

## Unauthorized Practice of Law in BV Reports

By Rod P. Burkert, CPA/ABV, CVA

A standard disclosure in all of our BV reports says something like this: *Nothing in this report should be construed as accounting, investment, legal, or tax advice.* So why, then, do appraisers proceed to offer their clients legal opinions in valuation reports?

Here's an example. Shareholder dies. There is a corporate insurance policy that was procured for the purpose of purchasing the shares, but there is no written agreement saying such is the case. The company tells you that a similar event happened a few years ago: the shares of that decedent shareholder were bought back for \$500 a share using the insurance proceeds, but there was no binding agreement to do so then, or now. You weigh the facts and concur with the company. You write: "I agree with the company that there is no binding agreement to purchase the decedent's shares." And then you proceed to value the company.<sup>1</sup>

So ... UPL—Unauthorized practice of law. I first heard the acronym early in my valuation career, but I thought an attorney who was protecting her turf made it up. I didn't know if it was real until sometime later. It is real. *Black's Law Dictionary* defines UPL as "The practice of law by a person, typically a nonlawyer, who has not been licensed or admitted to practice law in a given jurisdiction."<sup>2</sup>

1 The issue here is whether or not to consider a corporate liability for the purchase of the decedent's shares that would be deducted from the company valuation.

2 Garner, Bryan A., ed., *Black's Law Dictionary* (7th ed.). St. Paul, MN: West. pp. 1191–1192.

Now, this is a broad definition, and my imagination conjures up the kind of dodgy activity UPL statutes are meant to protect against. In our valuation practices, though, what I'm referring to is something seemingly more benign, like citing legal precedents with similar facts and circumstances to our valuation and concluding a similar outcome would be supported. I see this most often when appraisers are using old court cases to justify valuation discounts.

UPL can also be something more serious, such as making outright legal opinions or conclusions in our valuation reports. The intersection of closely held businesses, including family limited partnerships, and Chapter 14 (IRC Sections 2701-2704) is ripe for UPL. Let me provide some examples to illustrate:

- Substantial modifications of certain agreements (e.g., buy-sell) occurring on or after Oct. 9, 1990, may be subject to the special valuation rules of Chapter 14. From a legal perspective (the only one that counts in this case), are we as appraisers qualified to say whether or not the current agreement is "a substantial modification" to a pre-Oct. 9, 1990, agreement?
- Code Section 2701 provides rules for determining the amount of a gift when an individual transfers an equity interest in a corporation or partnership to a family member while retaining an interest in the entity. As appraisers, are we qualified to opine as to what is or is not "an applicable retained interest"?
- Code Section 2703 disregards certain provisions in restrictive agreements for valuation

## BUSINESS VALUATION UPDATE

Executive Editor: Jan Davis  
 Legal Editor: Sherrye Henry Jr.  
 CEO, Publisher: David Foster  
 Managing Editor: Janice Prescott  
 Graphic & Technical Designer: Monique Nijhout  
 Customer Service: Jasmine Pearsall  
 VP of Sales: Lexie Gross  
 President: Lucretia Lyons

### EDITORIAL ADVISORY BOARD

**CHRISTINE BAKER**  
 CPA/ABV/CFF  
 PARENTEBEARD  
 NEW YORK, NY

**NEIL J. BEATON**  
 CPA/ABV, CFA, ASA  
 GRANT THORNTON  
 SEATTLE, WA

**JOHN A. BOGDANSKI, ESQ.**  
 LEWIS & CLARK  
 LAW SCHOOL  
 PORTLAND, OR

**MICHAEL A. CRAIN**  
 CPA/ABV, ASA, CFA, CFE  
 THE FINANCIAL VALUATION GROUP  
 FORT LAUDERDALE, FL

**NANCY J. FANNON**  
 ASA, CPA/ABV, MCBA  
 FANNON VALUATION GROUP  
 PORTLAND, ME

**JAY E. FISHMAN**  
 FASA, CBA  
 FINANCIAL RESEARCH ASSOCIATES  
 BALA CYNWYD, PA

**LYNNE Z. GOLD-BIKIN, ESQ.**  
 WEBER GALLAGHER  
 NORRISTOWN, PA

**LANCE S. HALL, ASA**  
 FMV OPINIONS  
 IRVINE, CA

**THEODORE D. ISRAEL**  
 CPA/ABV/CFF, CVA  
 ECKHOFF ACCOUNTANCY CORP.  
 SAN RAFAEL, CA

**JARED KAPLAN, ESQ.**  
 MCDERMOTT, WILL & EMERY  
 CHICAGO, IL

**GILBERT E. MATTHEWS CFA**  
 SUTTER SECURITIES INCORPORATED  
 SAN FRANCISCO, CA

**Z. CHRISTOPHER MERCER**  
 ASA, CFA  
 MERCER CAPITAL  
 MEMPHIS, TN

**JOHN W. PORTER, ESQ.**  
 BAKER & BOTTS  
 HOUSTON, TX

**RONALD L. SEIGNEUR**  
 MBA, ASA, CPA/ABV, CVA, CFF  
 SEIGNEUR GUSTAFSON  
 LAKEWOOD, CO

**BRUCE SILVERSTEIN, ESQ.**  
 YOUNG, CONAWAY, STARGATT & TAYLOR  
 WILMINGTON, DE

**JEFFREY S. TARBELL**  
 ASA, CFA  
 HOULIHAN LOKEY  
 SAN FRANCISCO, CA

**GARY R. TRUGMAN**  
 ASA, CPA/ABV, MCBA, MVS  
 TRUGMAN VALUATION ASSOCIATES  
 PLANTATION, FL

**KEVIN R. YEANOPLOS**  
 CPA/ABV/CFF, ASA  
 BRUEGGEMAN & JOHNSON YEANOPLOS, PC  
 TUCSON, AZ

*Business Valuation Update*<sup>™</sup> (ISSN 1088-4882) is published monthly by Business Valuation Resources, LLC, 1000 SW Broadway, Suite 1200, Portland, OR, 97205-3035. Periodicals Postage Paid at Portland, OR, and at additional mailing offices. Postmaster: Send address changes to *Business Valuation Update*<sup>™</sup>, Business Valuation Resources, LLC, 1000 SW Broadway, Suite 1200, Portland, OR, 97205-3035.

The annual subscription price for the *Business Valuation Update*<sup>™</sup> is \$359. Low cost site licenses are available for those wishing to distribute the *BVU* to their colleagues at the same address. Contact our sales department for details. Please feel free to contact us via email at [customerservice@BVResources.com](mailto:customerservice@BVResources.com), via phone at 503-291-7963, via fax at 503-291-7955 or visit our web site at [BVResources.com](http://BVResources.com). Editorial and subscription requests may be made via email, mail, fax or phone.

Please note that by submitting material to *BVU*, you are granting permission for the newsletter to republish your material in electronic form.

Although the information in this newsletter has been obtained from sources that BVR believes to be reliable, we do not guarantee its accuracy, and such information may be condensed or incomplete. This newsletter is intended for information purposes only, and it is not intended as financial, investment, legal, or consulting advice.

Copyright 2012, Business Valuation Resources, LLC (BVR). All rights reserved. No part of this newsletter may be reproduced without express written consent from BVR.

purposes. As appraisers, are we qualified to opine as to whether a particular agreement, or provision therein, is or is not “a bona fide business arrangement” that is “comparable to similar arrangements entered into by persons in arm’s-length transactions”?

- Code Section 2704 prohibits the use of lapsing rights and restrictions that are more onerous than state law to reduce transfer taxes. Are we qualified to opine whether or not a particular restriction is “more onerous than state law”?

We may think we’re qualified to render these “valuation” opinions, but we’re not. It’s UPL. We need to avoid interpreting legal agreements that affect value. Instead, we should be requesting a written opinion from the client’s attorney on how to interpret the relevant provisions. Then, in our reports, we can state that we relied on the attorney’s written representation in following a particular course of action. If such a representation will not be forthcoming, either because the attorney refuses (unlikely if he wants to keep the client happy) or because there is no attorney (more likely in smaller valuations) you can work the valuation both ways (e.g., with and without the more-onerous-than-state-law restriction) which is more desirable, or make one way an assumption in your report, which is less desirable.

UPL should not be taken lightly. If our clients rely on our position or interpretation to their detriment, we could be liable for damages and attorney fees.<sup>3</sup> Then, there is the overlap with appraiser penalties to consider. If our valuation is predicated, in part, on UPL, how can we defend ourselves against the 6695A hurdle that the appraised value is “more likely than not” the proper value?

Here’s a rule of thumb to keep us out of trouble. If we would not make a particular legal opinion or conclusion in a litigation report, we should not do it for a valuation report. I say that because our litigation reports are generally submitted to attor-

<sup>3</sup> UPL remedies are covered by state law and vary from state to state.

Reprinted with permissions from Business Valuation Resources, LLC

neys who are careful to cull from them anything that resembles a legal opinion.

If you are looking for language to head UPL off at the pass, here is what I say in my BV engagement letter:

Unless I am provided with information to the contrary by ABC Company's legal counsel, my business valuation will assume that the provisions of ABC's [operating agreement] are in compliance with Internal Revenue Code Sections 2036(a), 2503(b), 2701, 2702, 2703, or 2704. The effect of 2036(a) is to include in the gross estate of a decedent the value of transferred assets if there is an express or implied retention of economic benefits by the transferor-decedent. The effect of 2503(b) is to make gifts that do not qualify as "present interests" ineligible for the gift tax

exclusion. The effect of 2701-2704 is to ignore any provisions or restrictions that (i) reduce value when there is an "applicable retained interest," (ii) would not be accepted in an arm's-length transaction with a third party, or (iii) are more onerous than state law. The determination of the applicability of these rules is legal in nature and, accordingly, beyond the scope of my capabilities.

I welcome feedback from others on how they handle the issue of the unauthorized practice of law.

***Rod Burkert, CPA/ABV, CVA, is the founder of Burkert Valuation Advisors LLC and offers a report review service for sole practitioners and small firms. He is a past chairman of NACVA's Executive Advisory and Education Boards.***