

## CROSS-EXAMINING THE FORENSIC ACCOUNTANT

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### ***1. Introduction***

Business litigation, shareholder and partnership disputes, employment litigation, family law property issues and personal litigation are, to put it bluntly, a numbers game. Identifying the heads of entitlement or damages may be a challenging task alone, but quantifying the damages is even more difficult.

During the last decade, a growth industry has developed in the area of financial expert witnesses. With the litigation explosion of 1980's and 1990's and the introduction of the concept of equalization of net family property under the *Family Law Act*, trial counsel were invited to choose from an impressive array of experts who could analyze numbers to produce, within reason, any conclusion that suited the facts of your case.

To put it in this rather crass way is to take nothing away from the expertise, skill and creativity of the accountants, valuers, actuaries, economists, financial planners and others who work in this field. On the contrary, the key to the bottom line is "What are your assumptions?". The expert evidence you present to the court as to quantum of damages and valuation is only as effective as the accuracy of the facts and assumptions upon which it is based.

The cross-examination of the other party's forensic accountant is often the event which makes or breaks a case. The importance of this aspect of the case is not much different whether looked at from the perspective of the plaintiff or the defendant: the objective is to persuade the trier of fact that your view of damages is more reliable than the other side's.

In Ontario, business, employment, corporate and family litigation are typically tried without a jury,

whereas personal injury cases are often tried with a jury. The matters addressed in this paper are equally applicable whether the trier of fact is a judge alone or a jury. Before a jury, counsel must take particular care to ensure that accounting and financial evidence and opinions are adduced with minimal complexity.

When the trial is before a jury, the jurors will not have read or analyzed the schedules in the accountant's reports. To reap maximum benefit from any complex evidence before a jury, counsel should carefully plan the presentation and positioning in the courtroom of charts and diagrams. Charts should be uncomplicated and large enough for all jurors to see easily. When a witness refers to a chart, counsel should point out the reference. Unlike the trial judge, who will speak up if an issue is unclear, the juror who does not appreciate the significance of a complicated issue, is likely to forget about or discount its importance.

## **2. *Set Realistic Goals for the Cross-examination***

In establishing the framework for the cross-examination of the opposing accountant or valuator, keep in mind that your objectives are no more (and no less) than to persuade the trier of fact to favour that conclusions of your expert over those of the opposing expert. In general, this is done by

### **Checklist of Cross-Examination Goals**

- 1) minimizing the strengths of opposing expert's report;
- 2) capitalizing on the weaknesses in the opposing report;
- 3) securing admissions as to key elements of your expert's report, including
  - a) the professional qualifications of your expert;
  - b) the appropriateness of the methodology or model used by your expert;
  - c) the accuracy of some or all of your expert's conclusions as to losses, damages or value; and

- d) the accuracy of your expert's calculations.

All too often counsel forget that every case has both strengths and weaknesses. There is no need to beat the opposing expert accountant to a pulp to make your point. All you need to be effective is to cast doubt on the main pillars of the other side's qualifications, methodology or model, calculation or analysis of the damages, valuation or losses. The process is comparative not absolute. You do not have to show that opposing accounting opinion is terrible --- only that the opinion of your forensic accountant is a better estimate of the damages, valuation or losses.

There is no need to cross-examine on every issue. Cross-examination of the opposing forensic accountant is rendered most effective when limited to a few key points which undermine the expert or his/her evidence in one or more of the areas mentioned below. This is not to say that the cross-examination will be brief or shallow. On the contrary, counsel will have to prepare meticulously and will have to have an intimate understanding of the differences in the approach and conclusions of the two expert accountants' reports.

It is suggested that cross-examination of the opposing accountant be limited to those issues upon which there is *substantial* disagreement and where the amount in issue is worth the preparation and trial time involved. It is wise to have the opposing accounting experts meet before trial to identify issues upon which they can agree. The accountants' pre-trial meeting will clear up mathematical errors, assists in understanding the theory of the other side's case and could yield settlement of the case. Your own expert accountant is the most important resource to help prepare for the cross-examination.

## **2. *Areas of Expertise of Forensic Accountants:***

Effective cross-examination of the opposing accountant begins long before you rise to ask your first

leading question. As plaintiff's counsel, you will have decided that you need a forensic accountant to help you quantify the financial issues in your case. The kinds of issues accountants address in litigation are generally these:

### **Checklist of Forensic Accounting Evidence**

- a) business valuation;
- b) reliability of accounting methodology
  - i) accounting and audit principles
  - ii) taxation principles
  - iii) assumptions or data for particular businesses and industries;
- c) business, profits or income losses; and
- d) business and economic cycles, trends and practices.

These skills find application in many types of cases, of which the following is an inexhaustive list:

### **Checklist of Cases Where Forensic Accountants Are Called Upon**

- 2) *Family Law*
  - a) Net Equalization of Family Property
  - b) Valuation of Shares or Business
  - c) Analysis of Income and Expenses
- 3) *Personal Injury*
  - a) Loss of Business or Profits
  - b) Loss of Past and Future Income
- 4) *Business Fraud or Breach of Fiduciary Duty*
- 5) *Professional Negligence*
- 6) *Breach of Contract*
- 7) *Shareholder, Joint Venture & Partnership Disputes*
- 8) *Insolvency and Receivership*

### **Retaining Your Forensic Accountant**

Your cross-examination strategy begins when you decide whom to retain as your own accounting expert. Your expert should be an expert in the particular field about which he/she will testify. Not all accountants are experts in every field of accounting, in every industry nor in every field of litigation accounting. Some accountants have experience in taxation, others in actuarial mathematics and others in economics. Get the best and most experienced expert the case will justify. The expert you fail to retain because of cost may turn out to be a formidable witness for the other side.

Interview your expert about her/his experience in the particular field your case involves. Find out about his/her trial experience. Surviving a cross-examination is a daunting experience. The best litigation accountants have raised it to an art form. Determine from colleagues whom they have retained in other cases. An expert who has published or whose partner or associate has published an authoritative text or article lends credibility to his/her opinion evidence (or if the writing is inaccurate or contradictory, it might be fuel for devastating cross-examination).

A database search for trials in which the expert has testified can shed light on the expert's experience in the courtroom. Also, make sure the expert you retain will be involved in all aspects of the preparation of the report and will be the witness at trial. The strategic decisions you make at this early stage will have an important impact on your cross-examination of the opposing accounting expert at trial.

### **3. *Preparing for the Cross-Examination***

As suggested above, cross-examination of the opposing accountant begins very early. As plaintiff's counsel, you will have commissioned an expert's report which paints the rosier picture of the quantum of your client's damages, valuation, losses or equalization. It cannot be overemphasized that the effectiveness of counsel's cross-examination of the opposing accountant is greatly affected by the

strength of counsel's own expert accounting evidence.

Usually, the first 'cross-examination' will be of your own accounting expert in the privacy of your office. You should ensure that witnesses and documentary evidence are available to prove, by reliable, admissible evidence, the facts and assumptions upon which your accountant's report is based. If the facts and assumptions are inaccurate or unreliable, the conclusions drawn from them may be equally inadmissible.<sup>1</sup> Counsel should ensure that she/he or a member of his law firm interviews the witnesses of fact. It is not enough to rely on the accountant's interview of the witnesses.

The discussion counsel conducts with his/her expert accountant should include a discussion about the methodology or model upon which your accountant's opinion is based, including the lines of attack the other side is likely to level at it. For instance, in a loss of profits case, the accountant will have to identify the base year to determine what profits the plaintiff ought to have earned. The earnings for the base year will be compared to the period of the loss to establish the damages. Counsel must educate him/herself about the principles involved in selecting a method or model and test its reasonableness by asking questions of his/her accounting expert.

It is wise to ask your expert accountant what model, analysis, investigation and conclusions, he/she would employ if retained by the other side. Note how the seeds of your cross-examination of the opposing accountant are being planted.

### **Counsel's Input into Preparation of the Expert's Report**

To what extent may counsel properly assist in the preparation or editing the report submitted by the

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<sup>1</sup> *R. v. Turner (1974), 60 Cr. App. R. 80 at 82*: "if the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless".

accounting expert? Even before the meeting to analyze your own expert's draft report, there will have been frequent communication between the expert and counsel. This exchange of ideas is fundamental to the proper organization and scope of your expert's opinion.

Does counsel exceeds proper limits by suggesting conclusions to the accounting expert? How far may counsel guide the accounting expert to her/his ultimate conclusions? Counsel's analysis of this issue in respect of one's own expert will be important in the preparation of the cross-examination of the opponent.<sup>2</sup>

It is submitted that counsel ought to feel free to comment upon and to suggest amendments to those parts of the expert's report which contain the chronology, factual assumptions (or omissions) both as to facts and information received from others, the statement of the issues and the articulation of principles of law. Counsel may also test or question the methodology or its application by his/her own accountant and may question any calculations or transposition of figures from one place in the report to another.

However, if a forensic accountant concludes that, say, a loss of profits calculation should be reduced by 50% to allow for contingencies, counsel's suggestion that 25% is a better figure may be improper, depending upon the reason for the intrusion. It must be clear that the opinion is the expert's opinion and not counsel's<sup>3</sup>.

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<sup>2</sup> See *infra*. under the heading **Draft Reports**

<sup>3</sup> Some judges do not find favour in extensive "round table discussions" about the contents of experts' reports. If the lawyer has interfered unduly, the accountant's evidence might be discounted at trial if the trial judge believes that the expert's independence, objectivity and integrity have been compromised: *Vancouver Community College v. Barrett et al.* (1986) 26 B.C.L.R. (2d) 296 (BCSC)

In an effort to ensure that their analysis of the facts is correct and to foreclose cross-examination on the accuracy of certain assumptions, some valuers, when valuating a business that is under the control of the adverse party circulate draft reports without values to all parties to the litigation asking for comments upon the accuracy of the factual statements. All parties are urged to respond. The purpose of this strategy is to invite all parties to contribute openly to the amending and revising process and, in our view, the process is entirely appropriate.

When acting for a defendant, counsel frequently has the benefit of having the opposing report to present to her/his expert accountant for critique before commissioning her/his own expert's report. However, the task of the defendant's forensic accountant should be no less thorough.

In a business valuation or loss of profits case, a model must be still be selected to determine the base year and the rate of growth from which values are extrapolated. Similarly, the analysis of the strengths and weaknesses of each side's case should be considered before the report is submitted. In a matrimonial case, the work of the forensic accountants is often the same whether commissioned by the plaintiff or the defendant.

### **Examination for Discovery**

Examination for discovery provides an important opportunity to prepare for the eventual cross-examination of the opposing accounting expert. In a complex matrimonial or corporate case, which requires valuation or analysis of financial statements, the forensic accountants might attend at discovery to explain the financial issues. Sometimes, the opposing party might have their personal or corporate accountant serve as the litigation accountant. The evidence obtained from the corporate accountant on discovery may be useful for cross-examination at trial.

### **Analysis of Expert's Reports**

When all accountants' reports are in hand and the trial is proceeding, counsel should have regard to the following matters in preparation for cross-examination of the opposing expert. In many of these areas, guidance from your forensic accountant will be helpful:

### **Checklist for Consultations with Your Forensic Accountant**

- 1) independent research about the opposing expert to determine
  - a) the accuracy of his/her curriculum vitae;
  - b) the position in his/her accounting firm or 'skeletons' which may make his/her opinion less credible;
  - c) experience in this aspect of litigation accounting;
  - d) other testimony by this expert<sup>4</sup>;
  - e) publications and articles<sup>5</sup>;
  - f) other reports by opposing expert on similar topics;
- 2) analysis of all forensic accountants' reports in the case including preliminary and draft reports, if available;<sup>6</sup>
- 3) discussion with the client and client's personnel as to all inquiries and documents conducted by the accountant and members of the accountant's staff;
- 4) analysis and comparison of your expert accountant's report to the opposing report ("Are they comparing apples to apples?");
  - a) review of documents considered by both accountants;

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<sup>4</sup> *A good place to find other testimony by the opposing accountant or by your expert is in the legal databases, such as QuikLaw or SearchLaw. A search may disclose an opposite position taken by the same expert on a matter of process or principle.*

<sup>5</sup> *A search of articles and texts on forensic accounting may also provide fuel for your cross-examination. Many of the better known forensic accountants have written books or articles in their field. Previous writings by the opposing expert may be used to challenge evidence. Matters of principle in writings by your expert or other authorities may also be put to the opposing expert.*

<sup>6</sup> *See Robyn M. Bell, Drafts of Experts' Reports: How Far Does the Obligation to Produce Extend? (1992) 13 Adv. Q. 353.*

- b) comparison of assumptions and information from others;
  - c) comparison methodology and models;
  - d) comparison of calculations;
  - e) comparison of reasonableness tests;
  - f) comparison of conclusions;
- 5) discussion with your accountant, valuator, actuary and economist as to
- a) the qualifications of the opposing expert;
  - b) the personal and professional strengths and weaknesses of the opposing expert;
  - c) points of agreement with the opposing report and whether differences can be further narrowed;
  - d) the accuracy and completeness of facts and data;
  - e) the reasonableness of assumptions;
  - f) the reasonableness of the methodology and models;
  - g) the reasonableness of the tests;
  - h) the reasonableness of the conclusions;
  - i) factors to support bias on the part of the opposing expert;
  - j) strengths of the opposing report which encourage your accountant to rethink positions in his/her own report; and
  - k) cross-examination suggestions;
- 6) review of transcripts of discoveries; and
- 7) review of transcripts in other cases, (i.e. appeals, daily evidence).

How much of this preparation is undertaken will depend on the facts of the case and the amount involved. Once the preparation has been completed, counsel will have identified areas of agreement between the accounting experts and eliminate those issues by serving a Request to Admit, working out an Statement of Agreed Facts or making submissions at trial as to matters which have been resolved.

For the purpose of this paper, we have assumed that each party has complied with Rule 53.03 of the Rules of Civil Procedure, which requires the delivery of a signed report of the expert, setting out his or name, address, qualifications and the substance of his or her proposed testimony to be delivered at least 10 days before the commencement of the trial.

Rule 53.03(2) provides that no expert witness may testify in the absence of the report without leave of the trial judge, but under Rule 53.08(e) leave must be granted on terms and with an adjournment if necessary unless prejudice will be caused or there would be undue delay in the conduct of the trial. However, it should not be forgotten that the expert evidence given in the witness box, and not the contents of the written report, is the evidence upon which the trier of fact must rely.

*Viva voce* evidence by the expert on matters which are not in the written report may be legitimate matters for exclusion, either in terms of limiting the witnesses evidence or as a basis for fruitful cross-examination.<sup>7</sup>

#### **4. Challenging the Expert's Qualifications**

An important aspect of the cross-examination is a challenge of the forensic accountant's qualifications to give opinions in the subject-matter of the proposed testimony. This aspect has two branches.

##### **1) Preliminary Challenge of the Expert's Qualifications**

When the proposed expert witness is called to testify, the first order of business is to satisfy the trial judge that the witness is an expert in her/his field and competent to give

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*The trial judge will determine in each case whether the expert witness report meets the requirements of Rule 53.03(1). In Thorogood v. Bowden (1978) 21 O.R.(2d) 385 (C.A.), it was held that an expert should be permitted to amplify the contents of his report but not to open a new field, but that case was decided before Rule 53.03(1) came into force. See Transmetro Properties Ltd. v. Lockyer Bros. Ltd. (1985) 4 CPC (2) 273 (Ont. H.C.), where a report setting out the expert's conclusions was held to be insufficient.*

opinion evidence. The opportunity to cross-examine arises immediately after opposing counsel offers this witness as an expert.<sup>8</sup>

2) **Challenging the Weight of the Opinion**

Even if the witness is qualified by the trial judge as an expert in, say, accounting, he/she may still be cross-examined about his/her qualifications and experience in the particular aspect of accounting at issue in the case. The objective is to demonstrate, for example, that the accounting expert is less qualified than your expert to give an opinion about the valuation of a business because the opposing litigation accountant practices primarily in the field of receiverships whereas your expert only does business valuations. More commonly, counsel cross-examines about the scope of practice and the departmental seniority of the expert in comparison with counsel's own evidence. This cross-examination takes place after the opposing party has completed evidence-in-chief.

Counsel should consider cross-examination on some of the following aspects of expert accountants' qualifications which may weaken the weight of the accountant's opinion:

**Checklist for topics on Challenging as to Qualifications**

- 1) differences between the professional qualifications set out in the expert report and those adduced in evidence;
- 2) professional achievements;
- 3) training and education and special certifications;
- 4) professional skills;
- 5) area and scope of the expert's practice and expertise;
- 6) skills required to provide the opinions in the case:

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*See Sopinka & Lederman, The Law of Evidence in Canada, 2nd Ed. Butterworths pp.536 and 563.*

- a) does evidence require an actuary?
  - b) does evidence require an economist?
  - c) does evidence require a different type of accountant?
- 7) previous experience in the subject-matter or in the industry;
- 8) personal connection with the evidence in this case;
- a) who collected the data?
  - b) who made the assumptions?
  - c) who chose the method or model?
  - d) who prepared the draft reports?
  - e) who prepared the report?
  - f) who researched Statistics Canada, Bank of Canada, etc.;
- 9) expert's position in the hierarchy of the accounting firm;
- 10) articles and publications of witness and own expert;
- 11) familiarity with publications in the field;
- 12) comparison with qualifications of own expert;

## **6. *Challenging Facts and Assumptions***

How counsel conducts the cross-examination depends upon the facts of the case. Essentially, the cross-examination is a selective analysis of the best and most vulnerable aspects of the opposing expert and the summary of the evidence in his/her report.

The following is a guide to the topics that ought to be considered in cross-examination in respect of facts and assumptions which differ from those made by your forensic accountant:

### **Checklist of Topics as to Cross-Examination on Facts and Assumptions**

- 1) question sources and reliability of data and information;
- 2) object to reliance upon facts not adduced in evidence;
- 3) question admissibility of evidence relied upon in the report;
- 4) test the relevance of facts relied upon;
- 5) question about the impact of factors not relied upon by expert;

- 6) test the accuracy of facts and assumptions;
- 7) test the accuracy of information obtained from third parties;
- 8) question the impact of changes in facts or assumptions from report until trial;
- 9) impeach credibility for bias for the client's position; and
- 10) observe whether evidence has been called by fact witnesses on all matters relied on the report<sup>9</sup>.

### **7. *Challenging the Accountant's Conclusions***

A forensic accountant's conclusions as to the quantum of damages, value of a business, or equalization of net family property is the sum of the building blocks earlier described. A successful attack on the building blocks of the expert's opinion may cast doubt on the conclusions. It is also appropriate to make a direct attack on the expert's conclusions.

In this aspect of the cross-examination, counsel's task is to cast doubt on the calculations, and on the reasonableness or application of the assumptions and facts relied upon by opposing forensic accountant to reach his/her conclusions. Counsel's objective is to persuade the court that, where there is disagreement, the opinion of counsel's own expert's view is preferable.

The attack on the opposing expert's conclusions may be focused on many aspects, many of which depend upon the facts and nature of the case, including the following:

#### **Checklist of Topics as to Cross-Examination on Conclusions**

- 1) the expert's evidence relies upon faulty methodology or model, or accounting methods;
- 2) the expert's evidence fails to consider another method or model, such as the one used by counsel's own forensic accountant;

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<sup>9</sup> *This is an important area but may not be a subject for cross-examination. The forensic accountant is often a party's last witness. If the cross-examination highlights the failure to adduce evidence on a particular point, the other party will still have an opportunity to call the relevant witness.*

- 3) the expert's evidence contains inaccurate calculations of damages or losses in that
  - a) mathematical errors in model skews results; or
  - b) mathematical error in conclusions;
- 4) tests in the expert's evidence do not support model or conclusions;
- 5) the expert's evidence fails to conduct appropriate tests of reasonableness, or the tests are not conducted properly;
- 6) the expert's evidence omits relevant factors or erroneously includes irrelevant ones;
- 7) the expert's evidence contains errors in applying the model to facts;
- 8) the expert has made contradictory statements in publications;
- 9) the expert makes contradictory statements between report and viva voce evidence, or between draft, preliminary or final report; and
- 10) the expert's evidence agrees with own expert's evidence.

### **Cross-Examining on Draft Reports**

How the opposing expert's report reaches final form is a subject for cross-examination and a worrisome problem for the litigation accountant.<sup>10</sup> The opposing expert may be asked to produce drafts or the drafts may be subpoenaed. The reliability and probative worth of the accountant's expert evidence may be substantially weakened if counsel has or appears to have been unreasonably involved in the writing or redrafting of the report. The probative value of the report may also be weakened by substantial change in theory or conclusions from one draft to another or the final report.

Draft reports in the hands of counsel are privileged on the ground that they are made for the purpose of instructing counsel, but they should be listed in Section C of the Affidavit of Documents. However, the privilege does not apply when the accountant who prepared the draft report is testifying. This is the reason why experienced litigation accountants refuse to submit draft reports or even preliminary or draft opinions. In the days before colour photocopiers, one firm was concerned about being

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<sup>10</sup> *Robyn Bell, 13 Adv. Q. 353, supra., f.n. 6.*

embarrassed by a draft report that they printed drafts on burgundy paper. When one photocopies burgundy paper, the result is an illegible black page.

### **Your Expert Should Be Present at Trial**

When the opposing forensic accountant or other financial expert witnesses testify, be sure that your expert is present to hear all of the evidence, including the evidence in chief. Even where the trial judge has made an order excluding witnesses, the order will not include experts. Your forensic expert is likely to detect weaknesses in the opposing accountant's evidence that will be helpful in your cross-examination.

Your cross-examination of the forensic accountant should be a fluid and flexible exercise that bends to changing circumstances in the trial. If you try to plan out every question, it may be strained and ineffective. Plan the general lines of attack and look to your expert for guidance and be sure to have her/him sit near you at the counsel table so that the notes can be quickly passed. After examination-in-chief of the opposing expert, it is useful to have an opportunity to compare notes with your accounting expert.

### **8. Conclusion**

Cross-examination of the opposing forensic accountant is a multi-dimensional event which involves lengthy advance planning, intimate appreciation of facts and assumptions in the case, meticulous attention to financial details and extensive consultations with your own accounting expert and other witnesses.

All of these elements combined with favourable facts and a generous dose of good luck increase the prospect that the trial judge will prefer your forensic accountant's opinion over that of the opposing expert.

***Cross-Examining the Forensic Accountant***  
***Igor Ellyn, Q.C. and Vince A. Pileggi***

# **CROSS-EXAMINING THE FORENSIC ACCOUNTANT**

**Igor Ellyn, Q.C.**

## ***1. Set Realistic Goals for the Cross-examination***

- 1) Minimize the Strengths of Opposing Expert's Report and Destroy the Weaknesses
- 2) Secure Admissions Over Key Elements of Own Experts Report
  - a) Qualifications of Own Expert
  - b) Appropriateness of Methodology or Model
  - c) Accuracy of Conclusions as to Losses, Damages or Value
  - d) Accuracy of Calculations
- 3) Persuade Court to Favour Conclusions of Your Own Expert over Opposing Expert's Conclusions

## ***2. Areas of Expertise of Forensic Accountants***

- 1) Business Valuation
- 2) Reliability of Accounting Methodology
  - a) Accounting and Audit principles
  - b) Taxation Principles
  - c) Assumptions and Data for Particular Businesses and Industries
- 3) Business, Profits or Income Losses
- 4) Business and Economic Cycles, Trends and Practices

## ***3. Kinds of Cases In Which Forensic Accountants Usually Testify***

- 1) Family Law
  - a) Net Equalization of Family Property
  - b) Analysis of Income and Expenses
- 2) Personal Injury
  - a) Loss of Business or Profits
  - b) Loss of Past and Future Income
- 3) Business Fraud or Breach of Fiduciary Duty
- 4) Professional Negligence
- 5) Breach of Contract
- 6) Shareholder, Joint Venture & Partnership Disputes
- 7) Insolvency and Receivership

## ***4. Preparing for the Cross-Examination***

- 1) Analysis of the Expert's Reports including preliminary and drafts

- 2) Discussion with Client and Staff re all inquiries and documents conducted by the accountant and staff
- 3) Analysis and Comparison of Own Accountant's Report
- 4) Discussion with Own Accountant, Valuator, Actuary and Economist
  - a) Qualifications, Weaknesses, Strengths of Opposing Expert
  - b) Accuracy and Completeness of Facts and Data
  - c) Reasonableness of Assumptions
  - d) Reasonable of Scope of Expertise
  - e) Choice of Method or Model
  - f) Choice of Reasonableness Tests
  - g) Strengths in Opposing Report
  - h) Weak Links in Opposing Report
- 5) Research About the Opposing Expert
  - a) Curriculum Vitae
  - b) Position in Firm, Professional Standing and 'Skeletons'
  - c) Experience and Sub-specialty
  - d) Other Testimony and Cases
    - i) Reported Cases - QuikLaw
    - ii) Does Trial Judge Know the Expert
  - e) Publications and Articles
  - f) Other Reports by Opposing Expert
- 6) Review of Documents Considered by Both Accountants
- 7) Review of Transcripts
- 8) Transcripts in Other Cases, (i.e. appeals, daily evidence)

## **5. *Challenging Qualifications***

- 1) Training and Education
- 2) Professional Skills
- 3) Area and Scope of Expertise
  - a) Does Evidence Require an Actuary?
  - b) Does Evidence Require an Economist?
  - c) Does Evidence Require a Different Type of Accountant?
- 4) Previous Experience in the Subject-matter
- 5) Personal Connection with the Evidence in this Case
  - a) Who collected the data?
  - b) Who made the assumptions?
  - c) Who chose the method or model?
  - d) Who prepared all preliminary and draft reports?
  - e) Who prepared the report?
- 6) Position in Hierarchy of Accounting Firm
- 7) Articles and Publications of Witness and Own Expert
- 8) Familiarity with Publications in the Field
- 9) Comparison with Qualifications of Own Expert

**6. *Challenging Facts and Assumptions***

- 1) Sources and Reliability of Information
- 2) Reliance Upon Facts not Adduced in Evidence
- 3) Admissibility of Evidence Relied Upon
- 4) Relevance of Facts Relied Upon
- 5) Impact of Factors Not Relied Upon by Expert
- 6) Inaccuracy of Facts or Assumptions
- 7) Inaccuracy of Information Obtained from Outside Sources
- 8) Changes in Facts or Assumptions from Report to Trial

**7. *Challenging Conclusions in the Accountant's Expert Evidence***

- 1) Faulty Method or Model
- 2) Failure to Consider Other Methods or Models
- 3) Inaccurate Calculations of Damages or Losses
  - a) Mathematical error in model which skews results
  - b) Mathematical error in conclusions
- 4) Factors Omitted or Erroneously Included
- 5) Faulty Accounting Method
- 6) Failure to Conduct Appropriate Tests of Reliability
- 7) Tests Do Not Support Model or Conclusions
- 8) Errors in Application of Model to Facts
- 9) Faulty Tests or Data
- 10) Contradictory Statements in Publications
- 11) Contradictory Statements between Report and Viva Voce Evidence
- 12) Contradictory Statements in Preliminary or Interim Reports
- 13) Contradictory Statements in Draft Reports
- 14) Comparisons and Agreement with Own Expert's Report
- 15) Error in Legal Assumptions

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