluded because of valid pre- or post-nuptial agreement;
- ▶ Presumption that assets acquired during marriage are marital;
- ▶ Spouse claiming exemption has burden of proof.

### Separate Property Earnings

- ▶ May or may not be separate property;
- ▶ Tracing the origins of funds may be necessary to prove separate property.

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## Matrimonial Litigation



### Types of Specific Forensic Accounting Assignments in Divorces

- ▶ Tracing of separate/marital/community property – usually involves tracking money/assets during the marriage;
- ▶ Analysis of the Lifestyle of the Parties; Expenses allocated to children;
- ▶ Other services in high net worth cases;
- ▶ Other services – stock options, family residences, etc.;
- ▶ Analysis of income available for support and/or maintenance.

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## Matrimonial Litigation



### Enterprise, Personal, and Celebrity Goodwill



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## BANKRUPTCY, INSOLVENCY, AND RESTRUCTURING

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### BOK: Legal Issues

- ▶ Bankruptcy Law
  - Bankruptcy and Insolvency Law in the US
  - Unique Issues in Bankruptcy and Insolvency Laws Today
  - Current Trends in Bankruptcy and Insolvency Law



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### BOK: Legal Issues

- ▶ Alternatives Available to a Financially Troubled Business
  - Out-of-Court Settlements
  - Assignment for Benefit of Creditors
  - Bankruptcy Under Title 11



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## BOK: Legal Issues



- ▶ Nature of Insolvency
  - The Bankruptcy Code
  - Key Case Law
  - Title 11 of U.S. Code – Bankruptcy
    - Chapter 1: General Provisions
    - Chapter 3: Case Administration
    - Chapter 5: Creditors, the Debtor and the Estate
    - Chapter 7: Liquidation
    - Chapter 9: Adjustment of Debts of a Municipality
    - Chapter 11: Reorganization
    - Chapter 12: Adjustment of Debts of Family Farmers
    - Chapter 13: Adjustment of Debts of an Individual with Regular Income

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## BOK: Legal Issues



- ▶ Provisions Common to all Proceedings
  - Bankruptcy Courts
  - U.S. Trustee
  - Sovereign Immunity
  - Commencement of Cases (Voluntary/Involuntary)
  - Filing and Quarterly Fees
  - Meetings of Creditors/Equity Security Holders/Other Stakeholders
  - Adequate Protection
  - Automatic Stay

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## BOK: Legal Issues



- ▶ Provisions Common to all Proceedings (Con't)
  - Use of Estate's Property
  - Executor Contracts and Leases
  - Utility Services
  - Allowance of Claims or Interests
  - Expense of Administration
  - Priorities
  - Exemptions
  - Discharge of Debts

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## BOK: Legal Issues



- ▶ Provisions Common to all Proceedings (Con't)
  - Property of the Estate
  - Avoiding Power of Trustee
  - Reclamation
  - Preferences
  - Fraudulent Transfers
  - Post-petition Transfers
  - Post-petition Effect of Security Interests
  - Setoffs

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## BOK: Employing Financial Professionals



- ▶ Use of Financial Professionals
  - Role in Proceedings
  - Scope of Work
  - Remuneration



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## BOK: Employing Financial Professionals



- ▶ Responsibilities of Independent Accountant
  - Professional Standards, Conduct and Responsibilities
  - Specific Responsibilities for Distressed Businesses/Deepening Insolvency
  - Responsibilities to Clients/Creditors/Public
  - Working with Legal Counsel
  - Working with Law Enforcement and the Courts

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## BOK: Employing Financial Professionals



- ▶ Retention of the Financial Advisor
  - Obtaining the Engagement
  - Retention Procedures
  - Consultant, Financial Advisor and/or Expert Witness
  - Working for Debtor vs. Creditors' Committee
  - Source of Payment/Retainers
  - Affidavit
  - Work to be Performed
  - Retention Application/Order/Procedure
  - Pre/Post-Petition Retention
  - Time Records, Compensation, Fees and Expenses (Pre/Post-Petition)

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## BOK: Employing Financial Professionals



- ▶ Range of Services Provided by Financial Advisors
  - As Accountant
  - As Financial Consultant
  - As Examiner
  - Management Advisory Services
  - Interim Management Services
  - Balloting and Noticing Agent Services
  - Other Financial Advisory Services for Debtors-in-Possession or Trustee
  - Litigation Services for Creditors, Debtors, Examiners, Trustees or Others

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## BOK: Employing Financial Professionals



- ▶ Range of Services Provided by Financial Advisors (Con't)
  - Post-confirmation Services
  - As Auditor
  - As Tax Advisor
  - As Business Valuation/Appraiser
  - Monitoring Debtor's Activities
  - Working for Creditors' Committee
  - Special Investigations and Review
  - Other Accounting Services

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## BOK: Debtor-in-Possession Under Chapter 11



▣ §6.1-6.8 of *Bankruptcy and Insolvency Accounting, Volume One, Practice and Procedure, Seventh Edition, Grant W. Newton.*

- ▶ Introduction/Purpose of Chapter 11
- ▶ Operating Under Chapter 11
  - Role of the Court and U.S. Trustee
  - Key Employee Retention Plans (KERPs)
  - Consolidation of Chapter 11 Petitions
  - Creditors' and Equity Holders' Committees
  - Appointment or Election of a Trustee
  - Appointment of Examiner

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## BOK: Debtor-in-Possession Under Chapter 11



▣ §6.9-6.16 of *Bankruptcy and Insolvency Accounting, Volume One, Practice and Procedure, Seventh Edition, Grant W. Newton.*

- ▶ Operating Under Chapter 11 (Con't)
  - Operation of the Business
  - Automatic Stay
  - Use of Collateral/Cash Collateral
  - Obtaining Credit
  - Claims and Interests
  - Special Provisions for Partially Secured Creditors

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## BOK: Accounting



▣ §8.1-8.3 of *Bankruptcy and Insolvency Accounting, Volume One, Practice and Procedure, Seventh Edition, Grant W. Newton.*

- ▶ Accounting and Financial Services for Debtor-in-Possession or Trustee



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## BOK: Accounting



- ▣ §8.4-8.8 of *Bankruptcy and Insolvency Accounting, Volume One, Practice and Procedure, Seventh Edition, Grant W. Newton.*

### ▶ Accounting Services

- Parties Retaining Accountants and Financial Advisors
- Accounting for a Chapter 11 Filing
- Pre-bankruptcy Planning

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## BOK: Accounting



- ▣ §8.9-8.17 of *Bankruptcy and Insolvency Accounting, Volume One, Practice and Procedure, Seventh Edition, Grant W. Newton.*

### ▶ Accounting/Financial Reporting Requirements

- Supporting Schedules
- Statement of Financial Affairs
- Monthly Reporting
- U.S. Trustee's Requirements
- Operating Statements
- SEC Reporting in Chapter 11
- Bankruptcy Claims Management Process

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## BOK: Financial Reporting



- ▣ §13.8-13.16 of *Bankruptcy and Insolvency Accounting, Volume One, Practice and Procedure, Seventh Edition, Grant W. Newton.*

### ▶ Financial Reporting During Bankruptcy and Reorganization (Con't)

- Notes of Statements
- Statement of Operations
- Statement of Cash Flows
- Statement of Capital Deficiency
- Statement of Affairs
- Special-Purpose Statements

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## DEPOSITION AND TRIAL TESTIMONY

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## Keeping in Mind the Role of the Expert

- ▶ Tell the financial story in a lawsuit
- ▶ As it relates to evidence...
  - Gather it
  - Interpret it
- ▶ Using a peer reviewed, generally accepted methodology
- ▶ Abiding by applicable rules
- ▶ In a manner acceptable to the Court
- ▶ In part
  - Carefully crafting financial models
  - "Running" the numbers
  - Numerical analysis
- ▶ As critical
  - Connecting the calculations to the allegations and facts of the case
  - Telling a story

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## HOW THE SPECIALTIES INTERACT

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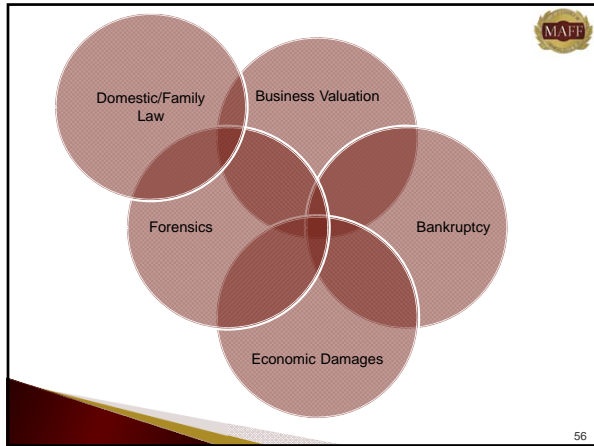
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### Overlap of Specialties

Lost Profits

- ▶ Commonly use valuation as a measure of damages
- ▶ Other forensic procedures applied to data

Divorce

- ▶ Frequently forensic and valuation issues

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### Overlap of Disciplines

Bankruptcy

- ▶ Frequently forensic techniques used to identify payments and irregularities
- ▶ Valuation
- ▶ Sometimes followed by litigation that involves damages

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## Overlap of Disciplines



### Business Valuation

- ▶ Measure of Lost Profit damages
- ▶ Used in divorce to value marital assets of a separate property interest in a business
- ▶ Used in bankruptcy for value of assets, solvency determinations, etc.

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## BUSINESS AND IP



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## Advanced Damages



- ▶ Acceptable Methods
- ▶ Valuations versus Lost Profits
- ▶ New Business Rules
- ▶ Evidence Required to Support Opinions
- ▶ Specialty Calculations:
  - Business Interruptions
  - Dealerships
  - Physicians
  - Construction
  - Government Contracts

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## Intellectual Property



- ▶ Types of:
  - Patents
  - Trademarks
  - Copyrights
  - Trade Secrets

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## Intellectual Property



- ▶ Lost Profits or Reasonable Royalty?
  - Panduit Factors
  - Costs of designing around the patent
  - Cost to develop or reproduce
  - Determination of lost revenues
  - Reasonable Royalty Revenues
  - Hypothetical Negotiation
  - Georgia-Pacific Factors

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## Panduit Factors



- ▶ Demand for the patented product
- ▶ Absence of acceptable noninfringing substitutes
- ▶ Manufacturing and marketing capability to exploit the demand
- ▶ The amount of profit that would have been made.

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## Other Considerations in IP Damages

- ▶ Value of the technology
  - Uses acceptable methods
- ▶ 25% Rule
- ▶ Trademark Damages
  - Lanham Act
- ▶ Copyright
  - Copyright damages: Title 17, Section 504 of U.S. Code

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## Georgia Pacific

- ▶ Royalties received by the Licensor for the patent
- ▶ Royalties paid by the Licensee for other patents
- ▶ Nature and scope of license – exclusive/non-exclusive or restricted/non-restricted
- ▶ Licensor's established licensing policy
- ▶ Commercial relationship between licensor and licensee
- ▶ Effect of selling the patented product in promoting the sales of other products
- ▶ Duration of patent/term of the license
- ▶ Established profitability of product, its commercial success and its current popularity
- ▶ Utility and advantage of the patent over previous devices
- ▶ Nature of the patented invention
- ▶ Extent to which infringer has used the invention
- ▶ Portion of profit or selling price that is customary in the business
- ▶ Portion of profit that should be credited to the invention
- ▶ Opinions and testimony of experts
- ▶ Amount that the licensor and licensee would have agreed upon at the time the infringement began if both had been reasonably and voluntarily trying to reach an agreement

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## Work Session on Case

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## Objectives of the Expert Deposition

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## The Expert's Objectives for the Deposition

- ▶ The expert's objectives for the deposition include:
  - Highlighting relevant education, credentials and professional experience.
  - Effectively communicating and explaining his/her opinions.
  - Explaining the bases for assumptions made.
  - Demonstrating the thoroughness and accuracy of the work performed.
  - Creating an impression that trial testimony will be presented effectively and persuasively.

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## Opposing Counsel's Objectives



- ▶ Review the expert's qualifications
- ▶ Identify the expert's opinions
  - Are there any opinions that are not disclosed in the report?
  - When should this question be asked?
  - Are there opinions that contradict previous opinions?
- ▶ Determine any potential bias
  - Does the expert consistently select options that favor his/her client?
- ▶ Determine the materials relied on
  - Identify underlying assumptions and facts
  - Were there documents that were not reviewed?
  - What outside research was conducted?

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## Opposing Counsel's Objectives (continued)



- ▶ Seek endorsement of your expert's opinions
  - Identify areas of agreement with assumptions or methodologies
- ▶ Discern adversary's theme, theory or strategies
- ▶ Obtain concessions and admissions; assess credibility
  - With fewer cases going to trial there is less reason for counsel to "hold back" at deposition
- ▶ Set the foundation for a Daubert/702 motion or motion in limine
- ▶ Prepare for trial
  - Develop material for cross examination at trial
  - Learn personalities of expert and attorney

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## Understanding the Terminology



- ▶ May ask you to "define" terms during the deposition
  - Tests the expert's knowledge
  - Limit the expert to their definition of terms
  - Might be inconsistent with case or acceptable principles
- ▶ Use of the wrong terms may lead to unanswered questions

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## Preparing for Your Deposition

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## Why Prepare

- ▶ Preparing for deposition starts when the expert is retained and begins working
  - Report should be accurate
  - Report should be thorough
  - Potential topics for cross examination should be considered before report is finalized
- ▶ Preparing for deposition is an important investment in the case
- ▶ Benefits of “mock” depositions

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## What You Should Know

- ▶ Tell the truth
  - Most important part of any testimony
  - Less than honest testimony does not help the case or the expert's reputation
- ▶ Logistics
  - When and where is the deposition?
  - Is the deposition going to be videotaped?
  - Why is the deposition not at my office?
  - What documents should be brought to the deposition?
  - Are deposition notes discoverable?
- ▶ Insights into the manner and style of opposing counsel
- ▶ Depositions are not a closed book memory exam
  - “I don't know” or “I don't remember” are appropriate answers (if truthful)

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## Preparation



- ▶ Need to understand – and prepare for questions about – the areas of concern regarding the expert's opinions and testimony
  - What are the 15-20 key questions that will be asked?
  - Response to hypothetical questions
- ▶ The expert should be prepared to describe:
  - Who first contacted you?
  - When were you first contacted?
  - When were you retained?
  - What are your hourly rates, total hours, total billed?
  - Who assisted you with this engagement?
- ▶ Breaks
  - Depositions are not endurance contests
  - Are conversations discoverable?
- ▶ Reading and signing
  - Preparing errata

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## Other Considerations



- ▶ Can assist counsel by:
  - Assessing the other expert's report:
    - Methodology
    - Analysis
    - Background on the other experts
    - Previous testimony or valuations
    - Reputation
    - Speaking presentations
- ▶ Prepare questions for opposing expert's deposition
- ▶ Potentially attending the other expert's deposition

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## Areas for Examination in an Expert Deposition



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## Areas for Examination in an Expert Deposition



- ▶ Background and qualifications
- ▶ Standards that apply
- ▶ Methodology
  - Selection
  - Capitalization rates
  - Discount rates
  - Assumptions in the methodology
- ▶ Underlying evidence and data reviewed
  - "Per management"
  - Financial evidence
- ▶ Potential bias of the expert
- ▶ Influence of management
- ▶ Reliance on evidence

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## Background and Qualifications - Expert's CV



- ▶ Look for contradicting testimony or where current testimony can be impeached by:
  - Authoritative works in the field
  - Texts that the witness uses as references
  - The witness's testimony in other matters
  - The witness's writings
- ▶ Compare produced CVs to CVs or biographies on websites or directories.
- ▶ Whether the expert has ever been disqualified or testimony limited previously.

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## Background and Qualifications - Credentials



- ▶ Credential requirements
  - Who issues it?
  - Requirements to obtain?
  - Testing or experience requirements?
  - Continuing education requirement?
  - Why did you choose the particular credential you did?
  - Why don't you have certain other credentials?

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## Background and Qualifications - Experience



- ▶ Have you ever performed this type of work before?
  - How many times?
  - What was different/similar to this engagement?
- ▶ Have you ever valued a company in this industry before?
- ▶ Who did you work for in the past – plaintiff or defendant?
- ▶ Are you outside of your area of expertise?

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## Applicable Professional Standards



- ▶ Standards governing consulting work are typically general
  - Do you know the standards?
  - Did you adhere to the standards?
  - Can you articulate why you did?
  - Know the standards that apply to your credentials?
  - Know the other standards as well?
- ▶ Did you consult any non-authoritative guidance or texts?
  - Do credentials you don't have, have standards that would apply to you?

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## Trial Testimony



Your role as an expert in the trial

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## Sequence of a Trial



- ▶ Pre-Trial motions
- ▶ Jury Selection/Voir Dire
- ▶ Opening Statements
- ▶ Plaintiff's Case in Chief
- ▶ Defendant's Motions
- ▶ Defendant's Case in Chief
- ▶ Rebuttal Cases/Close of Evidence
- ▶ Jury Instructions/Stipulations
- ▶ Closing Arguments
- ▶ Jury Instructions read to Jury
- ▶ Jury Deliberation
- ▶ Jury Verdict/Polling of Jury

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## Your Role as the Expert



- ▶ Assist the Trier of the Facts:
  - Judge
  - Jury
  - Arbitrator
  - Mediator
- ▶ You should think of yourself as a teacher
  - Teach the Trier of the Facts about a specialized area to assist them in making a determination of value, damages or some other financial determination

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## Federal Rules of Evidence



- ▶ Rule 701
- ▶ Opinion Testimony by Lay Witnesses
  - What they saw, heard or know
  - "Fact" Witness / Not an "Expert" Witness
- Rule 702
- ▶ Testimony by Experts
  - Scientific, technical or other specialized knowledge
  - Assist understanding of what happened, damages, etc.
- ▶ Testimony on sufficient facts or data
  - "Within a reasonable degree of accounting, valuation, etc. certainty"
- ▶ Based on reliable principles and methods
- ▶ Applied consistently to the facts of the subject case

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## Federal Rules of Evidence



- ▶ Rule 703
- ▶ Bases of Opinion Testimony by Experts
  - Experts may rely on facts or data made known to expert at or before hearing
  - Inadmissible facts may not be disclosed to jury unless
    - Probative value outweighs prejudicial effect.

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## Voir Dire



- ▶ "That which is true"
- ▶ Process by which jurors are questioned about their backgrounds before chosen to sit on the jury
- ▶ Also refers to the process by which expert witnesses are questioned about their backgrounds and qualifications prior to presenting testimony.
- ▶ Opposing counsel may attempt to stipulate to your qualifications thus "skipping" voir dire
- ▶ Unless it is a bench trial and the judge is very familiar with your qualifications, you may not want to agree to stipulation.
- ▶ What to highlight (SKEET):
  - Skills
  - Knowledge
  - Experience
  - Education
  - TrainingHighlight experience relevant to the case at hand

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## Preparing for Testimony



- ▶ Ask counsel if you can visit the courtroom if you have not been in it before
- ▶ Know where the jury or the judge will be
- ▶ Review any technology needs and test those out prior to testimony
- ▶ Check with counsel to see if any additional discovery or testimony has been offered that impacts your opinions
- ▶ Update research if there has been a lapse since issuing your report
- ▶ Have the appropriate amount of food/caffeine to remain energized but not "over fed"

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## Direct Examination



- ▶ Aware the jury is closely observing you
  - Even when you are not on the stand
- ▶ Get to the point and give conclusions first
- ▶ Persuade the jury by acting like a great teacher by:
  - Preparing thoroughly
  - Using understandable language and terms
  - Using good examples
  - Showing rather than telling
  - Getting to the point quickly in an organized, logical fashion
  - Moving around while teaching (can you get up and demonstrate something on a chart?)
  - Being entertaining
  - Being likable

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## Demonstratives



- ▶ Employ powerful and memorable analogies that the jury can identify with.
- ▶ Using effective visual aids and demonstratives can be powerful
  - Test them ahead of time to ensure they work as planned
  - Effective visual aids are not just spreadsheets projected onto a screen
  - Think "Highway billboard"
  - Consider building in motion in order to make your point to the jury

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## Direct Examination



- ▶ Have a format for your testimony
- ▶ Do not:
  - Tell the jury everything you've ever known about business valuation
  - Use too much technical jargon
  - Use long narratives
  - Avoid problems – deal with them up front
  - Allow retaining counsel to put words in your mouth

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## Cross Examination



- ▶ Goals of cross examination
  - Opposing counsel wants to make the jury think the cross examination was successful
  - To discredit the expert's conclusions
  - Have the expert change or modify opinions
  - To discredit the expert personally
  - Advance the opposing theories
  - Get the expert to step outside his or her area of expertise

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## Cross Examination



- ▶ Typical areas for cross examination
  - Fees
  - Pointing out the subjectivity in the opinion
  - Impeachment with prior statements/opinions
  - Mathematical or other errors
  - Lack of experience
  - Bias
  - Demonstrating how opinions are inconsistent with the facts of the case/prior testimony
  - Attacking assumptions
  - Showing the expert "new" evidence and using it to try and change his or her opinion
  - Focusing on the information the expert did not consider
  - Use of learned treatise/authoritative text to impeach the expert

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## Cross Examination



- ▶ Demeanor
  - Do not be argumentative, not an advocate for your client, you are an advocate for your opinion
  - Maintain the same demeanor on cross as direct
  - Concede points that should be conceded
  - Listen very carefully to the question
  - Be respectful and polite if you need the question repeated or rephrased because you do not understand it
  - Be aware of the Dr. Jekyll – Mr. Hyde phenomenon
  - Proper names and be professional
  - Understand who you are and what your strengths are

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## After Your Testimony



- ▶ Exit the stand professionally
- ▶ Gather your things as quietly as possible
- ▶ Leave the courtroom (or sit back down if you have been asked to listen to other testimony)
- ▶ Regardless of how the testimony went, maintain an professional demeanor
- ▶ No high-fiving or thumbs up to counsel
- ▶ As well, don't slump out of the courtroom if you felt it went poorly
- ▶ Leave the courthouse after your testimony

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## QUESTIONS?



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Consultants' Training Institute  
5217 South State Street, Suite 400  
Salt Lake City, Utah 84107  
Phone: (801) 486-0600  
E-mail: info@theCTI.com  
Website: www.theCTI.com



Master Analyst in Financial Forensics (MAFF) Workshop

**Litigation Bootcamp for Financial Experts**

# **Deposition**

and

# **The Dynamics of Trial**

**Co-Sponsored by:**  
**National Association of Certified Valuers and Analysts**  
**the Financial Forensics Institute**



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# Consultants' Training Institute Instructor/Course Evaluation Form



COURSE TITLE: Litigation Bootcamp: Deposition LOCATION: \_\_\_\_\_

INSTRUCTOR: \_\_\_\_\_

Your assistance will allow us to continue to provide you with the highest quality learning experience and to more closely satisfy your professional needs and expectations in the future. Thank you!

| INSTRUCTOR  | N/A | Poor | Fair | Good | Very Good | Excellent |
|---|-----|------|------|------|-----------|-----------|
| How would you rate the instructor's overall presentation/teaching skills? | 0   | 1    | 2    | 3    | 4         | 5         |
| How would you rate the instructor's knowledge of the subject matter?      | 0   | 1    | 2    | 3    | 4         | 5         |
| If applicable, were individual instructors effective?                     | 0   | 1    | 2    | 3    | 4         | 5         |

| COURSE   | N/A | Poor |   | Fair |   | Good |   | Very Good |   | Excellent |    |
|--|-----|------|---|------|---|------|---|-----------|---|-----------|----|
| Were stated learning objectives met?   | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were stated prerequisite requirements appropriate and sufficient?                                      | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were program materials accurate?   | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were program materials relevant and did they contribute to the achievement of the learning objectives? | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Was the time allotted to each learning activity appropriate?   | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were the handouts or advance preparation materials satisfactory?                                       | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |

Comments: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Would you recommend this course to your colleagues and/or other professionals?  Yes  No

If no, explain why? \_\_\_\_\_  
 \_\_\_\_\_

In what other ways could this course be improved or made more valuable to you? \_\_\_\_\_  
 \_\_\_\_\_

Which aspect(s) of this course did you enjoy / value the most? \_\_\_\_\_  
 \_\_\_\_\_

Rate your experience in this field.  None  Nominal  Modest  Seasoned  Extensive

What can we do in the future to assist you in your career/professional development? \_\_\_\_\_  
 \_\_\_\_\_

May we use your comments?  Yes  No If yes, please provide your member number \_\_\_\_\_  
 We are unable to use your comments without knowing who you are.

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# Consultants' Training Institute Instructor/Course Evaluation Form



COURSE TITLE: Litigation Bootcamp: The Dynamics of Trial LOCATION: \_\_\_\_\_

INSTRUCTOR: \_\_\_\_\_

Your assistance will allow us to continue to provide you with the highest quality learning experience and to more closely satisfy your professional needs and expectations in the future. Thank you!

| INSTRUCTOR  | N/A | Poor | Fair | Good | Very Good | Excellent |
|---|-----|------|------|------|-----------|-----------|
| How would you rate the instructor's overall presentation/teaching skills? | 0   | 1    | 2    | 3    | 4         | 5         |
| How would you rate the instructor's knowledge of the subject matter?      | 0   | 1    | 2    | 3    | 4         | 5         |
| If applicable, were individual instructors effective?                     | 0   | 1    | 2    | 3    | 4         | 5         |

| COURSE   | N/A | Poor |   | Fair |   | Good |   | Very Good |   | Excellent |    |
|--|-----|------|---|------|---|------|---|-----------|---|-----------|----|
| Were stated learning objectives met?   | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were stated prerequisite requirements appropriate and sufficient?                                      | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were program materials accurate?   | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were program materials relevant and did they contribute to the achievement of the learning objectives? | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Was the time allotted to each learning activity appropriate?   | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |
| Were the handouts or advance preparation materials satisfactory?                                       | 0   | 1    | 2 | 3    | 4 | 5    | 6 | 7         | 8 | 9         | 10 |

Comments: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Would you recommend this course to your colleagues and/or other professionals?  Yes  No

If no, explain why? \_\_\_\_\_  
 \_\_\_\_\_

In what other ways could this course be improved or made more valuable to you? \_\_\_\_\_  
 \_\_\_\_\_

Which aspect(s) of this course did you enjoy / value the most? \_\_\_\_\_  
 \_\_\_\_\_

Rate your experience in this field.  None  Nominal  Modest  Seasoned  Extensive

What can we do in the future to assist you in your career/professional development? \_\_\_\_\_  
 \_\_\_\_\_

May we use your comments?  Yes  No If yes, please provide your member number \_\_\_\_\_  
 We are unable to use your comments without knowing who you are.

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**Contributing Author**

**Michael Kaplan, CPA, ABV, CVA, MAFF**