

***The Comprehensive Guide to  
Lost Profits Damages  
For Experts and Attorneys***

**Edited by: Nancy J. Fannon**

**A Business Valuation Resources/ BVR Legal Special Guide**

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- AICPA (American Institute of Certified Public Accountants)
- ASA (American Society of Appraisers)
- IBA (Institute of Business Appraisers)
- NACVA (National Association of Certified Valuation Analysts)
- CFA Institute (Certified Financial Analyst)
- Association of Certified Fraud Examiners
- NAFE (National Association of Forensic Economists)
- CICBV (Canadian Institute of Chartered Business Valuators)
- CICA (Canadian Institute of Chartered Accountants)
  
- American Institute of Certified Public Accountants Litigation Services and Applicable Professional Standards: Decision Tree to Determine the Application of Professional Standards (reprinted with permission)                      **Appendix B**
  
- American Institute of Certified Public Accountants Litigation Services and Applicable Professional Standards: Comparison of AICPA Professional Standards and Federal Rule of Evidence Rule 702 (reprinted with permission)                      **Appendix C**

#### **Links to requirements for certifications, by organization                      Appendix D**

- AICPA (American Institute of Certified Public Accountants)

- CPA (Certified Public Accountant) (certification issued by state regulators)
- ABV (Accredited in Business Valuation)
- CFF (Certified in Financial Forensics)
- ASA (American Society of Appraisers)
  - AM (Accredited Member)
  - ASA (Accredited Senior Appraiser)
- IBA (Institute of Business Appraisers)
  - CBA (Certified Business Appraisers)
  - MCBA (Master Certified Business Appraiser)
- NACVA (National Association of Certified Valuation Analysts)
  - CVA (Certified Valuation Analyst)
  - AVA (Accredited Valuation Analyst)
  - CFFA (Certified Financial Forensics Analyst)
- CFA Institute
  - CFA (Certified Financial Analysts)
- Association of Certified Fraud Examiners
  - CFE (Certified Fraud Examiner)
- NAFE (National Association of Forensic Economists)
  - No designation
- CICBV (Canadian Institute of Chartered Business Valuators)
  - CBV (Certified Business Valuator)
- CICA (Canadian Institute of Chartered Accountants)
  - CA (Chartered Accountant)

Federal Rules of Evidence pertaining to Expert Testimony  
Federal Rules of Civil Procedure pertaining to Expert Testimony

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**Selected Readings:**

Proving Lost Profits after *Daubert*: Five Questions Every Court Should Ask Before Admitting Expert Testimony, Robert M. Lloyd

**Appendix G**

**Links to Litigation Studies**

- Interim Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System, August 1, 2008, American College of Trial Lawyers
- “Judicial Business of the U.S. Courts 2007”
- 2000-2007 Financial Expert Witness *Daubert* Challenge Study by PricewaterhouseCooper (PwC)

**Appendix H**

**Case Law Abstracts:**

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- **By State**

**Appendix I**  
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**Searchable CD of all significant cited cases—full text and summary abstracts of the opinions**

**Enclosed**

## Contributors' Biographies

### (In order of their materials in the text)

Nancy J. Fannon ASA, CPA•ABV, MCBA is the Owner of Fannon Valuation Group, a business valuation and litigation support services firm located in Portland, Maine. She is an Accredited Senior Appraiser (ASA) with the American Society of Appraisers, holds the specialty designation of Accredited in Business Valuation (ABV) from the American Institute of Certified Public Accountants (AICPA); and is a Master Certified Business Appraiser (MCBA) with the Institute of Business Appraisers (IBA). Ms. Fannon has over 20 years of professional valuation experience, and has been qualified as an expert witness in state and federal courts. She is a nationally known expert on lost profits damages, pass-through entity valuation, and the transaction databases; and has presented dozens of speeches and authored numerous papers on these and other areas of business valuation. She is the author of *Fannon's Guide to the Valuation of Subchapter S Corporations* and *The Comprehensive Guide to the Transaction Databases*, co-authored with Heidi Walker (both published by BVResources). She is a co-author of *Financial Valuation—Applications and Methods*, and was a contributing author for both *The Business Appraiser and Litigation Support* and *Business Valuation and Taxes: Procedure, Law, and Perspective* textbooks, and has been a technical reviewer on several other textbooks including the 5<sup>th</sup> edition of Shannon Pratt's seminal textbook, *Valuing a Business*, published in 2008. Ms. Fannon has a Bachelor of Business Administration in Accounting from the University of Massachusetts. She has been a member of the AICPA Business Valuation Subcommittee, the ABV Credential Committee, and has chaired the AICPA Business Valuation Conference. She is a member of the editorial advisory boards of *CPA Expert*, *Business Valuation Update*, and past member of *Valuation Examiner*, and is on the Panel of Experts for the *Litigation and Consulting Expert*. In 2007, Ms. Fannon was inducted into the AICPA's Business Valuation "Hall of Fame," awarded for substantial contributions to the advancement of the business valuation profession.

Jonathan M. Dunitz, Esq. is Senior Counsel with the Portland law firm of Friedman Gaythwaite Wolf & Leavitt and has fifteen years of litigation experience. He practices in commercial and business litigation, insurance coverage, complex family law, and appellate advocacy. He is admitted to practice before all state and federal courts of Maine and the United States First Circuit Court of Appeals. He is a frequent panelist for the Maine State Bar Association, including: Freeze-Out, Fiduciary Duty and Oppression: Litigating Pursuant to the New Maine Business Corporations Statute at the 2004 Summer Meeting; The Art of Written Advocacy: Drafting Persuasive, Concise and Creative Legal Briefs and Memorandum at the 2006 Annual Meeting; Damages for Loss of Business or Business Opportunity at the 2007 Summer Meeting; and, Business Interruption Insurance Coverage

at the 2008 Annual Meeting. He is a 1988 graduate of Ithaca College and a 1993 *magna cum laude* graduate of the Syracuse University College of Law where he was Lead Articles Editor of the Syracuse Law Review.

**Michael A. Crain, CPA/ABV, ASA, CFA, CFE** is the Managing Director at The Financial Valuation Group (Fort Lauderdale, Florida). Mr. Crain has been a licensed certified public accountant (CPA) in Florida since 1984 and has the ABV and ASA certifications; he is also a Chartered Financial Analyst (CFA) (certified by the CFA Institute) and a Certified Fraud Examiner (CFE) from the Association of Certified Fraud Examiners. He has B.A. (accounting) and M.B.A. degrees from Bellarmine University and undertaken doctorate studies at the Manchester Business School, University of Manchester, England. He has previously been approved as an arbitrator for the American Arbitration Association's Commercial Panel. Mr. Crain now works largely in the areas of business/economic damages measurement, valuation of businesses and financial assets, and forensic accounting. He has served as a consulting and testifying expert in many commercial cases in state and federal courts, and has also served as an arbitrator in commercial damages and minority shareholder cases and as a court-appointed accountant. He is skilled in statistics and the use of regression and time-series analysis. Mr. Crain has previously worked in the auditing and consulting areas in public accounting firms, including senior manager at an international firm. He is a past chairman of the AICPA's Business Valuation Committee and has been inducted into the AICPA's Business Valuation Hall of Fame. Mr. Crain also teaches and his publications include contributing author of *Litigation Services Handbook: The Role of the Financial Expert*, 4<sup>th</sup> ed., co-author of *Financial Valuation: Applications and Models*, 1<sup>st</sup> and 2<sup>nd</sup> ed., contributing author of *The Portable MBA in Finance and Accounting*, 3<sup>rd</sup> ed. and articles in the *Journal of Accountancy*.

**Robert Gray, CPA/ABV/CFF, CFE** is a principal with Parente Randolph Accountants & Consultants in their Dallas, Texas office, where he is responsible for complex forensic accounting and litigation and valuation engagements. With over 23 years of experience, Mr. Gray assists legal counsel in discovery, planning, and strategies before and during trial with examination of witnesses, rebuttal of opposing experts/witnesses, and preparation of trial demonstratives. Mr. Gray is a member of the AICPA's Forensic and Litigation Services ("FLS") Committee. Mr. Gray is a nationally recognized speaker to professional and educational groups discussing various aspects of financial/accounting analysis, economic damages, litigation consulting, business valuation, and forensic/fraud investigations. Mr. Gray earned a Bachelor of Science degree in Business Administration/Professional Accounting from Southern Illinois University-Edwardsville.

**James O'Brien, CPA** is a principal with Parente Randolph Accountants & Consultants in their Philadelphia office. He has provided a variety of financial consulting and accounting services to attorneys, insurance companies, governmental agencies, and public and private corporations since 1990. Mr. O'Brien specializes in providing financial analyses related to disputed matters, the majority involving litigation and/or insurance claims matters, as well as financial and forensic analysis of financial statements and tax returns, general ledgers and other original books of entry, relevant contracts and agreements, and industry data. Mr. O'Brien has a B.S. in Accounting from York College of Pennsylvania. He has spoken before professional and educational groups on various aspects of financial analysis, litigation consulting, fraud investigations, and economic damages.

**Thomas Burrage, CPA/ABV, CVA, CFF** is Principal in the forensic firm Burrage & Johnson, CPAs, LLC (Albuquerque, New Mexico). His fields of expertise include litigation, forensic accounting, business valuation, and taxation. He has been qualified as an expert witness in cases involving lost earnings, fraud, malpractice, minority shareholder suits, insider trading, damages, business valuation, and family law. Mr. Burrage has testified in district and federal courts throughout New Mexico, has been appointed a Special Master and served as the court's neutral Rule 11-706 witness; and he regularly serves as a settlement facilitator in the 2<sup>nd</sup> Judicial District (Bernalillo Co.). He often speaks on family law, economic damages, forensic accounting, taxation, and business valuation, and teaches nationally on these subjects. Mr. Burrage is the co-author of *Divorce and Domestic Relations Litigation: Financial Advisors' Guide*. He is a member of the AICPA's Valuation Services executive committee, formerly chaired its Forensics and Litigation Services committee, and has served on its Business Valuation/Forensics and Litigation Services Task Force and Editorial Task Force. Mr. Burrage holds a Bachelor of Business Administration degree from the University of New Mexico.

**Michael Kaplan, CPA, CVA, CFFA** is a co-founder of Voir Dire Partners, LLC, an association of independent forensic valuation consultants, and Kaplan Abraham Burkert & Company, litigation and valuation consultants (Los Angeles, California). He has provided services in numerous litigation matters, including business litigation, professional malpractice matters, fraud and embezzlement, intellectual property, marital dissolution, loss of earnings, employment matters, and partner and shareholder disputes. Mr. Kaplan has qualified to testify in court as an expert witness in approximately 250 matters, and has served as a court-appointed expert and accounting referee. Mr. Kaplan has been on the faculty of the Marshall School of Business and Leventhal School of Accounting (University of Southern California) and has authored numerous publications in the business valuation and litigation practice marketing. Mr. Kaplan is a principal member of the training

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**Michael A. Cunniff, Esq.** earned a law degree *magna cum laude* from Suffolk University Law School (Boston). A principal in The McCloskey Resource Group (Portland, Maine), Mr. Cunniff provides forensic resources, including computer forensics, investigative support, and eDiscovery consulting, to professional and corporate clients. He also serves as an adjunct professor at the University of Maine's School of Law, and is admitted to practice law in Maine and Massachusetts, the U.S. District Courts (districts of Maine and Massachusetts), the U.S. Court of Appeals for the First Circuit, and the U.S. Supreme Court; he has briefed and argued cases before the Maine Supreme Court and the U.S. Court of Appeals for the First Circuit, and was lead counsel in a petition for *certiorari* considered by the U.S. Supreme Court. In 2002, Mr. Cunniff became a founding partner of McCloskey Mina Cunniff & Dilworth (Portland, Maine), a law firm comprised largely of former federal prosecutors. Prior to starting the law firm, Mr. Cunniff served 27 years in federal law enforcement with the U.S. Drug Enforcement Administration. He is an *alumnus* of the Edward Thaxter Gignoux Inn of Court and a Bar panelist on the U.S. District Court for the District of Maine's Strategic Planning Committee, and has served on the Suffolk University Law School's ATLA Trial Team.

**Professor Robert M. Lloyd** is the Lindsay Young Distinguished Professor at The University of Tennessee College of Law, where he teaches courses in contracts, commercial law, and finance. His primary research interest is damages for lost profits. Professor Lloyd has twice been honored with the Student Bar Association's Outstanding Teaching Award and the Harold C. Warner Outstanding Teacher Award. In 1996 he received the UTK National Alumni Outstanding Teacher Award. Professor Lloyd is a Fellow of the American College of Commercial Finance Lawyers. He received a Bachelor of Science Engineering degree from Princeton University and his Juris Doctorate degree from the University of Michigan. Prior to his educational career in Tennessee, he practiced law with a large firm in Los Angeles.

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**Richard Hoffman, CPA/ABV** has over seventeen years of experience in performing damage calculations, business valuations, and other forensic accounting projects for several international consulting firms. He is a frequent instructor on the proper methods of measuring damages resulting from intellectual property disputes. He co-authored *Intellectual Property Damages: Guidelines and Analysis* and has taught many courses for NACVA. He has testified in state and federal courts, including bankruptcy courts, on many occasions. He has also acted as the Special Master in a number of matters. He is a co-founding partner of Lone Peak Valuation Group in Salt Lake City, Utah.

**Stephen D. Bowden, CPA** is the President of U.S. Financial Group of Georgia, Inc., CPAs (Atlanta), a firm specializing in loss accounting and damage measurement. Mr. Bowden's entire professional career has been in the forensic accounting field, working as an expert damages consultant to insurance carriers, legal counsel, and companies throughout the U.S. and internationally. He is experienced in most forms of commercial loss and value including business interruption, lost earnings, surety/builder's risk, inventory losses, arson/financial condition, fidelity/fraud losses, personal injury, and third party damages. Mr. Bowden has provided expert witness testimony in a variety of legal proceedings related to damages measurement for numerous industries. Mr. Bowden received his Bachelor of Business Administration-Accounting degree from the University of Georgia.

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**Patrick McGeehin, CPA** is a senior managing director with FTI Consulting ([www.fticonsulting.com](http://www.fticonsulting.com)). He consults and provides expert testimony on government contract and litigation support matters, and provides contract claims assistance and services relating to the calculation of and approach to damages, including breach of contract, lost profits, requests for equitable damages in delay and disruption cases, and fraud-related issues. Mr. McGeehin has provided expert testimony, both in deposition and trial proceedings, on over 100 occasions; and has published related articles in various professional publications. Mr. McGeehin graduated summa cum laude from the University of Scranton and received a Masters in Business Administration degree from George Washington University.

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**Timothy York, CPA/ABV** is a Managing Member of the Birmingham, Alabama office of Dixon Hughes, PLLC. Mr. York primarily advises owners of closely held businesses on accounting, tax, valuation, and consulting matters. Since 1993, he has focused extensively on the auto dealership industry and works daily with large dealership groups, including the valuation and cost segregation areas. Mr. York completed a three-year term as a member of the Business Valuation Committee for the AICPA in 2004 and served as the 2004 Chair of the its National Business Valuation Conference. Additionally, Mr. York has performed valuations and valuation consulting related to mergers and acquisitions, estate and gift taxes, litigation, and other matters. He has spent substantial time in the valuation areas of automobile and truck dealerships, family limited partnerships, and investment holding companies, with other experience across various industry sectors. He has provided expert testimony, worked valuation matters in mediation and arbitration, and has served as the special master on court-appointed assignments. Mr. York has spoken and written extensively about auto dealership valuation and cost segregation issues. He received his Bachelor of Science degree in accounting in Birmingham-Southern College.

**Colin Johns, CPA, CFF, CFE, CA** is a Director in the Litigation and Forensic Consulting Services Group in the San Francisco office of Hemming Morse, Inc. He has more than 30 years of experience in public accounting in both the United States and the United Kingdom. He has also worked as an auditor and consultant and appeared as an expert witness in state and federal courts, testifying to a diverse range of issues, including construction claims, accountants' liability, and contractual disputes. A member of the AICPA, he is one of the authors of the AICPA's "Practice Aid 06-4 Calculating Lost Profits" and is certified in Financial Forensics by the AICPA. Mr. Johns is also a former Chair of the California Society of Certified Public Accountants Litigation Sections, Economic Damages Section, which provides education and a discussion forum for the more than 200 CalCPA members throughout the state, and is a member of the Litigation Sections Steering Committee. Mr. Johns is also a member of the Association of Certified Fraud Examiners and the Institute of Chartered Accountants of Scotland. He holds a Bachelors of Arts degree in Economics, with an emphasis in Accounting and Business Finance, from the University of Manchester, England.

**Greg McKinnon, CPA, CMA** is a Director in the Litigation and Forensic Consulting Group of Hemming Morse, Inc. in its San Francisco and Chico, California offices. Having been a CFO and general manager in private industry as well as an accountant and consultant for public companies, he has more than 20 years of experience in accounting, chiefly in the areas of construction and real estate. Currently Mr. McKinnon applies this experience to matters in construction delays, disruption and loss of productivity, construc-

tion accounting, commercial economic damages (including lost profits), partnership and shareholder disputes, embezzlement and fraud, lost wages and business valuation. He also provides project audits and consulting on construction claims, troubled projects, and systems for project management and administration. Mr. McKinnon has testified as an expert in court and arbitration and has served as an arbitrator. He lectures on construction claims and best practices at local, regional and national construction conferences and seminars. Mr. McKinnon is a Certified Public Accountant and a Certified Management Accountant. He earned his Bachelor of Science in Business Administration from California State University (Chico).