



Court Case: Just Because I Didn't Say "No" Then...

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Video Depositions

– Not an Emmy Opportunity

Most experienced experts have given oral depositions dozens, if not hundreds, of times. However, many of those same experts may have never given a video deposition. Similarly, while most litigators are well versed in preparing their witness for an oral deposition, they may not be aware of the additional considerations for the expert about to be videotaped.

When the deposition commences, most deponents are nervous and cognizant of the videographer. In most instances, this is a good thing as it reminds the deponent to be aware of body language and other non-verbal responses. Without adequate preparation and additional awareness, however, an inexperienced expert (i.e., one who has only given testimony orally) will eventually tune out the videographer to focus on the deposer.

The primary purpose of a video deposition is to have a *visual* record, either because the deponent will be unable to appear live or to illustrate the deponent's nonverbal responses, to present to the trier of fact. There is a tremendous difference between seeing a deponent's response to deposition questions and simply reading the transcript of that exchange.

Please see Video Depositions on page 2

Business Valuation for the Litigator

– Part 2 of a 2-Part Series

In our Fall 2007 issue we discussed initial considerations of which the litigator should be aware when involved with matters requiring the valuation of a business interest (either partial or in the entirety), standards of value, premises of value, and approaches to the determination of value. If you do not have a copy or if you need another copy of our Fall issue, please let us know.

In this issue, we conclude our presentation with a discussion of the procedures guiding the valuator's effort, types of discounts and their applicability to the determined value, and the difference between, and the reconciliation of, price and value.

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Video Depositions...

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Here are the key elements necessary to educate your about-to-be video star:

Maintain eye contact with the trier of fact, i.e., the videographer.

It is human nature to establish eye contact when engaged in verbal dialogue. However, if you do so in a video deposition, you will **not** have eye contact with the trier of fact when the video is subsequently played for them.

Remember what your mother told you.

Sit up straight. Slouching in your chair presents a visual appearance of casualness, or perhaps even sloth, that you do not want associated with your testimony. Don't fidget. Fidgeting can take many forms, and no matter what the individual characteristic, all impart a message of nervousness that is associated with deception. Breathe through your nose. Mouth breathers look like a fish (at best) or slightly imbecilic (at worst). Hint: if your witness has a cold or is in nasal distress to the extent that it affects his/her breathing, reschedule the deposition.

Keep your hands off your face.

Leaning your head on your hand, placing a finger on cheek or chin, pulling on an ear lobe, and other such traits all come across poorly. Some of these traits, e.g., scratching behind the ear, have been correlated with lying. People with glasses have two additional problems. The first is the habit of pushing one's glasses back up the nose. Usually this is just nervousness – the glasses have not really slipped so far as to be noticeable. The second is that either from habit or the glare of the video lights, there is a tendency to take off one's glasses and rub the eyes. This is not as bad as a nervous trait, but it does convey a message of fatigue that would be better off avoided. Hint: if the lights truly are bothering the witness, he/she should ask for a break to perhaps irrigate their eyes [Visine™, etc.]. In general, hand contact with the face does not play well.

Silence is *not* golden.

Long pauses before answering a question are not reflected in the written transcript of a deposition. These pauses are quite common, though, as the deponent searches his or her memory for the answer, tries to decipher a particularly complex question, or simply has a momentary mental lapse.

These pauses are not flattering when viewed. First, most people are uncomfortable with silence in a conversation and grossly overestimate the actual length of the period of silence. However, ten seconds of dead air seems much longer when viewing it on video than it is in live conversation. Second, such pauses suggest that the deponent either does not know the answer to the question (which makes the eventual forthcoming answer suspect) or is trying to fabricate an answer.

There are several ways to deal with this. The first, and most obvious, is for the witness to thoroughly review his/her opinion and support

for it prior to the deposition. Still, one never knows what opposing counsel may ask, and other ways to avoid dead air include:

- Ask for clarification of any question not fully understood.
- Ask that compound questions be broken down into their individual components.
- Say, "At the moment, I don't recall."
- Say, "That's a good question, let me think about it a moment." (This doesn't eliminate the pause, but at least it offers an explanation for it – if the witness does this, he/she should keep their hands folded on the table in front of them, their chin up, and their eyes cast down to their hands as an extended period of silent staring at the camera may make the trier of fact nervous upon replay.)
- Finally, the witness should never be afraid to say, "I don't know."

The answers are not on the ceiling.

We frequently engage in non-verbal searching while we perform a mental search of our memory. This often includes rolling the eyes up, up and to the side (sometimes along with a head tilt), or, and this is frequent when one is seated, tilting back in the chair and reading the ceiling. In general, this is not too harmful, but it does look odd when seen in the video replay. Unfortunately, such behavior is often accompanied by the long pause. See above for ways to deal with these tendencies.

Actions speak louder than words.

Body language is a powerful communication tool. Unfortunately, it is often transmitted unawares by the speaker, but still clearly perceived by the listener. Some of these can be avoided simply by being mindful, while others can be minimized by not trying to anticipate opposing counsel's next question. Keep in mind the following interpretations of common body language statements:

- Arms crossed, aka body hug (the speaker is not being forthright, or is angry)
- Deer in the headlights (the speaker has been caught unawares, and/or is guilty)
- Smirk (the questioner is stupid, or "I've got you outfoxed on this one")
- Hands open, palms up (the speaker is forthright and honest)
- Hands together (as in praying), or interlaced with index fingers pointing upwards (the speaker is evaluating, judging, or making a decision about the question)

Summary.

"Up to 93 % of communication is non-verbal including tone of voice, eye movement, posture, hand gestures, facial expressions and more."¹ The expert who is invited to have his or her deposition videotaped needs to be aware of the significant differences between this deposition setting and the more common one of simply being transcribed. Careful planning and preparation are essential to avoid generating non-verbal responses to opposing counsel's questions that are more powerful or contradictory to the verbal responses given.

¹ <http://www.positive-way.com/body.htm>, 05/03/2007



Business Valuation...

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Procedures

Rev. Rul. 59-60 is the foundation of modern business valuation theory. Rev. Rul. 59-60 requires that a business valuator consider:

- (a) The nature of the business and the history of the enterprise from its inception
- (b) The economic outlook in general and the condition and outlook of the specific industry in particular
- (c) The book value of the stock and the financial condition of the business
- (d) The earning capacity of the company
- (e) The dividend-paying capacity [of the company]
- (f) Whether or not the enterprise has goodwill or other intangible value
- (g) [Prior] Sales of the stock and the size of the block of stock to be valued
- (h) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter

Rev. Rul. 59-60 item (d) above has been interpreted by some non-credentialed valuers as meaning the valuation should be based on the prior 5 years of earnings. As to the use of the historical financial statements, the Rule *actually* states, "Prior earnings records usually are the most reliable guide as to the future expectancy, but resort to arbitrary five-or-ten-year averages without regard to current trends or future prospects will not produce a realistic valuation." Reliance on prior earnings is only appropriate when the facts and circumstances indicate such earnings are a reliable predictor of future prospects.

Discounts

If the Fair Market Value standard is used, discounts to values determined by the approaches above need to be considered at both the entity level and the individual shareholders level. A Discount for Lack of Marketability (DLOM) may be required at the *entity* level. When the various approaches used are based on industry comparables or industry operating performance, a DLOM might be considered if circumstances indicate that the



subject entity has a weaker financial position or weaker operating results than the industry and these conditions have not been considered in the comparative or guideline company analysis. The DLOM relates to the inability to sell the entity (lack of liquidity) within a time period and at a price indicated in the analysis.

A Discount for Lack of Control (DLOC) will generally not be considered at the *entity* level, but would be considered at the *shareholder* level if a minority interest is the subject of the litigation. A DLOC is sometimes referred to as a minority interest discount. A DLOM may also be considered at the individual shareholder level, if not considered at the entity level. At the individual shareholder level discounts may not be considered if the standard of value applicable at the individual shareholder level is fair value.

Currently, courts require a reasoned analysis and documented support for the application and amount of any discounts employed. The litigator must insure that he/she understands this section of the business valuation report. If this reasoned analysis is not in the report, the court may not allow testimony from the valuation expert.

Price and Value

To paraphrase an old saying in the valuation profession: value is what you hope to get; price is what you hope to pay. In other words, the terms of a transaction will impact price without impacting value. When dealing with the Fair Market Value standard of value, the value result is presumed to be all cash or cash equivalent. When obtaining information from various databases, *price* is what is generally presented. One needs to examine and report on the terms and conditions of the reported price in order to make appropriate adjustments to estimate the value of the transaction. The expert's business valuation report should indicate and explain the analysis and foundation for any conclusions reconciling price and value.

Summary

The litigator needs to understand the foundational concepts of business valuation in order to review and understand the business valuation reports in litigation prepared by both his/her own expert and that of the opposing expert. The concept of value is fluid, and improperly understanding the multiple considerations that must be made can be fatal for both the litigator and valuator.

Just Because I Didn't Say "No" Then, Didn't Mean I Might Not Want to Later

CADCO, Inc. v. Fleetwood Enterprises, Inc., 220 S. W.3d 426, was heard by the Missouri Court of Appeals, Eastern District Division in March 2007. CADCO was, primarily, Imperial Homes, Inc., a manufactured home dealer and operating subsidiary of CADCO. Fleetwood was, primarily, a manufactured home manufacturer. At the time suit was brought, CADCO was an exclusive Fleetwood dealer in St. Louis, MO.

The matter involved a business dispute with claims of breach of contract (Counts I through IV), negligent misrepresentation (Count V), tortious interference (Count VI), and civil conspiracy (Count VII). CADCO was seeking lost profits and punitive damages. Following dismissal by the trial court of Counts I through IV and a two-week jury trial, the jury found in favor of CADCO on all remaining Counts and the trial court entered a final award slightly in excess of \$1.7 million.

Fleetwood appealed.

As would be expected, Fleetwood's primary focus of its appeal was the exclusion of the testimony of CADCO's lost profits expert, a St. Louis CPA and CVA (Certified Valuation Analyst). Without the

testimony of the expert, even if appeal failed on other points, the damages would have to be set aside and/or the case returned to the lower court.

In its consideration of this point, the Court noted that it had two perspectives from which to consider the appeal: first, and most customary, was under the abuse of discretion standard; second, and as noted by the Court "...rarely granted in civil cases..." was under the plain error standard.

Taking the latter first, the Court failed to find plain error on the part of the trial court with respect to admissibility of CADCO's expert.

With respect to the former, the Court made note that their ability to consider the point under the abuse of discretion standard was unavailable due to Fleetwood's failure to properly preserve the point for further review. Commenting, the Court noted:

"...Fleetwood did not make a specific and recorded objection to [CADCO's expert's] opinion testimony concerning lost profits. In fact, Fleetwood failed to object when [CADCO's expert] was called as a witness, when he was qualified as an expert witness, when he rendered his opinion concerning lost profits as the measure of damages, or when his testimony concluded. Notably, Fleetwood also failed to object when [CADCO's expert] described his method of analysis for determining lost profits, including a summary of the facts and data on which he based that analysis and his resulting opinion."

For preservation of the appeal, the time to say "no" was at the trial court. This point was, as were all of appellant's other points, denied.

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