

# THE Witness Chair

Leading-edge Ideas for CPAs Providing Litigation and Dispute Resolution Services

WINTER 2017

California Society of Certified Public Accountants

ISSUE 69

## Unblurring the Line(s) Between Accounting and Legal Opinions

by Greg Regan, CPA

**I**f you have ever testified as an expert witness, you have probably been subjected to a line of questioning somewhat similar to the following:

Q: Sir, are you a lawyer?

A: No.

Q: So, tell us how your opinion on the meaning of the terms in the contract is relevant to the trier of fact?

In this situation, there are probably some (great) responses that require restraint from stating out loud. But, what is the right answer? The immediate answer is, it depends. So, let's take a closer look at the rules for this arena.

First things first, how do you know when the door to this question has been opened? CPAs are often engaged as experts to address issues tangentially related to legal precepts, including breach of contract disputes (how much money is owed to the plaintiff pursuant to the obligations of the contract?); merger and acquisition disputes (how much money is owed pursuant to the representations in the transaction documents?); or fraud matters (what covenants did the lending documents impose on the defendant and did the defendant comply with those covenants?).

CPAs clearly have experience in analyses of underlying documents and agreements that have a bearing in these types of matters. Indeed, the role of the CPA in these capacities is plainly observable in the documents they keep in their libraries.

For example, the *Litigation Services Handbook* notes, "Accountants serving as advisors should work with counsel in drafting the transaction agreement

provisions related to ... earnout provisions ..." (5th Edition, Ch. 21, p.23) I typically prefer to cite such treatises to reduce the likelihood that a reader of my report will attack me as engaging in the unlicensed practice of law.

It can be perilous to ignore the risk of a challenge on this topic. For example, PwC issues an annual study on *Daubert* challenges made by attorneys to exclude the testimony of financial experts. In recent years, this study has demonstrated that one of the top reasons that the opinions of financial experts are excluded (in whole or part) is because the court considers the financial expert's opinion to be legal in nature. (PwC 2016 *Daubert* Study, p.13)

According to PwC, one issue is that financial experts find trouble when "opin[ing] on contractual obligations or conclud[ing] on the interpretation of disputed contracts in the context of their financial testimony." (PwC 2016 *Daubert* Study, p.22)

As an expert, if you're confronted with this issue, proceed with caution. Particularly when the basis for an opinion has nexus to legal evidence like a contract. One strategy is to address this issue offensively—include specific language in the CPAs report disclaiming a legal opinion.

Options exist, such as, "I am not offering a legal opinion ...," to a more expanded form, such as, "This analysis is financial in nature. No representation is made regarding questions of legal interpretation."

Is such a disclaimer enough? Here, as usual, it helps to be armed with more data.

In California, the Civil Code provides, "The words of a contract are to be understood in their ordinary and popular

sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (California Civil Code, Sec. 1644)

Do CPAs use terms or words in a technical sense? Or use terms with special meanings? Of course! For example, a CPA can explain to a court the meaning of the term "revenue" or other terms, such as "accrued expenses" and "operating profit."

The Civil Code continues, "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense." (California Civil Code Sec. 1645)

This provision, then, allows a CPA to offer insight to the court. For example, the CPA may be called to explain the meaning of contractual phrases like "consistent with the company's prior methods" or "recorded in a manner comparable with other entities in the industry."

Now, back to the question posed at the outset of this article. What's the best way to handle this type of shot across the bow?

One possible solution is to describe an

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## Section Action

### Business Valuation

by Megan Thompson, CPA

**Section 730** of the California Evidence Code allows the court to “appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required.”

The judiciary has embraced the idea of the court’s expert to help avoid inevitable conflict between two opposing experts. The Sec. 730 expert can be a benefit to parties and the attorneys, and can often lead to settlement, or at the very least, a narrowing of the issues; however, it can also lead to potential conflict and costs if the expert’s role in the case is not clear to all parties.

When agreeing to use a Sec. 730 expert, it is important that the attorneys make it clear to the parties what an expert’s role is in the process and what their analysis will entail. When asked to be a Sec. 730 expert, an expert should prepare a stipulation that clearly states they are able to have *ex parte* communications with the court, either attorney or either party.

While the stipulation may state that the expert is able to speak with anyone at any time, they should make every effort to include all parties in communications and to be as transparent as possible. If a client is not aware that the expert’s file is fully discoverable by opposing counsel or that their email to the expert will be sent to all parties, this can lead to issues.

There will often be areas of legal dispute that are unresolved prior to the finalization of the report. These can include disputes over the amount of officer perks expensed through the business, the value of inventory or equipment or any number of other issues. When this occurs, the attorneys can either agree on these issues, resolve the issues through the court or the expert can prepare multiple reports that are identical, save for these differences in legal opinion.

In particularly contentious cases, the

communication breakdown can lead to the parties needing to hire their own individual experts to evaluate

the Sec. 730 expert’s report and provide their own opinion. Unfortunately, this leads to additional time and expense for both parties. Through open communication and a solid understanding of the expert’s role, this breakdown can often be avoided.

**Megan Thompson, CPA, CFF, CVA** is Business Valuation Section treasurer and a partner with Thompson Accounting in San Jose.

### Economic Damages

by Travis Armstrong, CPA

**2016 was a** great year for the Economic Damages Section. Through the combined efforts of our section officers, we were able to provide diverse and compelling presentations during the year. For those of you who missed the meetings, here are a few highlights.

In June we had a design expert (and lawyer) show us how to design better documents and work product by using basic design principles. Along with her thoughts on which fonts to avoid (e.g., Word’s default fonts) and which to consider (e.g., Garamond or Palatino), the presenter provided us with helpful tips, including her suggestion to turn on kerning for all point sizes of font.

At the August meeting we had two data-centric presentations. Professionals from TM Financial Forensics and LitiNomics presented case studies that emphasized the intricacies of effectively utilizing big data in supporting class certification, theories of liability and calculating damages.

And during the November Joint Sections meeting, we heard from experienced attorneys on the topics of wage and hour litigation and economic damages considerations in California Unfair Competition Law (UCL) cases, and forensic accountant colleagues on the topic of Alter Ego and an economic damages/business valuation case study.

Attorneys from Littler’s Orange County office discussed recent trends in wage and hour litigation, including the complexities of analyzing data for discrimination claims and the application of the Supreme Court’s decision in *Wal Mart v. Dukes* in other cases.

The UCL-related presentation by a partner from Morrison & Foerster’s Los

Angeles office focused on available ways experts calculated remedies under the UCL, including the use of a price premium, which is the most common approach for mislabeling claims. Further, she discussed the use of consumer surveys to demonstrate the incremental price premium paid.

I’d like to thank my fellow section officers for the tremendous effort last year and I look forward to seeing everyone at the 2017 meetings.

**Travis Armstrong, CPA, CFF, CFE** is Economic Damages Section chair and a partner with Hemming Morse, LLP in San Francisco.

### Family Law

by Charles A. Burak, CPA

**Most of you** know of the death of my mentor and business partner, Donald Alvin Glenn, late last year. Those of you who knew him, met him or even simply saw him speak, can attest to his passion. When he chose an activity, he dove deeply.

There was no surface level experience or check the box mentality. It was all in or it was not worth his attention. He gave everything he had to every endeavor. This personality led him to proudly proclaim to have cleared every item from his bucket list years before his time ended. Eventually, this trait led him to mastery, followed by a move toward the next challenge.

There were two areas that provided Don with so much value and challenge that he never moved on from them. The first was Marjorie, his wife, his rock and his endless source of reason and joy. The second was this forensic community. For more than 40 years, Don gave everything to mastery of the craft and advancement of the profession.

This was no different than how he pursued other ventures. The difference was in what he received in return. For everything he gave, he received more reward and challenge. To hear Don speak of his respect for the brilliance and vibrancy of the people in this community was inspiring. It was his inspiration that led me to chase the position where I now sit.

What I learned along the way is that Don’s love for this community and profession was developed because others had passion to match his own. For as hard as he worked there were many others in this group who worked as hard and cared as much as he did. This community did not feel like competition, it was a team working together

for the betterment of all.

Don's inspiration did not come from witnessing a good presentation; it came from the lively discussion that followed the presentation, or more often the discussion that broke out during it. This is a group where individuals care so much about the topic that they cannot sit back and allow statements to pass unchallenged. It is a group that also knows that a challenge is not a fight, but instead is respected as an introduction to a valuable discussion.

I now feel gratitude and responsibility. I am grateful to all of you who built this community along with Don. To those who helped build his stories and continually fuel his passion for growth and challenge throughout his lifetime. What you have built with him is special and I am privileged to be a part of it. But maintaining this culture requires nurturing. For this purpose I welcome your input but, more importantly, I ask for your participation.

As chair of this section I will look to offer current topics and presentations. However, my priorities are to encourage progressive discourse and maintain this group as a shelter for a community of peers who share passion for betterment of our selected profession. Hopefully, along the way I can show you my appreciation for what you, and Don, spent lifetimes building.

**Charles A. Burak, CPA, ABV, CFF, CFE, CVA** is Family Law Section chair and principal with Burak & Associates CPAs in Walnut Creek.

## Fraud and Financial Investigations

by David Callaghan, CPA

**Several of last year's matters** reminded me of some important things business people are not doing. Failing to take these relatively inexpensive steps can lead to problems and disputes in business dealings.

**Research your counterparties and complete background checks.** Public databases and subscriptions services offer easy access to a wealth of information about individuals and entities. Professionals specializing in performing background checks can quickly and inexpensively compile and provide information that can identify important facts and history about potential counterparties.

For example, we had a background check completed related to a project that revealed our client had entered into a contract with an individual who had

## Message From the Chair

by B. Marie Ebersbacher, CPA



**The Forensic Services** Section lost one of our longtime members last October, Don Glenn. Don was with Glenn & Burak in Walnut Creek and had more than 30 years of experience in complex family law matters. He was a founding member of what we know today as the Forensic Services Section and taught for the CalCPA Education Foundation.

Don was instrumental in the development of the first litigation standards in the early 1990s. But more than that, he was a true force of this profession.

Don never thought twice about speaking up or about mentoring members of our sections. He was a thought leader who was never afraid to debate a subject or listen to an opposing point of view.

The day he passed was the same day of the Family Law Conference in San Francisco. Don was scheduled to present—involved and influential to the very last day. I can't imagine Don would have it any other way. Don's partner, Charlie Burak, said, "I don't know that there was anyone that could out-work or out-think the man. I expect that many of you have observed those characteristics. But what stood out to me as most unique about Don was his passion for helping others. I have never met an individual at his level more giving of their time to teach and help, whether to a peer, client, staff or stranger."

Charlie said that being a part of the Forensic Services Section was one of Don's proudest accomplishments and enjoyable outlets. Having him as part of the FSS was a privilege for all of us. We are all grateful to his wife, Marjorie, for letting us take so much of his time over the years.

Don passed on his knowledge and made our profession better for it. I thought about closing this by saying that the section meetings are a good place to meet people, like Don, who care. But instead, let me challenge you to come to the meetings and be like Don. Be a force. Mentor others. Pass on your knowledge to others and make our profession better for it.

— **B. Marie Ebersbacher, CPA, ABV, CFF, CFE** is Forensic & Financial Services National Practice Leader and Lead Managing Director for the Southern California offices of CBIZ MHM.

recently filed bankruptcy. If our client had known about the bankruptcy filing, he would not have entered into the deal that ended in a lengthy and costly dispute.

**Document your deal in writing.** Even when entering a deal with a company or person you know and trust, document the terms in writing. Far too often recollections of discussions about important issues change over time. Memorializing the deal on paper—even if done simply—helps avoid these disputes.

**Create and monitor budgets.** Set revenue and expense expectations early in the process; challenge the assumptions and allow for contingencies; regularly monitor budgets and compare the projections to actual results; and communicate with the other parties as soon as budget overruns or other problems are identified.

**Maintain good records.** Spend the

time and money to create appropriate financial reports supported with sufficient documentation. It always takes more time and costs more money to identify transaction records and create reports *after* a dispute.

**Use segregated bank accounts.** Make certain a separate bank account (or accounts) and credit cards specific to a project, partnership or deal are opened. This sounds obvious, but many of our forensic accounting assignments require the analysis of the financial activity of a project at the center of the dispute that is included in a bank account of a business or individual that also includes the activity for other projects, businesses or personal transactions.

**David Callaghan, CPA, CFF** is Fraud and Financial Investigations Section chair and a partner in the Fraud and Financial Consulting Services Group at Hemming Morse, LLP, based in Los Angeles.



## Factors to Consider in Assessing Engagement Risk

by Ron Klein, Esq.

It is late afternoon, and you are in your office. You get a call from an attorney you know by name only. She says she has a need for an expert witness and you might fit the bill. She goes on to say that the case was on the verge of settling, but it all blew up. She needs to designate an expert by tomorrow. Are you interested? How hungry/busy are you?

What should you be thinking about?

First of all, you should realize that the most important determining factor in assessing risk is the attorney you work for. Depending on the circumstances, the attorney may be the only person directly communicating with the ultimate client.

At the very least, the attorney will be instrumental in making sure the client understands the risks and rewards, especially whether to settle or not.

And regret over a settlement (or a settlement offer turned down) is one of the major reasons behind forensic and litigation support engagements and claims.

The other main causes of claims against the CPA are billing disputes, and it isn't disputes over your bill that can cause

problems. The attorney and client may have a fee dispute, and those can easily turn into disputes with you. It is not unusual for the attorney to respond to a fee dispute with the client by claiming that the CPA somehow caused the need for additional work.

So how do you decide?

- It is best to have a working relationship with the attorney even before the engagement. Of course, much of the time this is not feasible. Probing for CPAs or attorneys you both know is a good place to start.
- How and when the attorney contacts you are also important. It's best to be contacted with no looming deadlines and to secure an understanding of the case before accepting. In the case above, the looming deadline and the reason for it should give you pause.
- Can you be "protected" on fees? Can the client supply a retainer sufficient to cover your risk? Retainers are meant to be retained until the end of the engagement. Matters of family law often present difficult fee and retainer issues, especially if you are working for the "out" spouse. Again, an attorney willing to protect you on fees can be crucial.
- It may be now or never! Once you have accepted an engagement and the time to designate an expert has passed, it becomes very difficult to resign. You need to protect yourself in your engagement agreement. Consider a clause stipulating that your bills will be current, in addition to a retainer, before you are to testify, and that you may resign if the bills are not current.
- Once you take an engagement, things may start to get dicey. It is best to maintain open lines of communication from you to both the attorney and the client. Otherwise, your communications

intended for the client may never get there or may not be honored by the attorney. Many a "regrets over settlement" claim has revolved around whether the CPA's concerns were ever communicated to the client and, if not, whether the CPA is liable for not communicating the concerns directly to the client.

- If things all blow up, you want to make sure that the attorney has malpractice insurance. If the attorney is not collectible, the client will be forced to concentrate on you as the culprit. Almost all large law firms have insurance, but a solo practitioner may not. Do your due diligence. Remember, California is a "joint and several liability" state, so if you and the attorney are negligent, the client may be able to pursue you for the whole pie, including the attorney's share of damages.
- Like all claims, forensic or litigation support claims do not get better with age. Whenever you get nervous during an engagement, it is time to reassess the risks and rewards and to seek the advice of your risk management advisor. If you get nervous about the competency of the attorney, reassess and seek advice. If you get nervous because you cannot communicate directly with the client, reassess and seek advice. No matter what the reason, when you get nervous about the engagement, reassess and seek advice. Remember, it is always cheaper to clean up milk before you spill it.

With all of these concerns, you might get discouraged. You can be heartened by the fact that forensic or litigation support engagements are not usually considered high risk engagements. Of course, that is just statistics. If it happens to you, statistics will provide little comfort, so stay awake and on the alert for warning signs!

**Ron Klein, J.D., CFE**, is risk management counsel with CAMICO ([www.camico.com](http://www.camico.com)).

## Expert File Disclosure Statutes Amended

by Michael D. Belote, Esq.

On Jan. 1, important statutory changes became effective relating to the production of materials of retained experts in civil actions subject to California's Code of Civil Procedure. Specifically, AB 2427 by Assembly Member Ed Chau (D-Monterey Park) amended Code

of Civil Procedure Section 2025.280 and added Section 2034.415. Briefly stated, the new law requires retained experts to produce materials specified in deposition notices (sometimes colloquially referred to as the "expert's file") not later than three business days before the expert's deposition.

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## AICPA Alert

by Annette M. Stalker, CPA

The 2016 AICPA Forensic and Valuation Services Conference in Nashville is a wrap. A highly attended and engaged group of about 1,300 people joined on-site and online this year! For 2016, the planning committee unveiled several new tracks and multiple mechanisms to provide a higher level of engagement for both on-site and online attendees.

The new tracks included a fair value measurement track designed to address concentrated education in the fair value arena. Also, a specialized skills track was introduced that was designed to provide a theoretical teaching component followed by an interactive or discussion component, along with new tracks as learning path identifiers for the NextGen attendee as well as those interested in family law topics.

During the welcome announcements, attendees were encouraged to try some of the new methods of engagement using the conference app's activity feed, viewing the Facebook Live events and posting on social media. We also had several learning opportunities for leveraging social media.

Our kickoff keynote speaker, Ryan Estis, spoke on the topic of "Unleashing Your Inner Super Hero: Keys to Achieving Breakthrough Success" and included several points about stepping out of our comfort zone. One of many great lines from his talk was, "your biggest breakthrough is one step outside your comfort zone."

By the last day of the conference, our activity feed was filling up

with pictures and tweets from the conference and we had more than 2,000 views of the three Facebook Live chats. It seemed that this group of forensic and valuation professionals had stepped out of its comfort zone and embraced the new media channels in a big way.

We had strong representation from California at the conference. Along with myself, CalCPA FSS Steering Committee member Greg Regan served on the conference planning committee. Among the 150-plus speakers, we had several members present, including William Ackerman, Jim Andersen, Travis Armstrong, Tim Bryan, Joe Emanuele, Ted Israel, Jeffrey Klein and Charlene Podlipna.

Planning for 2017 is underway. If you have session or topic suggestions, please contact Greg ([regang@hemming.com](mailto:regang@hemming.com)) or myself ([annette@stalkerforensics.com](mailto:annette@stalkerforensics.com)).

There has been a lot of discussion about the Treasury Department's proposal, "Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest" (proposed last August) related to estate tax valuations, known as the 2704 regs. On Dec. 1, Michelle Gallagher testified at a Treasury Department hearing on behalf of the AICPA. There have been 9,477 comment letters in response to the proposed regulations, so it is unlikely that anything will be finalized in the short term.

The first issue of the AICPA FVS Eye on Fraud was published in August, which profiled the topic of executive impersonation, referred to as BEC (Business Email Compromise).

Two long-awaited practice aids on bankruptcy, providing bankruptcy and reorganization services (Volume 1—*Litigation and Dispute Resolution in Bankruptcy and Providing Bankruptcy and Reorganization Services*, Volume 2—*Valuation in Bankruptcy*) were recently published and are available within the Forensic & Valuation Services Online Professional Library (accessible through the AICPA website to FVS members).

**Annette M. Stalker, CPA, CFF, CFE** is the owner of Stalker Forensics in Sacramento and serves as chair of the AICPA FVS Executive Committee.

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An explanation of the origin of the change might be helpful. The Consumer Attorneys of California (plaintiff's lawyers) and the California Defense Counsel (civil defense lawyers) meet annually to discuss potential statutory changes that might increase efficiency in civil litigation. Items of consensus are then included in jointly sponsored legislation.

Recent successful proposals have included a requirement to "meet and confer" prior to filing demurrers, an expensive and time-consuming motion challenging the sufficiency of pleadings.

With regard to AB 2427, representatives of both plaintiffs and defendants agreed that the value and efficiency of expert depositions would be improved if counsel had an ability to review expert materials prior to depositions. Lawyers noted they are routinely handed voluminous materials or thumb drives of materials at the commencement of

depositions, which require time to absorb to conduct effective depositions.

Importantly, the joint sponsors of AB 2427 endeavored to make no substantive changes of any kind to the categories of information to be provided by experts, nor to the manner of production. New Sec. 2034.415 merely requires materials called for in deposition notices of experts described in subdivision (b) of Sec. 2034.210, whose depositions are noticed pursuant to Sec. 2025.220, to provide those materials not less than three days before depositions.

Again, there is no change whatsoever in what information must be provided, nor to the manner of providing the materials. The new section does clarify that the production must include any electronically stored information required by the subpoena or notice, but this is not intended to enlarge the types of materials that must be provided, as the statutes already contain extensive reference to electronic information.

Finally, AB 2427 amended current Code of Civil Procedure Sec. 2025.280 to provide that deponents required to produce electronically stored information, which is password protected or otherwise made inaccessible, must provide a means of gaining direct access to the materials, or translations in reasonably usable forms.

This change reflects the reality that no disclosure of information is meaningful, regardless of when the information is disclosed, if the ESI is password protected or otherwise not accessible.

Following the effective date of the new statute, we became aware of rumors of substantive changes to the materials that must be produced by experts. It is our hope that this information clarifies the bill.

**Michael D. Belote, Esq.** is president of California Advocates, Inc., a Sacramento-based contract lobbying firm. Among the firm's clients is the California Defense Counsel, representing civil defense practitioners throughout the state.

# HAPPENINGS

## FORENSIC SERVICES SECTION 2017-18 MEETING DATES

All Sections Joint Meeting	May 12 Oct. 12	North South
Business Valuation	Aug. 17 Feb. 8, 2018	North South
Economic Damages	Aug. 24 (joint with Fraud) Feb. 22, 2018	North South
Family Law	Aug. 18 Feb. 9, 2018	North South
Fraud and Financial Investigations	Aug. 24 (joint with ED) Feb. 23, 2018	North South
CalCPA Education Foundation Family Law Conference	Oct. 26 Oct. 27	South North

Register online: [www.calcpa.org/fss](http://www.calcpa.org/fss). | For more information, call (818) 546-3502.

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instruction by counsel to assume that the provision(s) at issue had a particular meaning. If taking this tact, however, be prepared for the examining attorney to quickly pose a hypothetical with an alternate (and likely less favorable) interpretation.

Another possible solution is for the CPA to describe their experience reviewing contracts and applying similar terms in practice. For example, if the contract at issue called for royalty payments based upon quantities of product sold, the CPA may explain how the approach taken was similar to the routine computation of revenue.

I was recently faced with such a situation where the matter involved a dispute concerning post-acquisition contingent consideration. The financial measure triggering potential earnout-related consideration was referred to in the parties' agreement as "bookings." This term is one that is generally recognizable by CPAs as a sales metric (i.e., a term that is broader than GAAP-related revenue).

The term had been inserted into the parties' agreement by the CFO and controller of the buyer. My testimony involved explaining the generally accepted usage of the term "bookings," as well as quantifying the qualifying transactions.

Before my testimony, I had issued a report. Prior to that, I worked with counsel to ensure my testimony was on firm accounting ground (and to distinguish the legal territory). The language used in my

report assimilated the sections of the Civil Code described above.

Ultimately, my report contained language similar to the following statement: "Accordingly, my opinions relate to the meaning of certain technical terms found in the Earn Out, accounting background and context that informs the interpretation of the provisions of, as well as the apparent purpose of, the Earn Out provisions.

"Specifically, I have applied certain terms of the Earn Out, as informed by my accounting analysis, to the transactions occurring during the Earn Out Period. In this way, my work in this matter is consistent with my experience and generally accepted methodologies for practitioners in my field."

Nevertheless, opposing counsel characterized my opinions as legal in nature. For this reason, opposing counsel argued that my opinions should not be accepted by the court. The court, however, did allow the testimony because it fit within the parameters set forth in the Civil Code. This experience proved helpful to an understanding of how to address and present opinions that approach the intersection of an apparent legal constraint.

One of the more important aspects of the statement in my report was the element, "... apparent purpose of ..." Technically, I could not know the parties' actual purpose. Therefore, I was drawing on the evidence and my experience to comment on the indicated or apparent purpose of the relevant provision. (PwC 2014 Daubert Study, p.8),

"The court noted that the expert 'may present and analyze facts indicating manipulation,' but 'may not embrace the ultimate issue of whether Defendant's acts were, indeed, manipulative.'" Citing *Hershey v. Pacific Inv. Management Co. LLC*, 05 C 4681, 2010).

This approach is consistent with guidance that CPAs should stick as closely to the facts as possible (See AICPA Practice Aid, 2014, Forensic Accounting—Fraud Investigations, p.35, "Avoid stating any legal conclusion about whether fraud does or does not exist, leaving that determination to legal counsel or a trier of fact." See also, ACFE Code of Professional Standards Interpretation and Guidance, p.21, "... conclusions may not include the CFE's opinion regarding the legal guilt or innocence of any person or party. The reason for this rule is to prevent the CFE from inserting himself into the role of the judge or jury.").

Ultimately, protect yourself and your opinion by basing your opinion on your expertise and relevant technical literature; clarifying the nature of your opinion as financial or accounting in nature; and limiting your opinions to indications of a concern ("... is consistent with ...") rather than the factual conclusion of a concern.

**Greg J. Regan, CPA, CFF, CFE** is Forensic Services Section vice chair and a partner at Hemming Morse, LLP in San Francisco.

*The Witness Chair* is published three times a year by the Forensic Services Section of the California Society of Certified Public Accountants.

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