

Thirteen-Point Checklist To Help You Survive Any Daubert Challenge

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Lack of reliability has been the leading cause for the exclusion of a financial expert's opinion under the Daubert standard, followed by lack of relevance and lack of qualifications, said Michael Costello (Decosimo Advisory Services), who spoke at the recent AICPA National Business Valuation Conference in San Francisco. Methodological flaws caused by the misuse of accepted financial and/or economic methods are also a frequent cause of financial expert exclusion, he said.

As for novel financial, economic, or valuation approaches, "Daubert is not to be used to exclude new methodologies so much as to scrutinize them," Costello noted, under the following now familiar four-part test:

1. Has the theory or technique been scientifically tested?
2. Has the methodology been peer-reviewed and published in professional journals?
3. What is its known rate of error? Has the expert's profession established standards to control its use?
4. Is the methodology generally accepted by members of the relevant scientific community?

Costello compiled the following 13-point checklist for testifying experts and valuation analysts to use before they take on a litigation engagement. Use this 13-point checklist when you select a valuation or litigation expert.

1. Do you have the requisite background, training, and experience required to gain acceptance by a court if a Daubert hearing is held?
2. Is it realistic to expect that your testimony will be admissible?
3. Has anyone performed a review of your work to see if it appears reasonable? "I'm lucky—I have the luxury of asking folks in my office to help me," Costello said. When he was a solo/small firm practitioner, he would pay his peers to review his report.
4. Have you followed all relevant professional standards? These can include the ASAs, IBAs, AICPA SSVS-1, etc.
5. Have you used proven methodologies? "This is a big one," Costello observed. "Some experts have used „off the-wall“ methods that precluded their testimony." Ask your peers for a review and/or reality check.

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6. If you apply an unusual or novel method, has it been peer-reviewed? If so, is there a basis on which the method would gain general acceptance in the BV professional community? Is the method generally endorsed by experts in the field?
 7. Does your work fit the facts of the case? “Have you made any assumptions or established some things which may not be reasonable, given the underlying facts?” Costello asked. Always ask your attorney if the facts you’ve relied on will be admissible at trial.
 8. Is the underlying data reliable? Did you take reasonable steps to ensure the accuracy of the information on which you based your conclusions?
 9. Have you considered alternative scenarios in reaching your conclusions? This is especially critical in lost profits and economic damages cases, Costello said, in which causation plays such a critical role. In those cases, be sure to consider alternative causes.
 10. Are the assumptions used consistent with the facts? “Make sure they are.”
 11. How have you dealt with those facts that are inconsistent with the ones you used? “I’ve gotten caught in this trap before,” Costello admitted. He’ll take facts from the attorney or client in making his assumptions—but then at trial, the opposing attorney will ask, “what if another version of the facts is true?”
 12. Have you received relevant statutes and case law to assist in developing a damages or other economic theory?
 13. Have you considered the track record of the relevant industry and the performance of comparable companies within that industry? “That came up for me recently, in a case concerning a retail firm,” Costello said. In the current economy, make sure to check how the subject company and its comparables are faring.

This 13-point checklist was taken in part from the full article, “Survive any Daubert Challenge with this 13-point Checklist”, provided by Business Valuation Resources, LLC, Jan 2010

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