

## Cross Examination Questions Skits

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**The following materials have been either created by Jim Hitchner or extracted (with modifications) from the following texts:**  
*How to Become a Dangerous Expert Witness*, Steven Babitsky, Esq., and James J. Mangraviti, Jr., Esq., SEAK, Inc., Falmouth, Mass. (2005), [www.seak.com](http://www.seak.com). (Used with permission.)  
*Cross-Examination: The Comprehensive Guide for Experts*, Steven Babitsky, Esq., and James J. Mangraviti, Jr., Esq., SEAK, Inc., Falmouth, Mass. (2003), [www.seak.com](http://www.seak.com). (Used with permission.)

Below are some exchanges between a valuation analyst/appraiser, Ms. Margaret Smith, and a cross-examining attorney, Ike Gotcha.

## **Assumptions and Limiting Conditions and Due Diligence on Future Expected Cash Flows**

In a litigation setting, the opposing attorney and expert will often carefully read your assumptions and limiting conditions and ask you questions about them. The bottom line is that you must be familiar and comfortable with the assumptions and limiting conditions that are part of your report. Many of these include caveat/protective language that a skilled litigator can take you to task on if you are not ready for that type of onslaught. Let's take some examples.

**Attorney Ike Gotcha:** Ms. Smith, I am going to ask you some questions on your assumptions and limiting conditions in your report, okay?

**Analyst Margaret Smith:** Yes.

**Question:** Do you still believe what you said in these 41 assumptions and limiting conditions?

**Answer:** Yes.

**Question:** Please read the third assumption and limiting condition from your report?

**Answer:** 3. Public information and industry and statistical information have been obtained from sources we believe to be reliable. However, we make no representation as to the accuracy or completeness of such information and have performed no procedures to corroborate the information.

**Question:** Ms. Smith, did you rely on public and industry and statistical information in forming your opinion of value?

**Answer:** Yes.

**Question:** So, that public and industry and statistical information was an important part of your valuation, correct?

**Answer:** Yes.

**Question:** Let's go to those sections of your report. Let's start on page 18. This set of numbers. What level of due diligence did you perform to determine that the sources were reliable? Tell me every step you took to make the statement that you believe the sources are reliable.

**Answer:** Well, you are ignoring the second sentence of assumption and limiting condition number 3, which states: "However, we make no representation as to the accuracy or completeness of such information and have performed no procedures to corroborate the information."

**Question:** Ms. Smith, please try to tell me, and ultimately the Court, how you can state that you believe something is reliable, but you will not represent that the information is accurate or complete, and that you did nothing to corroborate that information.

**Answer:** This is a normal and acceptable practice.

**Question:** So, it is your opinion that it is normal and acceptable to believe something is reliable without knowing that the information is accurate or complete, and having done nothing to corroborate that information, correct?

**Answer:** I stand by my previous answer.

**Question:** Please read assumption and limiting condition number 2.

**Answer:** 2. Financial statements and other related information provided by National Fastener or its representatives, in the course of this engagement, have been accepted without any verification as fully and correctly reflecting the enterprise's business conditions and operating results for the respective periods, except as specifically noted herein. XYZ has not audited, reviewed, or compiled the financial information provided to us and, accordingly, we express no audit opinion or any other form of assurance on this information.

**Question:** Did you verify the financial information?

**Answer:** No.

**Question:** Do you accept fully and correctly the enterprise's business conditions and operating results for the respective periods of the financial information?

**Answer:** Yes.

**Question:** Do you provide any assurances as to the financial information?

**Answer:** No.

**Question:** Whose responsibility is the financial information, particularly the annual financial statements you relied upon?

**Answer:** The management of the company.

**Question:** In this valuation dispute, does management have a vested interest to obtain a low value?

**Answer:** I do not know what they want. My value is straight down the middle.

**Question:** Would management benefit if the judge picks a low value? Isn't that better for them than a high value?

**Answer:** Yes.

**Question:** So, you did no verification of the financial information, you accepted fully and correctly that financial information, and you provide no assurances on that information, correct?

**Answer:** That's correct.

**Question:** So, if management "managed to their benefit" the financial information you relied upon, you would just accept it, correct?

**Answer:** I stand by my assumption and limiting condition as stated.

**Question:** Please read number 14.

**Answer:** 14. If prospective financial information approved by management has been used in our work, we have not examined or compiled the prospective financial information and, therefore, do not express an audit opinion or any other form of assurance on the prospective financial information or the related assumptions. Events and circumstances frequently do not occur as expected, and there will usually be differences between prospective financial information and actual results, and those differences may be material.

**Question:** Did you rely on the prospective financial information furnished to you by management?

**Answer:** Yes.

**Question:** You were furnished a five-year projection by the management of National Fasteners, correct?

**Answer:** Yes.

**Question:** These projections were prepared during this dispute, correct?

**Answer:** Yes.

**Question:** Are projections prepared by management during a dispute less reliable than projections prepared outside of a dispute, say for corporate planning purposes?

**Answer:** I believe the projections to be reliable.

**Question:** That's not what I asked you. The question, again, is "Are projections prepared by management during a dispute less reliable than projections prepared outside of a dispute, say for corporate-planning purposes?"

**Answer:** Well ... sometimes, but these projections are reliable.

**Question:** So, sometimes projections prepared during a dispute can be less reliable, correct?

**Answer:** Yes.

**Question:** And that is because they could be biased by whomever prepared them, correct?

**Answer:** Yes, but again, these projections are reliable.

**Question:** You keep saying that the projections are reliable. How could you possibly know that? Can you read minds?

**Answer:** I cannot read minds, but I know bias when I see it.

**Question:** Bias is a state of mind, correct?

**Answer:** I guess it can be.

**Question:** And you cannot read minds, correct?

**Answer:** No, I cannot read minds.

**Question:** You stated that you cannot read minds but that you know bias when you see it. Explain how you know the difference between a reliable and objective projection and a biased one.

**Answer:** I subjected the projection to due diligence.

**Question:** What due diligence steps did you perform? I want to know every single step.

**Answer:** I looked carefully at the projections. I also interviewed management and questioned them on the assumptions in the projections. I also compared the projections to industry margin and growth assumptions. I also compared them to historical results. After all that extensive work, I believe that the projections are reliable, objective, and unbiased.

**Question:** Okay, let's take these one at a time. You said that you looked carefully at the projections, correct?

**Answer:** Yes.

**Question:** What was and is your opinion after that careful look you say you gave the projections?

**Answer:** That they were reliable, objective, and unbiased.

**Question:** Are you telling this Court that you could tell that just by looking at the projections?

**Answer:** Yes. It seemed to make sense to me.

**Question:** You also said that you interviewed management about the projections, correct?

**Answer:** Yes.

**Question:** Where are your notes on those specific interviews?

**Answer:** I threw them away. The results of that interview are incorporated in the report.

**Question:** So, you destroyed written evidence that supposedly supports your opinion of the reliability of the projections, correct?

**Answer:** I threw them out. The evidence is in the report.

**Question:** When you interviewed management about the projections, did you have written questions?

**Answer:** Yes.

**Question:** And you destroyed those notes, correct?

**Answer:** I threw them away, but the information from that interview is incorporated in my report.

**Question:** Show me where those specific questions are in your report.

**Answer:** Well, the questions are not in the report. The questions and answers satisfied me that the projections were reliable.

**Question:** Where are the specific answers from management to the questions you asked?

**Answer:** The answers are not specifically in the report. Again, the questions and answers satisfied me that the projections were reliable.

**Question:** So, there are no specific questions and answers from that interview in the report or the workpapers?

**Answer:** Correct, but I did incorporate them in the analysis.



**Question:** After your interview with management and after you destroyed all your notes, what changes did you make to management's "during-litigation" prepared projections?

**Answer:** I resent the tone of your question.

**Question:** Please answer the question.

**Answer:** I did not make any changes. I was satisfied that they were reliable, objective, and unbiased.

**Question:** I want to make sure the Court clearly understands what you did. Is it your expert opinion, under oath, that you have no supporting notes on the questions and answers concerning the projections and that you did not change anything in the projections given to you by management and that were prepared during this dispute and only for this dispute?

**Answer:** I made no changes. They were reasonable.

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## **Guideline Company Transactions Method**

**Attorney Ike Gotcha:** Ms. Smith, I am going to ask you a series of questions on the transactions method that I am sure you can answer with a yes or no answer. Will you agree to answer each question with a yes or no answer?

**Analyst Margaret Smith:** Yes.

**Question:** Would you buy a business without knowing whether you would assume the liabilities or not?

**Answer:** No.

**Question:** Would you buy a business if all you knew was what the seller told you were the revenues?

**Answer:** No.

**Question:** Would you buy a business if all you knew was what the seller told you were the earnings?

**Answer:** No.

**Question:** Would you buy a business without seeing a financial statement or organized financial information?

**Answer:** No.

**Question:** Would you buy a business if all you were given is one year's financial information?

**Answer:** No.

**Question:** Would you buy a business if you had no idea about its future growth prospects?

**Answer:** No.

**Question:** Would you buy a business if you had no idea about its historical growth, none at all?

**Answer:** No.

**Question:** Would you buy a business without knowing anything about the company-specific risk factors?

**Answer:** No.

**Question:** Would you pay the same price for a business if you didn't know whether the inventory was included or not?

**Answer:** No.

**Question:** Would you buy a business based on a multiple of earnings based on a transaction database that had instructions that said you shouldn't do that?

**Answer:** No.

**Question:** Did you use Pratt's Stats and the IBA database for transactions in your valuation?

**Answer:** Yes.

**Question:** I just asked you several questions about what you would do, and what type of information you would want if you were to buy a business, correct?

**Answer:** Yes.

**Question:** Do either the transactions from Pratt's Stats or the ValuSource Market Comps (formerly IBA Market Data) databases have any of that information?

**Answer:** No.

**Question:** So, it is your testimony today that it is okay for your client, my client, and the Court to rely on these transactions to determine value, but you would not buy a company with your own money with such a deficient amount of information. Is that correct?

**Answer:** Well, I am not buying the business. I am just trying to value it.

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Let's do another concise, surgical, and potent line of questioning on the guideline company transactions method.

**Attorney Ike Gotcha:** The transactions you relied upon do not have anywhere near the sufficient amount of detailed information to support a value, correct?

**Analyst Margaret Smith:** It's the best we have.

**Question:** You said in your report on page 46 the following:

We did not rely on the guideline company transactions method but did use it as a check for reasonableness of the conclusions of the other valuation methods.

Correct?

**Answer:** Yes.

**Question:** Have you ever presented the guideline company transactions method and determined that other valuation methods were unreasonable?

**Answer:** No.

**Question:** Would a good definition of bias be emphasizing the good and deemphasizing the bad?

**Answer:** Yes.

**Question:** Isn't it biased to only use the transactions method when it supports your value and not use it when it does not support your value.

**Answer:** This is standard procedure in the valuation profession.

**Question:** You also say on page 46 the following:

The guideline company transactions provide market data for purposes of valuation analysis of National Fastener.

However, as is often the case with this method, we lack full details on the transactions, and we therefore rely on the transactions method as a corroborating method to check the reasonableness of the multiples implied from the guideline public company method and discounted cash flow method.

Correct?

**Answer:** Yes.

**Question:** You put less reliance on the guideline company transactions method because it was more unreliable than the other methods you used, correct?

**Answer:** Yes.

**Question:** You said it was more unreliable because you didn't have a lot of information about the transactions, correct?

**Answer:** Yes.

**Question:** Did you also state that you used it as a corroborating method, not a primary method?

**Answer:** Yes.

**Question:** Okay. Is it fair to say then that you placed some reliance on a method you deemed unreliable?

**Answer:** I already answered your question.

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## **Websites: Unsupportable and Unsafe**

**Attorney Ike Gotcha:** Ms. Smith, do you believe that your services are without equal and that you are the only person in the U.S. who provides such quality services?

**Analyst Margaret Smith:** I believe I am one of the best.

**Question:** I didn't ask you that. I asked you if you are number one, without an equal, in the entire U.S.

**Answer:** No, I do not believe that. As I just said, I do believe I am one of the best.

**Question:** Here is a copy of the *Merriam-Webster Dictionary*. Do you recognize this dictionary as one of the most well-known?

**Answer:** Yes.

**Question:** Please read the definition of "unique."

**Answer:** "the only one; being without a like or equal."

**Question:** Given that definition of "unique," and your prior testimony, do you believe that you and your services are "unique"?

**Answer:** No.

**Question:** Please read the following description of you, your firm, and its services that I downloaded from your website. [Attorney hands Smith a copy.]

**Answer:** "Margaret Smith and XYZ Appraisal Associates LLC are nationally recognized for their unique expertise in business valuation and forensic services."

**Question:** Ms. Smith, do you agree with that statement?

**Answer:** I guess not. However, I didn't write that. Someone in my firm wrote it.

**Question:** Did you know that sentence was on your website?

**Answer:** Yes. [Sheepishly looking down.]

**Question:** Do you believe that you and your firm are nationally recognized?

**Answer:** Yes.

**Question:** What authoritative group or organization determined that you and your firm are nationally recognized?

**Answer:** No one. I determined that. It's just well known.

**Question:** How many people have you polled to gather that data?

**Answer:** I didn't poll anyone. It's just well known.

**Question:** Are you telling this court that the reason that you and your firm are nationally recognized is because you say it is?

**Answer:** Yes.

**Question:** You have no concrete proof, do you?

**Answer:** No.

**Question:** Please read the following description of you and your firm concerning independence that I copied from your website.

**Answer:** "Margaret Smith and XYZ Appraisal Associates LLC possess extraordinary independence."

**Question:** Ms. Smith, please read the definition of extraordinary from the *Merriam-Webster Dictionary*.

**Answer:** "going beyond what is usual, regular, or customary; exceptional to a very marked extent."

**Question:** Do you possess extraordinary independence versus just ordinary independence?

**Answer:** Yes. If you put it that way, yes.

**Question:** So, you are more independent than all your peers, correct?

**Answer:** I don't know what you mean. [Smith is confused].

**Question:** If you are extraordinary, that means that everyone else is just plain ordinary, correct?

**Answer:** Yes, I guess so.

**Question:** I don't want you to guess. Are you more extraordinary than your ordinary peers?

**Answer:** Yes.

**Question:** By what metric or benchmark do you know you possess extraordinary independence?

**Answer:** I just know it. I am very careful to be very independent and unbiased.

**Question:** That's not what I asked you. By what metric or benchmark do you know you possess extraordinary independence?

**Answer:** It's just something I know.

**Question:** With no real concrete evidence or support, correct?

**Answer:** I guess not. The only evidence is I know how I conduct my analyses.

**Question:** So, you have self-designated yourself as being extraordinary?

**Answer:** Yes.



**Question:** Go to the front page of your website.

**Answer:** Okay.

**Question:** Is the information on your website, correct?

**Answer:** Yes.

**Question:** Please read what I just highlighted.

**Answer:** “We help attorneys win cases.”

**Question:** Are you helping your lawyer today to win his case?

**Answer:** Uh, uh, I am trying to present my opinions.

**Question:** Here is a full copy of the pages on your website. Please read this carefully and tell me if there are any other untruths or unsupportable statements. [Note: There are.]

We won’t belabor the point here. We can use several more descriptors from the website and go through a similar cross-examination. We think you get the point, sharply.

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## **Resumes/CVs**

**Attorney Ike Gotcha:** Are you a careful expert?

**Analyst Margaret Smith:** Yes.

**Question:** Were you careful when you prepared your CV?

**Answer:** Yes

**Question:** What year did you finally pass the ABV exam and become an ABV?

**Answer:** 2010.

**Question:** What year does it say on your CV on page 1?

**Answer:** 2009. Ahh, I'm sorry, that's just a typo.

**Question:** That's a mistake?

**Answer:** Yes.

**Question:** Do you know how many other mistakes you made in your own CV?

**Answer:** No, but I'm sure you're going to tell me.

**Question:** Do you know how many mistakes you made in your report?

**Answer:** None that I am aware of.

**Question:** You have submitted this CV in your report to the Court to rely upon, correct?

**Answer:** Yes.

**Question:** What does CV stand for?

**Answer:** Curriculum vitae?

**Question:** Do you know what the term "curriculum vitae" means?

**Answer:** No.

**Question:** If you don't know what "curriculum vitae" stands for, how do you know your CV is correct?

**Answer:** Uh, uh, I know it's correct.

**Question:** Now wait a minute. Are you telling me your CV is correct even though you just testified it has mistakes and you don't even know what it is?

**Answer:** I only know of one mistake.

**Question:** On pages 2 and 3 of your CV, you list 12 presentations you have given, correct?

**Answer:** Yes.

**Question:** Are you a biased witness?

**Answer:** Absolutely not.

**Question:** Did you opine on the amount of marketability discount in this valuation?

**Answer:** Yes.

**Question:** How much was that?

**Answer:** 40%.

**Question:** Is 40% your unbiased opinion about the marketability discount?

**Answer:** Yes.

**Question:** Did you try to get the highest discount you could for your client?

**Answer:** No. Of course not. This is my unbiased opinion.

**Question:** Let's go back to page 3 of your CV where some of your presentations are listed. Do you see where I am in your CV?

**Answer:** Yes.

**Question:** Please read the title of your third presentation from the top.

**Answer:** "How to support the highest discounts for your client."

**Question:** That's what you did here, correct? You gave your client the highest biased discount you could?

**Answer:** No, I am not biased here at all.

**Question:** So, you are saying you are not biased here, but you are biased to get a higher discount elsewhere according to the title of your presentation “How to support the highest discounts for your client,” correct?

**Answer:** I am never biased regardless of what that presentation says.

**Question:** Ms. Smith, I have just handed you an article you wrote for *The Valuation Rag*. Did you write that article?

**Answer:** Yes.

**Question:** Please read the portion I just highlighted.

**Answer:** “The key to a credible expert is not necessarily credentials or experience, but rather someone that can effectively persuade an unsophisticated jury.”

**Question:** Do you believe the jury in this trial will be unsophisticated?

**Answer:** I don’t know.

**Question:** Do you intend to try to persuade the jury to the best of your abilities?

**Answer:** I will try to present my opinions at trial.

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### **Review or “Rebuttal” Testimony**

**Attorney Ike Gotcha:** I now hand you Exhibit 24, which is your rebuttal report of Mr. Schmoo, the expert retained by my client. Is that your rebuttal report?

**Analyst Margaret Smith:** Yes.

**Question:** Is this your unbiased opinion about Mr. Schmoo's work and conclusions?

**Answer:** Yes.

**Question:** Would a reasonable view of unbiased mean not suppressing the good and just highlighting the bad?

**Answer:** That could be one view.

**Question:** Approximately how many criticisms do you have of Mr. Schmoo's work? You have them numbered, don't you?

**Answer:** Sixteen main areas of concern.

**Question:** Show me in your rebuttal report the number of times you say something positive about Mr. Schmoo's work.

**Answer:** Well, there aren't any. I wasn't asked to mention positive things since this is a rebuttal report.

**Question:** So, by your own admission, you are biased?

**Answer:** I was asked to prepare criticisms, so that was my scope of work.

**Question:** Oh, so you were biased because the attorneys told you to be biased?

**Answer:** I resent your remark. I was not biased.

**Question:** Did your client's attorneys tell you only to focus on the negatives and ignore the positives?

**Answer:** [Smith looks down dejectedly] Yes.

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## **Lunch and Break Times During a Deposition**

**Attorney Ike Gotcha:** After this morning's deposition session, did you have lunch with your client's attorney?

**Answer:** Yes.

**Analyst Val Dude:** Did you tell him anything about this case?

**Answer:** Yes.

**Question:** What did you tell him?

**Answer:** I told him you were a jerk.

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## **Hired Gun**

**Attorney Ike Gotcha:** Are you a professional?

**Analyst Margaret Smith:** Yes.

**Question:** What makes a person a professional?

**Answer:** Training, qualifications, education, experience, skill. Those are some of the items.

**Question:** Do you believe you are qualified to be an expert witness?

**Answer:** Yes.

**Question:** Are you experienced as an expert witness?

**Answer:** Yes.

**Question:** Have you ever read in trade journals or attended education sessions about being an expert witness?

**Answer:** Yes.

**Question:** So, then, by your own definition and explanation, you are a professional expert witness, correct?

**Answer:** Well, ah, I guess so.

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### **Guideline Public Company Method**

Can you use the GPCM when valuing smaller-type businesses? Should you check for GPCs even when you don't think you will find any? Isn't it a waste of time? It is not a waste of time. Let's illustrate this with a potential line of cross-examination:

**Attorney:** Did you apply the guideline public company method of the market approach?

**Analyst:** No.

**Attorney:** Why not?

**Analyst:** Because there weren't any guideline public companies that I could use.

**Attorney:** How do you know that?

**Analyst:** The company I am valuing is too small. There won't be any GPCs that are useable.

**Attorney:** I notice you use the term "there won't be." Are you clairvoyant?

**Analyst:** Of course not.

**Attorney:** Did you actually look to see if there were any guideline public companies?

**Analyst:** No, I knew there would be no guideline public companies.

**Attorney:** Did you check?

**Analyst:** No. I didn't have to.

**Attorney:** Mr. Analyst, I am handing you a copy of the AICPA *Statements on Standards for Valuation Services* (SSVS)? Are you familiar with this document and these business valuation standards?

**Analyst:** Yes.

**Attorney:** Did you follow these business valuation standards in this valuation?

**Analyst:** Yes.

**Attorney:** In fact, you are required to abide by these standards, correct?

**Analyst:** Yes.

**Attorney:** Please read aloud the highlighted sections of these standards that you just agreed you have to follow.

**Analyst:** "In developing the valuation, the valuation analyst should consider the three most common valuation approaches:

- Income (income-based) approach
  - Asset (asset-based) approach (used for businesses, business ownership interests, and securities) or cost approach (used for intangible assets)
- Market (market-based) approach"



**Attorney:** Did you consider the market approach per these business valuation standards?

**Analyst:** Yes.

**Attorney:** How did you consider the guideline public company method of the market approach?

**Analyst:** I thought about using the GPCM but, again, I knew there wouldn't be any.

**Attorney:** So, your position here is to say you considered this method by simply thinking about it?

**Analyst:** That's correct.

**Attorney:** How much did you bill your client for thinking about using this method that you outright rejected?

**Analyst:** Very little, if anything.

**Attorney:** So, you are telling this court today that you did no work in considering the use of the guideline public company method, correct?

**Analyst:** I already answered your question.

**Attorney:** Not really. Answer it again. Did you spend any real time when considering the guide-line public company method?

**Analyst:** No.

**Attorney:** Read the next section.

**Analyst:** "Three frequently used valuation methods under the market approach for valuing a business, business ownership interest, or security are as follows:

- Guideline public company method
- Guideline company transactions method

- Guideline sales of interests in the subject entity, such as business ownership interests or securities”

**Attorney:** Do you agree that your business valuation standards state that the “Three frequently used valuation methods under the market approach for valuing a business, business ownership interest, or security,” include the guideline public company method?

**Analyst:** Yes.

**Attorney:** And you did nothing in your consideration of this method other than thinking about it for a few seconds, correct?

**Analyst:** I did what I thought was appropriate.

**Attorney:** So, you believe that it is appropriate to just think about something to conform to your business valuation standards, correct?

**Analyst:** I answered your question.

**Attorney:** Read the next highlighted section.

**Analyst:** “In applying the methods listed in paragraph .36 [includes guideline public company method] or other methods to determine valuation pricing multiples or metrics, the valuation analyst should consider the following:

- Qualitative and quantitative comparisons
- Arm’s-length transactions and price
- The dates and, consequently, the relevance of the market data”<sup>6</sup>

**Attorney:** So, your business valuation standards say that you “should” consider “qualitative and quantitative comparisons,” correct?

**Analyst:** That's what it says.

**Attorney:** Did you make this consideration?

**Analyst:** No.

**Attorney:** So, your business valuation standards say that you "should" consider "arm's-length transactions and prices," correct?

**Analyst:** That's what it says.

**Attorney:** Did you make this consideration?

**Analyst:** No.

**Attorney:** So, your business valuation standards say that you "should" consider "The dates and, consequently, the relevance of the market data," correct?

**Analyst:** That's what it says.

**Attorney:** Did you make this consideration?

**Analyst:** No.

**Attorney:** Read the next highlighted section from your business valuation standards.

**Analyst:** "The valuation analyst should set forth in the report the rationale and support for the valuation methods used..."<sup>7</sup>

**Attorney:** Where in your report do you discuss your thinking about the use of the guideline public company method?

**Analyst:** That's not in the report.

**Attorney:** So, the bottom line here is that you did nothing to support your dismissal of the guideline public company method, other than thinking about it, correct?

**Analyst:** Yes.