



The Role of the Forensic Accountant in Litigation

By Andrew P. Ross and James Stewart

The Association of Certified Fraud Examiners, a leading organization in the area of fraud prevention and detection, describes on its website the characteristics of a forensic accountant — “Forensic accountants combine their accounting knowledge with investigative skills, using this unique combination in litigation support and investigative accounting settings.” The work of a forensic accountant will be marginalized if his¹ findings cannot be effectively communicated to the attorney who retains him to perform these services, and ultimately to the trier of fact. Attorneys look to the forensic accountant to untangle complex financial issues, and provide explanations needed for the tactical planning and negotiations for the matter, which they have been retained.



Andrew P. Ross



James Stewart

The testifying expert usually is required to give an opinion, and the expert’s work product generally is not protected from discovery. There are certain instances where the forensic accountant is initially retained as a consulting expert, only to be subsequently retained as a testifying expert. The positives and negatives associated with this arrangement should be carefully evaluated by the retaining attorney.

Forensic accountants have been retained in a wide range of matters including, but not limited to, commercial litigation, shareholder/partnership disputes, damage calculations, fraud investigations, business valuations, bankruptcy, and marital dissolutions.

Forensic accounting is a field that has adapted well to the rapid advancements in technology. More than ever, the forensic accountant is able to utilize technology to assist in investigating both the people and the money involved in a case. These technologies have allowed the forensic accountant to work in a more efficient manner, and provide the retaining attorney with a visually appealing product to bring to negotiations or trial.

Although each case is different, there are certain areas where a forensic accountant can effectively provide services to retaining counsel. Early retention of a forensic accountant will allow the retaining attorney to benefit from a greater amount of the procedures that the forensic accountant is qualified to assist in. Here are some of the services that a forensic accountant can provide:

Aside from the expertise that an attorney can receive from a forensic accountant, the attorney can also expect independent, unbiased work. The attorney’s client may request that his current CPA be retained to perform the required forensic accounting services. This strategy is often times shortsighted despite the client’s CPA having extensive knowledge of the finances of the company in litigation. Not only is the client’s CPA probably not trained to deal with forensic accounting and litigation matters, their inherent bias may become a weakness at deposition or trial.

Evaluation of the matter

Not all prospective cases should be litigated. An effective forensic accountant can assist plaintiff’s counsel in the evaluation of the merits of a case and assist in determining the feasibility of proceeding with the litigation. Perhaps the preliminary financial evidence obtained indicates that the case should not be pursued, or the client should accept some form of a settlement offer.

Similarly, the defendant’s retaining attorney can also benefit from the use of a forensic accountant in the evaluation of a matter. These benefits may include the forensic accountant assisting in structuring an initial settlement offer that will bring closure to a potentially damaging litigation before it begins.

Forensic accountants generally serve as either a consulting expert or as a testifying expert. The main difference between the two assignments is that a consulting expert does not provide an expert opinion, and the work product generally is privileged and protected from the discovery process. The primary purpose of the consulting expert is to serve as an extension of the retaining attorney, often times not even disclosed to the opposition. The consulting expert is often asked to assist in formulating case strategies and evaluate the merits or weaknesses of the matter at hand.

Discovery assistance

The early retention of a forensic accountant can be of great benefit to the retaining attorney. The forensic accountant can assist retaining counsel by preparing a financial document request that is specific to the matter. While the attorney may know exactly how he plans to handle the case, from a legal perspective, he may not be familiar with the specific financial documents that may be

necessary to prove the case arguments. The use of the forensic accountant's skill can be especially integral in especially difficult cases involving electronic discovery that contain a large volume of documents, and identifying pertinent documents is challenging.

Analysis of Documents

At the core of a forensic accountant's assignment is an analysis of the relevant documents obtained. Who better to analyze the contents of tax returns, general ledgers, financial statements and other financial documents than the forensic accountant? The forensic accountant understands the subtle accounting and financial issues related to a matter.

Depositions

The forensic accountant can assist the retaining attorney in preparing to depose the opposition's expert, and even certain fact witnesses. This assistance can take the form of preparing questions for, and attending, the depositions of these witnesses. At the deposition, the forensic accountant may be asked to prepare questions, in real time, for the attorney. This can be especially useful in a matter that entails a complicated financial fact pattern where the answers of the deponent might necessitate pinpointed follow up questions. After the deposition is completed, the forensic accountant may be asked to read the deposition transcripts of various witnesses to interpret and integrate new information into existing theories or to assist the attorney with trial preparation.

An effective forensic accountant must be ready to defend the expert report, expert findings, conclusions and opinions. The forensic accountant should understand the difference between a deposition and trial and prepare accordingly.

Settlement Negotiations

The vast majority of matters do not make it to trial. An effective forensic accountant will continuously update the attorneys on the strengths and weaknesses of the case as it progresses. This can be invaluable to an attorney during the negotiation phase, and help structure any appropriate counter offers. The forensic accountant may be asked to evaluate any tax ramifications of a potential settlement offer.

Andrew P. Ross, CPA, CFE, CVA, PFS, is a Partner at Gettry Marcus CPA, P.C. He is a Certified Public Accountant, Certified Fraud Examiner and Certified Valuation Analyst and a member in the firm's Business Valuation & Litigation Services Group. With over 30 years of experience, Mr. Ross provides audit, tax, and litigation services to his clients, many of whom are in the service, manufacturing, and wholesale industries. Andy can be contacted at aross@gettrymarcus.com or (516) 364-3390 x246.

¹ Use of the indefinite pronoun "his" and "him" throughout this article are used to mean both men and women. There is no intended disrespect to any individual who may feel she is not possibly covered by the usage of this term.

Expert report

The testifying expert may be required to present an expert report containing the expert's opinions. If the case is being litigated in Federal Court, a written report will be required pursuant to the Federal Rules of Civil Procedure 26(a)(2)(B). This expert report must be clear and concise, based on applying reliable theories and methodologies to the facts that are learned during the assignment. The expert report should serve as an effective tool in supporting the opinions that the expert has reached. The forensic accountant's report may serve as the roadmap for the expert's testimony in court or even facilitate a favorable out-of-court settlement.

Trial

The forensic accountant must be able to articulate his findings to the trier of fact at trial. This is best achieved by effective verbal communication supported by the use of visual aids. For the forensic accountant, verbal communication is the ability to convey, in a clear and concise manner, complex accounting and financial issues. The forensic accountant's audience can be a judge, jury or arbitrator. Therefore, the forensic accountant must understand who his audience is to be effective.

Visual aids are a very useful tool for the forensic accountant. There is truth in the saying that "a picture is worth a thousand words." A picture tells a story just as well, if not better, than a large amount of descriptive text. Studies have shown that approximately 65 percent of us are visual learners who are best at collecting information with our eyes. Judges and jurors are no different. Visual aids can take the form of flow charts, entity charts, genograms and anything else the forensic accountant feels can visually put forth his opinions in the matter.

As with depositions, the forensic accountant can assist retaining attorneys at trial by preparing questions for the opposition's financial witnesses. Attorneys can often attain distinct advantages at the negotiating table and at trial by being able to present quantifiable data in clear, cohesive terms. Retaining a qualified forensic accountant can play a vital role in helping the attorney achieve these goals.

James Stewart, CPA, is an associate at Gettry Marcus CPA, P.C. and a member of the firm's Business Valuation & Litigation Services Group. Mr. Stewart provides forensic accounting services in variety of litigation matters. Jimmy can be contacted at jstewart@gettrymarcus.com or (516) 364-3390 x215.