

THE Witness Chair

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

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A Nose for Fraud

by Katherine L. Hunt

There are many skills required to be a good forensic accountant. While forensic accounting services encompass many disciplines such as economic damages, business valuations, intellectual property and family law, the focus of this article is on fraud investigations and associated skill sets you may want to consider when hiring new forensic accountants.

However, can these skills be taught in a classroom? Can they be learned on the job? Or, do some individuals just have a nose for fraud, a natural ability to be successful and possess talents that cannot otherwise be taught on the job or in a classroom?

Skills Required

There are many technical, analytical and other skills that are utilized in fraud investigations. Some of the technical skills include proficiency with computer programs such as Excel and Access, as well as other analytical software products; having a good understanding of accounting rules and the internal controls of an accounting system; and a working knowledge of business law, legal rules and procedures.

Forensic accountants conducting fraud investigations must delve deeply into documents and financial data, as well as analyze, organize and present the data in a useful format. In addition, the successful forensic accountant steps back from the data in order to see the “big picture” to detect and uncover fraud schemes by seeing the pattern of the fraud that lies within the data.

A successful fraud investigator has the ability to lead and manage a project and its team members, learning early on the value of teamwork. Other important competencies

of a successful fraud investigator include effective interviewing skills, efficiently assimilating information from a variety of sources, forming a work plan that is direct and appropriate, and anticipating roadblocks and developing strategies to overcome them.

Forensic accountants need to be effective technical writers who can succinctly explain complex concepts. This ability assists the accountant in being able to recall vast amounts of information regarding the case, and to articulately and simply explain the essence of their analysis to the judge and jury.

Learning in the Classroom

Many colleges have developed forensic accounting courses and programs to meet the demands of the profession and the desires of their students to learn more about this intriguing field. This also serves to meet the needs of prospective employers who are seeking graduates competent in the skills and knowledge required of forensic accountants.

Golden Gate University, Cal State Los Angeles, UCLA Extension, University of Alabama, Louisiana State University and Carlow University are among universities offering courses that cover broad topics within forensic accounting. These courses provide students with an introduction to the field and many provide instruction on practical skills, such as cash tracing, damages calculations, computer forensics, testifying in court as an expert, report writing and fraud prevention, detection and investigation.

Taking the appropriate coursework and having advanced Excel and Access skills give a new professional a strong base

from which to begin a career. Those who have taken these relevant courses will have an early edge over others because they will have some training and may be in a better position to “hit the ground running.” However, these skills are only the beginning, because what is learned in the classroom does not foster a full understanding until one is able to apply theory to reality.

Learning on the Job

A vast majority of forensic accountants have acquired their knowledge and skills through on-the-job learning. Many professionals performing forensic accounting work began their careers performing traditional audit services. While there are significant differences between these practice areas, many of the skills are transferrable. The more experience an individual has applying learned theory to real case situations results in a faster mastery of technical and analytical skills.

A Nose for Fraud

Many successful forensic accountants have a natural talent for uncovering fraud schemes. These so-called “natural talents” include qualities that are difficult to teach,

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Section Action

Business Valuation

by Scott T. Dye, CPA

For my final column as Business Valuation Section chair, I want to talk about the value you receive by becoming an active member of the Litigation Sections and attending meetings.

No matter which of the section meetings you attend, you will walk away with much more than you invested. It is one of the few places where the risk and reward paradigm is not valid—you risk virtually nothing and the rewards are many.

During my involvement with the Business Valuation Section I have participated and spoken in small-group settings with many nationally recognized business valuation leaders, speakers and authors. The setting allows for interaction not available at a conference or seminar, and enables active discussions about cutting-edge subjects.

Whether you simply listen or throw in your two cents, you come away with some thought-provoking ideas. Possibly the most value you get is the chance to meet and talk with practitioners who deal with the same issues you do. Relationships with colleagues and competitors will grow into friendships, and those connections are invaluable. We all need assistance at times, and by being able to call someone you know and respect to talk over your problem is priceless.

Give the meetings a try. The cost is the best CPE value you will find. Four hours of CPE and lunch for practically nothing. It's such a bargain—you'll just have to attend and find out for yourself.

Scott T. Dye, CPA, ABV, CVA is Business Valuation Section chair and a shareholder at Stoughton Davidson Accountancy Corporation in Fresno.

Economic Damages

by Christian D. Tregillis, CPA

In *ResQNet.com, Inc. v. Lansa, Inc.*, decided Feb. 5, the Federal Circuit affirmed a District Court finding of patent infringement, but reversed and remanded as to damages, holding that ResQNet's expert had improperly relied on past licenses in

estimating a reasonable royalty. Similar to the Federal Circuit's ruling in *Lucent Technologies, Inc. v. Gateway, Inc.*, the ResQNet opinion included criticism of the use of previously

agreed-to royalty agreements in evaluating the hypothetical negotiation.

In *ResQNet*, plaintiff's expert looked at three types of license agreements (among seven agreements) covering the subject technology—each with plaintiff as licensor. One of the agreements was a lump-sum royalty for the patented technology, but it was drafted in the context of litigation. Another agreement was for a running royalty, but it too was entered into as a settlement of litigation. The other five agreements, called "re-bundled royalties," included "services such as training, maintenance, marketing and upgrades."

ResQNet's expert noted that the Federal Circuit had previously determined in *Hanson v. Alpine Valley Ski Area, Inc.* [718 F.2d 1075, 1078-79 (Fed. Cir. 1983)] that agreements entered into in the context of a dispute "should not be considered evidence of an 'established royalty,' since license fees negotiated in the face of a threat of high litigation costs may be strongly influenced by a desire to avoid full litigation."

As a result, ResQNet's expert used the re-bundled agreements and the other agreements, which had significantly lower royalties, and concluded that 12.5 percent of sales, which was "somewhere in the middle" of the rates in the seven agreements, represented a reasonable royalty for the patent in this lawsuit.

In evaluating the testimony of ResQNet's expert, the Federal Circuit concluded that past license evidence must be "sufficiently comparable to the hypothetical license" at issue, but the re-bundled licenses were "inapposite" because they included software and other services that were unrelated to the claimed invention.

In a dissenting opinion, Judge Newman suggested that the ResQNet majority's opinion was misguided, claiming that the Federal Circuit's ruling in *Lucent v. Gateway* does not call for disqualification of all past license evidence that does not wholly relate to the claimed technology.

Judge Newman pointed out that ResQNet's expert had addressed the differences between the seven licenses and the hypothetically negotiated agreement, as explained in the District Court's opinion,

which concluded that "[the expert's] conclusion that the reasonable rate lies between these two categories' averages (and closer to the lower one) is well-reasoned and supported in the record."

Christian D. Tregillis, CPA, ABV, CLP is Economic Damages Section chair and managing director of LECG in Los Angeles.

Family Law

by Lionel T. Engleman, CPA

An important service we can offer our clients is providing alternatives toward a solution of financial matters in the family law context. We can encourage the exchange of information between the accountants on the case. Generally, the best level of exchange is with the two accountants getting together with their files. These meetings can occur early in the case and may be more fruitful if the attorneys and clients are not present. This allows the free flow of financial data without posturing. However, the circumstances of each case need to be evaluated to determine how best to exchange information.

A possible alternative may be to divide the various tasks between the accountants with the other accountant given the opportunity to review or comment. Another level of accountant communication is simply the exchange of reports, followed by a meeting to discuss and narrow down the differences.

A well-known appellate justice has often said to attorneys that accountants can agree as to the numbers, but not necessarily the underlying assumptions. These assumptions often stem from the legal interpretations provided by the attorney.

More than 30 years ago, I established in my practice the methodology of providing a schedule to quantify the differences of the various assumptions to the attorney and/or judge. These differences can focus the case down to a few points.

Another alternative we can suggest to our clients is the use of a calculated value for a business valuation. There is growing acceptance of this approach in a settlement conference or mediation. The cost differential between the calculated value versus the full scope opinion of value can be substantial.

We are becoming more involved in disclosure as we obtain and collect financial documents. Without careful consideration and cooperation with the other professional, our fees may increase substantially. That means communication with the client is imperative.

SectionAction

Finally, the expansion of joint experts is so important to the survival of the accounting professionals in family law. The parties and the families cannot continue to bear the cost burdens of the marital dissolution litigation process and its inefficiencies. Hopefully, we will continue to see further development in the communication among the courts, the legal system, the attorneys, our clients and ourselves.

Lionel T. Engleman, CPA is Family Law Section chair and a shareholder in Engleman Accountancy Corporation in San Mateo.

Fraud

by Annette Stalker, CPA

In an ideal world, every business would have a full accounting staff, with complete segregation of duties and layers of review for all functions and processes. Few small businesses can afford such a luxury—and remain in business. Hope, however, is not lost. There are measures available to business owners that may reduce the opportunities for fraud within their businesses. I call these measures “low-cost controls.”

Several of these controls do not require an extensive staff. They may require the assistance of a consultant versed in fraud risks, business processes and internal control objectives—a service that fits well with the background and experience of many CPAs who practice in the fraud arena. A few of these controls are as follows:

Run a basic background check. This does not have to be an extensive or costly search. An initial database search can be done for less than \$50. Business owners would be well-advised to incur such a cost for any employee who may handle money.

Don't let too much financial authority reside within one person. At a minimum, establish dual check signing authority for amounts over a certain dollar level. Financial authority extends beyond check signing and should include limits on the ability to establish vendor master records in the accounting system(s) and EFT transactions. Also, those responsible for banking deposits should be provided with an ATM card that authorizes making deposits only.

Monitor bank statements and reconciliations. Have bank statements and canceled checks sent to the business owner's home. The business owner should

Message From the Chair

by Ronald L. Durkin, CPA



For my final column as Litigations Sections chair, I want to reflect on the past two years and give you my thoughts about the future.

Over the past two years, I have stressed the importance of leadership and supporting our young and emerging professionals. I have also discussed the CFF credential, which has been an overwhelming success.

With respect to the CFF credential, we should all thank our own Mike Ueltzen, who chairs the CFF Credential Committee. He has done a tremendous job of building the body of knowledge for the credential and establishing the testing criteria for the upcoming exam.

I would be remiss if I did not mention Hemming Morse and its fine professionals (too many to name) who have done a terrific job of building many of the platforms that will be used for training and testing for the credential.

Yes, I am happy to say that there will be a test coming—maybe as soon as September. I have challenged those in my firm and those on the CFF Credential Committee to take the exam with me. I hope to see you there as well!

As for the future, I am proud to say that our Litigation Sections are loaded with talented professionals. Most of them are willing to donate their time, talents and financial resources to help others. Our professionals have volunteered to serve on national, state and local committees, as well as serving as board members for a variety of organizations, teaching courses, participating in community outreach programs and a host of other activities.

And finally, I want to salute John Costello, who died March 15. We all owe him a debt of gratitude for all of his contributions to the profession and to our lives. John served as chair of the Litigations Sections Steering Committee and of CalCPA's Amicus Curiae and Government Relations committees, as well as serving on the CalCPA Council, CalCPA Board and various AICPA committees. He actively recruited and encouraged his colleagues, especially younger CPAs and women, to step up and volunteer their time and expertise to our profession, knowing full well the value contributed and received would benefit them—and all of us.

— **Ronald L. Durkin, CPA, CFF, CFE, CIRA** is senior managing director of Durkin Forensic, Inc. in Los Angeles.

open the bank statement envelope; review the statement for unusual activity; and inspect canceled checks, viewing both the front and back for any unusual or unauthorized payees or endorsements. If online statements are used, ensure the owner has direct access to the checking account and has the ability to view checks online. In the absence of paper statements, the owner should frequently log on and review banking activity looking for unusual transactions, akin to those of the paper statement review.

Ensure bank reconciliations are done timely and effectively. Have the owner set and enforce deadlines for the reconciliation, and review it for in-transit items and outstanding checks that do not

clear in a timely fashion. If there is an “other” line item used to balance the general ledger to the bank balance, make sure the amount is minimal and not slowly growing over time.

CPAs should be proactive in their approach to their small-business clients. Advise them of the fraud statistics, provide them with fraud checklists and offer to provide operational analysis consulting focused on risk controls. Remember, since most small businesses do not have financial statement audits, internal control weaknesses may not be identified unless a proactive approach is taken.

Annette Stalker, CPA, CFF, CFE is a director of forensic accounting at Ueltzen & Company, LLP, Certified Public Accountants in Sacramento.



Keepin' It Legal

Fact or Opinion? Maybe it's not Worth Asking the Experts

by Martin G. Laffer, CPA

Fact— Knowledge or information based upon real occurrences. *Opinion—*n: A belief or judgment that rests on grounds insufficient to produce complete certainty.

Are there really two sides to every issue?

Expert witnesses testify in court cases where evidence is subject to interpretation, and the issues of contention are rooted in specialized fields. They provide knowledgeable opinions, founded upon their education and experience.

Pursuant to Rule 702 of the *Federal Rules of Evidence*, an “expert” may be admitted “[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. [A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

In California, the 1923 case of *Frye v. United States* (54 App.D.C. 46, 293 F.1013, No. 3968) established: “While the courts will go a long way in admitting experimental testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” These generally accepted principles in accounting are GAAP, GAAS, SSARS, consulting standards, etc.

After having their testimony admitted based upon their knowledge of the facts and relevant experience, expert witnesses must swear (or affirm) to tell the truth. Failure to do so can result in civil or criminal sanctions.

Thus, to provide testimony, expert witnesses must be deemed admissible by judges, and must then vow to be truthful to the best of their ability, given the evidence and their knowledge base.

That established, the task of expert witnesses is to speak to a specified issue of contention in which they have special knowledge. At times, their expertise will provide “fact;” other times, it will merely give educated interpretations of inconclusive evidence, or “opinion.” In either circumstance, the testimony is intended to be bound by fact on one end, and, at the very least, by honesty and integrity on the other end, even if lacking complete certainty.

That said, I share the following case:

Several years ago our accounting firm was retained in a civil dispute between the lessor of a business park and the master lessee. One of the issues concerned a percentage rent clause. The lessee was allowed to deduct all operational expenses from the gross rent collected. Any rent in excess of a negotiated floor amount was subject to a percentage payable to the lessor.

While the case involved other points of contention subject to legal interpretation, as an accounting expert, I was asked to testify as to what constituted an “operating expense.” The expenses in question were new roofs installed on a number of buildings in the business park; the replacement of stand-alone commercial HVAC systems (which came with a five-year manufacturer’s warranty); and a new parking lot, which consisted of removing the asphalt surface, adding gravel, retopping the parking lot and re-stripping the surface. From a materiality standpoint, the “expenses” at issue totaled \$448,000.

One of the first lessons accounting students learn is the difference between an “expense” and a “capitalized asset,” the distinction being whether the “widget” is consumed in one operating cycle (typically one year) or used over a number of operating cycles.

As a general rule, “costs incurred to achieve future benefits should be capitalized,

whereas expenditures that simply maintain a given level of services should be expensed.” (Donald E. Kieso, Jerry J. Weygandt and Terry D. Warfield, *Intermediate Accounting*, 13th edition.) So, as an expert in this case, I was merely testifying as to whether the roofs, HVAC systems and re-paving constituted expenses or capitalized assets.

Armed with my Accounting 101 principles and the Internal Revenue Code, I looked to the IRC’s Modified Accelerated Cost Recovery System (MACRS) for further guidance.

Under MACRS, a new roof should be depreciated over 39 years, a new HVAC system has a useful life of 39.5 years, and a new parking lot has a useful life of 15 years (IRS Sec. 168).

Based on these facts, I deemed that all of these items provide benefit beyond a single operating cycle, which would make them capitalized assets. As I see it, this is not a matter of opinion, but a matter of fact. And yet, opposing counsel produced an expert who testified the exact opposite position—that the acquisition of \$448,000 of capital assets could—and should—be deducted as an operational expense against the rental income in the year of acquisition.

Presumably, as experts in the same field, we should be adhering to the same standards—the aforementioned ones established by the judicial system and those established in our field of accounting.

The CBA requires licensees to comply with “all applicable professional standards,” such as the AICPA’s Code of Professional Conduct, whether or not the California licensee is a member of the AICPA. Accordingly, Rule 201—General Standards of the AICPA’s CPC provides for AICPA members (and all California licensees by reference) to apply “professional competence by undertaking only those professional services that the member or the member’s firm can reasonably expect to be completed with professional competence,” where professional competence is defined as “applying appropriate technical knowledge.”

Furthermore, “in the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others.”

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AICPA Alert

by D. Paul Regan, CPA

Much has happened regarding the Certified in Financial Forensics credential. Of particular interest and importance are:

1. There are now more than 3,700 CPAs who have been granted the CFF credential. We have met our goal for permanent status.
2. The AICPA CFF educational program was launched in January with 15 courses. Visit <http://fvs.aicpa.org/events/financial+Forensic+Accounting+courses.htm> for details.
3. The CFF Committee has completed a Body of Knowledge document and the Content Specific Outline, which is the precursor to the development of the exam.
4. The AICPA has entered into a contract with a third-party exam provider.
5. Subject matter experts have been identified who will develop the CFF exam questions this spring.
6. The first CFF exam will be completed and delivered by September.

The National Accreditation Commission, a senior AICPA committee that provides a means for formally identifying, recognizing, advocating and supporting new areas of specialization that warrant an accreditation program, has recommended that the CFF Committee consider the following:

1. Eliminate the Substantially Equivalent program in June.
2. Place the emphasis on the AICPA CFF educational program as constituting a primary element of the educational portion of the CFF pathway.
3. Effective August 2011, the only pathway available to the new CFF would be through passage of the CFF exam.

The effect of the NAC proposal was to leave open the pathway to the CFF credential until August 2011, when the CFF exam would be completed. The NAC agreed to reconsider the recommendation after the CFF Committee evaluated its recommendation.

These are important steps in the progress of making the CFF an important credential that serves our profession, our public and our clients. If you have any comments or recommendations, please contact me or Mike Ueltzen.

D. Paul Regan, CPA, CFE, CFF is chair of Hemming Morse, Inc., CPAs, Litigation & Forensic Consultants. He is a member of the AICPA's Forensic and Valuation Services Executive Committee.

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I suppose I made an ill assumption: that the opposing counsel's expert witness and I were interpreting the same facts, and doing so with the same aspirations toward objectivity and integrity. Sadly, there he was, testifying that the assets could be deducted against the rental income in the year of acquisition. Surely the judge would see that we could not both be correct. After all, this was not a matter of opinion.

The issue at hand, as I saw it, was not at the mercy of subjective belief or unsupported speculation. All one had to do was crack an accounting primer and consult the IRC to arrive at the classification of capitalized assets. The "facts" were laid out plainly for him to see.

So, you can imagine my consternation when, in a decision following the several-day trial, the well-respected, retired judge issued an arbitration award that contained the following statement:

"Each side called accountants as both percipient and expert witnesses to testify as to the proper classification of the controversial paving, roofing, and [HVAC] payments [and whether the payments were] capital expenditure[s] or expense[s].

Predictably, LLC's accountant witness said

the proper classification was the former; Park's, the latter." [Emphasis added.]

Testifying in a court of law is much more than a game of "he said, she said." The judge makes a decision to allow expert testimony, and ideally uses said testimony to make a ruling. Hopefully, the judge rules in favor of logic and truth in the cases where right and wrong exist. The judge's job is to offer third-party perspective.

My issue with the above ruling was not a matter of win or lose. Rather, I was most troubled by the word "predictably." Unfortunately, the issue of contention we addressed was neither based on arcane accounting principles, nor one that was a matter of complex or subjective interpretation. One of us was right and one of us was wrong. An expense cannot be partially capitalized. Nonetheless, it was up to the judge to decide which one of us was right. But he didn't. He said, "Well, I *knew* you both would issue arguments in support of your client's interests, and therefore, since both of you must be right to some degree, I cannot particularly use either of your testimony." [Emphasis added.]

What saddens me further about that statement is that it assumes all "experts" will negotiate the "facts" to provide an opinion consistent with the source of

their paycheck, rather than consistent with objectivity and integrity. Slapping the word "expert" on a witness apparently gives them license to issue an opinion without veritable regard for the facts. They will find ways to justify their viewpoint and often convince the court, because, after all, they are experts! The false manipulation of fact into contrived favorable opinion is arrogant and unethical; such action should be deemed an offense to the intelligence of the court, and the profession.

I return to the precarious word "predictably." If expert witnesses of opposing counsel will "predictably" opine in such a way that their opinions nullify one another, why bother admitting such testimony? Save time, save money, save energy, but most importantly, save us from the mockery. Don't condescend to weigh testimony equally, and to rule with the side of reason, but then ignore objectivity and rationalism. It belittles us all. The label "expert" is not a valid blanket justification for any opinion, particularly if that opinion is not primarily swayed by fact.

As a footnote, my client (the plaintiff) received a favorable result.

Martin G. Laffer, CPA, CFF is secretary of the Litigation Sections Steering Committee and a partner with Laffer & Gottlieb in Beverly Hills.

HAPPENINGS

LITIGATION SECTIONS MEETINGS

Business Valuation	Thursday, May 20, OAK
Economic Damages	Wednesday, May 12, OAK
Family Law	Friday, May 21, OAK

You may register online or download a registration form at www.calcpa.org/LIT. For more information, call (818) 546-3502.

EDUCATION FOUNDATION CONFERENCES/COURSES

(800) 922-5272 or www.educationfoundation.org

Business Valuation: A Review of the Essentials	Monday, June 7, Lake Tahoe
Business Valuation Conference	Friday, July 9, LAX
California Fraud Case Studies	Monday, June 21, OC
Family Law Conference	Thursday, Nov. 4, LAX Friday, Nov. 5, SF
Forensic Auditing: The Audit of the Future, Today	Wednesday, June 16, BUR Friday, July 9, SJ
Fraud in Audit, Accounting and Tax Conference	Thursday, June 17, BUR Friday, June 18, SF
Intellectual Property Institute	Monday, Nov. 8, LAX
The Accountants Responsibility for Fraud	Tuesday, June 15, LAX
Valuation for M&A Transactions	Friday, May 14, OC Friday, June 11, SF

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such as common sense, assertiveness, inquisitiveness and communication savvy. Common sense is vital to possess but difficult, if not impossible to teach. Fraud investigators need to have an appropriate level of assertiveness. Identifying the truth from lies is not particularly suited for the meek and timid. A certain amount of tenacity

or assertiveness is required. Inquisitiveness is another critical skill underlying the ability to detect misrepresentations and other deceptions throughout an investigation.

Perhaps most important of the “natural talents” is the ability to communicate with people. While there are a number of very good courses that help to develop communication and interviewing skills,

Order Your Innocent Spouse Relief Flowchart

Produced by the Family Law Section in July 2009, the flowchart is designed to assist the user in determining tax relief for the innocent spouse under the Internal Revenue Code.

You can download an order form at www.calcpa.org/flowchart or contact Barby Petersson at (818) 546-3502.

there are some people who possess these naturally. In theory, these “natural talents” can be taught and the principles can be learned over time and through experience.

Professionals with a “nose for fraud,” in addition to learned skills, are more apt to succeed as forensic accountants and as members of your firm.

Katherine L. Hunt is a senior associate at Mayer Hoffman McCann P.C.'s Los Angeles office. She works on fraud investigation assignments and high net worth marital dissolution engagements.

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