

# MANAGING THE RISK OF FRAUD

LEVI & SINCLAIR, SENCRL  
LLP

1303 Greene Avenue, Suite 400  
Westmount, Quebec H3Z 2A7  
Tel: (514) 931-7600 Fax(514) 931-3600  
alert@levifca.com

A member firm of Integra International with offices worldwide

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

## VISIT US

TAKE A MOMENT TO VISIT OUR WEB SITE WHICH OFFERS A FULL PROFILE OF OUR FIRM AND BACK ISSUES OF OUR NEWSLETTERS

[www.levifca.com](http://www.levifca.com)

## Expert Witness Rules of Evidence Part 4

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 fourth 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

awareness 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.

## United States

### LEGAL CODES

#### US FEDERAL RULES OF EVIDENCE

Beginning with new Rule 26 amendments that took effect on Dec. 1, 2010, counsel's communications with a testifying expert are once again generally protected from discovery.

In summary, the new Rule 26 amendments—

- eliminate the requirement that a testifying expert's report disclose "information considered" in favor of a more narrow "facts or data considered" standard (Rule 26(a)(2)(B)(iii));

(Continued from page 1)

- provide that experts' draft reports or disclosures constitute "trial-preparation materials" generally protected from discovery (Rule 26(b)(4)(B));
- provide that, subject to three exceptions, communications between counsel and a retained testifying expert also constitute "trial-preparation materials" generally protected from discovery. (Rule 26(b)(4)(C)); and
- distinguish between retained testifying experts and non-retained testifying experts, providing that a report is not required for a non-retained testifying expert but, instead, a disclosure providing "a summary of the facts and opinions to which the witness is expected to testify" (Rule 26(a)(2)(C)).

The three exceptions are communications that:

- Relate to compensation for the expert's study or testimony;
- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

#### **RULE 702. TESTIMONY BY EXPERTS**

"There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute."

Ladd, Expert Testimony, Vand.L.Rev. 414, 418 (1952)

"When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time."

Wigmore § 1918.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

If 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.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier.

#### **THE DAUBERT RULES AND KUMHO CLARIFICATION**

Two Supreme Court cases set the primary legal precedence for the admissibility of expert testimony in federal cases:

- ♦ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993), and

(Continued on page 3)

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.

If you know of someone who should be added to our mailing list or if you require additional copies, please contact us at (514) 931-7600

- ◆ *Kumho Tire Co. vs. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 1179 (1999).

These cases expanded the role of the trial judge as a gatekeeper for expert testimony.

In *Daubert*, the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science.

The specific factors explained by the *Daubert* Court are:

- whether the expert's technique or theory can be or has been tested - that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
- whether the technique or theory has been subject to peer review and publication;
- the known or potential rate of error of the technique or theory when applied;
- the existence and maintenance of standards and controls; and
- whether the technique or theory has been generally accepted in the scientific community.

The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of nonscientific expert testimony, depending upon "the particular circumstances of the particular case at issue."

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact.

These factors include:

- (1) Whether experts are "proposing to testify about matters growing naturally and directly out of re-

search they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").
- (3) Whether the expert has adequately accounted for obvious alternative explanations. See *Clair v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). Compare *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).
- (4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). See *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999)
- (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999)

#### **FLA. STAT. §90.702 TESTIMONY BY EXPERT.**

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qual-

ified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

#### FLA. STAT. §90.105 PRELIMINARY QUESTIONS

- (1) Except as provided in subsection (2), the court shall determine preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence.
- (2) When the relevancy of evidence depends upon the existence of a preliminary fact, the court shall admit the proffered evidence when there is prima facie evidence sufficient to support a finding of the preliminary fact. If prima facie evidence is not introduced to support a finding of the preliminary fact, the court may admit the proffered evidence subject to the subsequent introduction of prima facie evidence of the preliminary fact.

#### FEDERAL RULES OF CIVIL PROCEDURE RULE 26

##### (2) Disclosure of Expert Testimony.

- (A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may

use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

- (B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.

The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

### Quebec Draft Reform Expert's Mission and Duty

288. The report of an expert stands in lieu of his or her testimony. The expert's report is admissible only if it was disclosed to the parties and filed in the record within the time for disclosure and production of evidence.

Otherwise, it can be admitted only if it was made available to the parties by another means in a timely manner so that they could react and determine whether the expert's presence might be useful. It is also admissible outside such timeframes with leave of the court.

## Index to Series on Expert Witness Rules of Evidence

Part 1	<ul style="list-style-type: none"> <li>1. Define Expert Testimony               <ul style="list-style-type: none"> <li>a. The Supreme Courts Have Spoken</li> <li>b. The Voir Dire</li> <li>c. Quebec Rule 402.1</li> <li>d. BC Rule 11-7</li> </ul> </li> <li>1. Professional Rules and Codes               <ul style="list-style-type: none"> <li>a. CICA Standard Practices for Investigative and Forensic Accounting Engagements</li> <li>b. Provincial Institute and Ordre's Codes of Ethics</li> <li>c. Chartered Business Valuators' Standards</li> <li>d. ACFE Code of Ethics</li> </ul> </li> </ul>
Part 2	<ul style="list-style-type: none"> <li>1. Legal Codes               <ul style="list-style-type: none"> <li>a. Canadian Federal Court Rules                   <ul style="list-style-type: none"> <li>(1) Expert Witnesses</li> <li>(2) RULE 52.2 Certificate Concerning Code of Conduct for Expert Witnesses</li> <li>(3) Form 52.2</li> </ul> </li> <li>a. Ontario Rules                   <ul style="list-style-type: none"> <li>(1) Rule 4.1 - Duty of Expert</li> <li>(2) Taking Evidence Before Trial</li> <li>(3) 53.03 Experts' Reports</li> <li>(4) FORM 53 Courts of Justice Act Acknowledgment of Expert's Duty</li> </ul> </li> </ul> </li> </ul>
Part 3	<ul style="list-style-type: none"> <li>1. Quebec Rules               <ul style="list-style-type: none"> <li>a. Written Report Required</li> <li>b. Court Appointed Expert</li> </ul> </li> <li>1. Nova Scotia Rules               <ul style="list-style-type: none"> <li>a. Written Report Required</li> </ul> </li> <li>1. British Columbia Rules               <ul style="list-style-type: none"> <li>a. Rule 11-2 — Duty of Expert Witnesses</li> <li>b. Requirements for Report</li> <li>c. Production of Documents</li> <li>d. Rule 11-7 — Expert Opinion Evidence at Trial</li> </ul> </li> <li>1. Alberta Rules               <ul style="list-style-type: none"> <li>a. 5.37 Questioning Experts Before Trial</li> <li>b. Continuing Obligation on Expert</li> <li>c. Use of Expert's Report at Trial Without Expert</li> <li>d. Expert's Attendance at Trial</li> </ul> </li> </ul>
Part 4	<ul style="list-style-type: none"> <li>1. United States Legal Codes               <ul style="list-style-type: none"> <li>a. US Federal Rules of Evidence                   <ul style="list-style-type: none"> <li>(1) Rule 702. Testimony by Experts</li> </ul> </li> </ul> </li> </ul> <p style="margin-left: 40px;">The Daubert Rules and Kumho Clarification          Fla. Stat. §90.702 Testimony by Expert          Federal Rules of Civil Procedure Rule 26</p>
Part 5	<ul style="list-style-type: none"> <li>1. United States Professional Rules and Codes               <ul style="list-style-type: none"> <li>2. AICPA Consulting Services Practice Aid 10 – 1 Serving as an Expert Witness or Consultant</li> <li>3. AICPA Standards for Consulting Services (SSCS) NO. 1</li> <li>4. AICPA and State Codes of Professional Conduct</li> <li>5. American Society of Appraisers Standards                   <ul style="list-style-type: none"> <li>a. Principles of Appraisal Practice and Code of Ethics</li> <li>b. Business Valuation Standards</li> </ul> </li> </ul> </li> <li>1. American Society of Appraisers               <ul style="list-style-type: none"> <li>a. Procedural Guideline-1 Litigation Support: Role of the Independent Financial Expert</li> </ul> </li> </ul>

## ABOUT **LEVI & SINCLAIR**

**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.

### **TAXATION**

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.

### **FINANCIAL**

**LEVI & SINCLAIR** can meet all of your basic financial needs with our exemplary Accounting Services Group that can truly add value whether it's your business or your personal finances that we are reviewing. We work with business entities as well as non-profits and foundations. Our accounting services include; auditing and compilation review of financial statements, budgets and forecasts, and government reporting. We won't simply process your financial statements, our mission is to add value. We will go the extra mile to help you forecast or locate opportunities that you may be missing.

### **BUSINESS CONSULTING**

**LEVI & SINCLAIR**'s Business Consulting unit has proven itself as a valuable resource to businesses of all kinds. We can help you plan your future, whether you see it coming or not. We can help you bring seminal business events to life; like mergers and acquisitions, business valuation, leases and contracts, or business development plans, all of which take a huge amount of planning and attention to detail. If there are no big events on your horizon, we can still be of service by helping you to anticipate the unexpected through our forecasting, real estate projections, risk management assessments, or our feasibility studies. We look at your business and all of its many facets, to find both issues and opportunities and bring that valuable insight to you.

## LITIGATION SUPPORT AND DISPUTE RESOLUTION SERVICE AREAS

- **Civil and criminal Fraud Investigation**
- **Management and employee fraud and theft**
- **Identification of secret commissions and kickbacks**
- **Intellectual Property Litigation Support**
- **Training on fraud awareness and prevention**
- **Due Diligence Audits**
- **Business valuation**
- **Fairness opinions**
- **Insurance claim assistance**
- **Retail sales audits**
- **Contract dispute resolution**
- **Professional negligence litigation support**
- **Fraud prevention program design, implementation and evaluation**
- **Bank due diligence audits**
- **Employee background audits**
- **Financial discrepancy analysis**
- **Divorce litigation support**
- **Insurance claim quantification**
- **Breach of contract quantification**
- **Electronic Discovery and Data Recovery**
- **Computer forensics**

### CONTACT INFORMATION

**LEVI & SINCLAIR** SENCRL  
LLP

1303 Greene Avenue, Suite 400

Montreal, Quebec H3Z 2A7

Tel: (514) 931-7600

Fax: (514) 931-3600

Philip C. Levi, CFE, FCPA auditor, FCA, CPA/CFF, FCA•IFA

plevi@levifca.com

WITH OFFICES WORLDWIDE THROUGH MEMBERSHIP IN

**INTEGRA**  **INTERNATIONAL**<sup>®</sup>

**YOUR GLOBAL ADVANTAGE**