Practice Aid 10 – 1

Serving as an Expert Witness or Consultant

10639-378

AICPA® Forensic and Valuation Services Section

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This practice aid supersedes AICPA Consulting Services Practice Aid 93-4, *Providing Litigation Services*.

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INTRODUCTION

1. The intent of this the practice aid is to provide the ***forensic*** accounting practitioner with nonauthoritative guidance when serving as an ***expert witness*** or ***consultant*** for litigation and ***dispute*** service engagements. This practice aid supersedes AICPA Consulting Services Practice Aid 93-4, *Providing Litigation Services*.

2. Terms in this practice aid that are in boldface italics are defined in appendix A, "Glossary." The term *practitioner* is used throughout this practice aid when a person serves either as an ***expert witness*** or ***consultant***, although these two roles are different. The terms ***expert witness*** and ***consultant*** are used independently in this practice aid in instances when it is necessary to indicate the separate roles and status of the practitioner.

Definition of *Forensic Accounting Services*

3. ***Forensic accounting services*** generally involve the application of specialized knowledge and investigative skills possessed by CPAs to collect, analyze, and evaluate evidential matter and to interpret and communicate findings in the courtroom, boardroom, or other legal or administrative venue. More simply, in a litigation context, the term ***forensic*** means to be suitable for use by a court of law.

4. ***Forensic accounting services*** include ***dispute*** resolution, litigation support, ***bankruptcy*** support, and ***fraud*** and special investigations, among many other services. ***Forensic accounting services*** utilize the practitioner's specialized accounting, auditing, economic, tax, and other skills to perform a number of consulting activities. The provision of ***forensic accounting services*** often requires the practitioner to serve as an ***expert*** or fact witness, depending on the assignment. A listing of examples of ***forensic accounting services*** is located in appendix B, "Examples of ***Forensic Accounting Services***."

5. ***Dispute resolution services*** assist parties with the ***settlement*** or determination of a ***dispute***. Litigation services involve pending or potential legal or regulatory proceedings before a ***trier of fact*** in connection with the resolution of a ***dispute*** between parties. A ***trier of fact*** may be a judge, a jury, a tribunal, a regulatory body or government authority and their agents, an ***arbitrator***, a ***mediator***, a ***special master***, a ***referee***, or another party with authority to decide the outcome of a ***dispute***. ***Bankruptcy*** support services assist debtors, creditors, other interested parties, and the courts with pending or potential formal legal ***bankruptcy*** proceedings. ***Fraud*** and special investigations typically involve the investigation of known or suspected bad acts or events using recognized ***forensic techniques***.

Roles of the Practitioner

6. The practitioner can be retained to serve in a number of roles, including the following:

- ***Expert witness.*** A person formally designated to render an opinion before a ***trier of fact*** is an ***expert witness***. If designated as an ***expert witness***, the

practitioner's litigation-related work may be required to be produced to opposing parties through a process called ***discovery***.

- ***Consultant.*** A person retained to advise about facts, issues, strategies, and other matters is a ***consultant***. The ***consultant*** does not testify about his or her ***expert*** opinion before a ***trier of fact*** unless the ***consultant's*** role is subsequently changed to an ***expert witness*** during the pendency of the litigation. Generally, the ***consultant's*** work is protected from ***discovery*** by the ***attorney work product doctrine***, which emanates by extension from the ***attorney-client privilege***. When engaged by a ***litigant***, as opposed to the ***litigant's*** attorney,[1] the ***consultant's*** work may lose the protection of privilege that would be afforded such work if the ***consultant*** was retained directly by the ***litigant's*** attorney.

- *Other.* This can be a person retained in a number of different roles, including, without limitation, a ***trier of fact***, a ***special master***, a ***court-appointed expert***, a ***referee***, an ***arbitrator***, a ***mediator***, or other.

Scope and Purpose of the Practice Aid

7. The intent of this practice aid is to provide the practitioner with nonauthoritative guidance when serving as an ***expert witness*** or ***consultant*** for litigation services engagements in the United States of America, although certain parts of this guidance also may be applicable to international assignments. In practice, most practitioners will serve in such roles in connection with ***civil litigation disputes***, and this practice aid primarily focuses on these types of matters. However, this practice aid also provides limited guidance for serving as an ***expert witness*** or ***consultant*** in ***criminal proceeding*** matters. This practice aid does not intend to apply to situations in which the practitioner may be required to testify as an official ***custodian of records*** or as a ***fact*** or ***lay witness***, although certain portions may be helpful.

8. A large number of state and local jurisdictions and private conflict resolution forums are available to disputing parties, and each has unique rules and practices. However, many jurisdictions and private parties have adopted some portion of the *Federal Rules of Evidence* and the *Federal Rules of Civil Procedure*. These rules, along with the *Federal Rules of Criminal Procedure* for criminal matters, also are applicable in federal court proceedings. Therefore, this practice aid generally refers to these federal rules.

9. In addition to this practice aid, the AICPA has issued additional nonauthoritative guidance for providing ***forensic accounting services*** in separate practice aids and special reports. This practice aid is to be used together with this additional guidance. Refer to appendix C, "AICPA Litigation Services Guidance," for a listing of these materials.

[1] For purposes of this practice aid, the ***client*** will be defined as the attorney, and the *litigant party* will be defined as the attorney's ***client***.

LITIGATION SUPPORT SERVICES PROFESSIONAL STANDARDS

10. When ***forensic accounting services*** are provided by a practitioner and CPA firms and their employees, they require, at a minimum, adherence to Statement on Standards for Consulting Services (SSCS) No. 1, *Consulting Services: Definitions and Standards* (AICPA, *Professional Standards*, vol. 2, CS sec. 100). The CPA engaged in ***forensic accounting services*** also must comply with the general standards of the accounting profession contained in the AICPA *Code of Professional Conduct and Bylaws*, as well as relevant standards established by the state boards of accountancy or other licensing agencies and other professional organizations to which the practitioner may belong.

Consulting Standards

11. Standards that apply to consulting are set forth in SSCS No. 1, under Rule 202, *Compliance With Standards* (AICPA, *Professional Standards*, vol. 2, ET sec. 202 par. .01). The consulting standards guide practitioners with their consulting ***client*** (attorney or attorney's ***client***, or both) relationships.

12. The practitioner should understand the definition of ***client***; as defined in paragraph .03 of ET section 92, *Definitions* (AICPA, *Professional Standards*, vol. 2), the ***client*** is "any person or entity, other than the member's employer, that engages a member or a member's firm to perform professional services or a person or entity with respect to which professional services are performed."

13. In many litigation support engagements, the ***client*** may be the attorney, the attorney's ***client*** (***litigant***), or both parties. It is important to define the ***client*** in a ***forensic accounting services*** litigation engagement, given the requirements of SSCS No. 1 that the practitioner (*a*) define the ***client***, (*b*) serve the ***client*** interest, (*c*) establish an understanding with the ***client***, and (*d*) communicate with the ***client***. In determining potential conflicts and ***client*** interests, the practitioner also should consider relationships with the attorneys and other interested parties. See the "Other Considerations" section for a more complete discussion of ***conflicts of interest***.

14. In general, the practitioner's responsibility to communicate with a ***client*** extends only to the ***client*** (the one who hires you, whether that be the attorney, ***litigant***, or both parties). However, this may differ in ***bankruptcy*** or valuation engagements or in instances when the parties have reached a joint defense agreement, an agreement between codefendants to defend claims together, or other arrangements. In many ***forensic accounting services*** engagements, the practitioner's contact with the ***litigant client*** may be minimal or nonexistent. To clarify the communication responsibility, the practitioner may determine that it is appropriate to advise the attorneys and the ***litigant*** parties that any communication with the attorney(s) is communication with the attorney's ***client***. The practitioner also may consider having the ***litigant*** (or the attorney's ***client***) cosign the engagement letter, along with their counsel, so that everyone has a clear understanding of the services to be performed.

15. SSCS No. 1 calls for the practitioner to communicate significant engagement findings and events to the ***client***. Once again, the professional standards do not intend for this to cause the practitioner to interfere with the attorney-***client*** relationship. Therefore, the ***expert witness's*** communications with the ***litigant***, unless otherwise required by the terms of the engagement, should be with the attorney or party directly engaging the ***forensic*** accountant.

The AICPA Code of Professional Conduct—General Applicability

16. The AICPA Code of Professional Conduct (code)[2] applies to the services rendered by practitioners. The following sections of the code have particular applicability to the practice of ***forensic accounting services***:

- Rule 102, *Integrity and Objectivity* (AICPA, *Professional Standards*, vol. 2, ET sec. 102 par. .01)
- Rule 201, *General Standards* (AICPA, *Professional Standards*, vol. 2, ET sec. 201 par. .01)
- Rule 202
- Rule 301, *Confidential Client Information* (AICPA, *Professional Standards*, vol. 2, ET sec. 301 par .01)
- Rule 302, *Contingent Fees* (AICPA, *Professional Standards*, vol. 2, ET sec. 302 par. .01)
- Rule 501, *Acts Discreditable* (AICPA, *Professional Standards*, vol. 2, ET sec. 501 par. .01)

17. In some instances, Rule 101, *Independence* (AICPA, *Professional Standards*, vol. 2, ET sec. 101 par. .01), and Rule 203, *Accounting Principles* (AICPA, *Professional Standards*, vol. 2, ET sec. 203 par. .01), also apply.

18. An understanding and appreciation of the importance of the rules contained in the code will assist the practitioner in his or her efforts to provide opinions that are relevant and reliable and that assist the ***trier of fact***.

19. The AICPA code provides general guidance on professional responsibilities, the public interest, integrity, objectivity and independence, due care, and the scope and nature of services without establishing additional standards. An understanding of the difference between independence and objectivity, particularly when providing consulting services, is important. The AICPA standards for independence relate only to the performance of

[2] Volume 2 of AICPA *Professional Standards*.

attestation services. The standards for objectivity apply to all services; however, the practitioner needs to adhere to all the rules that are appropriate for the particular service provided.

20. The following sections will discuss in detail Rules 101, 102, and 201 and SSCS No. 1. The AICPA website contains guidance that is more specific and information related to the practitioners' requirements for performing consulting services. Specifically, the practitioner can obtain information related to Rules 202, 203, 301, 302, and 501.

21. It is important to note that Rule 203 is applicable when a practitioner is expressing an opinion related to ***financial statements*** or data presented in conformity with generally accepted accounting principles (GAAP)[3] or any material modifications that are necessary for ***financial statements*** or data to be in conformity with GAAP.

22. The practitioner should consult Rule 302 when serving as an ***expert witness*** and considering contingent fee arrangements. See the "Other Considerations" section for a more complete discussion of fees.

The AICPA Code—Special Considerations

Independence, Objectivity, and Bias

23. The performance of ***forensic accounting service*** engagements as an ***expert witness*** or a ***consultant***, either for, or opposed to, a practitioner's or practitioner's firm's attestation ***client***, will impair independence, as defined by the Sarbanes-Oxley Act of 2002; the Securities and Exchange Commission; and the AICPA, as set forth in Interpretation No. 101-3, "Performance of Nonattest Services," under Rule 101 (AICPA, *Professional Standards*, vol. 2, ET sec. 101 par. 05). This section states the following:

> Before a member or his or her firm ("member") performs nonattest services (for example, tax or consulting services) for an attest client, the member should determine that the requirements described in this interpretation have been met. In cases where the requirements have not been met during the period of the professional engagement or the period covered by the financial statements, the member's independence would be impaired.

24. Independence generally is not mandatory for ***forensic accounting services*** or litigation support engagements that do not involve an attest ***client***. Nevertheless, in an attempt to impeach or disqualify the ***expert witness***, the opposing legal counsel may attempt to claim lack of independence and objectivity, or the presence of bias, in fact or appearance. The ***expert witness*** lacking independence and objectivity and demonstrating bias may raise serious questions about the ***expert's*** credibility, reliability, and believability. Therefore, the practitioner should carefully consider the potential risks inherent with these issues before

[3] U.S. generally accepted accounting principles are located at http://asc.fasb.org and described in the Notice to Constituents at the same website.

agreeing to serve as an ***expert***. If the practitioner lacks independence or objectivity or is biased in relation to any party in a ***dispute***, the practitioner should discuss these issues with the potential ***client*** and the ***client's*** attorney before accepting a litigation support engagement as an ***expert witness***.

25. When a practitioner's independence is impaired, the practitioner is precluded from performing attest services for the ***client***. A practitioner may perform nonattest services for a ***client*** without regard to whether the practitioner is independent. For example, a practitioner can perform ***forensic accounting services*** for an attest ***client*** but not serve as an ***expert witness***. If the practitioner serves as an ***expert witness*** for his or her firm, independence would be impaired in the performance of attest services for a period of time, depending on all the facts.

Integrity and Objectivity

26. Rule 102 of the code addresses integrity and objectivity.[4] To maintain integrity is to adhere to an ethical code and be free from corrupting influences and motives. The practitioner should not subordinate his or her ***judgment*** for personal gain or advantage when serving in a position of public trust.

27. The roles of ***expert witness*** and ***consultant*** practitioner differ from the role of the attorneys in the litigation process. Because litigation is an adversarial proceeding, each party presents his or her case to the ***trier of fact***. Attorneys must advocate for their ***clients***. The practitioner, on the other hand, must serve his or her ***client*** (the attorney) with integrity and objectivity, as required by the code. Accordingly, ***forensic*** accountants should have objective neutrality with regard to their professional opinions and not advocate for the position of the attorneys or the attorneys' ***clients***.

28. To be objective, practitioners must be free from ***conflicts of interest***. Interpretation No. 102-2, "Conflicts of Interest," under Rule 102 (AICPA, *Professional Standards*, vol. 2, ET sec. 102 par. .03), indicates that a ***conflict of interest*** may occur if the practitioner has a relationship with another person, entity, product, or service that could be perceived as impairing the practitioner's objectivity. Nonetheless, the practitioner can perform the service upon belief that the service can be performed objectively and the relationship is disclosed and consented to by the attorney or attorney's ***client***, employer, or other relevant parties. Please see the "Other Considerations" section for a more in-depth discussion on ***conflicts of interest***.

29. The ***expert witness*** practitioner is not an advocate for the ***client's*** position; thus, the practitioner should not subordinate his or her ***judgment*** to the ***client***, the ***client's*** legal counsel, or any other party. The ***expert witness*** is someone who has specialized skills, knowledge, education, experience, and training in a particular area and presents conclusions, ***judgments***, or opinions with integrity and objectivity. The ***expert witness's*** function is to assist the ***trier of fact*** to understand complex or unfamiliar concepts after having applied

[4] See AICPA Forensic and Valuation Services (FVS) Section Special Report 08-1, *Independence and Integrity and Objectivity in Performing Forensic and Valuation Services*, for further information.

generally accepted principles, approaches, and methods[5] sufficient for a conclusion or to provide an opinion of fact.

30. A practitioner serving as a litigation ***consultant*** may provide supporting analyses and opinions for the ***client's*** position but, like the ***expert witness***, should not subordinate his or her ***judgment*** to the attorney, the attorney's ***client***, or any other party. The practitioner serving in the consulting role should perform work and prepare any work product with integrity and objectivity. The practitioner serving as a litigation ***consultant*** should be mindful that the attorney or the attorney's ***client*** might request that he or she move to an ***expert witness*** role after the engagement has started and that a position of advocacy for the ***client*** is inconsistent with serving as an ***expert witness***.[6]

General Standards

31. The general standards under Rule 201 also apply to practitioners providing ***expert*** and consulting services. These standards cover professional competence, due professional care, planning and supervision, and sufficient reliable data.

32. The practitioner should carefully consider the standards related to professional competence, especially before accepting an engagement to serve as an ***expert witness***. During the litigation process, the practitioner is likely to have his or her qualifications examined and challenged to qualify as an ***expert***. Therefore, the practitioner should only agree to serve as an ***expert witness*** if his or her professional competence is appropriate and the practitioner is prepared to defend his or her qualifications for the particular engagement. Depending on the facts and circumstances of the matter, broad-based accounting, auditing, economic, financial, and ***forensic*** qualifications may be sufficient. In other cases, the practitioner may need to pay particular attention to having current and case-specific relevant qualifications and experience. This may require the practitioner to assess unique industry skills, specialized technical expertise, or closely related work experience, among many other items. In addition, the practitioner should be comfortable that he or she has the experience and communication skills to testify effectively and convincingly.

33. A practitioner is also to exercise due professional care in the performance of any professional services. Due professional care requires diligence and critical analysis of the work performed. The work of an ***expert witness*** or a ***consultant*** will likely be scrutinized prior to and during the ***trial*** to determine its reliability and relevance for use by the ***trier of fact***. Therefore, the practitioner should pay close attention to all principles, approaches, methods, facts, and assumptions used and the economic computations and analyses performed.

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[5] For purposes of this practice aid, *generally accepted principles, approaches, and methods* for forensic accounting are those commonly utilized by professionals in this field under similar facts and circumstances. Often, these generally accepted principles, approaches, and methods are supported by peer-reviewed treatises and other well-known publications.

[6] If the engagement letter does not address the fact that the litigation consultant may subsequently become an ***expert witness*** on the same matter, the practitioner may want to consider issuing a separate engagement letter for the change in scope.

34. The practitioner also must adequately plan and supervise the performance of professional services. Planning guides the conduct, supervision, control, and completion of the engagement. Because the litigation process is dynamic, plans continually change during a litigation engagement and frequently are not documented for ***discovery*** reasons because they are fluid in nature. Thus, as with any professional services, the supervision of assistants helps ensure quality performance. The extent of supervision will vary according to the number of assistants, their experience and qualifications, the complexity of the engagement, and other factors. Ultimately, the practitioner, as the potential ***expert witness*** or ***consultant***, is responsible for the work performed.

35. A practitioner attempts to obtain sufficient relevant data that is necessary to provide a reasonable basis for any findings, observations, opinions, conclusions, and recommendations. *Relevance* means that the data used by the practitioner can reasonably be linked with specificity to the facts and issues in the case. *Data* refers to the materials produced as evidence in the litigation ***discovery*** process, including, without limitation, documents, records, electronic data, research, ***testimony***, interviews, legal filings, and so on. The nature and extent of data will vary with each engagement and may include the practitioner's computations, analyses, and other information supporting conclusions. Sufficiency relates the quality and quantity of the relevant data obtained by the practitioner, as well as its ***admissibility*** under applicable rules of evidence.

36. The practitioner also is required to prepare and maintain documentation, the form and content of which is designed to meet the circumstances of the particular engagement. Results of research, analyses, and working paper documentation (including e-mail, spreadsheets, and correspondence) are the principal records of the procedures applied, information obtained, and the conclusions reached by the practitioner in the engagement. The quantity, type, and content of documentation are determined by several factors, including professional ***judgment***, the nature of the engagement, and the directives of the ***client's*** legal counsel. Documentation fundamental to the ***expert's*** conclusions and ***judgments*** is to be retained. The practitioner should follow his or her firm's record retention policy and communicate such policy to the attorney. Alternatively, AICPA Forensic and Valuation Services (FVS) Section Special Report 08-1, *Independence and Integrity and Objectivity in Performing Forensic and Valuation Services*, suggests that the practitioner's engagement letter address the document retention policy. Of course, the existence of ***subpoenas*** or agreements between ***litigants*** may influence the practitioner's retention policy.

37. The ***expert's*** conclusions and ***judgments*** are subject to ***discovery*** and ***cross examination*** by the opposing counsel, as well as evaluation by the ***trier of fact***. The ***expert*** often will defend findings, opinions, conclusions, observations, and ***judgments*** and must maintain objectivity and integrity.

38. In general, the practitioner's responsibility to communicate with a ***client*** extends to whoever is engaging the practitioner, whether that is the attorney, ***litigant***, or both parties.

OTHER GUIDANCE

39. The practitioner should ask the attorney or attorney's ***client*** to provide the appropriate guidance applicable to the practitioner's ***forensic*** work before undertaking any substantive ***forensic accounting services***. If the attorney or attorney's ***client*** is unfamiliar with the specific requirements, the practitioner can perform research or, alternatively, engage his or her own legal counsel to determine the guidance to follow.

Federal, State, and Local Requirements

40. Federal, state, and local administrative, court, and jurisdictional standards, procedures, rules, and protocols differ. For example, state courts have differing requirements related to the designation and disclosure of ***expert witnesses***, the ***admissibility*** of ***expert testimony***, the filing of ***expert witness*** reports, and the use of courtroom demonstratives, among other matters. Refer to appendix D, "Courts and Websites," for a listing of federal and state courts and their websites.

41. The *Federal Rules of Evidence* applicable to ***expert witnesses*** in federal civil matters are as follows:

- Rule 702, "Testimony by Experts"
- Rule 703, "Bases of Opinion Testimony by Experts"
- Rule 704, "Opinion on Ultimate Issue"
- Rule 705, "Disclosure of Facts or Data Underlying Expert Opinion"
- Rule 706, "Court Appointed Experts"

42. Rule 26, "Duty to Disclose; General Provisions Governing Discovery," of the *Federal Rules of Civil Procedure* describes, among other things, the following:

- Requirements for disclosure, including ***electronically stored information (ESI)***
- Reports and ***testimony*** of ***expert witnesses***
- Basis upon which a federal ***trial*** judge can disallow opinion ***testimony*** by lay witnesses
- Determination of whether ***testimony*** by ***experts*** meets the minimum standards
- Identification of the bases of opinion ***testimony*** by ***experts***

43. Refer to appendix E, "Excerpts of the *Federal Rules of Civil Procedure* and Evidence," for applicable sections of these rules, as well as citations to websites containing the rules.

Laws, Statutes, and Regulations

44. Depending on the type of ***dispute*** and litigated issues involved, there may be federal, state, and local laws and statutes that apply to ***forensic accounting services*** provided by the practitioner. Some states have statutes and associated regulations that preclude ***testimony*** from a practitioner serving as a CPA ***expert witness*** unless the practitioner has an active license to practice public accounting in that state; however, most states have now enacted exceptions for CPA ***expert witness testimony***. In addition, practitioners also should be aware that there are federal and state laws that specifically address allowable legal remedies for certain causes of action. For instance, federal laws specifically define monetary ***damages*** for infringement of most types of ***intellectual property*** rights. Additionally, some states have statues that spell out how ***lost profits*** and pretrial or prejudgment interest are calculated.

Legal Precedent

45. ***Legal precedent***, which comprises prior appellate court decisions, also binds judges presiding over the litigation process. Therefore, it is important for the practitioner to discuss any ***legal precedent*** with the ***client's*** attorney that may affect the practitioner's work in the matter at hand.

Court and Other Authoritative Orders

46. A court, judge, or another in a similar role and capacity may issue ***legal orders*** binding the parties and, at times, the practitioner.

47. One order commonly encountered by the practitioner requires the maintenance of the confidentiality of documents and data produced by the parties. A ***confidentiality or nondisclosure agreement*** typically requires the practitioner to read, understand, and sign the agreement prior to beginning any work. The practitioner should confirm that the confidentiality agreement requires the retention of CPA work product and working paper documentation. In addition, the practitioner should carefully evaluate security, including physical and electronic access, related to confidential materials received and under his or her control and custody.

48. Another common order important to the practitioner is a ***scheduling or calendaring order***. This order typically sets out the deadlines for the proceedings and, if possible, an expected ***trial*** date. The practitioner should obtain the scheduling order as soon as practicable after acceptance of the engagement to ensure compliance with ***discovery*** schedules, submission requirements, and other important matters.

Alternative Dispute Resolution **Rules**

49. ***Alternative dispute resolution*** (***ADR***) refers to a group of processes and procedures used to settle a ***dispute*** outside of litigation. It is common for ***ADR*** to be required under the

terms of contractual agreements or to be mandated by courts and judges prior to the ***trial***. In addition, many disputing parties prefer ***ADR*** for a variety of reasons. In ***ADR***, formal rules and protocols usually are relaxed, compared with formal litigation, often reducing the time, effort, and cost to resolve a ***dispute***. Further, many disputing parties believe that control over the resolution process is greater using ***ADR***.

50. A practitioner may be engaged by his or her ***clients*** to assist with ***ADR*** proceedings as either an ***expert witness*** or a ***consultant***. Additionally, depending on the qualifications of the practitioner, he or she may be engaged by the disputing parties to serve as a neutral decision maker, a ***special master***, a ***mediator***, or an ***arbitrator***. ***ADR*** engagements typically require a specially tailored arrangement letter between the practitioner and the disputing parties and often preclude ***ex parte***, or one party in the absence of the other, communications.

51. Differing rules and protocols exist for ***ADR***, depending on the type and form of governance agreed to by the disputing parties. ***ADR*** commonly consists of four types: ***negotiation***, ***mediation***, ***arbitration***, and collaborative proceedings (proceedings generally used in divorce cases, with the disputing parties reaching nonbinding agreement supported by legal counsel and ***experts***). However, other methods of ***ADR*** include ***mock trial*** and ***settlement conference***.

52. In ***negotiation ADR***, the parties mutually agree to communicate with each other in an attempt to reach agreement on the resolution of a ***dispute***. ***Mediation ADR*** utilizes the services of a neutral third party, or ***mediator***, to facilitate the disputing parties to reach agreement; it can be thought of as a facilitated ***negotiation***. In contrast, in ***arbitration ADR***, the disputing parties agree to have a neutral decision maker, an ***arbitrator***, reach a binding resolution. A collaborative proceeding ***ADR*** often is used in many states during divorce proceedings, with the disputing parties reaching a nonbinding agreement supported by legal counsel and ***experts***.

53. The American Arbitration Association is one of the largest ***ADR*** provider organizations. It uses proprietary governing processes consisting of established rules and protocols to hear and resolve ***disputes***. Alternatively, disputing parties may simply agree to prepare a tailored set of rules and protocols to be used for the ***ADR*** proceedings.

Internal Guidance

54. Practitioners providing ***forensic accounting services*** should have internal guidance related to the acceptance and provision of litigation support services. The practitioner should comply with internal guidance, as appropriate and applicable. Internal guidance may be subject to ***discovery*** by opposing parties in cases when the practitioner is serving as an ***expert witness*** or providing other litigation support services.

OTHER CONSIDERATIONS

Conflict of Interest

55. ***Conflicts of interest*** are actual or apparent incompatible interests between the practitioner and others connected to the engagement. This may include the potential ***client*** and legal counsel, opposing parties and legal counsel, and unnamed but associated third parties to the ***dispute***. Accordingly, before the practitioner begins work, he or she should undertake a conflict check by making an effort to identify all the potentially relevant parties. If a ***conflict of interest*** exists, the practitioner should not accept the engagement or, alternatively, should attempt to resolve the conflict, if possible. The parties and entities causing the ***conflict of interest*** for the practitioner generally should not be disclosed to the potential ***client*** or others, due to ***client*** confidentiality standards.

56. ***Conflicts of interest*** may impair objectivity. When performing ***forensic accounting services***, attorneys or courts may evaluate potential ***conflicts of interest***. A ***conflict of interest*** can impair a practitioner's ability to objectively evaluate and present an issue for a ***client*** because of a current, prior, or possible future relationship with other parties, including those who may be involved in the engagement.

57. Determining whether it is a ***conflict of interest*** to accept a litigation engagement against a former ***client*** can best be resolved on a case-by-case basis. Factors to consider include the length of time since the party was a ***client***, the confidential information the practitioner possesses that may become an issue in the litigation, and the facts and circumstances of the case. The ability of the practitioner to maintain integrity and objectivity is paramount in making a decision to accept the engagement. The practitioner should be mindful of, and deal with, ***conflicts of interest*** before accepting the engagement and should continue to monitor for ***conflicts of interest*** throughout the performance of the engagement.

58. Practitioners should consider whether they would be asked to perform services that are inconsistent with what they currently provide other ***clients***. For example, in a typical securities ***fraud*** case, the ***plaintiff*** wants to prove that the practices of the ***defendant*** company's accountant contributed to nondisclosure or fraudulent disclosure in the ***financial statements***. A practitioner who is considering accepting the ***plaintiff's*** engagement needs to consider if the practices of the ***defendant's*** accountant represent conduct that the practitioner engages in or condones.

59. Typically, practitioners disclose current and former relationships with all the parties to the litigation to the ***client's*** attorney so that the attorney and his or her ***client*** have the right to make their own determination about whether a conflict exists. During this process, the practitioner should be mindful not to disclose any information that could be confidential to his or her other ***clients***.

60. Conflicts may be of a legal or business nature. Legal conflicts involve such things as contractual obligations with other parties to the litigation or other interested parties. Legal

conflicts of interest generally preclude the practitioner from accepting the engagement. Discussions with practitioners may help define and avoid any legal conflicts. Business conflicts involve an assessment of economic risk and reward for the practitioner. In some cases, the parties know of, agree to and waive, the ***conflicts of interest***; however, the practitioner should exercise caution to avoid improperly disclosing any relationship or service to others that may violate professional ***client*** confidentiality.

Engagement Acceptance

61. Prior to agreeing to serve as an ***expert witness*** or a ***consultant*** for a ***forensic accounting services*** engagement, the practitioner should determine whether there are any ***conflicts of interest***. If no conflict exists, or after any known conflicts are satisfactorily resolved, the practitioner may want to understand the expected role of the practitioner and others in the matter, the scope of the assignment, any potential limitations, the ***expert*** opinion(s) the practitioner is asked to form, and any other pertinent matters. After obtaining this understanding, the practitioner should carefully evaluate the ability to serve by determining his or her qualifications, independence and objectivity, absence of bias, resources and availability, fee structure, and engagement terms. Refer to appendix C for a listing of other materials relevant to consider for litigation services engagement acceptance.

62. Accountants who perform ***expert witness*** or litigation consulting services, or both, need to consider and comply with accounting standards and relevant legal guidance or requirements specific to the situation, as discussed with counsel. As more and more cases are decided through the court systems, the implications on litigation strategy and the role the financial ***consultant*** plays are critical factors in successfully representing your ***client*** while maintaining your independence, integrity, and objectivity.[7]

63. Attorneys are engaged to represent their ***clients*** zealously. As stated previously, when acting as an ***expert witness***, the practitioner needs to maintain his or her independence and objectivity at all times during the engagement and not become the ***client's*** advocate. In this capacity, the practitioner's role is to form an objective professional opinion based on facts or hypotheses. When serving as an ***expert witness***, the practitioner needs to present and defend his or her position with strength and conviction.

64. The practitioner's reputation and qualifications will likely become an issue in judicial proceedings because of the impact of two seminal cases. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), the Supreme Court upheld the rule that ***expert*** opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 1179 (1999) extends *Daubert* not only to scientific ***testimony*** but to all ***expert testimony***. As these and many other cases suggest, the reliability and relevance of the expected ***testimony*** will likely be subjected

[7] Practitioners should consult AICPA FVS Section Special Report 08-1 to ensure compliance with the current guidance for independence and integrity and objectivity in performing forensic and valuation services.

to careful judicial scrutiny before ***expert testimony*** will be allowed to be presented at the ***trial***. Therefore, when deciding whether to accept a litigation services engagement, the practitioner should seriously consider whether it is likely that he or she has the knowledge and skills necessary to provide a reasonable basis to present relevant and reliable ***testimony*** on the issues in the particular case.

65. Another factor that practitioners may want to consider when contemplating whether to accept work as an ***expert*** is whether an attorney or ***client*** will restrict the practitioner's scope by limiting access to certain facts or attempting to influence the practitioner's ***judgment***. Such restriction or limitation might endanger the practitioner's reputation and the ultimate success of the case. In some situations, however, an attorney's limited presentation of the facts to a practitioner could be appropriate.

66. When providing ***expert testimony***, the practitioner's every word, through reports, ***deposition***, or on the stand at the ***trial***, will be scrutinized by intelligent and experienced attorneys and opposing ***experts***. Any weakness or inconsistency in ***testimony*** could be used against the ***expert witness***. Therefore, before accepting an engagement, a practitioner should review his or her ***testimony*** given in previous engagements to be sure it is consistent with the ***testimony*** anticipated in the prospective engagement. A practitioner who has no previous testimonial experience should consider whether his or her background is appropriate for the engagement and whether this litigation is a proper one for his or her first experience before accepting an engagement.

67. A practitioner should consider whether his or her ***testimony*** would be consistent or inconsistent with the position of the ***client***. It can be extremely embarrassing to the practitioner to give ***testimony*** that contradicts the ***client's*** position.

68. Practice mobility has become an issue that a practitioner also needs to consider before accepting an engagement. *Mobility* for a practitioner is the ability to gain a practice privilege outside of his or her home jurisdiction without obtaining an additional license in another state where he or she will be serving a ***client*** or an employer. Because the electronic age makes conducting business across state borders an everyday occurrence, an effort is underway to adopt a uniform system that will allow licensed practitioners the ability to provide services across state lines without being subject to unnecessary burdens that do not protect the public interest. Currently, if a practitioner is practicing outside his or her home state, or expects to, he or she should take into consideration the other states' licensing requirements and ensure compliance.

69. A practitioner can serve in other roles in the litigation process, such as serving as a ***trier of fact***, a ***special master***, a ***court-appointed expert***, a ***referee***, an ***arbitrator***, or a ***mediator*** or performing investigative services. The independence implications of providing these services are addressed in Interpretation No. 101-3.

The *Client*-Practitioner Relationship

70. At the beginning of an engagement, it is important to determine whether the ***client*** is the attorney or the attorney's ***client***. If the ***client*** is the attorney, then the practitioner's work may be protected from ***discovery*** by opposing parties as long as the practitioner does not give expert ***testimony***. In most instances in which the practitioner is retained as a ***consultant*** by the ***client's*** attorney, such work will be protected by privilege.[8] ***Consultants***, as opposed to ***experts***, may help develop the strategy of the case, assist in preparing other ***experts*** to testify, develop ***cross-examination*** material for use against the opposing ***experts***, assist with ***discovery***, and explore the strengths and weaknesses of each party's case. However, if the practitioner's ***client*** is the attorney's ***client***, then the attorney's ***work product privilege*** may not protect the practitioner's work from ***discovery*** by the opposing side.

71. The work of ***experts***, regardless of the ***client***, will likely be discoverable. Nonetheless, no matter what the practitioner's role, the practitioner should maintain working paper files with the expectation that the working papers will be produced. A waiver of the privilege or a production of documents compelled by a regulatory body many times causes an unanticipated production.

72. Particularly when engaged to serve as a litigation ***consultant***, ***legal privilege*** may protect the practitioner's work. ***Legal privilege*** applicable to practitioners typically falls into one of the following categories:

- ***Attorney-client privilege.*** The ***client's*** right to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the ***client*** and the attorney.

- ***Attorney work product privilege*** *or doctrine*. Under this rule, anything prepared by an attorney in anticipation of litigation is protected from ***discovery*** or compelled disclosure. This includes, but is not limited to, notes, working papers, and memoranda.

- ***Accountant-client privilege.*** The protection afforded to a ***client*** from an accountant's unauthorized disclosure of materials submitted to, or prepared by, the accountant. This privilege is not widely recognized.

73. It is important for the practitioner to discuss with the ***client's*** legal counsel the extent the practitioner's work is protected by ***legal privilege*** because it may influence communications and how the work is directed, documented, and disclosed. In instances in which ***legal privilege*** will be, or may be, asserted, the practitioner should confirm communication and documentation protocols, and work product should be identified on its face as privileged to aid in identification and protection.

[8] The ***attorney work product privilege*** doctrine should be monitored to ensure an up-to-date understanding.

Scope of Work

74. It is critical that the practitioner obtain an initial understanding about the expected scope of work and the practitioner's and others' roles in the engagement. However, the scope and roles often change over the course of a ***forensic accounting services*** engagement, so the practitioner should periodically document this understanding. If the practitioner decides that the role, scope, or limitations are unacceptable, the engagement should be declined.

Timetables

75. The litigation process timetable often is determined by the court. When accepting a litigation services engagement, the practitioner needs to consider the timetable to provide services. Quite often, lawyers delay hiring ***experts***, which may affect the practitioner's ability to adequately perform his or her services. Once hired, the practitioner should expect to provide services continuously or sporadically, or both, over a period of time.

Fees

76. As with any professional engagement, the fees and billing practices used by the practitioner will depend upon the perceived economic risks and rewards of the engagement, scope of the work to be performed, personnel needs, and resource requirements, as well as other factors. Additionally, rules and requirements related to fee arrangements, timekeeping, and invoicing vary depending on the subject matter, jurisdiction, judge, law, and prospective ***client*** attorney preferences. The practitioner needs to assess the credit risks of performing the litigation services. The engagement letter typically sets forth who will be responsible for the payment of fees and expenses. The engagement letter often is addressed to the attorney and usually requests acknowledgement of the terms of the engagement by having both the attorney and ***client*** sign and return a copy. The engagement letter often requests a retainer be paid upon the hiring of the practitioner.

77. The level of detail to be provided (for example, description of time, expenses, detail, and so on) with the invoice also varies between engagements and should be discussed with the attorney at the beginning of the engagement. In certain engagements, the court may require more detail in the billing. The practitioner should realize that if detailed billing records exist, they might be discoverable.

78. The practitioner in public practice shall not perform for a contingent fee any professional services for, or receive such a fee from a ***client*** for whom the practitioner or the practitioner's firm performs,

a. an audit or review of a financial statement;

b. a compilation of a financial statement when the practitioner expects, or reasonably might expect, that a third party will use the financial statement and the practitioner's compilation report does not disclose a lack of independence; or

c. an examination of prospective financial information

or prepare an original or amended tax return or claim for a tax refund for any ***client***.

79. The preceding prohibitions apply during the period in which the practitioner or the practitioner's firm is engaged to perform any of the preceding services and the period covered by any historical statements involved in any such listed services.

80. Except as stated in the next sentence, a *contingent fee* is a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained or in which the amount of the fee is otherwise dependent upon the finding or result of such service. Solely for purposes of this rule, fees are not regarded as being contingent if fixed by courts or other public authorities or, in tax matters, if determined based on the results of judicial proceedings or the findings of government agencies.

81. Fixed fees arrangements are permissible but may not be advisable. Typically, as the litigation process develops, additional work is required. The amount of work that needs to be performed usually increases as the case progresses. Thus, the practitioner who is working under a fixed fee arrangement should be specific about his or her scope and may want to consider protecting himself or herself in his or her retention letter by requiring the ***client*** to sign written change orders before beginning work that is outside of the scope of the original retention letter.

82. The majority of practitioner fee arrangements for litigation services are hourly rates for professionals, plus any associated expenses incurred. Nonetheless, arrangements may include fixed fee tasks, blended average hourly rate agreements, discounts or premiums, and administrative charges. Invoicing may provide for early payment discounts, late payment charges, and other allowable and acceptable terms. In addition, the practitioner may elect to collect a retainer in advance, which is a common practice for litigation support engagements. Others require a higher hourly rate for ***expert testimony*** in ***deposition*** or at the ***trial***. Regardless of the fee arrangement, it is advisable for the practitioner to collect any outstanding balances due for litigation services prior to ***expert testimony*** to avoid any collection issues.

83. In most cases, when the practitioner is working as a ***consultant*** for litigation support, the fees and invoicing information may be protected by the ***attorney work product privilege*** and may not be discoverable. Conversely, in the role of an ***expert witness***, the practitioner should understand that timekeeping, invoicing, and billing information might be subject to ***discovery*** and analysis by the opposing party. In addition, the *Federal Rules of Civil Procedure* requires the practitioner's ***expert witness*** to disclose the compensation paid in the case. Whether serving as an ***expert witness*** or a ***consultant***, the practitioner should reach an agreement with the ***client*** or the ***client's*** attorney on the type and details of information to be disclosed in connection with the practitioner's timekeeping and invoicing activities.

84. It also is important to note that certain jurisdictions, courts, and matters have specific timekeeping, disclosure, and invoicing requirements. For example, in federal ***bankruptcy*** cases, the court requires the practitioner to apply for retention and disclose the proposed arrangements, including fees to be charged. This application typically is available to interested parties who have the right to object to, or reject, the application. The practitioner may only officially begin work after an application for services has been approved by the court. Further, once retained, federal ***bankruptcy*** cases may require time to be reported in tenth of an hour increments and described in sufficient detail for interested parties to understand the work performed and billed. Once again, services, time, fees, and expenses incurred and invoiced by the practitioner in federal ***bankruptcy*** cases are available to interested parties for analysis and possible objections and denial.

Staffing and Supervision

85. Litigation services engagements require competent staffing because of the complex nature of the work. In addition, attorneys usually demand significant involvement by the person who will be the ***expert witness***. Therefore, a practitioner needs to closely supervise the staff and be ready to testify that the work, exhibits, analyses, and the like were prepared under his or her direct supervision and control. The practitioner who was asked to serve as an ***expert witness*** is ultimately responsible for the staff assigned for each task and the supervision of the work performed. Failure to assign staff with the proper experience and qualifications and to appropriately direct and supervise the work performed may adversely affect the quality and reliability of the ***expert's*** opinions. In addition, opposing legal counsel may attempt to discredit the ***expert witness*** and the ***foundation*** for any opinions offered by the practitioner in situations in which the work performed was not personally directed and supervised by the ***expert***. The practitioner in an ***expert report*** or ***testimony*** often confirms the direction and control exercised by the practitioner over the staff and work performed. The ***expert*** needs to base his or her conclusions and ***judgments*** on sufficient relevant data. The ***expert*** should rely on the attorney to comply with the applicable rules of evidence. The practitioner needs to consider the following:

- *Legal evidence.* The courts have established rules for the determination of admissible evidence and ***expert testimony***. The ***expert witness*** generally can rely on documents that the parties to the proceeding have authenticated or that are acceptable to the court under the various rules of evidence. Each legal jurisdiction may have different rules governing what the ***expert witness*** may rely upon; thus, it is important to communicate to the attorney what evidence is necessary to support the ***expert witness's*** conclusions and ***judgments***. Different rules of evidence may apply in different jurisdictions, and the practitioner is not expected to be a legal ***expert***.

- *Assumptions.* An ***expert witness*** can base opinion ***testimony*** on either facts or assumptions. Likewise, an ***expert witness*** may base assumptions on facts; presumptions from facts; or assumptions provided by the ***client***, other ***experts***, or counsel. For example, some analyses require the use of

assumptions about hypothetical situations. The practitioner should consider analyzing key assumptions to determine whether they are reasonable and to identify the source of information. Ultimately, the ***trier of fact*** will determine the reasonableness of the assumptions.

- *Documentation.* The practitioner should prepare and maintain documentation, the form and content of which should be designed to meet the circumstances of the particular engagement. The quantity, type, and content of documentation are determined by several factors, including the practitioner's professional ***judgment***, the nature of the engagement, and the directives of counsel. The ***expert witness*** should understand that his or her conclusions and ***judgments*** may be subject to ***discovery*** and ***cross-examination*** by the opposing counsel and evaluation by the ***trier of fact***. Results of research and working paper documentation (including e-mail, spreadsheets, and correspondence) are the principal records of the procedures applied, information obtained, and conclusions reached by the practitioner in the engagement. Finally, the practitioner also should consider adopting a formal policy on the retention of records in litigation matters and ensure that the staff are in compliance with the document retention policy or respond appropriately to any ***subpoenas*** or agreements between the parties to the litigation.

86. The practitioner in an ***expert report*** or ***testimony*** often confirms the direction and control exercised by the practitioner over the staff and work performed. Therefore, in cases in which it is anticipated that the practitioner will be unable to personally direct and supervise the work performed in support of his or her ***expert*** opinions, the practitioner should discuss this matter with the prospective ***client*** and the ***client's*** attorney and consider the impact on expected ***expert*** opinions and ***testimony***.

Merit

87. A practitioner should try to determine the merits of a case before accepting an engagement. If a practitioner determines that the potential ***client's*** case lacks merit or that the ***testimony*** he or she is asked to present is groundless, it is best to decline the engagement.

Opinions

88. In situations when the practitioner is being considered, or may be ultimately asked, to serve as an ***expert witness*** on the engagement, it is recommended that the practitioner gain an initial understanding of the opinions expected by the ***client's*** attorney to be formed and offered in ***testimony*** by the practitioner. It is important to note that the practitioner continue confirming this understanding with the ***client*** because modifications are common during the course of an engagement. In most cases, an ***expert*** opinion is exclusively the individual practitioner's, not a firm's or employer's. If the practitioner finds a requested opinion inappropriate, improper, or impossible, the practitioner should promptly communicate this

belief to the potential ***client's*** attorney and not accept this particular assignment of the engagement. Care should be taken by the practitioner to avoid accepting an assignment that may result in not being able to support an opinion.

89. In general, the practitioner, when serving as an ***expert***, will be asked to opine in three broad areas: (*a*) ***liability***, (*b*) ***causation***, and (*c*) ***damages***. ***Liability expert*** opinions assist the ***trier of fact*** to determine the fault or legal responsibility of the disputing parties. An example is a practitioner's ***expert*** opinion about whether management misstated financial results. ***Causation***, sometimes referred to as ***proximate cause*** opinions, helps the ***trier of fact*** understand to what extent an action or omission caused the claimed monetary ***damages*** in the case. The most commonly requested ***expert*** opinion from the practitioner is the quantification of monetary ***damages*** based on legally acceptable theories of remedy. In certain cases, a ***trial*** may be ***bifurcated***, with proceedings on ***liability*** and ***causation*** separately tried from ***damages***.

Inconsistent Opinions

90. When a practitioner draws conclusions that are inconsistent with the theories pursued by the ***client*** in the case, there may be a need to withdraw from the engagement. At the outset of litigation, a practitioner usually cannot know his or her ultimate opinions. Only after a careful evaluation and analysis of the facts can the practitioner form an opinion. An opinion could be adverse to the ***client's*** position or legal theory.

Qualifications

91. One of the most important evaluation factors by the practitioner and the prospective ***client***, prior to being retained as an ***expert witness***, is qualification to serve. It is common for the practitioner to provide a professional resume or curriculum vitae (CV) to the potential ***client*** or the ***client's*** attorney to assist with this determination. Under the Rule 26(a)(2) of the *Federal Rules of Civil Procedure*, the ***expert witness*** must disclose the witness's qualifications, including the following:

- A list of publications authored in the previous 10 years
- A list of cases in which the ***expert*** testified during the previous four years, at ***trial*** or by ***deposition***
- A statement of the compensation to be paid for the study and ***testimony*** in the case

92. Typically, these items are included in the CV.

93. The practitioner also should be aware that once disclosed as an ***expert witness***, opposing legal counsel is likely to scrutinize the practitioner's reputation, published works, prior ***testimony***, and opinions, as well as any other factor that might be relevant, in an effort

to challenge qualifications or to discredit or limit the practitioner's ***expert testimony***. If the practitioner believes he or she is unqualified to serve as an ***expert***, the practitioner should inform the prospective ***client*** or the ***client's*** attorney immediately and decline to accept this portion of the engagement.

Scheduling

94. The practitioner should obtain an understanding about the timing of the work to be performed and any important dates in the litigation process before agreeing to undertake a litigation engagement. This information may be obtained from the prospective ***client*** or the ***client's*** attorney, ***scheduling or calendaring orders***, and other case filings. Typically, key dates for the practitioner to know will include deadlines for disclosure of witnesses, ***expert witness*** and ***rebuttal*** reporting, ***depositions***, closure of ***discovery***, ***settlement conference***, and ***trial***.

95. Due to the nature of litigated ***disputes*** and the numerous ways a matter may progress through the litigation process, the practitioner may be approached to accept a litigation consulting engagement close to the deadline for closure of ***discovery***. This presents difficulties and challenges for the practitioner to complete an appropriate amount of work for sufficiently supportable ***expert*** opinions. Complicating this situation, the practitioner may not have available to him or her all the relevant information to perform the requested engagement. The practitioner may identify additional evidence, including ***ESI***[9] and witness statements, needed from the disputing parties, and the acquisition and delivery of this information may take significant time, cost, and effort. In these circumstances, the practitioner should carefully consider his or her workload, together with the expected scope and timing of the litigation support work, before accepting an engagement. In certain cases, it may be possible to work with the ***client's*** attorney to request and secure from the court an extension of scheduled deadlines to address this issue.

Engagement Letter

96. The AICPA FVS Section Practice Aid 04-1, *Engagement Letters for Litigation Services*, should be used to assist the practitioner with the preparation of engagement letters for litigation support engagements. However, it is important to emphasize to the practitioner the importance of defining the ***client*** and adequately documenting the understanding with the ***client***. Significant changes, modifications, and amendments to the engagement letter should be approved and documented, or alternatively, a new or supplemental engagement letter should be prepared and signed. Cases exist in which the court or a judge is required to approve the retention of the practitioner (for example, a ***court-appointed expert*** [see Rule 706 in appendix E] or in ***bankruptcy*** matters). In such cases, the court or judge may not agree to execute an engagement letter. In these situations, the practitioner should obtain a properly executed court order or approval with language satisfactory to the practitioner

[9] Appendix F, "Computer Data Gathering and Glossary," provides some basic assistance to the practitioner in understanding computer terminology.

prior to initiating any service. It may be appropriate for the practitioner to engage his or her own attorney to ensure that the rights of the practitioner are properly protected.

The CPA's Role

97. Serving as an ***expert witness***, the practitioner is required to adhere to the reporting requirements of the ***dispute*** forum and may consider the preferences of the ***trier of fact***. Under Rule 26 of the *Federal Rules of Civil Procedure*, in addition to disclosure of the ***expert witness's*** qualifications, publications, ***testimony***, and compensation, the ***expert report*** must contain several other items. The ***expert witness*** also must report a complete statement of the opinions he or she will express and the basis and reasons for them, the data or other information considered by him or her in forming such opinions, and any exhibits that will be used to summarize or support his or her opinions.

Assistance With Case Strategy

98. The ***client*** and the ***client's*** attorney are advocates for their position, and their advocacy influences how they present the facts of a case. One of the principal services a practitioner offers is an objective professional review of the facts. In addition, if the attorney is unfamiliar with the business, the practitioner can help by explaining the business facts relevant to the legal theories of the case.

99. The practitioner can suggest several different ways to prove facts or make points, such as using the following three common methods to compute ***lost profits***:

- *Before-and-after approach.* The practitioner uses the periods before or after the period of the alleged violation, or both periods, to estimate what the ***plaintiff's*** performance would have been during the period of the alleged violation.

- *Yardstick approach.* The practitioner studies a similar company, industry, or ***market*** that was unaffected by the alleged violation in order to estimate what the ***plaintiff's*** performance should have been during the period of the alleged violation.

- *Sales projections (hypothetical profits).* The practitioner creates a model of the impacted business by making assumptions based on how the ***plaintiff*** would have performed but for the alleged violation.

100. If a cost-benefit analysis is feasible, the practitioner also can assist in determining which approach is most cost effective by putting the various approaches in proper perspective. For example, if the objective was to determine the number of exceptions in a given population (such as the number of invoices paid without documentation of approval) or to compute the ***plaintiff's*** or ***defendant's market share***, possible approaches include reviewing the entire population, a statistical sample at various confidence levels,

or a judgmental sample. The practitioner also can advise on the costs and benefits of the alternative sources of ***market share*** information ***expert*** opinion, primary research, secondary sources, econometric models, or detailed surveys.

Assistance With *Discovery*

101. ***Discovery*** takes place in the time between filing the original ***pleadings*** (the ***complaint*** and ***answer***) and beginning the ***trial***. ***Discovery*** is the attempt to find out the facts and theories of the other party(ies). The practitioner collects the necessary facts, analyzes the facts, develops any assumptions, and reaches a conclusion.

102. This is a very important area for the practitioner to manage. Usually, most litigation attorneys have multiple cases running at one time. As a result, their schedules get extremely hectic, and they will rely on the practitioner to maintain the follow-up and constant reminders needed to keep the ***discovery*** process moving. In basic terms, this often means that the practitioner's communication with the attorney will be delayed or limited. Furthermore, it is in the practitioner's best interest to understand what time commitments are necessary to meet the various deadlines in each case. Otherwise, practitioners may find themselves having to complete a large amount of work at the last minute.

103. The following are various methods that can be used to help the practitioner obtain information during ***discovery***:

- ***Interrogatories***. ***Interrogatories*** are often the first ***discovery*** device used. They are written questions put forward by one party and served on the opposing party, who must ***answer*** the questions in writing, under oath. ***Interrogatories*** serve as an excellent tool to obtain information when little, if anything, is known about the opposing party. The practitioner's special knowledge of business or a particular industry can help in constructing questions to develop a thorough understanding of an organization's systems, documentation, and structure. For example, the nature and extent of the opposing party's financial reporting and management information systems are possible areas of inquiry. The names and titles of officers or principals in the business also can be obtained for further ***discovery*** of their files.

- ***Requests for production of documents.*** A ***request for production of documents*** requires one party to provide the opposing party with documents in its possession that are relevant to the issues in the case. These requests usually follow the ***interrogatories***. The requests must be very specific, or the opposing party may not produce the documents, even when the information sought is apparent. Therefore, each party needs to request exact titles of reports, culled from the information already obtained through ***interrogatories*** or ***depositions***.

  The party responding to the ***request for production of documents*** does not usually copy the documents and send them to the requesting party. Instead,

the documents are made available at the responding party's business or its attorney's offices. The requesting party is then given the opportunity to review the documents and decide which ones to copy at its own expense.

The requesting party's attorney will often want the practitioner to assist in reviewing financial and other business documents produced by the opposing party. If the practitioner was retained prior to the initial ***discovery*** request, it is a key step to be included in this process. Sometimes, however, the requesting party's attorney will only initially consult with his or her ***client***.

When this happens, confusion can result on several fronts:

— Too much information may be obtained, some of which may not be relevant.

— Relevant information may not be obtained.

— Information is piecemeal and disorganized.

Furthermore, because the producing party is aware of what information is supplied, it knows whether damaging evidence has been provided, which can have a significant impact on the litigation strategy.

The practitioner can be extremely helpful in identifying the relevant and irrelevant financial documents. Ensuring the relevant financial documents are available, in hard or soft copy, is important because the time required by the practitioner to review or consider the available documents depends on their quantity and quality. A knowledgeable practitioner can significantly reduce unnecessary copying and subsequent review by identifying the types of financial and business records that are relevant.

- ***Depositions.*** A ***deposition*** is the oral ***testimony*** of a witness questioned under oath by an attorney. The questions and ***answers*** are transcribed by a court reporter who records the ***testimony*** in a written document that can be used in a court. In a litigation engagement, the practitioner may give the ***deposition*** or assist the attorney in taking the ***deposition***.

- *The practitioner giving a* ***deposition***. The opposition's attorney usually takes the ***deposition*** of the practitioner retained as an ***expert witness*** in a civil case (***depositions*** generally are not taken in criminal matters). The attorney does this to understand the practitioner's background, reasoning, and opinions in the case. Often, the ***deposition*** affords the only opportunity prior to the ***trial*** for the opposing attorney to question the ***expert witness*** in depth. The opposing attorney uses the ***deposition*** to evaluate the practitioner's strengths and weaknesses as a ***trial*** witness and to develop a comprehensive

understanding of this ***expert's*** opinions, studies, and analyses. However, some experienced attorneys prefer not to question an ***expert*** in depth at a ***deposition*** because it allows the ***expert*** to thoroughly test theories and approaches and then correct them as needed for the ***trial***. Questions at the ***deposition*** usually cover the work performed by the practitioner, including rejected analyses and unused information. In addition, the ***deposition*** can be used to narrow the scope of the practitioner's ***testimony*** at the ***trial*** because anything said at the ***deposition*** can be used to impeach the practitioner's credibility at the ***trial***. Therefore, the practitioner's ***testimony*** in the ***deposition*** needs to be consistent with the ***testimony*** at the ***trial***.

Once the practitioner is named as an ***expert witness***, the practitioner needs to understand that he or she must be independent as a fact finder for the court and is not an advocate for his or her party as he or she may have been if he or she were initially retained as a ***consultant***. Conversely, the practitioner also should be aware that the attorney works for the attorney's ***client***, and the practitioner may wish to engage or consult with his or her own counsel during a challenge of his or her ***expert*** opinion or a Daubert challenge.

During a ***deposition***, the practitioner must ***answer*** honestly because he or she is not only required to do so for ethical standards but because he or she is under oath and the penalty of perjury. Therefore, it is critical that weaknesses the practitioner uncovers during ***discovery*** should be communicated to counsel as soon as possible. In addition, the practitioner should ***answer*** questions without volunteering additional information. The practitioner should read the ***deposition*** transcript carefully before signing and again before testifying at the ***trial*** because it often will serve as a script for the ***cross-examination*** by opposing counsel.

Depositions of ***experts*** in federal cases are covered by the *Federal Rules of Evidence* and the *Federal Rules of Civil Procedure*, as discussed in various areas of this practice aid, and are not an absolute right of the opposing party. Usually, agreement by both sides or the direction of the court is required to obtain an ***expert's deposition***.

- *The practitioner helping an attorney take a* ***deposition***. Although the only person who can ask questions at a ***deposition*** is the attorney, a practitioner can provide extremely valuable assistance to the attorney during the examination of business people, particularly those in the financial or accounting areas. Frequently, the attorney asks the practitioner to assist at a ***deposition*** in examining the opposition's ***expert*** or accounting personnel. The practitioner knows the language of business, including technical terminology, and usually can detect a witness's uninformative ***answer*** or a sign of weakness that the attorney might miss. The practitioner can suggest additional questions to the attorney by passing notes or at meetings during breaks in the ***deposition***.

In this way, the practitioner can help identify an inconsistency or expose a flaw in ***testimony***. To the extent that the practitioner can be present to assist the attorney in taking a ***deposition***, he or she should do so. Even if the practitioner does not identify weaknesses, he or she can assist in assessing the strength of an opposing ***expert's*** position and pass notes to get further clarification or rationale on technical points, which may help avoid faulty future assumptions.

Even an attorney who does not request the practitioner's presence at the ***deposition*** often will ask the practitioner to draft questions to ask. These questions have two aims: (*a*) to clarify the opposing ***expert's*** analysis and (*b*) to point out problems, inconsistencies, and errors in the analysis. This is also one of the best times during the ***discovery*** process to gain an understanding of the opposing party's position and the underlying basis thereof.

Again, attorneys differ in approach. Some believe it is unwise to make the witness aware of analytical flaws at the ***deposition***. They prefer to withhold this information for use at the ***trial***. Others believe that the ***deposition*** can be used to point out the weaknesses in their opponent's case, thus encouraging ***settlement*** or, at a minimum, getting the ***expert*** to correct a presentation for use at the ***trial***.

- ***Subpoenas.*** A ***subpoena*** commands a person to appear in court. The *subpoena ad testificandum* commands a person to appear and testify as a witness. The ***subpoena duces tecum*** commands a person to produce documents in court that are then designated as evidence.

  The ***subpoena*** is frequently the only method of obtaining information from third parties not related to the litigation. The recipient of a ***subpoena*** who refuses to cooperate can be found in contempt of court and jailed until agreeing to cooperate.

  A party, including the practitioner hired for the case, may file an objection to a ***subpoena*** with the court, thus requiring a hearing on the relevance and propriety of materials demanded. This practice is not recommended because it might create a conflict between the practitioner and ***client***, delay the ***trial***, and generate costly legal fees. Occasionally, however, it may be necessary for the practitioner to object if a ***subpoena*** requests irrelevant documents or materials related to other ***clients***. Often, the opposing attorneys can reach a compromise agreement on how much they will try to discover about the practitioner ***expert*** and thereby avoid issuing ***subpoenas*** or filing objections.

  The opposing counsel may wish to explore deeply the records of other nonparty ***clients*** of the practitioner through the ***subpoena*** and ***deposition***

process. A practitioner needs to be careful not to violate Rule 301, which requires the practitioner to maintain ***client*** confidentiality. The practitioner has a duty to comply with only a validly issued ***subpoena*** and, therefore, may find it necessary to test and verify the ***subpoena's*** validity before revealing confidential ***client*** information. In addition, for nonparty tax ***clients*** of the practitioner as of January 1, 2009, the IRS now requires under Internal Revenue Code Section 7216 the ***client's*** express written consent prior to the release of any taxpayer information. Therefore, it is imperative that if there is any question to the validity of the ***subpoena*** as it relates to a violation of ***client*** confidentiality, the practitioner should consult with his or her own firm's counsel before proceeding.

- ***Requests for admissions.*** A ***request for admission*** is used to obtain the opposing party's verification of information as fact. The request must be relevant to the litigation. Verifying the information as fact usually is adverse to the interest of the party making the admission.

  Requests for admissions help narrow the factual issues litigated at the ***trial***. Any facts that both parties agree upon prior to the ***trial*** do not have to be demonstrated at the ***trial***. This can greatly decrease the time it takes to try a case and is therefore favored by the judiciary. The practitioner can suggest the types of facts that the opposing party could admit prior to a ***civil litigation trial***. The practitioner also can assist the attorney in developing arguments about why certain business facts should or should not be admitted prior to the ***trial***.

- *Other* ***discovery*** *issues.* Documents or data obtained through the ***discovery*** process need to be organized. The practitioner can help in categorizing the information, developing or maintaining a retrieval system for it, and summarizing it for ***testimony***. To the extent that the information can be ***bates-stamped***, the better. It will help aid the practitioner in organizing and referencing the data used in forming his or her opinion. The practitioner must be able to produce for the opposing counsel the information that he or she reviewed, considered, or obtained in the course of the ***discovery*** process.

  Discovery includes obtaining third party documents and data, which usually take the form of industry, competitive, or economic information. If the information obtained is from another ***client***, without that ***client's*** express consent to use it for litigation, or from a source that will not allow its disclosure, then it probably cannot be used to support an opinion at the ***trial***.

  Economic and financial data are frequently available from computerized databases. To use this information effectively, the practitioner needs to

understand and validate how the data are input into the databases, as well as how the people who maintain the databases can manipulate the information. Documents or information from databases that are collected and support the practitioner's assumptions, conclusions, or opinions need to be properly organized and referenced in working papers. Extraneous materials that do not affect the assumptions, conclusions, or opinions may be removed, but the removal of this extraneous information should be discussed with the ***client*** or the ***client's*** attorney for any unwanted consequences.

Normally, a proper ***foundation*** must be established for ***testimony*** and documentary evidence submitted during a ***trial***. Typically, witnesses cannot testify about information told to them by a third party. The authors, recipients, or custodians must authenticate documents submitted as evidence. Otherwise, the ***testimony*** or written evidence may be classified as ***hearsay*** or may lack a proper ***foundation*** and may be excluded from the ***trial***.

However, several exceptions to the ***hearsay*** rule may affect a practitioner acting as an ***expert witness***. Under the *Federal Rules of Evidence*, an ***expert witness*** is allowed wide latitude in what he or she may rely upon to formulate an opinion. An ***expert***, in forming an opinion, may rely on information that otherwise would be deemed ***hearsay*** if admitted to prove something. Such items include research and academic literature available in the ***expert's*** field, as well as consultations with other ***experts*** and interviews with parties who have relevant information. The ***testimony*** may be based on the ***expert's*** research, interviews, and conversations.

Another important exception to the ***hearsay*** rule relates to business records, which include journals, ledgers, files, correspondence, ***financial statements***, and other records created or maintained in the normal course of business. The practitioner ***expert witness*** may rely on such records without auditing them. Of course, if the opposing side shows any inaccuracies or deficiencies in such records during ***cross-examination*** or ***surrebuttal***, the disclosure may have an impact on how the ***trier of fact*** weighs the ***expert's*** opinion.

Required *Expert Report* Disclosures

104. In accordance with these requirements, a sample format of the contents of an ***expert report*** under Rule 26(a)(2)(B) of the *Federal Rules of Civil Procedure* follows:

- *Basis for the **expert witness** opinions (required)*. In combination with work performed, a description of the fundamental principles used completes the requirement to report the basis and reasons for the ***expert witness's*** opinions.

- *Opinions of the **expert witness** (required)*. The practitioner must report the opinions to be expressed by ***testimony*** at the ***trial***.

- *Data or other information considered (required)*. Disclose materials considered by the practitioner in reaching opinions and preparing the ***expert report***. This includes documents and data produced by the parties during the litigation, as well as research and other materials independently prepared by the practitioner.

- *Exhibits to be used by the* ***expert witness*** *(required)*. The ***expert witness*** must include exhibits expected to be used during the ***trial*** to summarize, support, or explain the ***expert witness's*** opinions.

- *Qualifications of the* ***expert witness*** *(required)*. Describe the ***expert witness's*** scientific, technical, or other specialized knowledge believed to be able to assist the ***trier of fact*** to understand the evidence or determine a fact in issue. The practitioner should focus on his or her qualifications of (*a*) publications authored for the last 10 years, (*b*) ***testimony*** given in the last 4 years, and (*c*) compensation (see Rule 702 of the *Federal Rules of Evidence* in appendix E).

Data and Documents Considered and Work Product

105. Related to the reporting of data and documents considered, the practitioner should discuss this requirement with the ***client's*** attorney to ensure proper compliance. In some cases, the understanding is that materials received by the ***expert witness*** should be disclosed. In other cases, the disclosure is limited to only those materials received, read, considered, and used to reach the ***expert witness's*** opinions.

106. In connection with the required reporting of data and documents considered, the practitioner should become familiar with evidence considerations, such as the ***standard of proof***, ***admissibility***, and ***chain of custody***, because these matters may affect the reliance and weight given to certain information considered by the ***expert witness***. In addition, the practitioner is reminded that the materials considered or prepared by the ***expert witness*** are generally discoverable and cannot be protected from ***discovery*** by ***legal privilege***.

107. Therefore, the practitioner must exercise diligence to retain materials provided to, or prepared by, him or her during the litigation. The practitioner also must preserve the ***metadata*** generated in connection with ***ESI***. This may be facilitated by using a disciplined approach to receiving, inventorying, securing, and maintaining materials received or prepared during the litigation support engagement. For example, a ***bates-stamp*** is commonly used to control the dissemination of documents to the ***expert witness***. The failure to properly preserve and disclose ***expert witness*** materials may result in unfavorable rulings, sanctions, and other adverse consequences.

***Expert Witness* Opinions**

108. In federal court, the ***expert witness's*** opinion must comply with the *Federal Rules of Evidence* in order to be presented by the practitioner at the ***trial*** (see appendix E). Failure

to comply may result in disqualification of the ***expert witness***; limitations on the ***expert testimony*** that can be given at the ***trial***; or, in severe cases, the exclusion of the ***expert witness testimony***.

109. Generally, the practitioner will be allowed to testify at the ***trial*** if the ***expert witness's*** opinions are based upon sufficient facts or data and are the product of reliable principles and methods and if the ***expert witness*** has reliably applied the principles and methods to the facts of the case. However, the ***expert witness*** typically is allowed to rely on ***hearsay*** as part of the basis for his or her opinions, a right not afforded fact and lay witnesses. According to Rule 703 of the *Federal Rules of Evidence.*

> [t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

110. In addition, case ***precedent*** has given the ***trial*** judge gatekeeping responsibilities and discretion related to the ***admissibility*** of ***expert witness testimony*** (see appendix G, *"Daubert and Kuhmo Case Summaries"*). Therefore, it is possible that the practitioner's ***expert report*** and associated opinions will be challenged by the opposing legal counsel in an effort to exclude the practitioner's ***testimony***. This may be accomplished by filing a ***motion in limine***, sometimes referred to as a *Daubert motion*, in this particular instance. A partial list of reasons for the exclusion of ***expert witness testimony*** includes the following:

- Based on legal theories or remedies unavailable in the jurisdiction
- Failed to consider alternative scenarios, explanations, facts, and assumptions
- Failed to use procedures typically employed by similar professionals
- Ignored or failed to consider material facts and evidence in the case
- Unreasonable or unjustified use of a proven theory or technique
- Unreliable results
- Unsupported assumptions
- Used unproven or generally unaccepted theories, methods, and techniques
- Used untested, biased, or inadmissible evidence

111. The practitioner engaged as an ***expert witness*** by the party initiating a civil ***complaint***, referred to as the ***plaintiff***, generally submits his or her ***expert witness*** report first, although

simultaneous submission by the disputing parties is common. The practitioner engaged by the party subject to the ***complaint*** of the ***plaintiff***, or the ***defendant***, submits his or her ***expert witness*** report afterwards, and it is often referred to as a ***rebuttal*** report because it contradicts the ***plaintiff's expert witness*** report. In some cases, additional responsive or supplemental ***expert witness*** reports may be prepared and submitted by the practitioner. It is important that the practitioner disclose the ***expert witness*** opinions prior to the closure of ***discovery*** because failure to do so may prohibit the ***expert witness*** from testifying about these opinions at the ***trial***.

Expert Witness Reporting and *Spoliation*

112. ***Spoliation*** is an intentional act to improperly destroy, alter, or conceal evidence. A finding of ***spoliation*** is serious and may result in significant undesirable consequences to the practitioner and his or her ***client***. This concept is particularly relevant for the practitioner to consider in connection with the preparation and retention of ***expert report*** drafts. Accordingly, the practitioner should discuss with the ***client's*** attorney the protocols to be followed and potential implications of the *Federal Rules of Civil Procedure* on drafts and attorney communications to avoid accusations of ***spoliation***. This includes an agreement about the definition of a *draft document* for the particular case. In certain cases, legal counsel representing the disputing parties will agree that drafts of ***expert reports*** are not discoverable. However, to be safe, the practitioner may elect to save drafts and provide them to the ***client's*** legal counsel for the attorney to make a determination regarding production to the opposing party.

Expert Witness Subpoena

113. The ***expert witness*** practitioner typically is expected to be available to meet with the opposing party's legal counsel to provide ***testimony***, together with documents and records, about opinions to be expressed at the ***trial***. This meeting often takes place in the form of a ***deposition***. A ***deposition*** is pretrial ***testimony*** transcribed or recorded for use in court during the ***trial***. In most cases, the practitioner will work with the ***client's*** legal counsel to arrange a mutually agreeable date for the meeting before the close of ***discovery***. Once arranged, the opposing party's legal counsel is expected to prepare and serve notice of the meeting using a ***subpoena*** or ***subpoena duces tecum***. The ***expert witness subpoena*** commonly is served to the ***expert witness*** either personally or, alternatively, to the ***client's*** legal counsel on behalf of the ***expert witness***.

114. A ***subpoena***, which is Latin for *under penalty*, compels the ***expert witness*** to appear for the meeting or ***deposition***, subject to a penalty for failure to comply. A ***subpoena duces tecum*** requires the practitioner to bring (or produce in advance) specified documents and records, usually the materials considered by the ***expert witness*** in forming opinions and associated work product. The practitioner should carefully read the ***subpoena*** to ensure compliance. If a ***subpoena duces tecum*** is used, the practitioner should only produce materials specifically requested. One common practice is to provide requested materials to the ***client's*** legal counsel for review in advance of the meeting or ***deposition***. This allows

the attorney an opportunity to confirm and produce only those materials he or she deems specifically relevant to the request. Any concerns or questions about a ***subpoena*** should be directed to the ***client's*** legal counsel or the practitioner's own legal counsel.

Contractual Agreements

115. The practitioner may be asked to execute and comply with contractual agreements as part of his or her ***forensic*** litigation services. This is common for certain types and forms of ***ADR***. Contracts also are expected in circumstances when privacy is important and ***confidentiality orders*** are not in place. In such cases, the practitioner may be asked to sign a ***confidentiality or nondisclosure agreement*** to protect confidential and proprietary information of the parties to the ***dispute***. Similar to ***confidentiality orders***, the practitioner must ensure that such arrangements provide for the retention of work product and working papers to comply with the document retention policy. The practitioner also may want to consider seeking the advice of his or her legal counsel before signing such contractual arrangements, especially if such arrangements provide for the provision of work product to third parties when such provision might constitute a waiver of privilege.

Expert Witness Malpractice

116. Although cases of financial ***expert witness*** malpractice are rare, the practitioner should be aware that his or her standard of care can be challenged. An ***expert witness*** cannot be sued by an opposing party for ***expert witness testimony***; however, the practitioner's ***client*** can ask the court to review the standard of care used by the ***expert witness*** and his or her adherence to professional standards. This right was established by the appellate court in *Mattco Forge, Inc. v. Arthur Young & Co.*, 5 Cal. App. 4th 392 (1994).

OVERVIEW OF *CIVIL LITIGATION*[10]

117. ***Civil litigation*** arises from ***disputes*** that are either actions in ***tort*** statute or actions in contract. ***Tort*** *actions* are civil wrongs that result in a remedy of ***damages*** to the harmed party. Contract actions stem from breaches or other violations of contractual terms. During the litigation process, the party initiating a civil ***complaint***, referred to as the ***plaintiff***, and the party subject to the ***plaintiff's complaint***, referred to as the ***defendant***, may each engage litigation support professionals to assist with the ***dispute*** proceedings.

118. The ***civil litigation*** process has several phases and activities. The practitioner can provide a number of different services and contribute significant value to this process as an ***expert witness*** or a ***consultant***. A brief description of selected phases or activities involved in a ***dispute*** and how the practitioner can provide valuable services are included in the following chart:

[10] See AICPA FVS Section Special Report 09-1, *Introduction of Civil Litigation Services*, for more information.

Phase[11]	*Activity*	*Phase or Activity Description*	*Practitioner's Potential Services*[12]
Dispute		A ***dispute*** is the subject of the potential or pending litigation or a disputed fact, claim, or allegation from one side (the ***plaintiff***) met by the contrary fact, claim, or allegation by the other side (the ***defendant***).	• ***Dispute*** development and preparation • Early ***dispute*** resolution • Fact finding • Investigations
Precomplaint		Prior to filing a formal ***complaint***, the potential ***plaintiff*** and ***defendant*** gather information related to the ***dispute***.	• ***Complaint*** preparation • Case assessment • Case budgeting • Fact finding • Third party ***corroboration***
Complaint[13]		Initiated by the ***plaintiff***, the original or initial ***complaint*** is the first pleading in a formal civil litigated proceeding. The ***complaint*** names the ***defendant***, identifies the court having jurisdiction, and describes the legal ***complaints*** and remedies or relief requested. The ***plaintiff*** files the ***complaint*** with the court. The official notification of the ***complaint*** to the ***defendant*** requires official ***service***, or delivery, by a court appointed server.	• Case management • Case strategy (consulting only) • ***Class action*** certification • Motion support
	Motions	***Motions*** are requests by the disputing parties to have the court make a specified ruling or order in the case. ***Motions*** commonly encountered by the practitioner may include a scheduling or calendaring ***motion***, a ***motion for summary judgment*** requesting the court to decide on ***judgment*** before the ***trial***, a ***motion to compel discovery*** to order a response to a valid ***discovery*** request, or a ***motion to dismiss*** the ***complaint***.	• Preparation of materials to support the ***motions*** • Drafting document request lists

[11] Appendix H, "***Civil Litigation*** Chart," provides a condensed version of this chart.
[12] This is not an exhaustive list.
[13] See Appendix I, "Sample Court Document (One Page Complaint)."

Phase	*Activity*	*Phase or Activity Description*	*Practitioner's Potential Services*
	Motions	***Motions*** are requests by the disputing parties to have the court make a specified ruling or order in the case. ***Motions*** commonly encountered by the practitioner may include a scheduling or calendaring ***motion***, a ***motion for summary judgment*** requesting the court to decide on ***judgment*** before the ***trial***, a ***motion to compel discovery*** to order a response to a valid ***discovery*** request, or a ***motion to dismiss*** the ***complaint***.	• Preparation of materials to support the ***motions*** • Drafting document request lists
	Rulings and Orders	*Rulings* are the decisions made by the court or judge on disputed legal issues or case matters. These represent the opinions and ***judgment*** of the court or judge. *Orders* are the commands, directions, and instructions of the court or judge.	• Reviews of rulings and orders for insight into court proceedings (that is, timing, ***discovery***, procedures, and so on)
***Answer* or Response**		In response to the ***complaint***, the ***defendant*** prepares a pleading, called an ***answer*** or response, which denies or admits each of the allegations made by the ***plaintiff***.	• Preparation of materials or verbiage for ***answer*** or response • Response preparation • ***Counterclaim*** preparation
Discovery		***Discovery*** is the exchange of information and knowledge between the parties after the case has been filed in order to assemble evidence for the ***trial***.	• Case strategy (consulting only)
	Interrogatories	Written questions prepared and submitted to an opposing party, which require written ***answers*** under oath.	• Assistance with questions for ***interrogatories*** • Assistance with responses to ***interrogatories***
	Requests for Admissions	These are formal written requests for an opposing party to agree to, or admit the accuracy of, undisputed facts.	• ***Settlement*** assistance
	Stipulations	These are voluntary agreements between opposing parties about any matter relevant to the ***dispute***.	• ***Settlement*** assistance

Phase	Activity	Phase or Activity Description	Practitioner's Potential Services
	Requests for Production of Documents	These are requests to have an opposing party produce, or make available for inspection and duplication, certain specifically identified materials believed to be potentially relevant to the ***dispute***. The materials may be hard copy or ***electronically stored information***.	• Drafting production requests and responses • Document, data, and evidence identification, recovery, analysis, and management
	Written Sworn Statements (Affidavits)* and *Declarations	A *sworn statement*, or ***affidavit***, is a written and signed out-of-court statement or account given under oath. A *declaration* is a signed and written out-of-court statement.	• ***Expert witness*** affidavit • ***Rebuttal*** of opposing ***expert*** affidavit • Analysis of case documents • ***Damages*** quantification
	Expert Reports	Written reports prepared by the practitioner, or other ***experts***, based on the report requirements, such as under Rule 26, "Duty to Disclose; General Provisions Governing Discovery," of the *Federal Rules of Civil Procedure* for a federal case.	• ***Expert report*** • Analysis and ***rebuttal*** of opposing ***expert report***
	Depositions	Out-of-court oral ***testimony*** given by a witness or ***expert*** under oath and reduced to writing, usually by a certified court reporter.	• ***Deposition*** assistance • ***Expert witness deposition testimony*** • ***Rebuttal*** of opposing ***expert testimony*** • Witness preparation
Pretrial		Prior to the ***trial***, the ***disputes*** may be narrowed by using information obtained during ***discovery***, through court hearings, and by rulings made and orders issued by the judge as a result of numerous ***pleadings***, ***motions***, and objections registered over the course of litigation.	• ***Trial*** preparations • ***Trial*** demonstratives • ***Settlement*** and resolution support
	Pretrial Conference	In most federal cases, a conference is ordered prior to the commencement of the ***trial*** to encourage the parties to settle their ***disputes***.	• ***Settlement*** and resolution support
	Settlement	***Settlement*** of all or a portion of the litigated ***dispute*** may take place at any time during the litigation process. ***Settlement*** occurs when the disputing parties agree on the outcome and resolution of the claims in the ***complaint***.	• ***Settlement*** and resolution support • ***Settlement*** assistance

Phase	Activity	Phase or Activity Description	Practitioner's Potential Services
Trial		The ***trial*** can either be a jury or ***bench trial*** (a judge serves as the ***trier of fact***).	• Jury selection
	Direct Examination	*Direct examination* is the initial questioning of a witness at the ***trial*** by the attorney who calls the witness for examination. Direct examination consists of a series of questions designed to solicit admissible evidence from the witness in the form of responsive ***testimony*** and other materials.	• ***Expert witness testimony*** • Witness preparation • Analysis of opposing ***expert testimony***
	Cross-Examination	The initial examination of a witness by the opposing legal counsel, ***cross-examination*** follows the direct examination. The opposing attorney can use ***leading questions*** that are prohibited in direct examination, and frequently, ***deposition testimony*** is used to impugn the witness.	• Opposing ***expert cross-examination*** assistance • ***Trial*** preparation • Witness preparation
Posttrial		After the ***trial*** is concluded, a number of activities may occur, including ***appealing*** adverse decisions or calculating and distributing monetary ***damages***.	• Calculation of beneficiary allocations • Distribution of ***judgments*** and awards
	Calculation and Distribution of ***Judgments*** and Awards	Prepare a final calculation of the amount of ***damages***, including applicable pre- and postjudgment interest, and any penalties; attorney fees; or exemplary, punitive, or other ***damages*** awarded by the court.	• Calculation of amounts awarded

119. Appendix J, "Case Study—Shareholder ***Dispute***," demonstrates a simple shareholder ***dispute*** as it goes through the ***civil litigation*** process.

OVERVIEW OF CRIMINAL PROCEEDINGS

120. The practitioner also may serve as an ***expert witness*** or a ***consultant*** in criminal litigation. In some cases, civil claims and criminal charges may be filed together, requiring consideration of the unique aspects of criminal litigation and the consulting services to be provided. Differences exist between the federal civil and criminal litigation processes, some of which are described herein. However, much of the guidance contained in this practice aid related to ***civil litigation*** also may apply to criminal litigation support engagements.

121. In criminal litigation, the federal government attempts to identify and arrest ***illegal*** criminal activity and successfully convict, punish, and fine the violators, as provided under the law. The presence of the risk of punishment, including imprisonment, drives many of the differences between the civil and criminal litigation processes.

122. In criminal litigation, the party that brings the criminal ***complaint*** is the ***prosecution***, and the legal counsel leading the case is the prosecutor. The party subject to the criminal claims is the ***defendant***, just as in a ***civil litigation*** case. The prosecutor always represents the federal government, frequently referred to as *the State*, even when the prosecuting party is the U.S. federal government.

123. The Constitution provides increased protection to a criminal ***defendant***, as compared with a civil ***defendant***. The Fourth Amendment of the Constitution prohibits unreasonable search and seizure.[14] The Fifth Amendment protects the ***defendant*** from unwanted ***self-incrimination***, requires a ***grand jury indictment*** for specified ***crimes***, prohibits ***double jeopardy***, and provides the right to due process.[15] The Sixth Amendment guarantees the right for a ***trial*** by a jury of peers, the right to be represented by legal counsel, and other measures.[16]

124. Most of the time, the practitioner's involvement in criminal litigation cases will be limited to ***white collar crimes***, such as ***fraud, financial statement*** misrepresentation, or insider trading, focusing on financial ***forensic*** investigation procedures designed to identify and construct the improper and potentially ***illegal*** flow of monies.

125. This section of the practice aid also provides a chart to assist the practitioner with the provision of consulting services for federal criminal litigation matters. State and local criminal litigation processes, laws, rules, and regulations are numerous and may vary greatly and, therefore, have not been included in the scope of this practice aid.

126. The criminal litigation process consists of several phases and activities. Typically, a substantial part of the practitioner's work is performed and completed, and the associated evidence is gathered, at the front end of the engagement in anticipation of the ***grand jury*** proceedings. The practitioner can create substantial value through ***expert witness*** and ***consultant*** services during this process and for these activities.

[14]See http://topics.law.cornell.edu/constitution/billofrights.
[15] Ibid.
[16] Ibid.
[17] See footnote 12.
[18] Federal investigations may involve the following agencies and departments, among others: Bureau of Alcohol, Tobacco, Firearms and Explosives; Department of Labor; Drug Enforcement Administration; FBI; Department of Health and Human Services; Department of the Interior; Department of Justice and the associated U.S. Attorneys General; Department of the Treasury; IRS; Securities and Exchange Commission; U.S. Postal Service; or U.S. Secret Service.

Phase	*Activity*	*Phase or Activity Description*	*Practitioner's Potential Services*
Investigation		The federal criminal litigation process usually starts with an investigation of suspicious activities or suspected ***crimes*** by an authorized federal governmental unit.[18]	• Assist with federal governmental investigation, such as suspected ***financial statement fraud***, tax ***crimes***, money laundering, or corrupt practices • Case assessment • Document management
Indictment*—Federal *Crimes		The following lists some of the federal ***crimes*** likely to be serviced by the practitioner in criminal litigation support engagements: • Antimoney laundering law violations • ***Antitrust law*** violations • ***Bankruptcy crimes*** (for example, fraudulent conveyance and ***illegal*** preferential payments) • Federal income tax ***crimes*** (for example, conspiracy, false returns, tax evasion, and ***fraud***) • Federal financial institution law and regulatory violations • Federal health care law violations • Federal ***financial statement fraud crimes*** involving public companies • Federal securities law violations	• Case assessment based on alleged regulatory violation • ***Indictment*** assistance • ***Grand jury testimony*** • Document management • Case strategy (consulting only)
	Grand Jury	The ***grand jury*** reviews the evidence and must decide whether to issue an ***indictment***. However, it differs from a civil ***trial*** because the jury has ***subpoena*** power to compel witness appearance, and no ***defendant*** defense is presented.	• ***Grand jury testimony*** • ***Indictment*** fact assistance
Discovery		The ***discovery*** process typically is accelerated in criminal litigation to protect the ***defendant's*** rights and ensure a speedy ***trial***.	

Phase	*Activity*	*Phase or Activity Description*	*Practitioner's Potential Services*
	Evidence Gathering	The federal government, depending on the alleged ***crimes*** and violations of law, may be able to use surveillance and other investigative methods to gather admissible evidence, such as undercover observation and wiretapping. In addition, evidence developed for a civil ***trial*** can be admissible in a criminal ***trial***.	• Document production requests and responses • Document, data, and evidence identification, recovery, analysis, and management
	Subpoenas and ***Warrants***	***Subpoenas*** are used extensively in criminal cases to compel reluctant or uncooperative witnesses to provide testimonial evidence. In addition, ***warrants*** are used to legally search for and seize potential evidence for criminal litigation.	• Document production requests and responses • Document, data, and evidence identification, recovery, analysis, and management
Trial		Criminal ***trials*** are ***jury trials***, with limited exception. The evidence admissible in a federal criminal ***trial*** receives a higher level of scrutiny by the court than the evidence in most civil ***trials***.	• ***Trial*** preparation • ***Trial*** demonstratives

127.

Appendix A: Glossary[19]

This is not an exhaustive list of glossary terms. However, the terms defined in this glossary are frequently used during litigation proceedings and are included for the benefit of the users of this practice aid.

accountant-client privilege. The protection afforded to a client from an accountant's unauthorized disclosure of materials submitted to, or prepared by, the accountant. This privilege is not widely recognized.

acquittal. The legal certification, usually by jury verdict, that an accused person is not guilty of the charged offense.

admissibility. The quality or state of being allowed to be entered into evidence in a hearing, trial, or other legal proceeding.

affidavits (written sworn statements). A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public.

alternative dispute resolution. A procedure for settling a dispute by means other than litigation, such as arbitration or mediation.

american bar association. A voluntary national organization of lawyers organized in 1878. Among other things, it participates in law reform, law school accreditation, and continuing legal education in an effort to improve legal services and the administration of justice.

answer. A defendant's first pleading that addresses the merits of the case, usually by denying the plaintiff's allegations.

antitrust law. The body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination. The principal federal antitrust laws are the Sherman Act and the Clayton Act.

appeal. A proceeding undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal.

apportionment. Division into proportionate shares, especially the division of rights and liabilities between two or more persons or entities.

[19] Unless otherwise noted, all definitions are derived from *Black's Law Dictionary*, 8th ed.,(St. Paul, Minnesota: West Publishing Company, 2004).

arbitration. A method of dispute resolution involving one or more neutral third parties who usually are agreed to by the disputing parties and whose decision is binding.

arbitrator. A neutral person who resolves disputes between parties, especially by means of formal arbitration.

arraignment. The initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges and enter a plea.

assurance services. An audit, review, compilation, or other attestation performed in compliance with applicable AICPA and other professional standards.[20]

attorney-client privilege. The attorney's client's right to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the client and the attorney.

attorney work product privilege (work product rule). Qualified immunity of an attorney's work product from discovery or other compelled disclosure.

bail. To obtain the release of oneself or another by providing security for future appearance.

bankruptcy. (1) A statutory procedure by which a (usually insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor's assets for the benefit of creditors. (2) A case under the Bankruptcy Code (*Bankruptcy, U.S. Code* [USC] 11).

bates-stamp. To affix a mark, usually a number, to a document or the individual pages of a document for the purpose of identifying and distinguishing it in a series of documents.

bench trial. A trial before a judge without a jury.

bifurcated (trial). A trial divided into two stages, such as for liability and damages.

bribery. The corrupt payment, receipt, or solicitation of a private favor for official action.

brief. (1) A written statement setting out the legal contentions of a party litigation, especially on appeal. (2) A document prepared by an attorney as the basis for arguing a case consisting of legal and factual arguments and the authorities in support of them.

burden of proof. A party's duty to prove a disputed assertion or charge.

[20] Source: AICPA Litigation Consulting Task Force of the 2008 AICPA Forensic and Valuation Committee.

business interruption insurance. An agreement to protect against one or more kinds of loss from the interruption of an ongoing business, such as a loss of profits while the business is shut down to repair fire damage.

calendaring or scheduling order. A schedule of the time of court appearances.

case evaluation. A method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution (conciliation).

case-in-chief. The evidence presented at the trial by a party between the time the party calls the first witness and the time the party rests.

causation. A cause that directly produces an event that without which the event would not have occurred.

chain of custody. The movement and location of real evidence, and the history of those persons who had it in their custody, from the time it is obtained to the time it is presented in court.

civil litigation. (1) Litigation regarding a civil action brought to enforce, redress, or protect a private or civil right. (2) A noncriminal litigation.

class action. A lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group.

client. "[A]ny person or entity, other than the member's employer, that engages a member or a member's firm to perform professional services or a person or entity with respect to which professional services are performed."[21] However, for civil litigation services, the client is usually the attorney representing an underlying party to the litigation. The underlying party represented by the attorney's client is referred to as the *attorney's client*.

closing arguments. In a trial, an attorney's final statement to the judge or jury before deliberation begins in which the attorney requests the judge or jury to consider the evidence and apply the law in his or her client's favor.

complaint. The initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief.

confidentiality or nondisclosure agreement. (1) An agreement that protects confidential information or an agreement of secrecy. (2) An agreement protecting the state of having the dissemination of certain information restricted.

[21] Source: Paragraph .03 of ET section 92, *Definitions* (AICPA, *Professional Standards*, vol. 2).

confidentiality order. A court order prohibiting or restricting a party from engaging in conduct, especially a legal procedure, such as discovery, that unduly annoys or burdens the opposing party or third party witness.

conflict of interest. A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.

consultant (litigation). A person or expert who, though retained by a party, is not expected to be called as a witness at the trial.

corroboration. Confirmation or support by additional evidence or authority.

corruption. (1) The act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others. (2) A fiduciary's or official's use of a station or office to procure some benefit, either personally or for someone else, contrary to the rights of others.

counterclaim. A claim for relief asserted against an opposing party after an original claim has been made, especially a defendant's claim in opposition to, or as a set-off against, a plaintiff's claim.

court-appointed expert. An expert who is appointed by the court to present an unbiased opinion. See Rule 706, "Court Appointed Experts," of the *Federal Rules of Evidence*.

CPA-client privilege. See **accountant-client privilege**.

crime. (1) An act that the law makes punishable. (2) The breach of a legal duty treated as the subject matter of a criminal proceeding.

criminal proceeding. (1) A proceeding instituted to determine a person's guilt or innocence or to set a convicted person's punishment. (2) A criminal hearing or trial.

cross-complaint. A claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action.

cross-defendant. A defendant party to a claim asserted between coplaintiffs or codefendants in a case that relates to the subject of the original claim or counterclaim.

cross-examination. The questioning of a witness at a trial or hearing by the party opposed to the party who called the witness to testify.

custodian of records. A person or institution that has charge or custody of records.

damages. Money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

Daubert hearing. A hearing conducted by federal district courts, usually before the trial, to determine whether proposed expert testimony meets the federal requirements for relevance and reliability. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

Daubert test. A method that federal district courts use to determine whether expert testimony is admissible under Rule 702, "Testimony by Experts," of the *Federal Rules of Evidence*, which generally requires that expert testimony consist of scientific, technical, or other specialized knowledge that will assist the fact finder in understanding the evidence or determining a fact in issue. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

declarations. A formal statement, proclamation, or announcement.

defendant. A person sued in a civil proceeding.

demurrer. A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer.

deposition. A witness's out-of-court testimony that is reduced to writing (usually by a court reporter) for later use in court or for discovery purposes.

directed verdict. A ruling by a trial judge taking a case from the jury because the evidence will permit only one reasonable verdict as a matter of law.

discovery. Compulsory disclosure, at a party's request, of information that relates to the litigation. The primary discovery devices are interrogatories, depositions, requests for admissions, and requests for production.

dispute. A conflict or controversy, especially one that has given rise to a particular lawsuit.

dispute resolution services. Consulting services to assist parties with the settlement or determination of a dispute.

dissolution of marriage. A divorce-like remedy available when both spouses have signed a separation agreement that deals with (1) the issue of alimony (providing either some or none) and (2) if there are children, the issues of support, custody, and visitation.

diversity of citizenship. A basis for federal court jurisdiction that exists when (1) a case is between citizens of different states or a citizen of a state and an alien and (2) the matter in controversy exceeds a specific value (now $75,000) (*Judiciary and Judicial Procedure*, USC 28 Section 1332).

double jeopardy. The fact of being prosecuted or sentenced twice for substantially the same offense.

due diligence. The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation.

dumping. (1) The act of selling a large quantity of goods at less than fair value. (2) Selling goods abroad at less than the market price at home.

electronically stored information. Defined in this practice aid to mean electronically stored data. See Rule 26(a)(1)(A) of the *Federal Rules of Civil Procedure* and *The Sedona Conference® Glossary: E-Discovery & Digital Information Management*, 2nd ed. (Sedona, AZ: The Sedona Conference®, 2005), which established practices of electronic discovery.

embezzlement. The fraudulent taking of personal property with which one has been entrusted, especially as a fiduciary.

ex parte. (1) Done or made at the instance and for the benefit of one party only and without notice to, or argument by, any person adversely interested. (2) Of or relating to court action taken by one party without notice to the other, usually for temporary or emergency relief.

expert. A person who, through education or experience, has developed skill or knowledge in a particular subject so that he or she may form an opinion that will assist the fact finder.

expert report. A report prepared by an expert witness in accordance with court rules and procedures for the purpose of assisting a trier of fact and expressing the opinions of the expert witness.

expert witness. An expert who is identified by a party to the litigation as a potential witness at the trial.

fact (lay) witness. A witness who does not testify as an expert and who is, therefore, restricted to giving an opinion or making an inference that is (1) based on firsthand knowledge and (2) helpful in clarifying the testimony or determining facts (Rule 701, "Opinion Testimony by Lay Witnesses," of the *Federal Rules of Evidence*).

financial statement. A balance sheet, income statement, or annual report that summarizes an individual's or organization's financial condition on a specified date or for a specified period by reporting assets and liabilities.

forensic. Used in, or suitable to, courts of law or public debate.

forensic accounting services. Services that generally involve the application of specialized knowledge and investigative skills possessed by CPAs to collect, analyze,

and evaluate evidential matter and to interpret and communicate findings in the courtroom, boardroom, or other legal or administrative venue (March 2007 AICPA Council-approved definition).

forensic techniques. The following seven recognized forensic investigative techniques: (1) public document reviews, (2) interviews of knowledgeable persons, (3) confidential sources, (4) laboratory analysis of physical and electronic evidence, (5) physical and electronic surveillance, (6) undercover operations, and (7) analysis of financial transactions. See also AICPA Forensic and Valuation Services Section Special Report, *Forensic Procedures and Specialists: Useful Tools and Techniques*.

forgery. (1) The act of fraudulently making a false document or altering a real one to be used as if genuine. (2) A false or altered document made to look genuine by someone with the intent to deceive. (3) Under the *Model Penal Code*, the act of fraudulently altering, authenticating, issuing, or transferring a writing without appropriate authorization.

foundation (that is, basis and reasons for expert witness opinions). The basis on which something is supported, especially evidence or testimony that establishes the admissibility of other evidence.

fraud. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.

grand jury. A body of people (often 23) who are chosen to sit permanently for at least 1 month—and sometimes 1 year—and who, in ex parte proceedings, decide whether to issue indictments.

hearsay. Traditionally, testimony that is given by a witness who relates not what he or she knows personally but what others have said and that is, therefore, dependent on the credibility of someone other than the witness. Such testimony generally is inadmissible under the rules of evidence.

hung jury. A jury that cannot reach a verdict by the required voting margin.

illegal. (1) Forbidden by law. (2) Unlawful.

indictment. The formal written accusation of a crime made by a grand jury and presented to a court for prosecution against the accused person.

insolvency. (1) The condition of being unable to pay debts as they fall due or in the usual course of business. (2) The inability to pay debts as they mature.

intellectual property. A category of intangible rights protecting commercially valuable products of the human intellect.

interrogatories. Written questions submitted to an opposing party in a lawsuit as part of discovery.

judgment. A court's final determination of the rights and obligations of the parties in a case.

judgment as a matter of law. A judgment rendered during a jury trial, either before or after the jury's verdict, against a party on a given issue when there is no legally sufficient basis for a jury to find for that party on that issue.

jury trial. A trial in which the factual issues are determined by a jury, not the judge.

lay (fact) witness. See **fact (lay) witness**.

leading questions. A question that suggests the answer to the person being interrogated, especially a question that may be answered by a mere "Yes" or "No."

legal orders (order). A written command, direction, or instruction delivered by a court or judge.

legal precedent. (1) The making of law by a court in recognizing and applying new rules while administering justice. (2) A decided case that furnishes a basis for determining later cases involving similar facts or issues.

legal privilege. (1) A special legal right, exemption, or immunity granted to a person or class of persons. (2) An exception to a duty.

liability (legal). (1) The quality or state of being legally obligated or accountable. (2) Legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.

litigant. A party to a lawsuit.

litigation hold. Defined in this practice aid to mean an order to preserve records that may be relevant to a lawsuit, including any lawsuit that is "reasonably anticipated" to be filed. See *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (SDNY 2004) and *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed*, *LLC*, 2007 WL 684001 (D. Colo. 2007).

lost Profits. *Contracts*—A measure of damages that allows a seller to collect the profits that would have been made on the sale if the buyer had not breached. *Patents*—A measure of damages set by estimating the net amount lost by a plaintiff inventor because of the infringing defendant's actions.

manual journal entries. An entry performed by hand in an accounting journal of equal debits and credits, with occasional explanations of the recorded transactions.

market. A place of commercial activity in which goods or services are bought and sold.

market share. The percentage of the market for a product that a firm supplies, usually calculated by dividing the firm's output by the total market output. In antitrust law, market share is used to measure a firm's market power, and if the share is high enough (generally 70 percent or more), then the firm may be guilty of monopolization.

mediation. See **case evaluation**.

mediator. A person serving as a neutral third party in mediation who tries to help the disputing parties reach a mutually agreeable solution.

metadata. The digital attributes of electronic documents that are appended to those documents either during their creation or use in their native application. Metadata is created and exists in its natural state before the electronic discovery process is initiated. The existence of metadata is referenced in the comments to the proposed *Federal Rules of Civil Procedure* and is characterized as the historical, managerial, and tracking components of a document or file; these components can be lost when the document is printed to paper or quasipaper.[22]

misappropriation. The dishonest application of another's property or money to one's own use.

mitigate. To make less severe or intense.

mitigation-of-damages doctrine. The principle requiring a plaintiff, after an injury or breach of contract, to make reasonable efforts to alleviate the effects of the injury or breach.

mock trial. A fictitious trial organized to allow law students, or sometimes lawyers, to practice the techniques of trial advocacy.

motion. A written or oral application requesting a court to make a specified ruling or order.

motion for summary judgment. A request that the court enter judgment without a trial because there is no genuine issue of material fact to be decided by a fact finder. That is because the evidence is legally insufficient to support a verdict in the nonmovant's favor. See Rule 56, "Summary Judgment," of the *Federal Rules of Civil Procedure*.

motion in limine. A pretrial request that certain inadmissible evidence not be referred to or offered at the trial. Typically, a party makes this motion when it believes that mere mention of the evidence during the trial would be highly prejudicial and could not be remedied by an instruction to disregard.

motion to compel discovery. A party's request that the court force the party's opponent to respond to the party's discovery request (for example, to answer interrogatories or produce documents). See Rule 37(a) of the *Federal Rules of Civil Procedure*.

[22] Source; www.edrm.net.

motion to dismiss. A request that the court dismiss the case because of settlement, voluntary withdrawal, or procedural defect.

negotiation. (1) A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. (2) Dealings conducted between two or more parties for the purpose of reaching an understanding.

notice of trial. A document issued by the court informing the parties of the date on which the lawsuit is set for trial.

opening statement. At the outset of a trial, an advocate's statement giving the fact finder a preview of the case and the evidence to be presented.

plaintiff. The party who brings a civil suit in a court of law.

plea bargain. A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal of the other charges.

pleadings. Formal documents in which a party to a legal proceeding, especially a civil lawsuit, sets forth or responds to allegations, claims, denials, or defenses.

precedent. See **legal precedet**.

predatory Pricing. (1) Unlawful below-cost pricing intended to eliminate specific competitors and reduce overall competition. (2) Pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.

pretrial conference. An informal meeting at which opposing attorneys confer, usually with the judge, to work toward the disposition of the case by discussing matters of evidence and narrowing the issues that will be tried.

price discrimination. The practice of offering identical or similar goods to different buyers at different prices when the costs of producing the goods are the same. Price discrimination can violate antitrust laws if it reduces competition, either directly when a seller charges different prices to different buyers or indirectly when a seller offers special concessions (such as favorable credit terms) to some but not all buyers.

price-fixing. The artificial setting or maintenance of prices at a certain level, contrary to the workings of the free market.

prosecution. A criminal proceeding in which an accused person is tried.

proximate cause. See **causation**.

punitive damages. (1) Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit. (2) Specifically, damages assessed by way of penalizing the wrongdoer or making an example to others.

rebuttal. The contradiction of an adverse party's evidence.

receiver. A disinterested person appointed by a court or a corporation or other person for the protection or collection of property that is the subject of diverse claims. For example, a *judgment receiver* is a receiver who collects or diverts funds from a judgment debtor to the creditor.

redirect examination. A second direct examination after cross-examination, the scope ordinarily being limited to matters covered during cross-examination.

referee. A type of master appointed by a court to assist with certain proceedings.

requests for admissions. In pretrial discovery, a party's written factual statement served on another party who must admit, deny, or object to the substance of the statement.

requests for production of documents. In pretrial discovery, a party's written request that another party provide specified documents or other tangible things for inspection and copying.

restitution. (1) A body of substantive law in which liability is based not on tort or contract but on the defendant's unjust enrichment. (2) The set of remedies associated with that body of law, in which the measure of recovery usually is based not on the plaintiff's loss but on the defendant's gain. (3) Return or restoration of some specific thing to its rightful owner or status. (4) Compensation for loss, especially full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort but ordered as part of a criminal sentence or a condition of probation.

scheduling or calendaring order. A schedule of the time of court appearances.

self-incrimination. The act of indicating one's own involvement in a crime or exposing oneself to prosecution, especially by making a statement.

sequestered. To segregate or isolate (a jury or witness) during trial.

service. The formal delivery of a writ, summons, or other legal process.

settlement. An agreement ending a dispute or lawsuit.

settlement conference. A meeting by disputing parties in litigation for reaching an agreement to end a dispute or lawsuit.

settlement (full). A settlement and release of all pending claims between the parties.

settlement (structured). A settlement in which the defendant agrees to pay periodic sums to the plaintiff for a specified time, especially in personal injury and product liability cases.

special master. A parajudicial officer (such as a referee, an auditor, an examiner, or an assessor) specially appointed to help a court with its proceedings.

spoliation. The intentional destruction, mutilation, alteration, or concealment of evidence, usually a document.

standard of proof. The degree or level of proof demanded in a specific case, such as "beyond a reasonable doubt" or "by preponderance of the evidence."

stipulations. A voluntary agreement between opposing parties concerning some relevant point.

subpoena. A writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply.

subpoena duces tecum. A subpoena ordering the witness to appear and bring specified documents, records, or items.

surrebuttal. (1) The response to the opposing party's rebuttal in a trial or other proceeding. (2) A rebuttal to a rebuttal.

tax basis. The value assigned to a taxpayer's investment in property and used primarily for computing gain or loss from a transfer of the property.

testimony. Evidence that a competent witness under oath or affirmation gives at the trial or in an affidavit or deposition.

tort. (1) A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages. (2) A breach of a duty that the law imposes on persons who stand in a particular relation to one another.

trade secret. (1) A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors. (2) Information, including a formula, pattern, compilation, program, device, method, technique, or process, that (*a*) derives independent economic value (actual or potential) from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use and (*b*) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy.

trial. A formal judicial examination of evidence and determination of legal claims in an adversary proceeding.

trial (bench). See **bench trial**.

trial (bifurcated). See **bifurcated (trial)**.

trial (jury). See **jury trial**.

trier of fact. One or more persons, such as jurors in a trial or a judge in a hearing, who hear testimony and review evidence to rule on a factual issue.

verdict (general). A verdict by which the jury finds in favor of one party or the other, as opposed to resolving a specific issue.

verdict (special). A verdict in which the jury makes findings only on factual issues submitted to them by the judge, who then decides the legal effect of the verdict.

voir dire. A preliminary examination of a prospective juror (or expert witness) by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury (or as an expert witness).

warrant. A writ directing or authorizing someone to do an act, especially one directing a law enforcer to make an arrest, a search, or a seizure.

white collar crimes. A nonviolent crime usually involving cheating or dishonesty in commercial matters.

work product privilege or doctrine. See **attorney work product privilege (work product rule)**.

written sworn statements (affidavits). See **affidavit (written sworn statement)**.

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Appendix B: Examples of *Forensic Accounting Services*

The following is a representative listing of ***forensic accounting services*** engagement matter types. This listing is not all-inclusive.

Dispute **Resolution (excluding litigation):**

- ***Alternative dispute resolution***

  — ***Arbitration***

  — Collaborative proceeding

  — ***Mediation***

  — ***Mock trial***

  — ***Negotiation***

  — ***Settlement conference***

- Administrative proceedings
- Breach of contract
- License and royalty contract compliance
- Postacquisition ***disputes***

  — Working capital computations

  — Earn-out payments

- Regulatory inquires, investigations, and compliance

Litigation Support Services:

Providing assistance for actual, pending, or potential legal or regulatory proceedings before a ***trier of fact*** in connection with the resolution of ***disputes*** between parties.

- ***Expert*** *services*. Rendering an opinion before a ***trier of fact*** about the matter(s) in ***dispute***.

- *Consulting*. Providing advice about the facts, issues, and strategy of a matter. The ***consultant*** does not testify unless the role changes to that of an ***expert witness***.

- *Other.* Serving as a ***trier of fact***, a ***special master***, a ***court-appointed expert***, a ***referee***, an ***arbitrator***, or a ***mediator***.

Types of Engagements

Discovery:

1. Request production of financial documents and other information that the parties to the lawsuit want to analyze, gather, or preserve

2. Advise on suitable questions for ***interrogatories*** related to various accounting matters at issue or in ***dispute***, such as information recorded or reported in ***financial statements*** or books and records

3. Assist with ***depositions*** in the form of (*a*) advising on questions for the opposing party's financial and accounting witnesses or ***experts*** or (*b*) facilitating the understanding of terminology and the bases of the accounting issues, facts, or generally accepted accounting principles (GAAP) at issue or in ***dispute***

Information Seeking Interviews:

1. Gain an understanding of the organization's accounting and reporting process based on individual roles, responsibilities, and perspectives

2. Gather perspective of the internal audit department, audit committee members, or external auditors regarding pertinent accounting issues or ***disputes***

3. Obtain information from business partners, former employees, suppliers, and so on surrounding pertinent financial or accounting issues or ***disputes***

Document Management:

1. Extract data from electronic devices (data-mining), such as ensuring complete revenue recognition or reviewing master files

2. Secure electronic evidence

3. Retrieve financial data

4. Store and categorize or file financial and accounting information (hard or soft copy)

Third Party ***Corroboration****:*

1. Verify an organization's representations through confirmation requests of third parties, such as financial institutions, suppliers, or vendors

2. Compare ***client*** or organization metrics to external metrics, such as industry benchmarks

Settlement:

1. Assist with ***settlement*** terms and ***negotiations***, especially in regard to accounting terms and GAAP

2. Oversee payments, such as structured ***settlement*** payments, to ***plaintiffs*** in class-action ***settlements***

Case Assessment:

1. Perform ***case evaluation*** to assist parties in realizing the strengths and weaknesses of their lawsuit positions and potential resolutions

2. Analyze GAAP issues or ***disputes***

3. Determine the potential merits of a case involving professional ***liability*** (accounting malpractice)

4. Examine financial and accounting recording and reporting issues

Trial *Assistance****:***

1. Prepare questions for the opposing party's financial and accounting fact witnesses or ***experts***

2. Assist with accounting terminology and ***dispute*** analysis

3. Provide GAAP perspective or analysis

Posttrial Support:

1. Serve as ***settlement*** funds administrator, especially for structured ***settlements***

2. Serve as ***receiver***

Transaction Testing:

1. Determine how disputed regulatory or contractual obligations, such as sales and use taxes or royalty payments, are calculated

2. Verify how disputed transactions are recorded through the financial and accounting processes and systems

3. Analyze whether financial and accounting processes and systems capture all of the contractual assets or obligations, based on the appropriate bases of accounting

Negotiation:

1. Provide a GAAP perspective

2. Perform ***case evaluation*** to assist parties in realizing the strengths and weaknesses of their positions and potential resolutions

3. Examine financial and accounting recording and reporting issues

4. Prepare questions for the opposing party's financial and accounting fact witnesses or ***experts***

5. Assist with accounting terminology

Arbitration:

1. Act as a sole ***arbitrator*** or on a panel of ***arbitrators*** for accounting or contractual ***disputes***.

2. Provide a GAAP perspective or analysis

3. Provide an ***expert report*** or ***testimony*** for the ***arbitrator***

Mediation:

1. Act as a sole ***arbitrator*** or on a panel of ***arbitrators*** for accounting or contractual ***disputes***

2. Provide a GAAP perspective or analysis

Expert Reports *and* ***Testimony:***

1. Provide a GAAP perspective

2. Examine financial and accounting recording and reporting issues
3. Opine on whether there was a perpetration of a ***fraud***

Litigation Fact Finding:

1. Execute asset searches
2. Conduct ***market*** studies
3. Review systems
4. Interview witnesses
5. Perform ***due diligence***

Litigation Analysis:

1. Perform investigative accounting
2. Conduct computer modeling
3. Carry out statistical or actuarial analysis

Antitrust:

1. Analyze potential ***price-fixing***
2. Define the ***market***
3. Determine ***market share***
4. Investigate ***predatory pricing***
5. Analyze price ***dumping***
6. Investigate ***price discrimination***

Tax:

1. Determine ***tax basis***
2. Aid with numerous federal or state tax matters
3. Assist with property tax issues, such as exempt versus nonexempt

4. Allocate costs
5. Determine tax treatment of specific transactions
6. Assist with duty or import tax matters

*Economic **Damages:***

1. Perform ***lost profits*** analysis
2. Determine lost value of a business
3. Verify extra costs associated with a specific business situation
4. Analyze lost cash flows
5. Review ***mitigation of damages*** of economic ***damages***
6. Analyze or aid in calculating ***restitution***

Punitive Damages:

1. Perform a study based on benchmarks
2. Assist in calculation

Insurance Claims:

1. Analyze or calculate ***business interruption***
2. Determine lost wages

*Financial and Source Documents **Fraud**:*

1. Identify false reporting, particularly of income or assets
2. Determine whether financial books and records have been manipulated
3. Identify and analyze ***forgery*** of financial documents, such as invoices
4. Analyze electronic tampering of financial books and records
5. Trace and review related party transactions
6. Determine and review ***manual journal entries***

7. Perform data-mining techniques
8. Carry out accounts receivable aging analysis, including trend analysis
9. Examine suspicious vendor relationships or activities
10. Examine suspicious financial performance by a unit, subsidiary, or joint venture

Fraud *and* ***Illegal*** *Acts:*

1. Investigate ***embezzlement***
2. Identity theft
3. Determine and catalog asset ***misappropriation***
4. Investigate ***corruption*** and ***bribery***
5. Evaluate ***financial statement*** manipulation

Financial Reporting and Securities ***Fraud****:*

1. Trace and review related party transactions, arms-length transactions, or preferential treatment
2. Determine and review ***manual journal entries***
3. Carry out accounts receivable aging analysis, including trend analysis
4. Perform data-mining techniques
5. Investigate insider trading

Insolvency *and* ***Bankruptcy Fraud:***

1. Trace and review related party transactions or preferential treatment
2. Serve as a ***bankruptcy consultant***, a trustee, or an examiner

Intellectual Property *and* ***Trade Secrets:***

1. Test royalty payment transactions
2. Confirm all royalties are included

3. Ensure proper basis of accounting, such as GAAP versus International Financial Reporting Standards or other comprehensive basis of accounting

Marital Dissolution:

1. Search for hidden assets
2. Trace assets for ***apportionment***
3. Evaluate and analyze spending and expenses

Bankruptcy *Support**:***

1. Breach of fiduciary duty claims
2. Fraudulent conveyance claims
3. Preferential payment claims

Fraud *and Special Investigations:*

1. Commercial ***fraud*** claims
2. ***Financial statement*** restatements
3. Securities claims

Other:

1. Civil ***complaints*** (all phases of ***civil litigation*** process)
    a. Breach of fiduciary duty claims
    b. Business interruption claims
    c. Contractual ***disputes***
    d. Contracting, construction, and real estate claims
    e. Commercial ***fraud*** claims
    f. Divorce, domestic, and matrimonial cases
    g. Insurance claims and defense

h. ***Intellectual property*** (for example, patent, copyright, trademark, and know-how) claims

i. Labor and employment claims

j. Licenses and royalties claims

k. Postacquisition ***dispute***

l. Professional malpractice claims

2. Other ***complaints*** (civil or criminal—all phases of litigation)

   a. Antitrust claims

   b. Class actions

   c. ***Fraud***, waste, and abuse claims

   d. Securities claims

3. Valuations (for example, asset valuation and business valuation)

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Appendix C: AICPA Litigation Services Guidance

AICPA *Professional Standards*

AICPA *Code of Professional Conduct and Bylaws*

AICPA Statement on Standards for Consulting Services No. 1, *Consulting Services: Definitions and Standards* (AICPA, *Professional Standards*, vol. 2, CS sec. 100)

AICPA Statement on Standards for Valuation Services No. 1, *Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset* (AICPA, *Professional Standards*, vol. 2, VS sec. 100)

AICPA Consulting Services Practice Aid 98-2, *Calculations of Damages From Personal Injury, Wrongful Death, and Employment Discrimination*

AICPA Consulting Services Special Report 03-1, *Litigation Services and Applicable Professional Standards*

AICPA Forensic and Valuation Services (FVS) Section Practice Aid 04-1, *Engagement Letters for Litigation Services*

AICPA FVS Section Practice Aid 05-1, *AICPA's Guide to Family Law Services*

AICPA FVS Section Practice Aid 06-1, *Calculating Intellectual Property Infringement Damages*

AICPA FVS Section Practice Aid 06-2, *Preparing Financial Models*

AICPA FVS Section Practice Aid 06-3, *Analyzing Financial Ratios*

AICPA FVS Section Practice Aid 06-4, *Calculating Lost Profits*

AICPA FVS Section Special Report, *Forensic Procedures and Specialists: Useful Tools and Techniques*

AICPA FVS Section Practice Aid 07-1, *Forensic Accounting & Fraud Investigations*

AICPA FVS Section Special Report 08-1, *Independence and Integrity and Objectivity in Performing Forensic and Valuation Services*

AICPA FVS Section Special Report 09-1, *Introduction to Civil Litigation Services*

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Appendix D: Courts and Websites

Federal Court System

The federal court system consists of the following courts and special courts:

- *District courts.* Involve a ***dispute*** claiming monetary ***damages*** in excess of an established minimum when the ***plaintiff*** and ***defendant*** reside in different states (referred to as ***diversity of citizenship***) or, alternatively, involve an issue of federal law. Consists of 93 geographic districts (each state has at least 1).

- *Courts of appeal.* The courts used for ***appeals*** of district court ***trial*** decisions.

- *Supreme Court.* This is the highest ***appeals*** court in the federal court system. Generally, a disputing party must have a decision from the Court of Appeals for the Federal Circuit and file a successful petition for ***trial*** to be granted in the Supreme Court.

- *Tax court.* The courts used for tax ***disputes*** between taxpayers and the IRS.

- *Court of federal claims.* The courts used for constitutional claims against the federal government or its branches, offices, or executives.

- ***Bankruptcy*** *court.* The courts used for federal ***bankruptcy*** matters.

Federal Circuits

Following are the 13 appeals circuits operated by the federal court system:

1. First (Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico)

2. Second (New York, Connecticut, and Vermont)

3. Third (New Jersey, Pennsylvania, Delaware, and Virgin Islands)

4. Fourth (Maryland, Virginia, West Virginia, North Carolina, and South Carolina)

5. Fifth (Texas, Louisiana, and Mississippi)

6. Sixth (Tennessee, Kentucky, Ohio, and Michigan)

7. Seventh (Illinois, Indiana, and Wisconsin)

8. Eighth (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota)

9. (California, Arizona, Nevada, Oregon, Washington, Idaho, Montana, Alaska, Hawaii, Guam, and Northern Mariana Islands)

10. Tenth (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming)

11. Eleventh (Alabama, Georgia, and Florida)

12. District of Columbia (Washington, D.C.)

13. Federal

The federal court system website is www.uscourts.gov.

State Court System

The structure of state court systems, laws, rules, and regulations varies. Refer to the National Center for State Courts website at www.ncsconline.org.

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Appendix E: Excerpts of the *Federal Rules of Civil Procedure* and the *Federal Rules of Evidence*

Following are sections of the *Federal Rules of Civil Procedure* and the *Federal Rules of Evidence* that apply to an ***expert witness***. The *Federal Rules of Civil Procedure* are found at www.law.cornell.edu/rules/frcp/Rule26.htm, and the *Federal Rules of Evidence* are found at www.law.cornell.edu/rules/fre/.

Federal Rules of Civil Procedure

V. DEPOSITIONS AND DISCOVERY

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosures.

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;
(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;
(v) an action to enforce or quash an administrative summons or subpoena;
(vi) an action by the United States to recover benefit payments;
(vii) an action by the United States to collect on a student loan guaranteed by the United States;
(viii) a proceeding ancillary to a proceeding in another court; and
(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures—In General*. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(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) *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 data or other information 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.

(C) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
(i) at least 90 days before the date set for trial or for the case to be ready for trial; or
(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(b) Discovery Scope and Limits

(4) Trial Preparation: Experts.

(A) *Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. However, a party may do so only:
(i) as provided in Rule 35(b); or
(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:
(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and
(ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

Federal Rules of Civil Evidence

Rule 702. Testimony by Experts

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.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court Appointed Experts

(a) Appointment.

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit

nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation.

Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment.

In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection.

Nothing in this rule limits the parties in calling expert witnesses of their own selection.

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Appendix F : Computer Data Gathering and Glossary

Ensuring that you acquire reliable, accurate electronic data can be a challenge for a ***forensic*** accountant. How do you ensure the right information is gathered? What do you need in order to conduct your investigation? If you have limited knowledge of computers, how do you communicate your needs to the computer ***forensic*** people to get the correct information and ensure that they are capable of getting the right information? The following exchange is a good illustration of this point:

Forensic accountant (FA): I need to have a ***mirror*** of the ***accounting package***, complete with any ***access code*** so I can gain access to the accounting system. I would also like to be sure the ***audit trail*** is preserved.

Computer geek (CG): What sort of ***system*** do they have?

FA: I don't know. That's your job, isn't it?

CG: Let me be more specific, what sort of OS do they have?

FA: Huh?

CG: What sort of ***operating system*** do they have? You know, like ***UNIX*** or ***Linux***?

FA: I don't know.

CG: Okay, let's start over.

The following outline details the steps that should be followed and the type of information to convey to the computer ***forensic*** technician to facilitate a legitimate and efficient data extraction.

- ***Chain of Evidence***

  — Maintain and document the chronological history of the investigation

    - When and how data was collected
    - Where data was stored and found
    - How the data was collected and maintained
    - Who handled the data and when
    - What procedures and analyses were performed

— Maintain for each piece of evidence

- Determine the type of data of interest

  — Spreadsheets, word processing documents, PDFs, image files, sound files, and so on

  — ***Accounting package*** data files

  — E-mails

    o Type of ***server*** (in-house or external)

- Determine where the data is stored and maintained

  — Individual's computer, network ***server***, flash drive, CD or DVD, mobile device, and so on

    o What is the make and model of the computer or device

    o What type of ***network***

- Determine who has access to the data

  — What type of ***operating system***

  — Who has administrator rights

  — Is there an ***access code***

  — When was the data (or ***system***) last accessed

    o The more activity that has occurred, the less likely of finding historical data

- Collection and preservation

  — Imaging—make a ***mirror*** of the original data

    o ***Forensic*** computer technicians often have special tools to enable imaging

  — Evidence should be protected from physical, mechanical, or electromagnetic damage

COMPUTER GLOSSARY[23]

access code. An identification number or password used to gain access to a computer system.

accounting package. A program or group of programs intended to help a business owner automate a firm's accounting procedures. Though accounting packages have grown easier to use recently, they still often require a level of accounting expertise and tedious data entry.

audit trail. In an accounting package, any program feature that automatically keeps a record of transactions so that one can backtrack to find the origin of specific figures that appear on reports.

bulk storage. Devices used to store massive amounts of computer data, including clusters of hard drives, optical disks, and magnetic tape. Synonymous with mass storage.

burn. To record data on a writable optical disc, such as a CD-R, CD-RW, DVD-R, DVD-RW, or DVD-RAM disk.

chain of evidence. The sequencing of the chain of evidence follows this order: identification and collection, analysis, storage, preservation, transportation, presentation in court, and return to owner. The chain of evidence shows who obtained the evidence, where and when the evidence was obtained, who secured the evidence, and who had control or possession of the evidence.[24]

custodian. Person having administrative control of a document or electronic file (for example, the data custodian of an e-mail is the owner of the mailbox that contains the message).[25]

database. An application that provides the tools for data retrieval, modification, deletion, and insertion (for instance, Access, MySQL, and Oracle). Such applications also can create a database and produce reports.

data culling. The umbrella term used to describe the technical tactics or processes employed to reduce a large document population to a much smaller set.[26]

data custodian. See **custodian**.

[23] Unless otherwise noted, all definitions are derived from Webster's *New World Computer Dictionary*, 10th ed. (Indianapolis, IN; John Wiley & Sons, Inc., 2003).
[24] Source: www.edrm.net/wiki/index.php/Category:Glossary.
[25] Ibid.
[26] Ibid.

data field. In databases, a space reserved for a specified piece of information in a data record. In a table-oriented database management program, in which all retrieval operations produce a table with rows and columns, data fields are displayed as vertical columns.

data manipulation. In databases, the use of the basic database manipulation operations, such as data deletion, data insertion, data modification, and data retrieval, to make changes to data records.

data mining. In a data warehouse, a discovery method applied to very large collections of data. In contrast to traditional database queries, which phrase search questions using a query language (such as SQL), data mining proceeds by classifying and clustering data, often from a variety of different and even mutually incompatible databases and then looking for associations.

de duplication. The process of identifying and segregating those files that are exact duplicates of one another. The goal is to provide a deliverable that contains one copy of each original document while maintaining the information associated with each instance of that document within the collection.[27]

directory tree. A graphical representation of a disk's contents that shows the branching structure of directories and subdirectories. Microsoft Windows 95 and 98 Explorer, for example, display a directory tree.

disaster recovery plan. A written plan with detailed instructions specifying an alternative computing facility to use for emergency processing until a destroyed computer can be replaced.

domain. In a computer network, a group of computers that are administered as a unit. Network administrators are responsible for all the computers in their domain. On the Internet, this term refers to all the computers that are collectively addressable within one of the four parts of an IP address. For example, the first part of an IP address specifies the number of a computer network. All the computers within this network are part of the same domain.

drill down. In data mining, a method of data exploration and analysis that involves more detailed examination of the data that produced a summary value or aggregate.

driver. A program designed to operate a specific peripheral, such as a monitor or printer.

electronically stored information. Defined in this practice aid to mean electronically stored data. See Rule 26(a)(1)(A) of the *Federal Rules of Civil Procedure* and *The*

[27] Ibid.

Sedona Conference® Glossary: E-Discovery & Digital Information Management, 2nd ed. (Sedona, AZ: The Sedona Conference®, 2005).

file permissions. In a multiuser operating system, such as Linux or Microsoft Windows XP, a file attribute that specifies varying levels of file access for different types of file owners (individual owners, group owners, and others). Access levels include no access, read-only access, and read/write access. An additional level of access—execute access—is available for executable programs and scripts. Synonymous with permissions.

file server. In a local area network, a computer that stores on its hard disk the application programs and data files for all the workstations in the network. In a peer-to-peer network, all workstations act as file servers because each workstation can provide files to other workstations. In more common client and server architecture, a single, high-powered machine with a huge hard disk is set aside to function as the file server for all the workstations (clients) in the network.

FTP. Acronym for file transfer protocol. An Internet standard for the exchange of files. FTP (uppercase) is a specific set of rules that comprise a file transfer protocol (note the lowercase letters).

FTP site. On the Internet, an Internet host running an FTP server that makes a large number of files available for downloading.

integrated accounting package. An accounting package that includes all the following major accounting functions: general ledger, accounts payable, accounts receivable, payroll, and inventory. Integrated programs update the general ledger every time an accounts payable or accounts receivable transaction occurs.

LAN. Acronym for local area network. A computer network that uses cables or radio signals to link two or more computers within a geographically limited area (generally one building or group of buildings).

linux. Extremely popular Unix-like operating system created by Linus Torvalds that originally was designed to run on Intel-powered PCs. Linux is free, open source software distributed under the terms of the GNU General Public License.

metadata. The digital attributes of electronic documents that are appended to those documents either during their creation or use in their native application. Metadata is created and exists in its natural state before the electronic discovery process is initiated. The existence of metadata is referenced in the comments to the proposed *Federal Rules of Civil Procedure* and is characterized as the historical, managerial, and tracking components of a document or file; these components can be lost when the document is printed to paper or quasipaper.[28]

[28] Ibid.

mirror. To copy automatically to another storage location.

network. A group of computers or devices that is connected together for the exchange of data and sharing of resources.[29]

operating system. A master control program that manages the computer's internal functions, such as accepting keyboard input, and that provides a means to control the computer's operations and file system.

PAN. A computer network that is designed to serve the needs of an individual rather than a group. PANs are designed to integrate an individual's devices, including desktop computers, notebook computers, personal digital assistants (PDA), and digital cellular phones.

server. Any computer on a network that contains data or applications shared by users of the network on their client PCs.[30]

system. (1) An organized collection of components that have been optimized to work together in a functional whole. (2) The entire computer system, including peripheral devices.

unix. A 32-bit multitasking and multiuser operating system that originated at AT&T's Bell Laboratories and is now used on a wide variety of computers, from mainframes to PDAs.

validation. A process that ensures the data entered into a database form, an Internet form, or a computer program conforms to the correct data type.

virtual. (1) Not real. (2) A computer representation of something that is real.

WAN. Acronym for wide area network. A data network that provides data communications services for businesses and government agencies.

[29] Ibid.
[30] Ibid.

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Appendix G: *Daubert* and *Kuhmo* Case Summaries

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 *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***.[31]

Daubert v. Merrell Dow Pharmaceuticals, Inc.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the court addressed scientific evidence offered by an ***expert witness*** and its ***admissibility***. In summary, the court held that ***trial*** judges are to ensure ***expert witness testimony*** is based on a reliable ***foundation*** and is relevant to the task at hand. In general, the *Daubert* ruling consists of two parts:

1. Is the expertise and ***testimony*** of the ***expert witness*** relevant to matters at issue in the ***trial***?

2. Is the ***testimony*** of the ***expert witness*** reliable because the theory or technique used by the ***expert***

   a. can and has been tested?

   b. has been subjected to peer review and publication?

   c. identifies the known or potential error rate?

   d. is standardized and generally accepted within the relevant peer community?

Kumho Tire Co. vs. Carmichael

Kumho Tire Co. v. Carmichael expanded the gatekeeping function of the ***trial*** judge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* to all ***expert testimony*** based on scientific, technical, or other specialized knowledge, including experience-based technical ***testimony***.

[31] These cases are referenced as guidance only and do not necessarily comprise all factors and considerations related to the ***admissibility*** of expert witness testimony.

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Appendix H: *Civil Litigation* Chart

LITIGATION PHASE	DESCRIPTION OF SERVICES
Dispute	• ***Damages*** quantification • Dispute development and preparation • Early dispute resolution • Fact finding • Investigations
Precomplaint	• Complaint preparation • ***Damages*** quantification • Early case assessment and budgeting • Fact finding • ***Liability*** assessment (limited)
Complaint	• Case management • Case strategy (consulting only) • Class action certification • Motion support
Answer	• Response preparation • Counterclaim preparation
Discovery	• Case strategy (consulting only) • ***Damages*** quantification • Deposition assistance • Document, data and evidence identification, recovery, analysis, management • ***Expert witness deposition testimony*** • ***Interrogatories*** and responses • Production requests and responses • ***Rebuttal*** of opposing ***expert testimony*** • Witness preparation
Pretrial	• ***Trial*** preparations • ***Trial*** demonstratives • Settlement and resolution support
Trial	• ***Expert witness testimony*** • Opposing expert ***cross-examination*** assistance • ***Trial*** preparation • Witness preparation
Posttrial	• Calculation of beneficiary allocations • Distribution of judgments and awards

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Appendix I : Sample Court Document (One Page *Complaint*)

JOE JOHNSON	*	IN THE DISTRICT COURT
1234 Valley Drive	*	OF MARYLAND
Belle Note, Maryland 21101,	*	FOR NORTH EDWARD
Plaintiff,	*	COUNTY
v.	*	CASE NO.: 0000-0000000-2008
STATE INSURANCE FUND.	*	
Served on:	*	
Susan Jones.	*	
Insurance Commissioner	*	
36 Capitol Place	*	
Baltimore, Md 21201,	*	
Defendants.	*	

* *

COMPLAINT

Plaintiff, Joe Johnson (hereinafter referred to as the ***plaintiff***), by and through her attorneys Jimmy Smith and Miller & Smith, LLC, brings suit against the ***defendant***, State Insurance Fund (SIF), and in support thereof states as follows:

COUNT I—BREACH OF CONTRACT—PIP BENEFITS

1. That at all times, the ***defendant***, SIF, was a corporation licensed in the state of Maryland to provide insurance, including, but not limited to, personal injury protection (PIP) coverage.

2. That on or before September 7, 20XX, the ***defendant***, SIF, provided a policy of insurance, which included PIP coverage to the ***plaintiff***.

3. That since January 10, 20XX, the ***plaintiff*** has demanded benefits due her under the PIP policy from the ***defendant***, but the ***defendant*** has refused to pay same.

4. That said denial is without justification.

5. That under *Maryland Code* § 19-508(c), payment of benefits that are not made within 30 days after the insurer receives satisfactory proof of claim, said benefits are overdue and shall bear simple interest at the rate of 1.5 percent per month.

WHEREFORE, the ***plaintiff*** demands ***judgment*** against the ***defendant***, SIF, in the amount of $102,000.00, plus costs.

Respectfully submitted,

MILLER & SMITH, LLC
Jimmy Smith
Attorney for the ***plaintiff***

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Appendix J: Case Study—Shareholder *Dispute*[32]

Preface

An acquaintance meets with Betty Jones of Smith & Jones CPAs to discuss the operations of a business (company A) in which he is part owner. The business is supposed to be managed by another owner, and a third owner (a CPA) handles all record keeping. These two other owners are also coowners of the same type of business they are opening in another town (company Z). Because of his concerns that resources from his business are being used to facilitate the opening of the other business, the acquaintance engages Betty to

1. determine if funds are being misappropriated by the two other owners.

2. assist him, as needed, to recover those funds, if funds are being misappropriated.

The Investigation

As with any litigation support engagement, Jones first prepares an engagement letter to serve as a contract between the new ***client*** and her firm.[33]

Her next step is to gather circumstantial evidence. She prepares a list of the documents needed for her initial investigation, determining that she would start with the three most recent years then expanding the investigation, if necessary.[34] She requests the following from company A:

1. A backup of the QuickBooks company file

2. Three years of bank statements for all bank accounts

3. Copies of all income and payroll tax returns filed, with any supporting documentation

4. All accounts payable files for the three years included in the initial investigation

[32] All cases, characters, names, and places used in examples herein are either the product of the author's imagination or are used fictitiously. Any resemblance to actual person(s), living or dead; events; or locales is entirely coincidental.

[33] See AICPA Forensic and Valuation Services (FVS) Section Practice Aid 04-1, *Engagement Letters for Litigation Services*, for more information.

[34] See AICPA FVS Section Practice Aid 07-1, *Forensic Accounting & Fraud Investigations*, and AICPA FVS Section Special Report, *Forensic Procedures and Specialists: Useful Tools and Techniques*, for more information.

As an owner of the business, the ***client*** has the right to request the documents without having to take legal action. The downside of having to request the information from the other two owners is that it alerts them to the investigation, but Betty and the ***client*** determine that this is the best avenue to take.

Upon receiving the records, Betty performs an analytical review of the information and finds evidence of substantial related party transactions and transactions that appear to be for company Z. After receiving written permission from the ***client***, she requests additional information from the vendors (that is, source of orders, delivery information, payment information, and so on). She also visits both sites, chats with employees, and observes activities. She immediately notices two employees of company A who are working at the site of company Z. She then requests interviews of the employees of company A but is refused access by the two opposing owners. After visiting with her ***client***, Betty prepares her written report of the investigation.[35] The report includes the following:

1. The objectives of the investigation
2. The scope of the investigation
3. Background information on the company and the purpose of the investigation
4. Source documents used
5. A summary of procedures performed
6. Her findings and opinions
7. A conclusion
8. The restrictions on the findings, opinions, and use of the report
9. The assumptions used during the investigation
10. All exhibits
11. Her qualifications
12. Her compensation
13. A list of other cases in which she testified
14. Her signature

[35] See AICPA Practice Aid 96-3, *Communicating in Litigation Services: Reports*, for more information.

Betty's report states that she found almost $500,000 in transactions, and it indicates that the other two owners conspired to utilize assets of company A to facilitate the opening of company Z. Her ***client*** is appalled at the amount. He and his attorney meet with his coowners to discuss the matter. The manager/coowner denies the allegations and refuses to reimburse company A. The CPA/coowner is silent.

Mediation and Arbitration

Betty, Betty's ***client***, and his attorney meet to discuss the options. The attorney mentions two options that would avoid a court proceeding: ***mediation*** and ***arbitration***.

In ***mediation***, an impartial third person assists the parties in reaching a resolution of the ***dispute***. The ***mediator*** does not decide who should win but instead works with the parties to reach a mutually agreeable ***settlement***.

In ***arbitration***, the ***arbitrator*** (an impartial third person) acts as a judge by deciding the case on its merits. The ***arbitration*** can be either binding or nonbinding. If it is binding, the decision of the ***arbitrator*** is the same as a judge's, and the parties cannot later turn to the courts for a decision.

In the hopes of saving money and avoiding public knowledge of the problems, Betty's ***client*** requests ***mediation***. The manager/coowner continues to deny that there is anything to mediate. The CPA/coowner continues his silence. Betty's ***client*** has two choices at this point: work with law enforcement in pursuit of criminal charges or file a civil action. He chooses a civil action because it presents the best chance of recovering the misappropriated funds.

The Civil Action

The civil action is commenced by filing a ***complaint*** with the court. In order to be inclusive, Betty's ***client***, now the ***plaintiff***, files a ***complaint*** against the other two coowners and company Z. Included with the ***complaint*** are three copies of the summons, one for each of the ***defendants***, which are signed by the clerk and served upon the ***defendants***. They are given 20 days to respond.

The response is received within one week. All three ***defendants*** have hired the same attorney, and they have denied all the allegations in the ***complaint***. They ask the court to dismiss the proceedings. A hearing is set for two weeks later. During the hearing, the ***plaintiff*** testifies to the evidence found during Betty's preliminary investigation. The judge denies the request to dismiss. At that time, he also signs ***subpoenas*** for copies of the personal financial records of the individual ***defendants*** and the corporate financial records of company Z.

At this point, Betty's initial engagement has changed, so she issues a new engagement letter covering the additional records, a more distinct purpose, assistance to the ***client's*** attorney, and the possibility of ***expert testimony***.

Her analysis of the additional records verifies her original findings. She updates her report to include this new information, being particularly aware that this report will be filed with the court. She knows that the copy provided to the ***defendants*** also will be given to their ***expert witness***, whose main purpose is to find ways to question and discredit the report. Betty, aware that she is not protected by any privilege, is very careful about what she puts in writing and also is careful to maintain her files properly in case they are ***subpoenaed***. She meets frequently with her ***client's*** attorney to discuss the various ***motions***, ***counterclaims***, and cross-claims filed by the parties. During this time, it also is disclosed that she will testify as an ***expert witness***.

Betty assists the attorney in preparing ***interrogatories*** for the ***defendants*** and in preparing for ***depositions*** of related parties, including the two company A employees she saw working at company Z. As expected, Betty receives a notice of her own ***deposition*** by the opposing attorney.

Then there is a surprise filing. The CPA/coowner ***defendant*** has hired a different attorney and is claiming he was not involved in any alleged ***misappropriation*** and had no knowledge of any such activities. He also asks that his proceeding be severed from that against the other coowner and company Z. Betty is not surprised by this because he could lose his CPA license if he was found guilty,[36] and it is taken as a good sign by her client and his attorney. The judge denies the request to sever the proceedings, so the new attorney then approaches the ***plaintiff's*** attorney about a ***settlement***. He continues to assert that his ***client*** was unaware of any of the alleged activities, and publicity from the lawsuit and ***trial*** would have a negative impact on his ***client's*** practice. Betty goes back to the audit trail in the QuickBooks provided for company A and shows that the CPA had changed transactions in order to hide the ***misappropriation***. The assertions of innocence are dropped but pursuit of a financial ***settlement*** continues. Betty's ***client*** wants justice but understands that the cost of pursuing justice through the courts might exceed any benefit he would receive. Eventually, the ***client*** agrees to accept $300,000 and the CPA's share of ownership in company A in exchange for dismissing him from the lawsuit.

The journey through the ***discovery*** process continues, and Betty's turn to be deposed arrives. She has done this before and knows that a ***deposition*** is often more stressful than testifying in court. During court ***testimony***, the judge will keep ***testimony*** to relevant questions, and her ***client's*** attorney can object to a question before she ***answers***. Frequently, a ***deposition*** is more of a "fishing trip," and although her ***client's*** attorney may object to the form of a question, she still has to ***answer***. Opposing attorneys may badger, belittle, or attempt to confuse in order to get information. She reviews all the sources of information in her report so they are fresh in her mind and realizes that remaining calm and taking her time to ***answer*** is the key. Her ***deposition*** takes most of a day, and in the end, she wishes she had said a few things differently, but her ***client's*** attorney is pleased with her ***testimony***.

[36] See Rule 102, *Integrity and Objectivity* (AICPA, *Professional Standards*, vol. 2, ET sec. 102 par. .01), and Rule 501, *Acts Discreditable* (AICPA, *Professional Standards*, vol. 2, ET sec. 501 par. .01).

Her ***client's*** attorney then deposes the ***expert*** for the ***defendants***. His main issue with her report is that there was no proof that the QuickBooks company file hadn't been tampered with prior to its delivery to Betty and that the CPA was the guilty one, not the manager/coowner. Betty again uses the QuickBooks audit trail to verify that the only changes made were those made to cover up ***misappropriation*** and that orders were made and checks were written by the manager/coowner. This is further verified by the bank statements and the records received from vendors. Alternatively, he suggests that the funds used were actually just loans to the ***defendants***, even though no loan documents were prepared and a loan was never discussed with, or approved by, Betty's ***client***. Her ***client's*** attorney considers this ruse to be easily cleared up in court.

As the date for ***trial*** approaches, the attorney for the remaining ***defendants*** begins dropping hints about a possible ***settlement***, but no offer is made. Betty and her ***client's*** attorney spend time making easy-to-follow exhibits for use during her ***testimony***, and he reviews with her the questions he intends to ask and the points he expects the opposing attorney will try to make.

The ***trial*** date eventually arrives and jury selection begins. All jurors and alternates are selected and given instructions by the end of the first day. The attorney had told Betty that her ***testimony*** would probably begin the afternoon of the following day and may go into the third day, so she spends the next morning reviewing all records. As she is leaving for the courthouse, she receives a call from her ***client's*** attorney telling her that the ***defendant's*** attorney had come forward with a serious offer for ***settlement***, and the ***trial*** had recessed for the afternoon. No ***settlement*** was reached, however, so Betty showed up the next morning to testify.

Her ***testimony*** takes most of the morning, and she believed she did a good job of explaining the procedures she used during her investigation and the results thereof. After lunch was ***cross-examination***, with opposing counsel trying to misrepresent some of the things she had said that morning and also trying to get her to say that her results were not conclusive. Betty took her time and allowed her ***client's*** attorney to object to the questions before ***answering***. Above all, she knew not to take it personally.

When she was dismissed from the witness stand, she breathed a sigh of relief. Although she knew she could be called back to the stand, she knew the worst part was over. One of the two company A employees she saw working at company Z would testify that afternoon as the last witness for the ***plaintiff***. The ***defendant's testimony*** would begin the following day. Her ***client's*** attorney was again approached about a ***settlement***—this time a reasonable offer—but her ***client*** smelled victory and wouldn't even consider it.

The defense concluded ***testimony*** by its witnesses by the afternoon of the following day, at which time her ***client's*** attorney filed a ***motion*** for ***judgment as a matter of law***. The judge agreed that there was no legally sufficient evidentiary basis for the jury to find for the defense and granted the ***motion***. The jury was dismissed.

The ***judgment*** called for payment of $500,000, plus court costs and attorney's fees, which was later negotiated to $400,000, plus court costs and attorney's fees, plus transfer of the ***defendant's*** ownership in company A to Betty's ***client***.

Moreover, in the best compliment of all, Betty was contacted by the opposing attorney who wanted to hire her as an ***expert witness*** in another case.

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Appendix K: Bibliography and Reference Materials

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