

August 15, 2007

Sent via e-mail to lsnyder@aicpa.org
Original hard copy will not follow

Ms. Lisa Snyder, Director
AICPA Professional Ethics Division
1211 Avenue of the Americas, 19th Floor
New York, New York 10036



California
Society

Certified
Public
Accountants

Re: **Exposure Draft re: Proposed Interpretation 102-7**

Dear Ms. Snyder,

I am writing to you on behalf of the Litigation Sections of the California Society of Certified Public Accountants regarding "Proposed Interpretation 102-7, Other Considerations: Meeting the Objectives of the Fundamental Principles, and Proposed Framework for Meeting the Objectives of the Fundamental Principles" (Interpretation). We thank you for allowing us the opportunity to comment on the proposed Interpretation.

We understand the need for periodic review of the ethical requirements for CPA's. However, we believe the document, as proposed, contains significant problems for CPAs practicing not only in litigation, but a host of other consulting capacities. This comment letter will focus primarily on the issues faced by our members practicing in the litigation services area.

At our August 8, 2007 meeting we had a discussion regarding the Interpretation. There was unanimous consent by the 42 members in attendance that there are multiple and significant problems associated with the Interpretation.

The Interpretation and the framework, threats and safeguards contained therein, are set forth in such a broad, vague and burdensome manner as to significantly impair the litigation consulting practices of our members and subject them to risks that are not justified to protect the public.

In the most general sense, we concur with the need to further interpret Rule 102 as it applies to members practicing in the *attest* area. However, the Interpretation applies to *all* members and *all* professional services they may perform, whether in public practice or private industry. Given this scope, and onerous language set forth in the document, we believe it requires significant revision.

Specific examples of situations which unduly constrain the ordinary and customary *consulting* work of CPAs are numerous. We see no public benefit that justifies such constraints. Moreover, the proposed safeguards to an identified threat are either impractical for a litigation practitioner to employ, or are insufficiently described to protect the litigation practitioner. The following are several examples of these constraints.

Specific Comments:

1. **Advocacy Threat – paragraph .05 (b):** We agree one should not advocate on behalf of a client. However, CPAs acting in the capacity of an expert witness frequently differ in their opinions. In these instances, both CPAs may have a reasonable factual and theoretical basis for their opinion and may not be justifiably accused of practicing unethically. Their differences may be due to factual issues, theoretical differences, or legal facts and assumptions. Our work in this area is not black and white. Nonetheless, an outside party may certainly conclude on the appearance of bias. In instances such as this, would both CPAs be barred from continuing work due to the appearance of an *Advocacy Threat*? How would one practically “safeguard” this situation? If the client of one of the two CPAs receives an adverse outcome on the issue, which may be the result of factors outside his or her control such as poor performance by the lawyer, an improper finding from the bench, or an attempt by the judge to achieve equity based on other factors in the case beyond the specific issue, have we unnecessarily exposed this CPA to litigation?
2. **Adverse Interest – paragraph .05 (c):** Litigation consulting practitioners frequently encounter issues in an engagement when a client or attorney asks them to address an issue in a certain manner that the practitioner does not believe is correct. If the practitioner does not agree, yet the client wishes to continue retention of the CPA, this may be considered to have created an Adverse Interest threat according to the Interpretation. How would one practically safeguard around this? Should they resign? If the client receives an unfavorable outcome on the specific issue, or obtains another opinion after the case is closed favoring their proposed treatment of the issue, how is the member protected even though they may be correct in the handling of the issue? The practice of litigation consulting cannot be analogized to other service areas such as the attest function, where results are far less subjective.
3. **Familiarity Threat - paragraph.05 (d):** Members working in a litigation or consulting capacity often rely on highly competent specialty experts, based primarily on their reputation and prior working relationship. Under this paragraph, the CPA may be accused of placing undue reliance on the competent expert by referring the work to him or her. In this instance, is the member is forced to send the work to a less competent or unknown expert to avoid risk associated with the Interpretation? The same can be said for repeatedly working with the same law firm with whom the CPA has conducted substantial work in the past – a common occurrence for litigation practitioners. To what public benefit is this compared to the detriment and risk incurred by our members and how would one practically safeguard around this risk given the parameters of this document?
4. **Financial Self Interest Threat – paragraph .05 (f):** Many litigation practitioners encounter situations whereby a court will freeze payment of fees

or a client will be unable to pay fees on a current basis until litigation is completed. If a member is owed substantial fees yet continues to testify, opposing counsel or a subsequent plaintiff's attorney can easily condemn the expert for violating the self interest threat. Thus, the CPA must either resign, and face client-abandonment issues from the client and relationship issues with the referring attorney, or face risk. How can a CPA practically "safeguard" around this explicitly stated ethical violation set forth in our own rules of conduct and why is this interpretation required for CPA's working in a consulting or litigation capacity?

5. **Management Participation Threat - paragraph .06 (g):** Members who provide bankruptcy related services are retained to act in a management capacity on behalf of a client. Based on this paragraph, such members will no longer be able to serve as trustees in bankruptcy cases and similar matters.

In addition, many CPAs perform CFO outsourcing work. Based on this paragraph it appears that these services will now be unethical, given the risks associated with them and the safeguarding measures, which are generally vague and ineffective.

Finally, many firms, of all sizes, assist clients in negotiating with third parties in complex contracts and other consulting matters, often taking the lead in situations with unsophisticated clients. It appears that these services will no longer be allowed from an ethical standpoint for CPAs.

6. **Safeguards – paragraph .08:** This section is not effective. For sole proprietors and small firms, CPAs frequently help unsophisticated clients in negotiating contracts, dealing with administrative hearings in connection with an array of taxing authorities, and other issues. This document essentially removes them from this practice, as the safeguards are either too vague or too conservative to allow the member to effectively serve clients in this capacity. In addition, given the unique nature of litigation and consulting services, many such engagements, particularly for smaller firms, do not lend themselves to peer review. In many situations of this type, confidentiality provisions alone will preclude such review.
7. **Self Review Threats – paragraph 13 (c):** This paragraph states that a CPA cannot prepare original data used to generate records subject to review as part of an engagement. This paragraph applies to *any professional service* not simply attest services. A CPA working in a business management or bookkeeping capacity often creates data on behalf of a client, including writing checks and maintaining basic accounting records. Why would the member be prohibited from using that data in a consulting context? Such work would apparently include the completion of tax returns and a host of consulting services falling outside of the attest area. While this provision is

perfectly acceptable for attestation services, it is overreaching and overburdensome as it pertains to all professional services performed by CPAs in both public practice and private industry.

8. **Advocating – Paragraph .14b:** The word “advocating” is problematic for the litigation practitioner. The litigation practitioner *is* advocating *his or her opinion* based on facts, theories and legal assumptions. This situation may be considered to beneficially assist the client. The exclusion of “fact witnesses” does little to assist the litigation practitioner in this regard, since a fact witness was defined as percipient witness in Interpretation 101-16, and was clearly distinguished from an “expert witness” in that document. Additionally, how does a CPA represent a client in an administrative proceeding related to a tax issue, in negotiating a lease, or in contract negotiations without violating this paragraph? Limiting CPAs to simply commenting on facts as a percipient witness in consulting engagements renders them useless in this capacity.
9. **Adverse Interest Threats – paragraph .15:** CPAs working in a consulting capacity may encounter situations of delinquent fees. In order to collect they may need to invoke the provisions of their engagement letter relevant to this issue. A literal reading of this document would suggest that an adverse interest threat has occurred. If the situation is resolved for that billing period, should the CPA resign thereafter? If it is the client who threatens litigation, but ultimately pays to keep the work continuing, may the CPA continue work?
10. **Familiarity Threat – paragraph 16:** The issues stated in paragraph 16 *are* relevant to an *attest* practitioner. For a consulting or litigation practitioner, several are onerous and over burdensome. What is the threat if a member installs a website for a company with whom he or she has a distant relationship or assists with the evaluation of a contract? Why would it be a threat for a CPA to continue working with an attorney with whom he or she has had a longstanding, working relationship? A logical interpretation of this document clearly suggests this is an ethical problem, for which there is no practical safeguard. Again, the CPA is either subject to substantial risk for little public benefit or must decline work.

In closing, we have not endeavored to cite all relevant issues with the Interpretation. We recognize that some of the above examples are less severe than others. We applaud the AICPA for continuing the efforts to improve the ethical provisions applicable to CPAs, particularly as they pertain to attest services.

However, the document extends far beyond the attest function, into areas beyond which are required to effectively protect the public given the broad and inflexible language of the document and the ineffectiveness of the safeguards set forth within it. Essentially, CPAs will be forced to either decline work or face unnecessary risk.

Litigation services are unique. The work that a CPA performs in this context is subject to intensive examination before and during trial. There is little risk to the public that must be safeguarded by a document as rigid and constricting as this.

The scope of the Interpretation applies to all professional services, performed by all members, whether in public practice or private industry. We believe this is simply too extensive, and fails to recognize the diverse and valued array of consulting services provided by CPAs. The impact this document will have on those services, if implemented in its current form is to significantly restrict a CPA's ability to perform them.

Thank you again for the opportunity to comment on the Interpretation and to share our thoughts with you. Should you have any questions, please feel free to contact me at mluttrell@cbiz.com or (661) 325-7500. You may also contact our staff liaison, Maria Nazario at maria.nazario@calcpa.org or (818) 546-3506.

Sincerely,

A handwritten signature in black ink, appearing to read 'MLuttrell', is positioned below the word 'Sincerely,'.

Mark Luttrell, CPA/ABV
Chair, Litigation Sections
California Society of Certified Public Accountants

Cc: Teresa Mason, CalCPA Chair
Loretta Doon, CalCPA CEO
Mike Ueltzen, CalCPA Professional Conduct Committee Chair
Litigation Sections Steering Committee