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2005

# Omnibus proposal of professional ethics division interpretations and rulings; Exposure draft (American Institute of Certified Public Accountants), 2005, Sept. 15

American Institute of Certified Public Accountants. Profesional Ethics Executive Committee

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# EXPOSURE DRAFT

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## OMNIBUS PROPOSAL OF PROFESSIONAL ETHICS DIVISION INTERPRETATIONS AND RULINGS

PROPOSED NEW INTERPRETATION 101-16 UNDER RULE 101: *Indemnification, Limitation of Liability, and ADR Clauses in Engagement Letters* □ PROPOSED DELETION OF ETHICS RULING NO. 94 UNDER RULE 101: *Indemnification Clause in Engagement Letters* □ PROPOSED DELETION OF ETHICS RULING NO. 95 UNDER RULE 101: *Agreement With Attest Client to Use ADR Techniques* □ PROPOSED NEW INTERPRETATION 101-17 UNDER RULE 101: *Performance of Client Advocacy Services, Fact Witness Testimony, and Forensic Accounting Services*

**September 15, 2005**

Prepared by the AICPA Professional Ethics Executive Committee for comments from persons interested in independence, behavioral, and technical standards matters

Comments should be received by December 16, 2005, and addressed to  
Lisa A. Snyder, Director, Professional Ethics Division,  
AICPA, Harborside Financial Center, 201 Plaza Three,  
Jersey City, NJ 07311-3881 or via the Internet at [lsnyder@aicpa.org](mailto:lsnyder@aicpa.org).

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September 15, 2005

This exposure draft contains an important proposal for review and comment by the AICPA's membership and other interested parties regarding pronouncements for possible adoption by the Professional Ethics Executive Committee (the PEEC, or committee). The text and an explanation of the proposed pronouncements are included in this exposure draft.

After the exposure period is concluded and the committee has evaluated the comments, the committee may decide to publish one or more of the proposed pronouncements. Once published, the pronouncements become effective on the last day of the month in which they are published in the *Journal of Accountancy*, except as may otherwise be stated in the pronouncements.

Your comments are an important part of the standard-setting process. Please take this opportunity to comment. Responses must be received at the AICPA by December 16, 2005. All written replies to this exposure draft will become part of the public record of the AICPA and will be available for inspection at the office of the AICPA after January 16, 2006, for a period of one year.

All comments received will be considered by the committee at an open meeting that will be announced in the *CPA Letter* and posted to the division's Web site.

Please send comments to Lisa A. Snyder, Director, AICPA Professional Ethics Division, Harborside Financial Center, 201 Plaza Three, Jersey City, NJ 07311-3881 or via the Internet to [lsnyder@aicpa.org](mailto:lsnyder@aicpa.org). Comments submitted via electronic mail are encouraged and would be appreciated.

Sincerely,

Bruce P. Webb  
*Chair*  
*AICPA Professional Ethics*  
*Executive Committee*

Lisa A. Snyder  
*Director*  
*AICPA Professional*  
*Ethics Division*

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**PROPOSED INTERPRETATION 101-16, INDEMNIFICATION, LIMITATION OF LIABILITY, AND ADR CLAUSES IN ENGAGEMENT LETTERS, UNDER RULE 101, INDEPENDENCE**

*[Explanation]*

Since September 2004, the Professional Ethics Executive Committee (PEEC, or committee) has been actively studying the use of indemnification and limitation of liability provisions in member engagement letters and has engaged in numerous discussions and deliberations regarding the impact such provisions may have on a member's independence. In deliberating these issues, the PEEC considered guidance issued by other regulators, including the Securities and Exchange Commission (SEC), as well as the Proposed Advisory issued by the Federal Financial Institutions Examination Council (FFIEC) on May 10, 2005, *Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions and Certain Alternative Dispute Resolution Provisions in External Audit Engagement Letters*. However, the PEEC was mindful that there are critical differences between public or regulated entities and nonpublic companies with respect to regulatory oversight and requirements; investor and marketplace communications, access, and interactions; and board of directors and audit committee composition, responsibilities, and procedures.

The PEEC believes that certain indemnification or limitation of liability provisions would result in an unacceptable threat to a member's independence that could not be mitigated sufficiently through the application of safeguards. For example, in cases where the member seeks to limit or eliminate his or her liability with respect to actual damages arising from the member's negligence or the client's negligence, independence would be considered to be impaired. In such cases, the threat to independence posed by a member's performance of insufficient attest procedures in reliance on the belief that he or she is protected through an indemnification or limitation of liability clause could not be reduced to an acceptable level. In addition, certain other provisions were identified by the PEEC as impairing a member's independence such as a limitation of the period during which the client would be otherwise legally entitled to file a claim and any limitation on the client's legal right to assign or transfer a claim or potential claim to its successors or assigns.

On the other hand, the PEEC believes that an indemnification or limitation of liability provision that seeks to limit or eliminate a member's liability arising from the client's knowing misrepresentation, willful misconduct, or fraudulent behavior would not impair independence. This has been a long-standing position of the committee with respect to knowing misrepresentations, as reflected in ethics ruling no. 94 under Rule 101, *Indemnification Clause in Engagement Letters* [ET section 191.188], and the committee believes that position should be expanded to specifically include willful misconduct and fraudulent behavior. (Ethics ruling no. 94 is proposed for deletion as the guidance would be reflected in the proposed interpretation.) Specifically, the PEEC continues to believe that permitting a member and his or her client to agree to a limitation of liability or indemnity for claims resulting from knowing misrepresentations by management is fundamentally fair both to the client and to the member, and also furthers the public interest. Such a limitation of liability or indemnity is a significant deterrent to management fraud and shifts to the client, which is where it properly belongs, the

responsibility for management's deliberate and improper misrepresentations. For example, such a clause would apply where a client intentionally misleads an auditor or lies to an auditor. However, the use of such a clause does not relieve the member, in the case of an audit, of the responsibility to comply with generally accepted auditing standards (GAAS) and does not eliminate his or her liability to shareholders, regulators or others for audits not conducted in accordance with those standards. The committee believes that the use of this type of limitation of liability and indemnification provision encourages management to completely and accurately disclose and communicate all pertinent matters to the member, and that result benefits the financial statement users.

The PEEC also believes that a limitation of liability agreement, in which a member would not be liable to a client for *punitive* damages, would not impair the member's independence provided the member remains liable to the client for actual damages. Specifically, the member still remains exposed to clients, and also to lenders, shareholders and other nonclients, for damages for any *actual* harm caused. The committee believes that the amount of actual damages can be significant, and can often equal hundreds of times (or more) the fees generated in connection with the engagement. Accordingly, the committee believes that the possibility that actual damages might be awarded against a member in favor of clients and/or nonclients serves as a sufficient safeguard to mitigate the threats to a member's independence. The committee also agreed that any agreement to limit or exclude punitive damage claims brought by lenders, shareholders, or other nonclient third parties should not be permitted and accordingly, independence would be considered impaired if a member enters into an agreement to be indemnified from third-party claims for punitive damages.

The proposed interpretation makes clear that the use of indemnification or limitation of liability provisions does not relieve a member from the requirement to exercise due professional care and comply with all professional standards (for example, in the case of an audit, specific performance standards under GAAS) as required by Rule 201, *General Standards* [ET section 201], and Rule 202, *Compliance With Standards* [ET section 202].

The proposed interpretation also provides guidance on arrangements whereby a member and client agree to use arbitration, mediation, or other alternative dispute resolution (ADR) methods to resolve a dispute between them, or agree to waive a jury trial. The PEEC does not believe independence would be impaired when a member and his or her client agree to use an ADR procedure to resolve disputes between them provided such a provision does not limit a member's liability for actual damages. Specifically, ADR clauses merely determine the forum in which a dispute will be heard and decided, and facilitate dispute resolution between the member and the client. However, if an ADR clause incorporates an indemnification or limitation of liability provision that would impair independence, then the ADR clause would also impair independence. In addition, the PEEC does not believe that waiver of a jury trial would impair independence provided such a provision does not limit a member's liability for actual damages. Such a waiver merely specifies one procedural aspect of a how a dispute will be resolved.

Finally, the proposed interpretation states that independence would not be impaired if a member and the client agree that the unsuccessful party in a lawsuit or ADR between them will pay the legal fees and expenses of the successful party, and the interpretation clarifies that an

indemnification or limitation of liability provision related to nonattest services performed for a client (that is, where the provision relates only to the nonattest services engagement and not the attest engagement) would not impair a member's independence with respect to that client.



**PROPOSED INTERPRETATION 101-16, INDEMNIFICATION, LIMITATION OF LIABILITY, AND ADR CLAUSES IN ENGAGEMENT LETTERS, UNDER RULE 101, INDEPENDENCE**

[Text of Proposed Interpretation]

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**Terminology**

The following specifically identified terms are used in this interpretation as indicated:

- A. **Member.** The term *member* includes both a member and his or her firm.
- B. **Indemnification.** An *indemnification* is a client's agreement to compensate a member for loss, damage or costs sustained or incurred by that member as a result of claims made against the member by a third party (for example, a lender or shareholder). An indemnification does not insulate a member from claims asserted by the client.
- C. **Limitation of Liability Provisions.** A *limitation of liability provision* is a client's agreement to restrict the damages the client could recover from a member arising out of the member's performance of professional services. A limitation of liability provision does not insulate a member from claims asserted by third parties.
- D. **ADR.** The term *ADR* refers to an alternative dispute resolution proceeding.
- E. **Actual Damages.** *Actual damages* consist of audit fees and other out-of-pocket costs as well as incidental or consequential damages that are caused by the wrongful conduct (for example, economic losses).<sup>1</sup>
- F. **Punitive Damages.** *Punitive damages* are monetary recoveries by plaintiffs in private civil litigation that are in addition to actual damages. Such damages may be available, depending on circumstances and the law of the relevant jurisdiction, absent exclusion by contract, to punish someone found liable in civil litigation.<sup>1</sup>

**Interpretation**

This interpretation provides guidance to members concerning the impact that certain indemnification and limitation of liability provisions may have on a member's independence when included in engagement letters or other agreements entered into with a client. Certain types of indemnification and limitation of liability provisions pose an unacceptable threat to a

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<sup>1</sup> This term is defined solely for purposes of this interpretation and the laws in a particular jurisdiction may not define damages in this manner. Accordingly, members should consult their legal advisers when drafting engagement letters or similar arrangements to ensure that the types of damages are properly described.

member's independence. The interpretation also provides guidance on arrangements whereby a member and client agree to use arbitration, mediation, or other ADR methods to resolve a dispute between them, or an agreement to waive a jury trial.

In all cases, the inclusion of an indemnification or limitation of liability provision does not relieve a member from the requirement to exercise due professional care and comply with all professional standards (for example, in the case of an audit, specific performance standards under generally accepted auditing standards (GAAS)) as required by Rule 201, *General Standards* [ET section 201], and Rule 202, *Compliance With Standards* [ET section 202].

Members should refer to ethics interpretation 101-6 [ET section 101.08] and ethics ruling no. 96 under rule 101 [ET section 191.192] for guidance on the impact on independence of threatened or actual litigation or ADR between the client and the member.

### **Attest services engagements**

The following describe the impact of indemnification, limitation of liability, and certain other provisions in connection with an attest engagement. .

#### Member's negligence, willful misconduct, or fraudulent behavior

An indemnification or limitation of liability provision that seeks to limit or eliminate the member's liability with respect to actual damages arising from the member's negligence, willful misconduct, or fraudulent behavior would impair independence.

#### Client's negligence

An indemnification or limitation of liability provision that seeks to limit or eliminate a member's liability with respect to actual damages arising from the client's negligence would impair independence.

#### Client's knowing misrepresentation, willful misconduct, or fraudulent behavior

An indemnification or limitation of liability provision that seeks to limit or eliminate a member's liability with respect to actual or punitive damages arising from the client's knowing misrepresentation, willful misconduct, or fraudulent behavior would not impair independence.

#### Unsuccessful party to pay adversary's fees (loser pays arrangement)

Independence would not be impaired if a member and the client agree that the unsuccessful party in a lawsuit or ADR between them will pay the legal fees and expenses of the successful party.

#### Punitive damages

A limitation of liability provision, in which a member would not be liable to a client for punitive damages, would not impair the member's independence provided the member remains liable to

the client for actual damages.

#### Other limitations

A limitation of the time period during which the client would be otherwise legally entitled to file a claim, or a limitation or exclusion of actual damages occurring prior to the date on which such claims legally lapse, would impair independence. In addition, any limitation on the client's legal right to assign or transfer a claim or potential claim to its successors or assigns would impair independence.

#### ADR and waiver of jury trial

An agreement between a member and client to use arbitration, mediation, or other ADR method to resolve a dispute between them, or an agreement between a member and client to waive a jury trial in a dispute between them, would not impair the member's independence provided such provisions do not limit the member's liability for actual damages.<sup>2</sup> However, if an ADR clause incorporates a provision, procedure, or rule that would impair independence under the preceding guidance, the ADR clause would impair independence.

#### **Nonattest services engagements**

An indemnification or limitation of liability provision related to nonattest services performed for a client would not impair a member's independence with respect to that client.

#### **Transition**

Independence would not be impaired as a result of the more restrictive requirements of this interpretation for engagements commenced prior to [*effective date dependent on publication date in the Journal of Accountancy*] where the member complied with all applicable independence interpretations and rulings in effect prior to [*effective date dependent on publication date in the Journal of Accountancy*].

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<sup>2</sup> Some jurisdictions may limit or fail to give effect to certain of these arrangements.

## PROPOSED DELETION OF ETHICS RULINGS NO. 94 AND NO. 95 UNDER RULE 101- INDEPENDENCE

### **94. ~~Indemnification Clause in Engagement Letters~~**

~~.188 *Question*—A member or his or her firm proposes to include in engagement letters a clause that provides that the client would release, indemnify, defend, and hold the member (and his or her partners, heirs, executors, personal representatives, successors, and assigns) harmless from any liability and costs resulting from knowing misrepresentations by management. Would inclusion of such an indemnification clause in engagement letters impair independence?~~

~~.189 *Answer*—No.~~

~~[Revised, July 2002, to reflect conforming changes necessary due to the revision of interpretation 101-1.]~~

### **95. ~~Agreement With Attest Client to Use ADR Techniques~~**

~~.190 *Question*—Alternative dispute resolution (ADR) techniques are used to resolve disputes (in lieu of litigation) relating to past services, but are not used as a substitute for the exercise of professional judgment for current services. Would a predispute agreement to use ADR techniques between a member or his or her firm and a client cause independence to be impaired?~~

~~.191 *Answer*—No. Such an agreement would not cause independence to be impaired since the member (or the firm) and the client would not be in threatened or actual positions of material adverse interests by reason of threatened or actual litigation.~~

~~[Revised, July 2002, to reflect conforming changes necessary due to the revision of interpretation 101-1.]~~

**PROPOSED INTERPRETATION 101-17, PERFORMANCE OF CLIENT ADVOCACY SERVICES, FACT WITNESS TESTIMONY, AND FORENSIC ACCOUNTING SERVICES, UNDER RULE 101, INDEPENDENCE**

***[Explanation]***

The Professional Ethics Executive Committee (PEEC, or Committee) is proposing an ethics interpretation that would provide guidance on how the provision of those services, typically classified under litigation/forensic services, would affect a member's independence with respect to his or her attest clients. In developing the proposed standard, the committee sought input and feedback from a number of experts and practitioners in this field to ensure the development of meaningful and practical guidance. The committee also considered existing guidance under Interpretation 102-6, *Professional Services Involving Client Advocacy* [ET section 102.07], under Rule 102-*Integrity and Objectivity*, but acknowledged that this guidance is limited in its focus and scope, addressing only the objectivity concerns associated with advocating on behalf of a client in tax or consulting services, or otherwise advocating in support of a client's position on accounting or financial reporting issues. The committee believes such existing guidance fails to adequately address the breadth of services being provided and roles in which members are being asked to serve in today's practice environment. While Interpretation 102-6 would still remain applicable to both attest and nonattest clients, the committee believes more detailed and comprehensive guidance is required to address the threats to a member's independence when he or she performs such services for an attest client.

Early on, the committee concluded that the term *litigation services* did not accurately reflect the true nature of services customarily provided in this area for clients and agreed to replace it with the term *forensic accounting services*. Key to the development of this proposal is the overriding principle that independence is deemed to be impaired when an expectation of confidentiality of information between the member and the client/client attorney exists, and the communication of any information uncovered by the member during the course of the forensic engagement is restricted (for example, subject to the attorney-client privilege or attorney-work product doctrine) and therefore, cannot be shared with members of the attest engagement team. In addition, the committee concluded that there are significant differences between the various types of forensic accounting services performed for clients and acknowledged that certain services should be subject to the general requirements<sup>3</sup> of Interpretation 101-3, *Performance of Nonattest Services*

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<sup>3</sup> General Requirements for Performing Nonattest Services

1. The member should not perform management functions or make management decisions for the attest client. However, the member may provide advice, research materials, and recommendations to assist the client's management in performing its functions and making decisions.
2. The client must agree to perform the following functions in connection with the engagement to perform nonattest services:
  - a. Make all management decisions and perform all management functions;
  - b. Designate an individual who possesses suitable skill, knowledge, and/or experience, preferably within senior management, to oversee the services;
  - c. Evaluate the adequacy and results of the services performed;
  - d. Accept responsibility for the results of the services; and
  - e. Establish and maintain internal controls, including monitoring ongoing activities.

[ET section 101.05], while others, such as expert witness services, should not be subject to the general requirements because due to the nature of the services, the *management participation threat* (that is, the threat of a member taking on the role of client management or otherwise performing management functions on behalf of an attest client) is at an acceptable level.

For purposes of the proposed interpretation, forensic accounting services involve the application of specialized accounting, auditing, finance, and quantitative methods, and skills in various aspects of law, research and investigative methods to collect, analyze, and evaluate evidential matter, and to interpret and communicate these findings. Under the proposal, forensic accounting services consist of (1) litigation services and (2) investigative services.

### *Litigation Services*

Litigation services are those services provided as part of actual, pending, or potential legal or regulatory proceedings before a trier of fact in connection with a resolution of disputes between parties. They consist of expert witness services, consulting services, and other services such as serving as a court-appointed expert, special master, trier of fact, referee, arbitrator, or mediator.

Expert witness services are not subject to the general requirements of Interpretation 101-3 because experts must testify as to their own representations, opinions, and understanding of facts regarding the matters under consideration. Accordingly, the *management participation threat* is deemed to be at an acceptable level. However, if, a member assumes the role of client management, performs management functions, makes decisions on behalf of client management, or advocates on behalf of a client, independence would be considered to be impaired. In addition, independence would be considered to be impaired if performance of the expert service results in an expectation of confidentiality of information between the client/client attorney and

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The member should be satisfied that the client will be able to meet all of these criteria and make an informed judgment on the results of the member's nonattest services. In assessing whether the designated individual possesses suitable skill, knowledge, and/or experience, the member should be satisfied that such individual understands the services to be performed sufficiently to oversee them. However, the individual is not required to possess the expertise to perform or re-perform the services. In cases where the client is unable or unwilling to assume these responsibilities (for example, the client does not have an individual with suitable skill, knowledge, and/or experience to oversee the nonattest services provided, or is unwilling to perform such functions due to lack of time or desire), the member's provision of these services would impair independence.

3. Before performing nonattest services, the member should establish and document in writing <sup>5</sup> his or her understanding with the client (board of directors, audit committee, or management, as appropriate in the circumstances) regarding the following:
  - a. Objectives of the engagement
  - b. Services to be performed
  - c. Client's acceptance of its responsibilities
  - d. Member's responsibilities
  - e. Any limitations of the engagement

The documentation requirement does not apply to:

- a. Nonattest services performed prior to January 1, 2005.
- b. Nonattest services performed prior to the client becoming an attest client. <sup>6</sup>

General requirements 2 and 3 above do not apply to certain routine activities performed by the member such as providing advice and responding to the client's questions as part of the normal client-member relationship.

the member, and the communication of any information uncovered by the member during the course of the engagement is restricted.

Under the proposal, litigation consulting services involve providing advice about the facts, issues, and strategy of a matter without testifying as an expert witness before a trier of fact. Such services are subject to the general requirements of Interpretation 101-3. In addition, providing any such consulting service to an attest client would impair independence if the communication of any information uncovered by the member during the course of the engagement is restricted.

The committee also agreed that serving as a trier of fact, special master, court-appointed expert, referee, arbitrator, or mediator on behalf of a client (that is, other services) may create the appearance that the member is performing either management functions or making management decisions on behalf of the client, and may also have a direct impact on the subject matter of an attestation engagement. Accordingly, independence would be considered to be impaired if such services were performed for a client.

#### *Investigative Services*

Investigative services include all forensic accounting services that do not involve actual or threatened litigation, including the performance of analyses and investigations that may involve the same skills as litigation services but do not involve the litigation process. Under the proposal, provision of these services would not impair independence provided the services comply with the general requirements of Interpretation 101-3.

#### *Client Advocacy Services and Fact Witness Testimony*

The proposed interpretation also provides guidance on the provision of client advocacy services and fact witness testimony. The committee acknowledged that these services are by their very nature substantially different from, and outside the scope of, forensic accounting services. However, the committee believed it was appropriate for the proposed interpretation to address these services so comprehensive guidance exists in one place for the convenience of the user.

When a member performs client advocacy services for a client, the member begins to speak for, or on behalf of the client; or leads, substantially directs, or implements the litigation effort. In such a case, the threat to a member's independence as a result of the *advocacy threat* (that is, the threat of a member promoting an attest client's interests or position) and *management participation threat* cannot be reduced to an acceptable level and, therefore, such services would be considered to impair independence.

The committee acknowledged that when providing fact witness testimony (sometimes referred to as a percipient or sensory-witness testimony), the member's role is to provide factual testimony to the trier of fact and the member is not acting in any capacity for the client, nor engaged by the client or the client's attorney. Accordingly, providing fact witness testimony is not deemed to create a threat to the member's independence. However, should the member be engaged by the client or the client's attorney, he or she would be considered to be performing forensic accounting services and subject to those provisions previously described.

**PROPOSED INTERPRETATION 101-17, PERFORMANCE OF CLIENT ADVOCACY SERVICES, FACT WITNESS TESTIMONY, AND FORENSIC ACCOUNTING SERVICES, UNDER RULE 101, INDEPENDENCE**

[Text of Proposed Interpretation]

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**Client Advocacy Services**

*Client advocacy services* are those services where a member lacks impartiality; speaks for or on behalf of the client; leads, substantially directs or implements the litigation effort; performs management functions, makes management decisions, or acts in a capacity equivalent to that of a member of client management and are not considered to be forensic accounting services. Independence would be considered to be impaired if, during the period covered by the financial statements or during the period of the professional engagement, a member serves in an advocacy role for, or on behalf of, a client. Regardless of whether or not a member performs advocacy services, the performance of any management functions or making management decisions on behalf of a client would impair independence.

**Fact Witness Testimony**

A *fact witness* is also referred to as a percipient witness or a sensory witness. Fact witness testimony is based on the member's knowledge of facts obtained in the performance of professional services on behalf of the client and may also include a factual description of the professional services performed by a member or his or her firm and an explanation of the positions taken or conclusions reached during the performance of those services. As a fact witness, the member's role is to provide factual testimony to the trier of fact. The member is neither acting in any capacity for the client nor engaged by the client or the client's attorney. Should the member be engaged by either, he or she would be considered to be performing forensic accounting services and subject to those provisions. While serving as a fact witness, a member may be called upon to testify as to his or her opinions pertaining to matters within the member's area of expertise. In such circumstances, independence would not be considered to be impaired.

**Forensic Accounting Services**

*Forensic accounting services* generally involve the application of special skills in accounting, auditing, finance, quantitative methods, certain areas of the law, and research, and investigative skills to collect, analyze, and evaluate evidential matter and to interpret and communicate findings, and may involve either an attest or consulting engagement. For purposes of this interpretation, forensic accounting services consist of:

- **Litigation services; and**
- **Investigative services**



**Litigation services** recognize the role of the member as an expert or consultant and consist of 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. Litigation services generally consist of the following services:

- a. *Expert witness services* are those litigation services where a member is designated to render an opinion before a trier of fact as to the matter(s) in dispute.

Expert witness services are not subject to the general requirements of Interpretation 101-3, *Performance of Nonattest Services* [ET section 101.05], because due to the nature of these services, the management participation threat is at an acceptable level. Specifically, an expert witness must testify as to his or her own representations, opinions, and understanding of facts regarding the matter(s) under consideration (that is, not the representations of the client or client management); therefore, the risk of taking on the role of client management or making management decisions is reduced to an acceptable level provided the member does not assume an advocacy role. However, if, during the period covered by the financial statements or during the period of professional engagement, a member assumes the role of client management, performs management functions, makes decisions on behalf of client management (for example, by calculating material amounts included in the financial statements), or advocates on behalf of a client, independence would be considered to be impaired.

In addition, independence would be considered to be impaired if during the period of the professional engagement, performance of the expert service results in an expectation of confidentiality of information between the client/client attorney and the member, and the communication of any information uncovered by the member during the course of the engagement is restricted (that is, cannot be communicated to members of the attest engagement team). This would include documents provided to the member via a court-ordered confidentiality agreement. The independence impairment is deemed to occur when information is restricted (for example, subject to the attorney-client privilege or attorney-work product doctrine). Thus, to the extent that the member cannot communicate the information contained in these documents to other firm personnel planning or performing an attest service, independence would be impaired.

- b. *Consulting services* are those litigation services where a member provides advice about the facts, issues, and strategy of a matter. The consultant does not testify as an expert witness before a trier of fact unless the consultant's role subsequently changes to that of an expert witness.

Consulting services are nonattest services subject to the general requirements of Interpretation 101-3, *Performance of Nonattest Services*. In addition to compliance with the general requirements of that interpretation, providing any consulting service to an attest client would impair independence if, during the period covered by the financial statements or during the period of the professional engagement, the communication of any information uncovered by the member during the course of the engagement is restricted.

- c. *Other services* are those litigation services where a member serves as a trier of fact, special master, court-appointed expert, referee, arbitrator, or mediator on behalf of a client. These other services may create the appearance that the member is either performing management functions or making management decisions on behalf of the client, and may also have a direct impact on the subject matter of an attestation engagement. Accordingly, independence would be considered to be impaired if during the period covered by the financial statements or during the period of the professional engagement, a member were to serve in such a role. This proscription also applies when serving as part of an arbitration panel. In this case, independence would be impaired regardless of whether the communication of any information uncovered by the member during the course of the engagement is restricted.

***Investigative services*** include all forensic services not involving actual or threatened litigation such as performing analyses or investigations that may require the same skills as used in litigation services, but do not involve the litigation process. Such services would not impair independence provided the member complies with the general requirements of Interpretation 101-3.

### **Compliance With Independence Requirements of Other Regulatory Bodies**

This interpretation requires compliance with independence regulations of authoritative regulatory bodies (such as the Securities and Exchange Commission, the Government Accountability Office, the Department of Labor, and state boards of accountancy) when the member is required to be independent of the client under the regulations of the applicable regulatory body. Accordingly, failure to comply with the provisions contained in the independence rules of the applicable regulatory body that are more restrictive than the provisions of this interpretation would constitute a violation of this interpretation.

### **Transition**

Independence would not be impaired as a result of the more restrictive requirements of this interpretation for engagements commenced prior to [*effective date dependent on publication date in the Journal of Accountancy*] where the member complied with all applicable independence interpretations and rulings in effect prior to [*effective date dependent on publication date in the Journal of Accountancy*].