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EXPOSURE DRAFT

PROPOSED STATEMENT ON RESPONSIBILITIES FOR LITIGATION SERVICES NO. 1

December 1, 2001

**Prepared by
Litigation and Dispute Resolution Subcommittee
Statement on Responsibilities Task Force**

**Comments should be received by January 31, 2002, and addressed to
Anat Kendal, Director, Member Innovation—Financial Planning, Harborside Financial Center,
201 Plaza Three, Jersey City, NJ 07311-3881
or via the Internet to sorls@aicpa.org.**

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The CPA. Never Underestimate The Value®

December 1, 2001

Accompanying this letter is an exposure draft of a proposed AICPA Statement on Responsibilities (SOR) for Litigation Services, authored by the Litigation and Dispute Resolution Subcommittee of the Consulting Services Executive Committee. The exposure draft sets forth the responsibilities of a litigation services practitioner in a litigation services engagement. The purpose of this exposure draft is to solicit comments from CPAs who provide litigation services and other interested parties.

The proposed SOR provides guidance on the application of the Statement on Standards for Consulting Services for a CPA providing litigation service consulting. The exposure draft accomplishes the following:

1. Incorporates into the SOR selected provisions of Special Reports that have been issued previously by the AICPA.
2. Provides guidance as to the application of consulting standards in a litigation services engagement.
3. Recognizes the impact of recent U.S. Supreme Court decisions relative to expert testimony and related changes in the federal Rules of Evidence.

Comments or suggestions on any aspect of this exposure draft will be appreciated. To facilitate the subcommittee's consideration of responses, comments should refer to specific paragraphs and include supporting reasons for each suggestion or comment. In developing guidance, the subcommittee has attempted to consider the relationship between the cost imposed and the benefits reasonably expected to be derived from a Statement on Responsibilities.

The subcommittee has also attempted to consider the differences that practitioners may encounter in the provision of litigation services and, when appropriate, has attempted to make special provisions to meet those needs. Therefore, the subcommittee would particularly appreciate comments on these matters.

Written comments on the exposure draft will become part of the public record of the AICPA and will be available for public inspection at the offices of the AICPA on or after January 31, 2002, for one year. Responses should be sent to Anat Kendal in time to be received by January 31, 2002. Responses may also be sent by electronic mail to sorls@aicpa.org.

Sincerely,

Sandra K. Johnigan, CPA
Chairperson, Litigation and Dispute
Resolution Subcommittee
Consulting Services Executive Committee

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PROPOSED STATEMENT ON RESPONSIBILITIES FOR LITIGATION SERVICES NO. 1

SCOPE OF LITIGATION SERVICES

Purpose of the Statement on Responsibilities

1. The purpose of this Statement on Responsibilities (SOR) is to provide practitioners with additional guidance on the existing professional standards that affect the litigation services practitioner.

Definition of Litigation Services

2. Litigation services are consulting services that involve pending or potential formal legal or regulatory proceedings before a trier of fact in connection with the resolution of a dispute between two or more parties. A trier of fact is a court, regulatory body, or government authority; their agents; a grand jury; or an arbitrator or mediator of a dispute.

Roles of the Litigation Services Practitioner

3. The practitioner may be retained in a number of roles. These include the following:

- a. *Expert witness.* A person who renders an opinion before a trier of fact. When the practitioner is an expert witness, all work the practitioner has performed related to the litigation is potentially discoverable.
- b. *Consultant.* A person who is retained to advise about the facts, issues, and strategy of the case. The consultant does not testify about an expert opinion before a trier of fact. The consultant's work generally is protected from discovery by the attorney work product privilege.
- c. *Other.* A person who is retained in any of a number of different roles, including a trier of fact, special master, court-appointed expert, fact witness, and mediator.

Products and Services of the Litigation Services Practitioner

4. Practitioners might provide many products and litigation services. Some of the more common ones include the following:

- Computation or other assessment of economic losses and lost profits damages
- Consulting or testimony, or both, on professional standards and other accountant liability issues
- Business valuations
- Proactive and reactive fraud investigation
- Pre- and post-bankruptcy restructuring, solvency analysis, and liquidation consulting
- Special accountings, tracings, reconstructions, and cash flow analysis
- Tax issues assessment and analysis
- Marital dissolution's assessment and analysis

- Contract costs and claims assessment and analysis
- Historical results assessment and analysis
- Antitrust and other business combinations assessment and analysis
- Construction and environmental disputes assessment and analysis
- Business interruption and other insurance claims assessment and analysis

Tasks of the Litigation Services Practitioner

5. The litigation services practitioner may undertake any of the following tasks:

- Issue identification
- Locating other experts
- Fact-finding
- Analysis
- Discovery assistance
- Document management
- Settlement assistance
- Expert testimony
- Trial and deposition assistance
- Post-trial support (for example, accounting services, and funds administration)
- Negotiations
- Arbitration
- Mediation
- Training

Other Engagements of the Litigation Services Practitioner

6. Litigation services do not usually, but may, include the following engagements:

- Attestation
- Review
- Compilation

7. Separate professional standards apply to each of these three engagements.

Comparison to Other Services

8. The litigation services engagement differs from the attestation engagement in several ways.

- a. The role of the practitioner in a litigation services engagement is different from that in an attestation services engagement, where the CPA expresses a conclusion about the reliability of a written assertion of another party. In a litigation services engagement, the practitioner helps to gather and interpret facts and must support and defend any conclusions reached against challenge. The standards contained in Statement on Standards for Attestation Engagements (SSAE) No. 10, *Attestation Standards: Revision and Recodification* (AICPA, *Professional Standards*, vol. 1, AT secs. 101–701) do not envision the practitioner as theasserter and were established to provide assurance to third parties.

When providing litigation services, the practitioner is subject to the rules of the proceedings, including discovery and cross-examination. Also, there are usually no uninformed third parties because all the parties (if the practitioner is an expert) generally have access to the working papers of, and other documents relied upon by, the practitioner and can question the conclusions.

- b. In an attestation services engagement, the practitioner obtains sufficient and competent evidence to support the client's written assertion. In a litigation services engagement, the practitioner as an expert may offer to the trier of fact opinions about facts that may be in dispute, and is subject to Statement on Standards for Consulting Services No. 1, *Consulting Services: Definitions and Standards* (AICPA, *Professional Standards*, vol. 2, CS sec. 100). The standards are no less authoritative or professional than those contained in the SSAE, the Statements on Auditing Standards (SASs), or the Statements on Standards for Accounting and Review Services (SSARs), but the consulting services standards are designed to consider the role of the practitioner as the asserter in litigation rather than as the attester in attestation engagements.

When performing a typical litigation service engagement, the practitioner is specifically exempted from the standards contained in SSAE No. 10 and the SSARs.¹

- c. Litigation services engagements and attestation services engagements also differ in the purpose for engaging the practitioner and in the use of the practitioner's conclusions.
- d. In a litigation services engagement, the audience for the practitioner's opinion and work product is generally limited to the court and the parties to the dispute. Each has the opportunity to evaluate and question the practitioner's conclusions, working papers, documents, and methodology.
- e. In some situations, the practitioner may be asked to perform attest services in connection with a litigation services engagement. In those situations, the applicable professional standards for the service would apply to the engagement.

Role of the CPA Providing Litigation Services

9. CPA litigation services practitioners are called upon to assist triers of fact in their deliberations by helping them understand complex or unfamiliar concepts. Knowledge, skills, education, training, and

¹ See Interpretation No. 3, "Applicability of Attestation Standards to Litigation Services," of Statement on Standards for Attestation Engagements (SSAE) No. 10, *Attestation Standards: Revision and Recodification* (AICPA, *Professional Standards*, vol. 1, AT §9100.34–42), and Interpretation No. 20, "Applicability of Statements on Standards for Accounting and Review Services to Litigation Services," of Statement on Standards for Accounting and Review Services (SSAR) No. 1, *Compilation and Review of Financial Statements* (AICPA, *Professional Standards*, vol. 2, AR secs. 9100.76–79).

experience that are used in a litigation services engagement must meet the same professional standards required for all other professional services provided by CPAs. Of equal importance is the requirement that the CPA performing a litigation services engagement must also meet the standards established by the respective court or other dispute resolution forum. State and federal standards may be different, at least to a degree. Thus, the litigation services practitioner must be aware that his or her services should meet both the profession's standards and the applicable dispute resolution forum rules. An examination and comparison of the various state and federal rules reveals that compliance with the profession's standards also means that the applicable court's or other trier of fact's rules are likely to be met.

10. An important U.S. Supreme Court decision (*Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 US 579 [1993]) established the concept that the federal trial judge may become the gatekeeper for the admissibility of expert scientific testimony and may look to several factors to ensure the testimony's reliability and relevancy to the matter at issue.

11. After the *Daubert* decision, the Court concluded that the same concepts applied not just to experts providing scientific testimony, but to all experts providing testimony in federal courts, including financial experts (*Kumho Tire Company, Ltd. v. Patrick Carmichael*, 526 US 137 [1999]). The Court established in *Kumho Tire* that *Daubert's* general principles apply to all matters described in Rule 702 of the Federal Rules of Evidence, which establishes a standard of evidentiary reliability.

12. As a result of these decisions, the Federal Rules of Evidence were amended and provide the basis upon which a federal trial judge can distinguish between opinion testimony by lay witnesses, determine whether testimony by experts meets the minimum standards, and identify the bases of opinion testimony by experts.² The three guidelines for admissibility of expert testimony that are particularly relevant to CPAs providing litigation services are the following:

- a. The testimony should assist the trier of fact to understand the evidence or to determine a fact in issue.
- b. The expert should have some minimum qualifications, which would include one or more of the following:
 - Special knowledge
 - Special skills
 - Special experience
 - Special training

² Rule 701, Opinion Testimony by Lay Witnesses, states:

If the witness is not testifying as an expert, the witness testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702, Testimony by Experts, states:

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, states:

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.

- Special education
- c. In addition, before providing testimony, the expert would have to show that the testimony (a) was based upon sufficient reliable facts or data, (b) is the product of reliable principles and methods, and (c) is the result of the application of established principles and methods to the facts in the case.

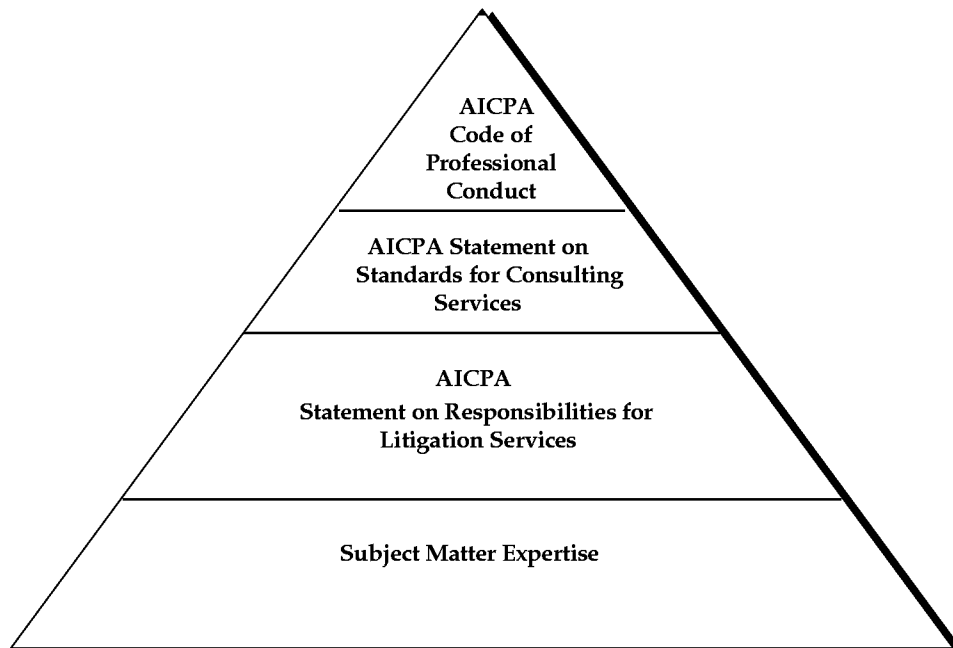
The reliability standards set for expert testimony are based on three pillars: (a) reliable data, (b) a reliable methodology, and (c) the reliable application of the methodology.

COMPARATIVE ANALYSIS OF STANDARDS AND RESPONSIBILITIES

13. The CPA should recognize there is a pyramid of standards and responsibilities that apply to litigation services, which may be summarized as follows:

- *Level 1.* General Standards; AICPA Code of Professional Conduct
- *Level 2.* Consulting Standards; AICPA Statement on Standards for Consulting Services
- *Level 3.* AICPA Statement on Responsibilities for Litigation Services No. 1
- *Level 4.* Subject matter expertise

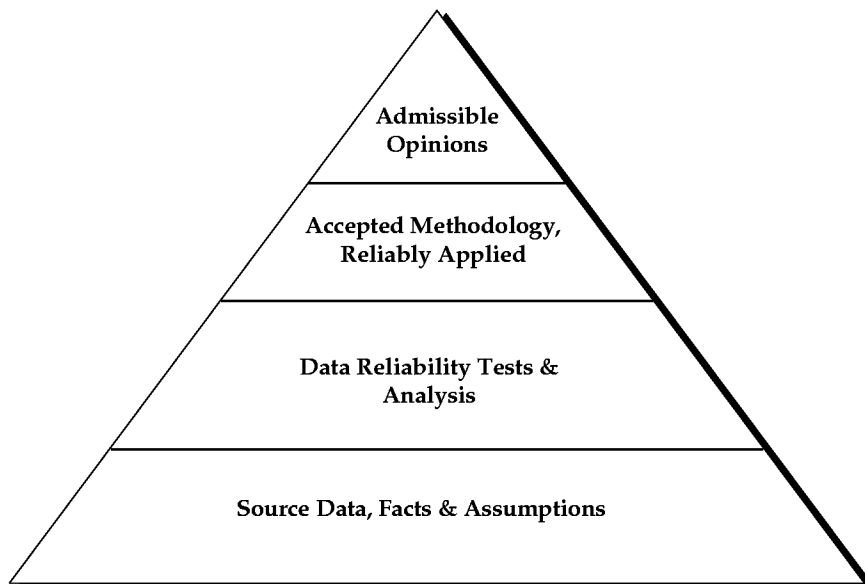
14. The pyramid can be portrayed as follows:



15. A comparative analysis of the AICPA professional standards and the Federal Rules of Evidence, section 702, reveals that if CPAs comply with the applicable AICPA professional standards, they most likely also meet the requirements of Federal Rules of Evidence section 702. The comparative analysis is summarized as follows:

<i>AICPA Standards</i>	<i>Federal Rules of Evidence Section 702</i>
CPA scope of expertise <ul style="list-style-type: none"> • Accounting, auditing, tax, consulting, and other services 	Scope <ul style="list-style-type: none"> • Scientific knowledge • Technical knowledge • Specialized knowledge
CPA qualifications <ul style="list-style-type: none"> • Education • Examination • Experience • Ethics—AICPA Code of Professional Conduct 	Qualifications <ul style="list-style-type: none"> • Knowledge • Skill • Experience • Training • Education
AICPA Code of Professional Conduct 101 Independence 102 Integrity and Objectivity 201 General Standards <ul style="list-style-type: none"> a. Professional Competence b. Due Professional Care c. Planning and Supervision d. Sufficient Relevant Data 202 Compliance with Standards 203 Accounting Principles 301 Confidential Client Information	Basis of testimony <ul style="list-style-type: none"> • Sufficient relevant facts • Product of reliable principles and methods • Applied the principles and methods reliably to the facts of the case

16. Consistent with AICPA professional standards, the Federal Rules of Evidence, section 702, requires that expert testimony be based upon sufficient facts or data, be the product of reliable principles and methods and that the principles and methods be reliably applied to the facts of the case. Graphically presented, the testimony pyramid would be as follows:



SCOPE OF STANDARDS AND RESPONSIBILITIES

The AICPA Code of Professional Conduct

17. The AICPA Code of Professional Conduct applies to all professional services rendered by AICPA members. Certain sections of the Code of Professional Conduct have particular applicability to litigation services practice; they are the guiding principles of this practice area. A greater understanding and appreciation of the importance of the existing standards contained in the Code will assist practitioners in their efforts to provide opinions that are relevant and reliable, and that assist the trier of fact.

18. Existing standards contained in the Code have particular relevance to litigation services engagements.

Rule 101: Independence

19. When performing a litigation service engagement without a related attestation service, independence is not required.

20. Generally, to be independent is to be free from relationships that might affect one's ability to perform objectively and with integrity, or that might prevent the practitioner from being impartial and fair in reaching conclusions and judgments, or from maintaining an independent mental attitude in all matters relating to the engagement.

21. The practitioner should be sensitive to the *appearance* of independence so that the trier of fact will accept conclusions and judgments as objective and impartial. Lack of independence from the client may be used to question the practitioner's credibility and objectivity and could subject his or her working paper files relating to the client or other engagements to the discovery process. The practitioner should carefully consider the potential difficulties inherent in serving as an expert witness for a party with whom the practitioner lacks independence and discuss them with the client before accepting such an engagement.

Rule 102: Integrity and Objectivity

22. To maintain integrity is to adhere to an ethical code and be free from corrupting influences and motives. A litigation services practitioner must, among other things, be honest and candid within the constraints of client confidentiality. Service and public trust should not be subordinated to personal gain and advantage.

23. To be objective is to maintain independence in mental attitude, uninfluenced by emotions or personal prejudices, and to be able to reach conclusions and judgments without undue influence from others. The principle of objectivity imposes the obligation to be impartial, intellectually honest, and free from conflicts of interest. (See further, paragraphs 45 through 47.)

24. The litigation services practitioner must recognize the difference between independence and objectivity because, although very similar, they are somewhat different. Failure to appropriately do so might result in an undesirable conflict of interest in which the practitioner's ability to objectively evaluate and present an issue for a client is impaired by current, prior, or possible future relationships with either the attorneys or the parties to the litigation. While conflicts of interest are based on facts, not appearance, the practitioner should be mindful of and deal with the appearance of conflicts before accepting an engagement.

25. The litigation services practitioner must also recognize how roles and responsibilities of attorneys differ from those of CPAs in the litigation process, which is an adversarial proceeding in which the best case for each party is put before the trier of fact. The litigating attorney is the client's advocate, ethically obligated to represent the client within the bounds of the law. This duty of advocacy is basic to the legal profession and demands that the attorney take every available advantage for the client, put the client's case in the best possible light, not offer evidence that is harmful to the client (to the extent legal), and challenge everything in the opponent's case.

26. By contrast, the litigation services practitioner does not serve as an advocate for the client's position. The litigation services practitioner is engaged as someone with specialized knowledge, skills, training, and experience in a particular area that presents conclusions and judgments with integrity and objectivity. The litigation services practitioner's function is to assist the trier of fact in understanding complex or unfamiliar concepts after having reasonably applied reliable principles and methods to sufficient relevant data. The litigation services practitioner is not expected to blindly offer only evidence and opinions helpful to the client, but instead is expected to offer objective opinions, based on knowledge and experience, of how the trier of fact should interpret the relevant issues. So, although the litigation services practitioner may resolve doubt in favor of the client, so long as the position can be reasonably and reliably supported, he or she must not subordinate his or her judgment to the client. (See Ethics Ruling No. 101, "Client Advocacy and Expert Witness Services," of ET section 191, *Ethics Rulings on Independence, Integrity, and Objectivity* [AICPA, *Professional Standards*, vol. 2, ET sec. 191.202–.203].)

Rule 201: General Standards

27. The four general standards under Rule 201 apply to litigation services as well as to all other professional services rendered by CPAs to their clients. In fact, these four standards are the backbone of a consulting services practice, and are included in SSCS No. 1.

- a. *Professional competence.* Practitioners undertake only those professional services that the member or the member's firm can reasonably expect to complete with professional competence.
- b. *Due professional care.* Practitioners exercise due professional care in the performance of professional services.
- c. *Planning and supervision.* Practitioners adequately plan and supervise the performance of professional services.

- d. *Sufficient relevant data.* Practitioners obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.³

Rule 202: Compliance With Standards

28. This rule requires all CPAs to comply with standards promulgated by bodies designated by the AICPA Council. For litigation services practitioners, that body is the Consulting Services Executive Committee; this committee issued SSCS No. 1, and all litigation services practitioners are required to adhere to its standards. (See Interpretation 102-06, "Professional Services Involving Client Advocacy," of ET section 102 [AICPA, *Professional Standards*, vol. 2, ET sec. 102.07].)

Rule 203: Accounting Principles

29. The CPA has a demonstrated understanding of generally accepted accounting principles (GAAP). The AICPA and the Securities and Exchange Commission have designated the Financial Accounting Standards Board (FASB) and Governmental Accounting Standards Board as the appropriate bodies to establish accounting principles. To the extent GAAP is applicable, the litigation services practitioner shall apply the appropriate accounting principles.

Rule 301: Confidential Client Information

30. The CPA in public practice may not disclose confidential client information without the client's consent. Although there are certain exceptions, including one involving legal proceedings, a conflict of interest may possibly arise for litigation services practitioners due to the CPA's ethical obligation to preserve client confidences.

31. The litigation services practitioner brings to the courtroom all of his or her prior experience and knowledge of clients and their practices, operations, and trade secrets. Even though such experiences may enable the practitioner to render expert opinions, confidential client information obtained in prior engagements must be protected. Thus, the practitioner has the dual responsibility to be both truthful and honest while preserving past and present client confidences. If the practitioner relies on specific information obtained in an unrelated prior engagement and uses that information as the basis for his or her opinion, the trier of fact may require the expert to disclose the source. If the practitioner refuses, the trier of fact may preclude the testimony because discovery could not be taken as the basis of the expert's opinion. So, the litigation services practitioner must anticipate such a circumstance and either obtain the consent of the prior client to reveal its confidences or abandon any effort to use such information as the basis of his or her current opinions.

32. Moreover, the litigation services practitioner should evaluate the fact of any prior or existing confidential relationship with a party to a litigation matter and disclose the relationship to the client and the client's legal counsel before accepting the engagement, if disclosure is permitted by the parties with whom the practitioner has a confidential relationship. This would include disclosing both named and potential adverse parties, including their counsel. When possible, disclosure of such relationships is a good practice, even if a conflict does not exist. During the course of an engagement, there is always the potential for an unknown party to become an opposing party, so continuing sensitivity to newly arising conflicts is necessary, particularly in engagements that are long or involve many parties. Great care should be taken to avoid disclosing client confidences, including names, which in themselves may be confidential. Client names are not confidential unless the disclosure would compromise the client, for example, if the expert primarily consults with businesses about to file for bankruptcy protection. Indeed, there may be circumstances in which the very fact of a prior relationship may be confidential; the litigation services practitioner may be forced to reject an engagement without giving the attorney a viable reason because he or she may not disclose information gained from another client. The litigation services

³ AICPA Code of Professional Conduct (AICPA, *Professional Standards*, vol. 2, ET sec. 201).

practitioner is required to adhere to confidentiality agreements executed during the course of an engagement.

SSCS No. 1

33. The first four elements of SSCS No. 1 are based on rule 201, discussed earlier.

General Standards

34. **Professional competence.** The practitioner should accept only those engagements he or she or the CPA firm can reasonably expect to complete with professional competence.

35. Professional competence includes having adequate knowledge, skills, training, and experience so that duties can be performed in accordance with appropriate professional standards.

36. The body of knowledge that exists for a particular subject matter of technical expertise may range from vast to limited, depending on the specific field of endeavor. Regardless of the extent of resources and other information available from the relevant professional community, it is incumbent upon the practitioner to become familiar with the various theories, techniques, and methodologies being considered or used within that community for analysis.

37. **Due professional care.** The practitioner should exercise reasonable care and diligence in analyzing the issues before the trier of fact and should present his or her conclusions and findings in a concise, clear, and correct manner.

38. Due care in litigation services practice assumes the practitioner will make a conscientious effort in his or her performance of the engagement, by obtaining sufficient relevant data, and applying reliable principles and methods to the facts of the case before reaching conclusions and findings.

39. **Planning and supervision.** Planning and supervision have different implications for the litigation services practice than for many of the other services a CPA may be engaged to provide. Unlike attestation, tax, and most consulting services engagements, the litigation service engagement may begin with ill-defined goals and an unstructured and roughly defined body of information and data. Each situation presents a unique set of facts, available records, and possibilities, with clarity of purpose and preliminary conclusions and judgments typically available only after a significant amount of work has been performed. Thus, specific plans tailored to the issues of the particular litigation are usually broadly defined, at least initially, and are frequently designed to allow the practitioner to form appropriate opinions based on the information currently available and within a given time frame. It is not unusual for such engagements to be performed in phases, with plans formulated phase-by-phase based on the findings and results of the prior phase. For each phase, the practitioner must determine with the client (a) the nature of the issues and how they may relate to different sets of facts, financial information, and sources or locations of that information; (b) how the facts and financial information are affected by what was learned in the prior phase(s) and what additional information will be needed to proceed; and (c) what the goals are for the next phase and how to best plan for the identification, accumulation, and analysis of data that may be acquired through the discovery process. Obviously, each plan will be unique and will change as the engagement progresses.

40. The testifying practitioner supervises the ongoing work because that practitioner may ultimately present the conclusions and judgments as his or her own to the trier of fact, no matter that some of the underlying work may be actually performed by others. A litigation services engagement is usually far more dynamic than other consulting engagements and may require more flexibility. Information and issues flow into and out of an ever-changing environment, requiring the practitioner to maintain a continuing awareness of his or her importance to the work effort and, ultimately, to the conclusions and judgments. Therefore, the practitioner communicates with staff persons assisting with ongoing work and monitors their progress and findings.

41. **Sufficient relevant data.** It is the responsibility of the attorney to comply with the applicable rules of evidence. The practitioner needs to base his or her conclusions and judgments on sufficient relevant data. To determine what constitutes sufficient relevant data, the practitioner should look to several forums of guidance.

a. *Legal evidence.* *Ballentine's Law Dictionary* defines *evidence* as follows:

Evidence—The means by which any matter of fact, the truth of which is submitted to investigation, may be established or disproved. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or the other.

The law of evidence embraces those rules which determine what testimony is to be admitted or rejected in the trial of a civil action, or a criminal prosecution, and what weight is given to evidence which is admitted.

It is important to draw a distinction between the meaning of evidence, as defined above, and the attestation and auditing literature. The trier of fact in the legal forum will evaluate the evidence the practitioner relied upon in forming the opinion, measuring it against the legal standards. It is not only the practitioner's opinion that is evaluated, but also the relevancy, sufficiency, and verifiability of the underlying evidence supporting the opinion.

Ballentine's further defines *sufficient evidence* and *relevant evidence* as follows:

Sufficient evidence—Abstractly, evidence of such probative value as to support the verdict of the jury or a finding of fact by the court. Practically, *evidence such as will satisfy an unprejudiced mind* of the truth of that which the court or jury has found to be the fact. [*Emphasis added*]

Relevant evidence—Any matter of fact the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact — a persuasion either affirmative or disaffirmative of its existence. Concisely, evidence of one fact rendering the existence of the fact in issue probable.

As previously discussed, the courts have established rules for the determination of admissible evidence and expert testimony.

The practitioner can generally rely on documents that have been authenticated by the parties to the proceeding, or that are acceptable to the court under the various rules of evidence. Each legal jurisdiction may have different rules governing what the practitioner may, and needs to, rely on. Consequently, while the attorney is primarily responsible for the acceptability of the evidence upon which the practitioner will rely, it is incumbent upon the practitioner to advise the attorney of possible missing or questionable documents and the lack of sufficient relevant data upon which to reach an opinion.

It is important to communicate to the attorney what evidence is necessary to properly support the practitioner's conclusions and judgments. Different rules of evidence may apply in different jurisdictions and the practitioner is not expected to be a legal expert.

b. *Attestation and audit evidence.* While the sufficiency and relevancy of evidential matter is addressed in generally accepted auditing and other attestation standards, this guidance is normally directed toward a different type of professional service not governed by the legal rules of evidence. However, the general guidance of such standards concerning audit and attestation evidence is, in some instances, applicable to the presentation of conclusions and judgments by practitioners in litigation or other forums of dispute resolution.

Evidence is competent when it is “both valid and relevant.” Additionally, audit guidance on sufficiency states:

The amount and kinds of evidential matter required to support an informed opinion are matters for the auditor to determine in the exercise of his or her professional judgment after a careful study of the circumstances in the particular case. However, in the great majority of cases, the auditor must rely on evidence that is persuasive rather than convincing.⁴

The attestation standards also discuss the reliability of evidential matter in attestation engagements and attribute a value to the source of the evidence. The practitioner’s direct personal knowledge obtained through physical examination, observation, computation, and inspection is considered more persuasive than evidence obtained indirectly. Evidence obtained from independent sources provides a greater assurance of reliability than evidence secured solely within the entity being audited.⁵ Audit evidence includes underlying accounting data and all the corroborating evidence available to the auditor.

FASB Statement of Concepts No. 2, *Qualitative Characteristics of Accounting Information*, defines *relevance*, *reliability*, and *verifiability* as follows:

Relevance—The capacity of information to make a difference in a decision by helping users to form predictions about the outcomes of past, present and future events or to confirm or correct prior expectations.

Reliability—The quality of information that assures that information is reasonably free from error and bias and faithfully represents what it purports to represent.

Verifiability—The ability through consensus among measurers to ensure that information represents what it purports to represent or that the chosen method of measurement has been used without error or bias.

These guiding principles and definitions are similar to the standards used by courts to measure the relevancy and validity of evidence relied on by a litigation services practitioner. This is especially true of the need to exercise reasonable professional judgment in evaluating the competency and sufficiency of the evidence. The independence and qualifications of the source of the evidence need to be evaluated when using evidence in an audit, as well as when formulating conclusions and judgments to be presented to a trier of fact in a litigation matter.

- c. *Working paper documentation.* There is no definitive rule on what documentation should be maintained by the practitioner. Usually, all of the practitioner’s working papers are subject to discovery and must be given to the opposing counsel, if requested. Generally, the practitioner should maintain a working paper file that includes bases for the opinions including all the assumptions used, the detailed calculations performed to arrive at numeric conclusions and judgments, and copies of or references to underlying records or other materials that corroborate conclusions and judgments.

There are no specific rules for the form and content of working papers and supporting documentation used in litigation services engagements. The extent and quantity of documentation to be maintained in the practitioner’s working papers is a matter of professional judgment. The practitioner should understand that his or her conclusions and judgments are subject to cross-examination by opposing counsel and evaluation by the trier of fact. The practitioner must be prepared to defend these conclusions and judgments knowledgeably and

⁴ Statement on Auditing Standards (SAS) No. 31, *Evidential Matter* (AICPA, *Professional Standards*, vol. 1, AU sec. 326.22).

⁵ SAS No. 31 (AU sec. 326.21).

professionally. Materials that are fundamental to the practitioner's conclusions and judgments should be retained or disclosed in the expert's written report.

The practitioner should adopt a policy on the retention of records in litigation matters, based on the rules in effect, and should follow that policy consistently. Moreover, the practitioner should be aware that, regardless of his or her retention policy, he or she should retain materials in the working paper files at the time of receipt of a deposition notice or subpoena, if requested.

The testifying practitioner should form conclusions and judgments on the issues. Others working under the practitioner's direction should be collecting data, preparing analyses, and consulting with the practitioner on the interpretation of the evidence, and may assist the testifying practitioner in forming conclusions and judgments about the issues. Others should understand that the conclusions and judgments are those of the testifying practitioner only and that the materials in the underlying file should support those conclusions and judgments.

Consulting Standards

42. **Client interest.** For a traditional consulting engagement, this standard has been interpreted to mean the practitioner should seek to accomplish the objectives established for the engagement through an understanding with the client while maintaining integrity and objectivity. However, in a litigation services engagement, the practitioner has a special duty to a third party, the trier of fact—a consideration not typically present in a traditional consulting engagement. Thus, in meeting this standard, the practitioner must recognize that a duty is owed to the trier of fact, deserving of the same level of integrity and professionalism as the traditional client.

43. **Understanding with the client.** In developing an understanding with the client (normally the attorney and in writing), the practitioner should understand the following:

- a. Identification of the attorney's client
- b. The title of the litigation, including the litigants' names, the court, and docket number
- c. A description of the nature of the litigation services to be provided or a statement that the services will be as the attorney may direct
- d. An identification of the expert witness or the willingness of the person who will be the expert witness if necessary
- e. Reference to the absence or existence of conflicts of interest
- f. The absence or existence of the attorney's work product privilege
- g. Restrictions of the use or exposure of the CPA's work
- h. The CPA's right to withdraw from and terminate the engagement in certain circumstances

44. Other portions of the understanding may deal with administration and fee matters, including a description of fee and billing arrangements.

45. **Communications with the client: conflicts of interest.** In a litigation services engagement, a conflict of interest exists when a practitioner's ability to objectively evaluate and present an issue for a client will be impaired by current, prior, or possible future relationships with either the attorneys or the parties to the litigation. As a professional, the practitioner should avoid engagements that involve conflicts of interest. Rule 102 of the Code requires that members shall, in the performance of any professional service,

maintain objectivity and integrity, shall not knowingly misrepresent facts, or subordinate their judgment to others.

46. The criteria for evaluating whether a conflict of interest is present in a litigation services engagement is the ability of the practitioner to maintain integrity and objectivity as described in the SSCS No. 1. Although a conflict of interest is based on fact rather than appearance, the appearance of a conflict of interest can be particularly problematic in a litigation services engagement. If the trier of fact believes there is a conflict when in fact there is only the appearance of one, he or she may call into question the practitioner's credibility. Thus, the practitioner should be mindful of and deal with the appearance of conflicts before accepting the engagement.

47. Interpretation 102.2, "Conflicts of Interest," of ET section 102, *Integrity and Objectivity* (AICPA, *Professional Standards*, vol. 2, ET sec. 102.03), also indicates that a conflict of interest may occur if, while performing a professional service for a client, the practitioner or the firm has a significant relationship with another person, entity, product, or service that could be viewed as impairing their objectivity. The rule provides, however, that if this significant relationship is disclosed to the client and other appropriate parties, and they consent to the practitioner's acceptance of the engagement, the rule shall not prohibit the performance of the professional service.

48. In addition to the rule and related interpretation concerning conflicts of interest, the practitioner who provides litigation services must also consider the impact of Rule 301: Confidential Client Information, which prohibits a member in public practice from disclosing any confidential client information without the consent of the client. The practitioner, therefore, may be unable to disclose to or obtain consent from all of the appropriate parties. Indeed, the legal process may operate to prevent the practitioner from disclosing any information to other parties, particularly in the case of expected or threatened litigation. Rule 301 may restrict the practitioner's attempts to resolve apparent conflicts of interest or business relationships. Problems arising under rule 102, its interpretation, and rule 301 are commonly referred to as conflicts of interest, perceived or otherwise, in the provision of litigation services.

49. Independence is not a criterion in the determination of whether a conflict of interest exists in a litigation services engagement. Independence as an ethical issue is limited to attestation engagements,⁶ as required by the attestation standards, which also address the question of the appearance of independence. The independence concept was developed to ensure the CPA's objectivity and credibility in examining and reporting upon financial statements that will be relied upon by people who cannot investigate the assertions. The reliability of the CPA's professional opinion of the financial statements gives them more credibility and usefulness. The independence concept forms an important part of the comprehensive and well-documented set of standards applied to attestation and audit services.

50. Unlike the legal profession, the accounting profession has developed little formal guidance on conflicts of interest. Most guidance relating to the CPA's professional relationships concerns the concept of independence, focusing primarily on the relationship between the CPA and the client in an attestation or audit engagement. This guidance, however, is not directly concerned with relationships that the CPA may have in other types of engagements.

51. The increasing use of CPAs as consultants and expert witnesses in litigation has required them to consider their professional relationships in new ways. When an attorney seeks to engage a CPA for a litigation services engagement, both professionals are concerned with whether the CPA has a conflict of interest with any of the parties to the litigation or their legal counsel. An attorney has documented concepts of what constitutes such a conflict in the legal profession. Consequently, these concepts may be applied inappropriately to the CPA. The standards of the legal profession concerning conflicts of interest

⁶ See the AICPA MAS Special Report *Comparing Attest and Management Advisory Services: A Guide for the Practitioner* (New York: AICPA, 1988).

should not be applied to the accounting profession because the roles of the attorney and the CPA in litigation are entirely different.

52. A conflict of interest may arise from the practitioner's ethical obligation to preserve client confidences or from the existence of relationships that may undermine objectivity in presenting an issue concerning a client. In judging conflicts of interest, the practitioner should differentiate between those based on fact and those that could arise as a result of perceptions or business considerations. The practitioner may base a decision to decline an engagement on the existence of the perception that a conflict exists, on business considerations, or on other reasons. Conversely, absent a conflict of interest or possession of confidential information, the practitioner may accept an engagement, even if business relationship issues exist, although such issues should be discussed with the client.

53. The practitioner must decide, on a case-by-case basis, whether a conflict of interest exists. If none exists, he or she must then decide whether a business relationship or a perception of a conflict exists that may warrant declining the request for professional services. For example, the practitioner may decline to perform services because the position required by the prospective client conflicts with the business interests of an existing client. Alternatively, the practitioner may decline to perform services because the position required by the prospective client conflicts with the position the practitioner has taken on the same issue in a prior matter. Thus, while a conflict of interest may not exist as defined by the professional standards, conflicting business relationships or conflicting prior positions may indeed exist. If the perception of conflict exists, the practitioner must evaluate his or her potential ability to carry out the engagement effectively on behalf of the client. In such a circumstance, the practitioner may determine it is necessary to decline the engagement.

54. Before accepting a litigation services engagement, practitioners should carefully evaluate their relationships, if any, with all parties to the action to identify potential conflicts. These parties include named and potential adverse parties, including counsel to the opposing parties. During the course of an engagement, there is always the potential for an unknown party to become an opposing party. Therefore, continuing sensitivity to newly arising conflicts is important, particularly in engagements that are long or involve several parties.

55. The practitioner should be alert to several types of potential conflicts:

- a. *Simultaneous conflicts.* Simultaneous conflicts may occur when the practitioner is asked to provide litigation services for a new client in an industry where the practitioner already has an existing client. The practitioner should consider whether he or she has obtained confidential client information in providing current services to the existing client and whether such information may be used in the litigation matter. In performing an audit, or an attest function for a client, practitioners generally have broad access to confidential information. Therefore they should be sensitive to actual conflicts of interest when they are providing attestation services to one of the litigants involved.
- b. *Preliminary interviews with prospective clients.* Preliminary interviews may occur when the practitioner is approached by a prospective client about a litigation engagement and the client gives the practitioner sufficient information about the case to define the opposing parties, the key issues in dispute, and the practitioner's intended role. The prospective client may communicate confidential information to the practitioner at this time. If the practitioner is not retained by this client and is subsequently approached by the opposition, the practitioner may have to decline the opposition's offer of an engagement because he or she has received the confidential information. To avoid this problem, the practitioner may, as a rule, limit the receipt of confidential or strategic information from prospective clients before there is a clearer picture regarding acceptance of the prospective engagement.
- c. *Joint representations.* Joint representations occur when a practitioner is engaged by both opposing parties for assistance in resolving the issues in the dispute. The judge, a mediator,

or an arbitrator typically initiates a request for joint representation. Given the adversarial nature of a litigation services engagement, the practitioner should carefully consider the nature of the relationship to be established with each of the parties in the role to be played. In general, it is entirely possible the practitioner would have no conflict and could accept engagements to resolve business disputes between two or more parties objectively.

- d. *Simultaneous consultation.* A simultaneous consultation may occur when the practitioner is engaged to work simultaneously for and against different clients of the same law firm in different cases. Generally, because no confidential client communications are shared between clients, the practitioner can maintain objectivity and integrity and, therefore, there is no conflict of interest. The practitioner may wish to contact the first client and notify him or her of the relationship with the second client. The practitioner should be aware of the potential problems for such circumstances and should fully disclose such relationships to the client, if possible, before accepting an engagement. This situation represents a conflict of business relationships, not a conflict of interest, and is thus a matter for the individual practitioner to decide.

56. ***Communications with the client: significant reservations concerning the scope or benefits of the engagement.*** Unlike many consulting engagements, the client frequently establishes the scope of the litigation services engagement. As previously indicated, the practitioner who serves as a consultant may be protected by the attorney-client work product privilege. The findings, observations, and reservations developed during the course of the engagement should be communicated with the client. At the time the practitioner becomes an expert, the same degree of integrity and objectivity is still required; however, the practitioner now has duties and responsibilities to both the client and the trier of fact.

57. ***Communications with the client: significant engagement findings or events.*** Communication with the client and the trier of fact about findings and events may take many forms. During the initial phases of engagement, the litigation services practitioner may communicate with the client orally.

58. Unlike many consulting engagements, the practitioner may also communicate the engagement findings at a deposition, through a written report pursuant to the rules of the dispute resolution forum, trial testimony, or other submissions.

59. A deposition involves an examination of a witness under oath by the attorney of the party requesting the deposition. A deposition's purpose is to elicit information relevant to the complaint from a witness. During the deposition, the practitioner will normally be questioned about his qualifications, the scope of his assignment, the materials provided, the conclusions or opinions developed, and the basis for those opinions. Supporting documentation that has been used and relied upon by the practitioner will generally be produced at the deposition.

60. In some instances, a court may require a written report that may be in addition to, or in lieu of, the deposition process. The federal courts have established a separate rule (Federal Rules of Civil Procedure 26(a)(2)(B)) that sets forth the required contents of a written report during the discovery process. The report must include the following:

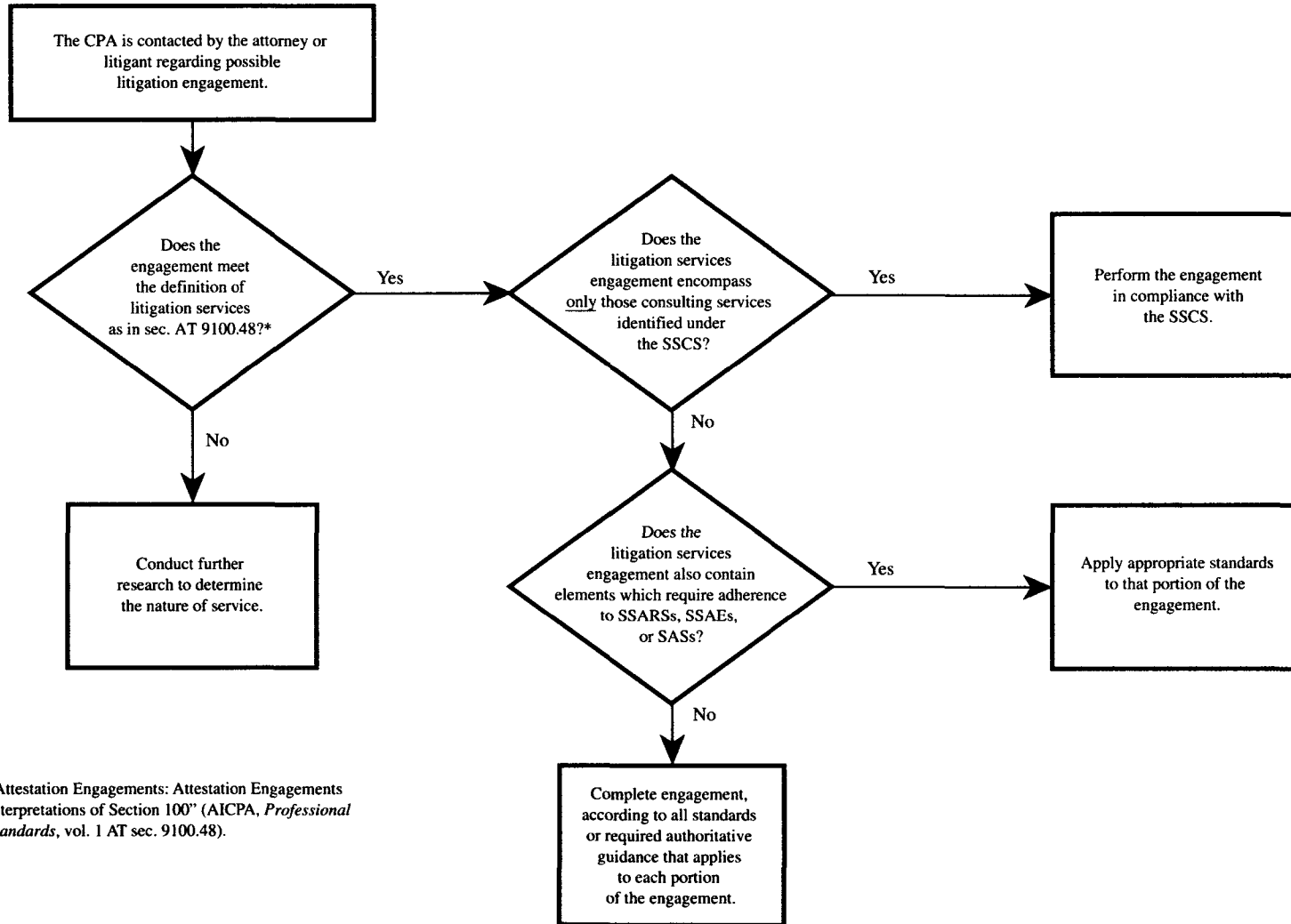
- A complete statement of all opinions to be expressed and the basis and reasons therefore
- Identification of the data or information considered by the witness in forming the opinions
- Any exhibits to be used as a summary of, or support for, the opinions
- Qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years
- The compensation to be paid for the study and testimony

- A listing of any other cases in which the witness has testified as an expert at trial or deposition within the preceding four years
- The signature of the witness

61. The complete statement of all opinions means the practitioner should state how and why he or she was able to reach the conclusions and opinions that were expressed. Such reports submitted in federal matters may frequently be lengthy and extensive.

APPENDIX A

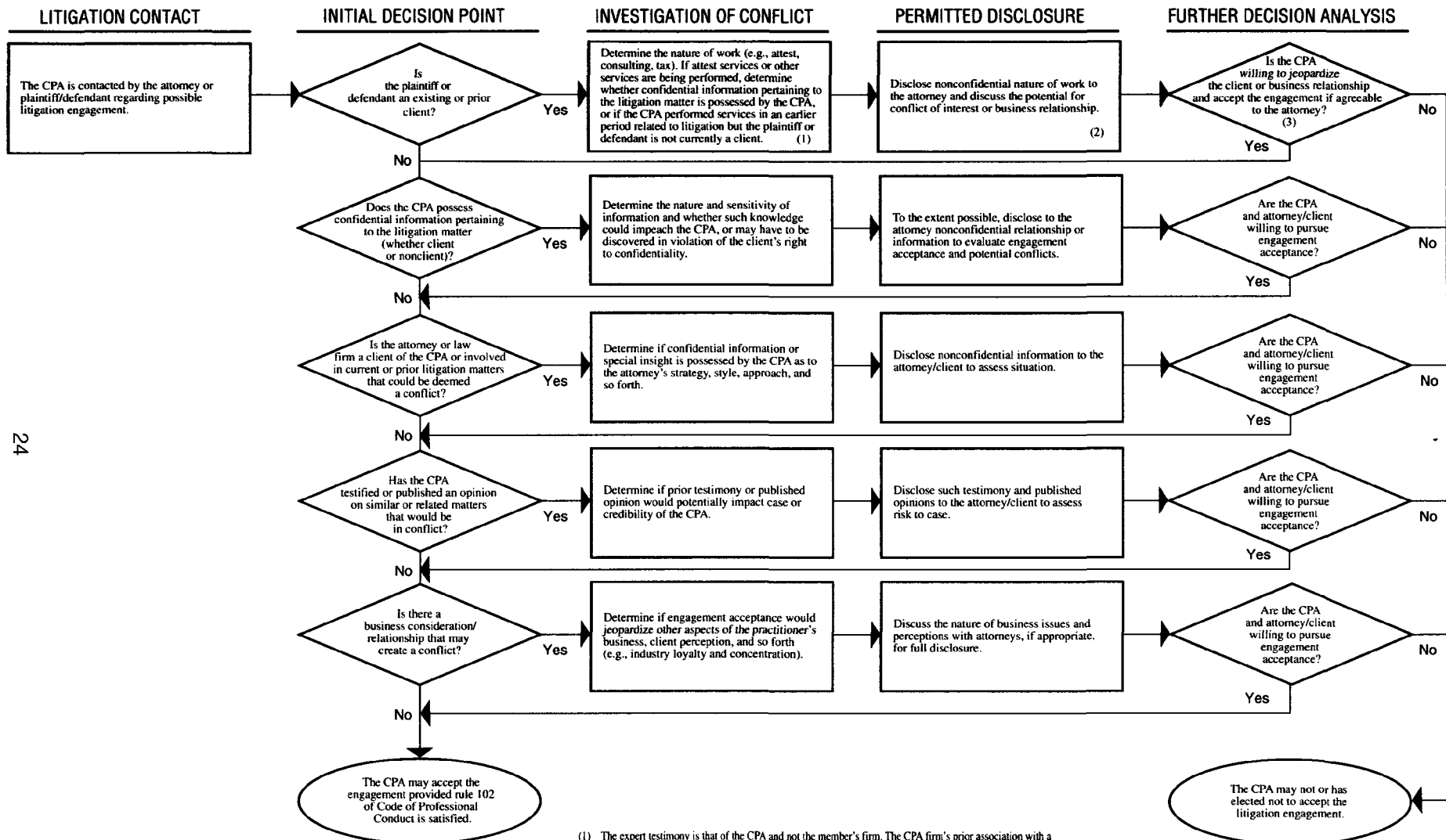
DECISION TREE: APPLICATION OF PROFESSIONAL STANDARDS



* "Attestation Engagements: Attestation Engagements Interpretations of Section 100" (AICPA, *Professional Standards*, vol. 1 AT sec. 9100.48).

APPENDIX B

DECISION TREE: CONFLICTS OF INTEREST



(1) The expert testimony is that of the CPA and not the member's firm. The CPA firm's prior association with a company would generally not create any attribution of the firm's knowledge to the testifying CPA, so long as the CPA has no direct or indirect knowledge. However, such prior or current association should be disclosed to the attorney provided no sensitive information is shared.

(2) Although a CPA's firm may have a current or prior business relationship with a plaintiff/defendant through providing attest or other services, such relationships would not necessarily create a conflict of interest (provided confidential information is not possessed by the testifying CPA). However, there is likely a business or client relationship that would create a business conflict requiring the CPA to decline the engagement.

(3) Should a CPA decide to pursue litigation opposite an attest client (e.g., fraudulent conveyance litigation involving a bank), the litigation probably should not be material to the financial statements of the attest client.

APPENDIX C

AICPA SPECIAL REPORTS AND PRACTICE AIDS

Consulting Services Special Report 93-1, *Application of AICPA Professional Standards in the Performance of Litigation Services* (to be superceded by this Statement on Responsibilities)

Consulting Services Special Report 93-2, *Conflicts of Interest in Litigation Services Engagements*

Consulting Services Special Report 93-3, *Comparing Attest and Consulting Services: A Guide for the Practitioner*

Consulting Services Practice Aid 93-4, *Providing Litigation Services*

Consulting Services Practice Aid 95-2, *Communicating Understandings in Litigation Services: Engagement Letters*

Consulting Services Practice Aid 96-3, *Communicating in Litigation Services: Reports*

Consulting Services Practice Aid 97-1, *Fraud Investigations in Litigation and Dispute Resolution Services*

Consulting Services Practice Aid 98-1, *Providing Bankruptcy and Reorganization Services*

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

Consulting Services Practice Aid 99-1, *Alternative Dispute Resolution Services*

Consulting Services Practice Aid 99-2, *Valuing Intellectual Property and Calculating Infringement Damages*

APPENDIX D

OTHER SOURCES OF HELPFUL INFORMATION

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APPENDIX E

INDUSTRY AND PROFESSIONAL RESOURCES

<p>AICPA Management Consulting Services 1211 Avenue of the Americas New York, NY 10036 (212) 596-6065 www.aicpa.org</p>	<p>The Appraisal Foundation 1029 Vermont Avenue, N.W. Suite 900 Washington, DC 20005-3517 (202) 347-7722 www.appraisalfoundation.org</p>
<p>The American Society of Appraisers 555 Herndon Parkway, Suite 125 Herndon, VA 20170 (703) 478-2228 (800) ASA-VALU www.appraisers.org</p>	<p>Association for Investment Management and Research P.O. Box 3668 5 Boar's Head Lane Charlottesville, VA 22903-0668 (800) 247-8132; (804) 980-3668 www.aimr.org</p>
<p>Association of Certified Fraud Examiners The Gregor Building 716 West Avenue Austin, TX 78701 (800) 245-3321 (USA & Canada only) (512) 478-9070 www.cfenet.com</p>	<p>National Association of Certified Valuation Analysts 1245 East Brickyard Rd., Suite 100 Salt Lake City, UT 84106 (800) 677-2009 www.nacva.com</p>
<p>Association of Insolvency Accountants 132 Main Street, Suite 200 Medford, OR 97501 (541) 858-1665 www.aiacira.org</p>	<p>National Association of Forensic Economics P.O. Box 30067 Kansas City, MO 64112 (816) 235-2833 http://nafe.net/</p>
<p>Institute of Business Appraisers P.O. Box 1447 Boynton Beach, FL 33425 (561) 732-3202 www.instbusapp.org</p>	