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 **VSCPA**
Virginia Society of CPAs

Forensic and Valuation Services Conference

Surviving Cross Examination


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Speaker Biography

Harold Martin, CPA/ABV/CFF, ASA, CFE



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Harold G. Martin, Jr. is the Partner-in-Charge of the Valuation and Forensic Services Practice for Keiter. He is a former member of the Executive Committee. He has over 40 years of experience. He has performed over 1,800 valuation and forensic projects in over 220 industries. He has qualified as an expert witness before U.S. District Court, U.S. Bankruptcy Court, 21 circuit courts in five states, the American Arbitration Association, and the National Association of Securities Dealers. He was appointed by U.S. District Courts as a forensic accountant on cases in which he worked with the SEC and the FBI. He was appointed by the U.S. Office of the Federal Public Defender as a consultant on fraud cases. He was retained by the U.S. Department of Justice as a consultant in a litigation in U.S. District Court.

He is an adjunct faculty member of The College of William and Mary Raymond A. Mason School of Business and has taught forensic accounting in the Master of Accounting program for 17 years.

He was affiliated for 13 years with two international accounting firms, serving as a Director responsible for managing the Financial Advisory Services practice for Coopers & Lybrand's Richmond, Virginia office and as a Senior Manager in Management Consulting Services for Price Waterhouse.

He is a member of the AICPA BV Hall of Fame and is also a two-time recipient of the AICPA BV Volunteer of the Year Award. He serves as an instructor for the AICPA National BV School and is a former instructor for the AICPA ABV Exam Review Course and AICPA Expert Witness Skills Workshop. He is a former member of the AICPA BV Committee and former Chair of the AICPA BV Conference Committee. He created and serves as chair of the VSCPA FVS Conference. He is a former member of the VSCPA's Board of Directors and former chair of the BV Committee and Litigation Services Committee. He was selected as a "Super CPA" in peer surveys conducted by the VSCPA and *Virginia Business*.

He is a co-author of *Financial Valuation: Applications and Models*, 1st-4th ed., a contributing author to *Cost of Capital: Estimation and Applications*, 2nd-4th ed., a member of the VSCPA Editorial Task Force for *Disclosures*, an Editorial Board member for *Business Valuation Update*, and a former expert panelist for *Financial Valuation and Litigation Expert*. He has been interviewed by *The Wall Street Journal*.

He received his A.B. degree from The College of William and Mary and his M.B.A. and Post-Baccalaureate Certificate in Accounting from Virginia Commonwealth University.

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Speaker Biography

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Kristopher Boushie has over 35 years of experience in financial and litigation consulting, with an emphasis on forensic valuation issues. He has more than 30 years of experience consulting with corporate and legal clients on IP damages, IP valuation, and IP asset management issues across a variety of industries. He is a member of NERA's IP practice and heads its Trade Secrets Task Force. Earlier in his career, Mr. Boushie headed the IP practice of CapAnalysis LLC, an affiliate of Howrey LLP, one of the largest litigation firms in the U.S. He has worked with clients and counsel on hundreds of matters involving patent, trade secret, and Lanham Act damage assessment, strategic IP analyses, IP licensing negotiations, and patent royalty auditing.

Along with his IP consulting work, Mr. Boushie's expertise includes the analysis and quantification of damages in the areas of intellectual property infringement or misappropriation, contract disputes, distributorship terminations, antitrust, and tort claims. He also consults with clients on financial and cost accounting-related issues in areas such as Federal Insecticide, Fungicide, and Rodenticide Act data compensation, cost assignment and allocation, supply chain issues, ability/inability-to-pay-related issues, and other forensic accounting issues. He has been named as an expert in numerous cases and has testified in arbitration hearings, state court, U.S. district court, and before the European Commission.

Mr. Boushie is a member of several professional organizations, including the American Institute of Certified Public Accountants; the Virginia Society of Certified Public Accountants (where he is past chairman of the Litigation Services Committee); and the National Association of Certified Valuators and Analysts (where he is former Chair of the Executive Advisory Board, past President of the Vermont State Chapter, a 2011/2012 and 2013/2014 State Chapter Committee Honoree, and 2009 recipient of the State Chapter President's Leadership Award).

He is editor and a contributing author of *Calculating and Proving Damages* and has published articles in *The Value Examiner* (NACVA) and *The Financial Valuation and Litigation Expert*.

He received a B.S. in Economics from Allegheny College and a MAcc (Accountancy) from The George Washington University.

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Speaker Biography

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Martin Cunniff has been involved in all types of high-stakes litigation for over 30 years. This experience includes "on his feet" courtroom experience in dozens of trials, arbitrations and regulatory hearings. His varied litigation experience allows him to handle complex legal and economic analysis and his courtroom experience helps him present those arguments in a persuasive and understandable manner.

Mr. Cunniff has practiced in both large national firms and high-powered litigation boutiques. He served as chair of commercial litigation for the then largest litigation firm in the world supervising a group that conducted over 400 trials with a 92%-win rate. He was a member of the top-rated unfair trade and competition practice in the world and served as chair of antitrust for a national law firm. He started his career at Howery & Simon (later Howrey LLP) and was there for twenty-two years (1989-2011), then moved to Arent Fox (2011-2016), Innovista Law (2016-2018) and RuyakCherian (2018-2020).

Much of Mr. Cunniff's litigation experience has been as lead counsel in high-exposure cases involving complex economic analysis and large damage exposure. He has represented both plaintiffs and defendants in hundreds of cases involving various types of business and consumer litigation. Some of his notable cases include the BCS Antitrust case which helped force a college playoff system, hearings before the Copyright Royalty Board to set statutory rates for digital streaming services, the largest gold mining fraud ever, the largest credit ratings cliff case, high-profile international arbitration under the NAFTA treaty, environmental litigation before the Supreme Court of the Philippines, and several class actions for homeless citizens in the District of Columbia (one of which inspired a character in a John Grisham novel). He also helped move thirty inmates from death row to life imprisonment in Maryland.

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Speaker Biography

Ron Seigneur, MBA, CPA/ABV, CVA, ASA



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Ron Seigneur is a Founding Partner of Seigneur Gustafson LLP, based in Lakewood Colorado, where he is responsible for financial forensics, business and intellectual property valuation, practice management consulting and exit and succession planning services. He is co-author of *Financial Valuations: Applications and Models*, published by John Wiley & Sons, *Reasonable Compensation: Applications and Analysis for Management, Valuation and Tax*, published by Business Valuation Resources, *The Cannabis Industry Accounting and Appraisal Guide*, published by LuLu, *Financial Expert Guide for Family Law Judges and Attorneys*, published by LuLu, and a contributing author to the 6th edition of Shannon Pratt's *Valuing a Business*.

Ron is an adjunct professor at the University of Denver Daniels College of Business where he teaches business appraisal classes. Ron is also vice chair of the Business Valuation Committee of the American Society of Appraisers and a charter member of the Academy of Matrimonial Lawyers FBV Division. He has a BA from Michigan State University and an MBA from the University of Michigan. He is a fellow of the College of Law Practice Management and a frequent speaker and author on professional practice issues including leadership, expert witness skills, cannabis industry matters, strategic planning, compensation and related topics.

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Qualifying (or Disqualifying) the Expert

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Surviving Cross Examination Qualifying (or Disqualifying) the Expert

- › Appraisal Experience (or Lack Thereof)
 - › Mr. Expert, you are not a full-time appraiser, isn't that true?
 - › How many hours do you work in valuation annually?
 - › How many valuations have you performed?
 - › How many valuations have you performed for non-litigation purposes?

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Surviving Cross Examination Qualifying (or Disqualifying) the Expert

- › Experience – Particular Purpose
 - › How many valuations have you performed for this particular purpose?
- › Experience – Particular Industry
 - › How many valuations have you performed for this particular industry?

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Surviving Cross Examination Qualifying (or Disqualifying) the Expert

- › Experience - Testimony
 - › How many times have you qualified as an expert witness on valuation in a courtroom?
 - › Have you ever provided testimony for a case of this type?
 - › Have you ever provided testimony regarding the valuation of a business in this industry?
 - › Have you ever been excluded as an expert?
 - › Has your testimony ever been excluded?

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Surviving Cross Examination Qualifying (or Disqualifying) the Expert

- › “Practical” Experience - Selling Business
 - › Mr. Appraiser, have you ever assisted a client in buying or selling a business?
 - › Since you have not, you really do not know what real buyers and sellers consider, do you?
 - › Would you consider a broker who buys and sells this kind of business to be more knowledgeable than you about this industry?

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Surviving Cross Examination Qualifying (or Disqualifying) the Expert

- › Professional Certifications
 - › Mr. Expert, are you a CPA and a member of the AICPA?
 - › Do you hold the AICPA's specialization credential in valuation – the ABV? If not, why not?
 - › Do you hold the AICPA's specialization credential in forensic accounting – the CFF? If not, why not?
 - › What professional valuation designation do you consider to represent the highest standard of expertise and knowledge?

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Deposition and Cross-Examination

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Surviving Cross Examination Expert's Invoice

- › Questions about invoice
 - › Mr. Expert, how much time did you personally work on this project?
 - › How much time did your staff work on this project?
 - › Don't your professional standards require that you supervise your staff? Did you do this?
 - › Did you write your own expert report? If so, why have you only charged X hours for this task?
 - › Your time entry indicates you wrote correspondence to your client. Did you produce all such correspondence in response to our subpoena?

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Surviving Cross Examination Questions by Expert Type

- › Tactics Used by Opposing Counsel for Different Types of Experts
 - › The neophyte witness
 - › The ill-prepared witness
 - › The reluctant witness
 - › The over-confident witness

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Surviving Cross Examination Questions by Expert Type

- › The “Hired Gun”
 - › Mr. Expert, you advertise yourself as an expert for hire, is that correct, sir?
 - › How much are you being paid for your testimony today?
 - › Mr. Expert, how many times has Mr. Attorney hired you to be an expert?
 - › Isn't it true that you are his “go to” guy/gal?

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Surviving Cross Examination Silencing Questions

- › The “Yes/No” Question
 - › How do you handle a question from opposing counsel who instructs you to simply answer “yes” or “no” when an explanation is required to be accurate?
- › The “Deposition” Question
 - › How do you handle questions from opposing counsel who is reading from your deposition?

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Surviving Cross Examination Trapping Questions

- › “Authoritative” Literature
 - › Mr. Expert, do you recognize Shannon Pratt’s book *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* as authoritative?
 - › Do you consider Jim Hitchner’s *Financial Valuation – Application and Models* to be authoritative?
 - › Do you consider Gary Trugman’s *Understanding Business Valuation* to be authoritative?
 - › Do you consider any text to be authoritative?

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Surviving Cross Examination Trapping Questions

- › Failure to Interview Management
 - › Mr. Expert, you have stated that the standard of value is FMV which implies a willing buyer and seller, both having reasonable knowledge of the facts, etc.
 - › Would a willing buyer purchase a company without knowledge of its personnel?
 - › Did you interview management?
 - › No? Why not?

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Surviving Cross Examination Trapping Questions

- › The Hypothetical
 - › Mr. Expert, you have assumed for purposes of your terminal period calculation that long term growth was 2.5%.
 - › What would your result be if you changed your assumption to 3%?
 - › 4%?, 5%?, etc.

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Surviving Cross Examination Trapping Questions

- › Watch for the following:
 - › So, based on the foregoing, you *hoped to show*. . . .
 - › Well, isn't it *possible*. . . .
 - › It's *equally likely*. . . .
 - › So to *sum up*. . . .

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Surviving Cross Examination Questions on Professional Standards

- › Professional Standards
 - › Are you a CPA?
 - › With what professional standards must a CPA comply in preparing a valuation?
 - › Did you comply with those standards?
 - › Does your valuation comply with GAAP?

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Surviving Cross Examination Questions on Professional Standards

- › Professional Standards (Cont.)
 - › You have testified that the scope of your work was a “Calculation Engagement” as defined by AICPA SSVS1.
 - › Have you rendered an “opinion of value”?
 - › Does your opinion have a “reasonable degree of certainty”?
 - › Why didn’t you perform a “Valuation Engagement” as defined by AICPA VS100? Was it because your client would not pay the additional fees?
 - › Did you follow USPAP?

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Surviving Cross Examination Questions on Legal Standards

- › Proximate Cause
 - › Mr. Expert, can you explain to the court how the alleged harm resulted in the damages you have estimated?
- › Reasonable Certainty
 - › Mr. Expert, how certain are you that your valuation conclusion is accurate?
 - › Isn’t it true that valuation is more of an art than a science?
 - › Issue of certainty in fact v. certainty in amount

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Surviving Cross Examination Questions on Expoliation

- › Report Drafts
 - › Mr. Expert, isn't it true that you prepared several drafts of your report?
 - › Did you produce those drafts in response to my subpoena?
 - › Did you discard any draft reports? (Spoliation and sanction alarm bells!)
 - › Did counsel make any suggested revisions to your report?
 - › Did your opinion change? If so, why?

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Surviving Cross Examination Questions on Expoliation

- › Federal (**NOT State**) Privilege Rule
 - › Federal Rule Civil Procedure 26(b)(4) provides work-product protection for draft expert reports and communications with counsel, except
 - › Compensation;
 - › facts or data that the expert considered in forming the expressed opinions;
or
 - › assumptions that the expert relied on in forming the expressed opinions.
 - › Rule 26(a)(2) requires expert reports to state the "facts or data," not "data or other information," as in old Rule.
 - › The Advisory Committee Notes explain that this change is "meant to limit disclosure to material of a factual nature" and exclude "theories or mental impressions of counsel."

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Surviving Cross Examination Competency Questions

- › Math or Calculation Errors in Report
 - › Is Schedule A as accurate as the rest of your report?
 - › Your Schedule A: $1 + 1 = 3$
 - › Mr. Expert, do you have a calculator?
 - › Mr. Expert, please turn to Schedule A of your report, add up the figures, and tell the Court the sum you derive.
 - › Your report is wrong, isn't yet?
 - › How many other errors do you have in your report?

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Surviving Cross Examination Reliability Questions

- › Facts Incorrect/Not Disclosed to Expert
 - › Mr. Expert, you have stated that you relied upon management's representation of certain facts.
 - › What if I told you those facts were incorrect?
 - › How would that change your opinion?

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Surviving Cross Examination Reliability Questions

- › Reliance on a Third Party
 - › Mr. Expert, you have stated that you relied upon the real estate appraisal of Mr. Average Appraiser.
 - › If I gave you an appraisal of this same real estate prepared by Mr. Excellent Appraiser, do you have the expertise to say which appraisal is more accurate?

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Surviving Cross Examination Technical Questions

- › Valuation Date – Information Relied Upon
 - › Mr. Expert, you have stated in your expert report that the valuation date is 12/31/19.
 - › Would you please explain to the court why that date is significant in terms of the information an appraiser should consider?
 - › Information known
 - › Information reasonably knowable

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Surviving Cross Examination Technical Questions

- › Premise of Value
 - › Mr. Expert, you have stated that you have assumed the business is a “going concern.”
 - › Doesn’t this mean the business will operate into perpetuity (which is a long time)?
 - › Isn’t it true that most small businesses do not last beyond the second or third generation?

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Surviving Cross Examination Technical Questions

- › Valuing a Start-Up
 - › Mr. Expert, are you aware that the subject company is a start-up without any prior operating history?
 - › Would you please explain to the court how you can value a start up to a “reasonable degree of certainty”?
 - › Mr. Expert, aren’t these forecasts that you relied upon pure speculation?

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Surviving Cross Examination Technical Questions

- › Normalization Adjustments - Compensation
 - › Mr. Expert, you have stated that Mr. Owner is a key person, yet you have reduced his compensation to “market compensation.”
 - › What if Mr. Owner were not willing to work for that amount?

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Surviving Cross Examination Technical Questions

- › Normalization Adjustment – Tax Affecting Earnings
 - › Mr. Expert, did you tax affect the earnings?
 - › If not, did you adjust the discount rate to a pre-tax rate?
 - › If you did tax affect the earnings, assuming that the company is a pass-through entity, did you give any consideration to the tax benefits for such an entity?

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Surviving Cross Examination Technical Questions

- › Financial Projections
 - › Mr. Expert, you stated that you did not project cash flow in computing a value because to do so would be speculative.
 - › However, isn't it true that an investor or buyer would consider the expected future results of the business in determining value?
 - › Mr. Expert, did you prepare the projected cash flow for the company?
 - › If so, did you adhere to the AICPA standards governing preparation of financial projections?

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Surviving Cross Examination Technical Questions

- › Income Approach – Capitalization of Cash Flow
 - › Mr. Expert, you previously stated that you did not rely upon projected cash flow in computing a value because this would be speculative.
 - › However, isn't it true that you used the capitalized economic income method?
 - › Isn't it also true that this method results in a single period projection of cash flow which is assumed to grow at some rate into perpetuity?
 - › Would you please explain how this is not speculative?

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Surviving Cross Examination Technical Questions

- › Income Approach - Discount Rate - Cost of Equity v. WACC
 - › Mr. Expert, in computing the discount rate, you have used the cost of equity.
 - › Further, you noted that the cost of equity was preferable to using a WACC because the WACC requires assumptions about the company's capital structure.
 - › Isn't it true that the equity model also has implicit assumptions about a company's capital structure?

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Surviving Cross Examination Technical Questions

- › Income Approach - Discount Rate - Specific Company Risk
 - › Mr. Expert, in computing the cost of equity, you have added a specific company risk premium of 5%.
 - › How did you determine this rate?
 - › Isn't this subjective?
 - › Couldn't the rate be 3%? 4%?
 - › How do you know which rate is correct?

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Surviving Cross Examination Technical Questions

- › Income Approach -Terminal Period
 - › Mr. Expert, you have used a long term growth rate of 10% to compute the terminal period value.
 - › Isn't it true that the expected long term inflation rate is 2.5% and the expected rate of real GDP is 3%, or a total of 5.5%?
 - › How can the long term growth rate for this company exceed expected GDP?

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Surviving Cross Examination Technical Questions

- › Market Approach - Guideline Public Company Method
 - › Mr. Expert, you have used the guideline public company method as one of your methods to value this small closely held business.
 - › How can you consider these large, publicly traded companies to be comparable to this small business?

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Surviving Cross Examination Technical Questions

- › Market Approach - Transaction Method
 - › Mr. Expert, you have relied upon transaction multiples for purposes of computing value.
 - › Isn't it necessary for you to assess the validity and comparability of this data?
 - › What information did you consider for purposes of assessing the validity of the data?
 - › Are you aware of the terms of the transaction:
 - › Cash, owner-financed, contingent consideration?
 - › Stock v. asset sale?
 - › Non-compete?
 - › When did the transactions occur? Were the market conditions similar to the conditions at the valuation date?

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Surviving Cross Examination Technical Questions

- › The Key Person
 - › Mr. Expert, doesn't the success of this company depend on Mr. Key Person?
 - › Are you aware that Mr. Key Person does not intend to sell the company and even if he were to sell, he would not be willing to work for someone else or sign a non-compete agreement?
 - › Does your value assume a non-compete or that Mr. Key Person would be willing to work for a buyer?

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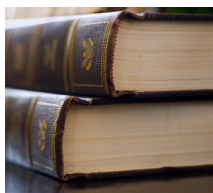
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- › ***Litigation Services Handbook – The Role of the Financial Expert, 6th ed., Weil, et al.***
- › ***Sampling of Valuation Cross-Examination Questions, Hawkins***
- › ***The Valuation Expert in Divorce Litigation, Moriarty and Zaumeyer***

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Thank You!