

MANAGING THE RISK OF FRAUD

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The expert witness who, because of their knowledge or experience in a specific area, is allowed to give opinion evidence.

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Expert Witness Rules of Evidence Part 1

Expert witnesses have been an integral part of the tribunal system and their importance is growing. With that growth comes the need to regulate and control the role and manner in which experts are used and abused by the parties to litigation.

As a result, the professional bodies and the legal jurisdictions have developed rules, standards and codes which the expert must follow. The degree of adherence to these rules will have a direct impact on how the expert's report, testimony and opinions are considered by the trier of fact.

This is the first in a series of newsletters that will look at the existing and new rules, standards and codes that are applicable to expert witnesses, including the Standard Practices for Investigative and Forensic Accounting Engagements, the Federal Rules and the new Federal Code of Conduct, the provincial rules of procedure and the new rules in Ontario, British Columbia and Alberta.

In addition, the series will review the Daubert rules in the US and the recent changes to Rule 26 governing the discoverability of experts in the US as well as the US Federal rules, State rules and the American Institute of Certified Public Accountants rules.

The rules applicable to Chartered Business Valuators and the American Society of Appraisers will be examined as well.

As the rules, standards and codes have expanded, so has the focus of the courts on the expert's adherence to these rules, standards and codes. Readers will have a better aware-

ness of their obligations to the courts and will be prepared to respond in the affirmative when questioned about their methodology and compliance with these rules, standards and codes.

DEFINE EXPERT TESTIMONY

It is a time-honored rule of common law (and civil law) jurisdictions that witnesses ought only to relate their personal observations of events. They are not to attempt to enter their opinions into evidence in a court of law.

The major exception to this is the expert witness who, because of their knowledge or experience in a specific area, is allowed to give opinion evidence. Generally, the rationale behind this is that judges can't possibly be knowledgeable in all areas of human activity and in any event, many cases before the courts turn on a scientific issue or upon special knowledge.

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THE SUPREME COURTS HAVE SPOKEN

Both Canada and the United States Supreme courts have addressed the need for expert witness testimony and what would qualify as expert witness testimony.

“With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary”

Supreme Court Of Canada, *R. v. Abbey*, [1982] 2 S.C.R. 24

“Admission of expert evidence depends on the application of the following criteria:

- (a) Relevance;
- (b) Necessity in assisting the trier of fact;
- (c) The absence of any exclusionary rule; and
- (d) A properly qualified expert.”

Supreme Court Of Canada *R. v. Mohan*, [1994] 2 SCR 9

“The Federal Rules of Evidence, not *Frye*, provide the standard for admitting expert scientific testimony in a federal trial.

The Rules—especially Rule 702—place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to “scientific . . . knowledge,” since the adjective “scientific” implies a grounding in science's methods and procedures, while the word “knowledge” connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds. The Rule's requirement that the testimony “assist the trier of fact to understand the evi-

dence or to determine a fact in issue” goes primarily to relevance by demanding a valid scientific connection to the pertinent inquiry as a precondition to admissibility.”

US Supreme Court *Daubert v. Merrell Dow Pharmaceuticals, Inc.* - 509 U.S. 579 (1993)

“The *Daubert* factors may apply to the testimony of engineers and other experts who are not scientists.”

The *Daubert* “gatekeeping” obligation applies not only to “scientific” testimony, but to all expert testimony. Rule 702 does not distinguish between “scientific” knowledge and “technical” or “other specialized” knowledge, but makes clear that any such knowledge might become the subject of expert testimony.”

US Supreme Court *Kumho Tire Co. V. Carmichael* (97-1709) 526 U.S. 137 (1999)

THE VOIR DIRE

A proposed expert witness has to first be qualified by the court. The *voir dire* is a process of submitting the expert's qualifications to the court, usually done by having the witness testify as to his qualifications, training, experience and other attributes which the court should consider in the determination of whether the expert will meet the criteria to be accepted as an expert for purposes of the case at hand. If the judge accepts the witness as an expert within the *stated area of qualification*, that witness can then give opinion evidence.

The judge is not bound to any expert evidence and often has to weigh and prefer the evidence of one expert against that of another.

An expert must first produce an expertise report which is produced into the court record. Of importance is the **rule** that the expert may only testify on what is contained in the report. Therefore, it is important to consider all possible issues which may need to be brought forward to the trier of fact, and incorporate this into the report.

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MANAGING THE RISK OF FRAUD has been prepared for the general information of our clients, staff and other interested parties. The enclosed comments are of a general nature and are not intended to cover all aspects of the subject matter. Prior to implementing any planning based upon information in this publication, the specific facts pertaining to any particular situation should be carefully considered. We will be pleased to assist in this regard and to provide further details pertaining to the matters discussed herein.

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Below are two examples of the provincial rules governing the requirement for an expert report by an expert witness. In most, if not all jurisdictions, an expert report is required in advance of a witness being presented to the court as an expert.

QUEBEC RULE 402.1

402.1. Except with leave of the court, no expert witness may be heard unless his written report has been communicated and filed in the record in accordance with the provisions of Sections I and II of Chapter I.1 of this Title. However, in the case of a motion other than a motion to institute proceedings, a copy of the report must be served on the parties at least 10 days before the date of the hearing, unless the court decides otherwise.

The filing in the record of the whole or abstracts only of the out of court testimony of an expert witness may stand in lieu of his written report.

BC RULE 11-7

Reports must be prepared and served in accordance with rules

- (1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed by the court under Rule 11-5, must not be tendered at trial unless
 - (a) that evidence is included in a report of that expert that has been prepared and served in accordance with Rule 11-6, and
 - (b) any supplementary reports required under Rule 11-5 (11) or 11-6 (5) or (6) have been prepared and served in accordance with Rule 11-6 (5) to (7).

PROFESSIONAL RULES AND CODES

Most experts will be members of professional bodies which have rules and codes that govern the performance of their members. Although the professional rules and codes are specific to the members of the professional organization, the courts have considered these rules to be applicable when the expert is opining on issues of expertise relating to the his expertise associated with the profession.

These newsletters will focus on the rules for experts that provide financial expertise. As such, the rules of the professional bodies governing the forensic accounting expert will be examined.

CICA STANDARD PRACTICES FOR INVESTIGATIVE AND FORENSIC ACCOUNTING ENGAGEMENTS

As the practice of forensic accounting flourished in Canada, the majority of the experts in this area were also Chartered Professional Accountants (CPA), previously Chartered Accountants (CA).

The standards were established to protect the public by ensuring consistency with a minimum standard of practice to be met by all CPAs in the performance of Investigative and Forensic Accounting (“IFA”) engagements.

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Voir Dire Ruling

At trial, the defendants proposed to call an accountant as an expert to give evidence with respect to the forensic accounting and the Alfano's damages claim. Counsel for the plaintiffs objected to the admissibility of the expert's two reports on the grounds that the expert and his associates had assumed the role of advocates and were not acting independently.

The judge held that the proposed expert's evidence was inadmissible. She reasoned that an expert must be objective and cannot "buy into" the theory of one side of the case to the exclusion of the other. The fundamental principle with respect to the admission of expert evidence is that such evidence must assist the court. If it becomes apparent that an expert has adhered to and promoted his or her client's theory of the case, he or she becomes less reliable.

Alfano v. Piersanti, [2009] O.J. No. 1224 (S.C.J.)

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The applicability of these standards are described in section 100:

100.02 These are the minimum standard practices that **should be met by all chartered accountants** conducting IFA engagements (collectively referred to in this document as “IFA practitioners”).

100.05 IFA standard practices are different from IFA engagement procedures. Standard practices relate to the IFA practitioner’s professional skills, the performance of his or her engagement, and the preparation of his or her report. IFA procedures are the specific acts or steps performed by the practitioner to attain his or her objectives in the particular engagement.

100.08 “Investigative and forensic accounting engagements” are those that:

- (a) Require the application of professional accounting skills, investigative skills, and an investigative mindset; and
- (b) Involve disputes or anticipated disputes, or where there are risks, concerns or allegations of fraud or other illegal or unethical conduct.

These are the minimum standard practices that should be met by all chartered professional accountants conducting IFA engagements

100.17 These IFA standard practices should be applied to all IFA engagements, and to work performed by all individuals on such engagements.

100.18 In the context of this document, “work” means the work of IFA practitioners, including that performed by other individuals, within the domain of the IFA engagement.

The primary jurisdiction other than Canada, that Canadian practitioners will encounter is the United States. The US Federal rules of Civil Procedure, the Daubert rules and professional standards in the US are discussed in Parts 4 and 5 of this series.

100.21 IFA practitioners accepting IFA engagements in a jurisdiction other than Canada should have adequate knowledge of, and meet the relevant standards and regulatory and legal requirements applicable to, that jurisdiction.

The remainder of the IFA standards consist of the following sections:

- 200. Engagement Acceptance
- 300. Planning & Scope Of Work
- 400. Information Collection & Analysis
- 500. File Documentation
- 600. Reporting
- 700. Expert Testimony

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Without limiting the importance of the entire Standard, some of the most relevant standards are as follows:

400.04 IFA practitioners should **consider the relevance of all information** that arises during the course of an IFA engagement.

400.05 IFA practitioners should identify, analyze, assess and compare all relevant information, assess substance over form, and develop and test, as needed, hypotheses for the purpose of evaluating the issues in the IFA engagement.

400.10 IFA practitioners should **evaluate the reasonableness and consistency of all estimates** and assumptions having regard to the IFA practitioners' competence, expertise and other available relevant information.

400.12 IFA practitioners should review all information received during an IFA engagement, and consider its relevance, reliability, reasonableness, completeness and consistency with other known engagement information.

400.13 IFA practitioners should consider and address reasonable alternative theories, approaches and methodologies that may be relevant to their work.

600.08 All reports should include the following information:

- (a) the name(s) and professional designation(s) of the IFA practitioners and/or the firm responsible for the report;

- (b) who retained the IFA practitioner(s) and to whom the report is directed;
- (c) the date of the report;
- (d) the effective date for the findings and conclusions, if different from the date of the report;
- (e) the objectives and circumstances of the IFA engagement and the purpose for which the report is being prepared;
- (f) identification of the documents and sources of information relied upon to prepare the report;
- (g) the extent of reliance on the work of others;
- (h) the techniques and procedures performed when preparing the report, including a description of the approach(es) and rationale for selecting such approach(es);
- (i) any underlying assumptions and the reasons for relying on such assumptions;
- (j) the definition(s) of any technical terms and interpretations used in the report;
- (k) the findings and conclusions reached and any supporting analyses and charts;
- (l) sufficient information to enable the user to relate the findings and conclusions to the supporting analyses, information and documents;
- (m) any restrictions on the use of the report; and
- (n) any scope or other limitations affecting the findings and conclusions.

Adherence to the above reporting standards should keep the practitioner onside ***with most other rules and codes.***

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PROVINCIAL INSTITUTE AND ORDRE'S

CODES OF ETHICS

One of the major credentials that the court will consider when assessing the value of the expert's testimony will be the credibility that the court places on the expert himself.

The courts do not consider an expert to be excluded simply because he may not be independent from one of the parties, in the context of a client – professional relationship (e.g. a CPA who acts as an expert for a client of the firm in which he/she is a partner). This potential conflict of interest will impact the weight placed on the expert's testimony by the trier of fact, but not their ability to act for the client.

The Ontario Court General Division has stated:

“An expert witness is called to provide assistance to the court in understanding matters which are beyond the expertise of the trier of fact. Such a witness is not to be an advocate for one party, but an independent expert. Expert witnesses are of course paid a fee by the party calling them, which in itself may be considered to affect their independence. The court will examine the demeanor of an expert in the way the evidence is given, in particular whether the expert takes on the role of an advocate for one side, or remains objective, in weighing the evidence and attributing value to the opinion. If the expert does adopt the attitude of a neutral, then the fact that he is being paid or that the defendant is his client will cause little or no concern, but that will not be the case if he appears to lose his neutrality. In that case the value of his evidence can diminish significantly.”

Interamerican Transport Systems Inc. v. Canadian Pacific Express & Transport Ltd., [1995] O.J. No. 3644 (Gen. Div.) (QL)

However, a lack of independence or conflict of interest, as defined by the applicable Code of Ethics may

have a more serious impact. Careful attention should be placed on the following:

- Independence
 - ⇒ Family relationship
 - ⇒ Business interests
- Objectivity
- Due Care
- Training and supervision
- File retention
- Engagement letters

CHARTERED BUSINESS VALUATORS' STANDARDS

The CBV has been an important part of numerous types of litigation and their calculations and opinions generally incorporate a larger degree of assumptions and estimates than other forms of financial expertise. The importance of this field of practice has been recognized in the CBV Handbook as a separate series of standards including Standard 310, 320 and 330.

The CBV's standards are codified in the CBV Handbook and generally apply to all three types of valuation reports:

- ◇ Comprehensive Valuation Report
- ◇ Estimate Valuation Report
- ◇ Calculation Valuation Report

Standard 310 includes minimum reporting requirements which are similar to those in the IFA standards, as well as specific reporting requirements for valuation reports.

Due to the highly specialized field, the valuation report must also contain numerous definitions and it is incumbent upon the valuator to insure that these defi-

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nitions are in accordance with the generally accepted application for the terminology used in the report.

Standard 320 relates to the scope of work standards and are very similar to those found in the CICA Handbook for auditing standards as they relate to:

- Adequate technical training, and proficiency, due care and objectivity.
- Adequate planning and proper execution of all work.
- Sufficient evidence to support the conclusions in the report.

Similar to the IFA standards, the CBV must consider the assumptions and determine their reasonableness and appropriateness.

Standard 330 relates to File Documentation which includes:

- A copy of the final report.
- An engagement letter (not mandatory but recommended).
- Summaries of key meetings, discussions and correspondence.
- Information relied upon.
- Approach taken and reasoning for its selection.
- Techniques used and reasoning for their selection.
- Client representation letter, if deemed necessary.

As for all documentation, the question of confidentiality will be important, in particular with the content and manner in which the above is written.

Quebec Draft Reform—Expert’s Mission and Duty

235. Before the trial begins, a party can demand that an expert’s report be dismissed on the ground of irregularity, substantial error or bias, in which case the demand must be notified to the other parties within 10 days after the report is submitted.

*If the court considers the demand well-founded, it orders that the report be corrected or that it be withdrawn. In the latter case, it can allow another expert to be appointed. The court can also reduce the amount of the fee payable to the expert or **order that the expert repay any amount already received**, to the extent specified.*

ACFE CODE OF ETHICS

All members of the Association of Certified Fraud Examiners (ACFE) must meet the rigorous criteria for admission to the Association of Certified Fraud Examiners. Thereafter, they must exemplify the highest moral and ethical standards and must agree to abide by the bylaws of the ACFE and the Certified Fraud Examiner Code of Professional Ethics.

- A Certified Fraud Examiner shall, at all times, demonstrate a commitment to professionalism and diligence in the performance of his or her duties.
- A Certified Fraud Examiner shall not engage in any illegal or unethical conduct, or any activity which would constitute a conflict of interest.
- A Certified Fraud Examiner shall, at all times, exhibit the highest level of integrity in the performance of all professional assignments and will accept only assignments for which there is reasonable expectation that the assignment will be completed with professional competence.
- A Certified Fraud Examiner will comply with lawful orders of the courts and will testify to matters truthfully and without bias or prejudice.
- A Certified Fraud Examiner, in conducting examinations, will obtain evidence or other documentation to establish a reasonable basis for any opinion rendered. No opinion shall be expressed regarding the guilt or innocence of any person or party.
- A Certified Fraud Examiner shall not reveal any confidential information obtained during a professional engagement without proper authorization.
- A Certified Fraud Examiner will reveal all material matters discovered during the course of an examination which, if omitted, could cause a distortion of the facts.
- A Certified Fraud Examiner shall continually strive to increase the competence and effectiveness of professional services performed under his or her direction.

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LEVI & SINCLAIR is a firm of chartered professional accountants that traces its origin in Montreal to 1970. We pride ourselves on being more than just an accounting firm. We offer an effective blend of personalized service, experience and technological leadership, coupled with a steadfast commitment to consistently deliver excellence.

Our Chartered Professional Accountants and Business Consultants provide advisory services on a broad range of issues to both our individual and corporate clients. The members of our firm possess unique talents, expertise and experience, giving our clients access to a knowledge base of considerable breadth and depth. Together with our support personnel, we share a commitment to developing practical solutions for the business challenges of today, and to devising strategies for tomorrow.

OUR SERVICES

Our firm takes pride in adding value to every client that we serve through our extensive expertise and proactive approach to your financial needs. We match our dedication to adding value with experience and expertise: we have experience in servicing virtually every type of industry and professional practice.

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Our office has a strong basis in federal and provincial tax issues. Our tax group is highly qualified and experienced. Our accountants work hard to minimize your taxes, yet make sure that you fulfill your tax requirements ethically while working to add value. We can fill a variety of tax needs, both domestic and international as well as corporate and personal. Our specialties lie in tax reporting and representation, tax planning (business, personal, divorce and litigation), tax structuring of entities and transactions and tax research.

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