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NORTHERN ILLINOIS UNIVERSITY

" The Growing Opportunities for Accountants
in Litigation Services"

A Thesis submitted to the
University Honors Program

In Partial Fulfillment of the
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with University Honors

Department of Accountancy

by

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ABSTRACT (100-200 WORDS): See Attached

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ABSTRACT

As a future CPA about to begin work in a Big Six accounting firm, I hoped to gain, through this research, a better understanding of what is involved in areas outside of the traditional auditing, tax, and consulting. Many public accounting practices are expanding into the area of litigation support services.

I began my information gathering by talking with my father, who has represented many clients as an expert witness in cases such as divorce. His experience, along with information from seminars he has attended, sparked my interest in the area. I did secondary research at both Founders Memorial Library and the NIU Law Library. Lot's of reading, interpreting and organizing was necessary to produce the final paper.

This thesis attempts to detail many of the decisions that are made by the firm in order to select an engagement, as well as, the role an accountant plays in determining the outcome of a court case by both testifying and calculating damages. Through work on this paper I have not only learned of how accounting and the legal process work together, but have found an interesting, future career path which I may someday follow.

As a result of recessionary times in today's economy, individuals and businesses are faced with a variety of financial burdens. Lawyers and accountants have found fortune in others' hard times by providing litigation support services. "The CPAs contribution to successful litigation is accomplished behind the scenes by combining accounting, auditing, and computer expertise with thorough preparation for potential litigation." (Sloane 16)

The work done encompasses a broad spectrum of services ranging from discussing tax consequences of a proposed transaction to assisting an attorney prepare and execute a case. Litigation support engagements usually relate to civil litigation and require the CPA to calculate and prove/disprove damages.

Opportunities for accountants are endless. A sample list of possible types of litigation services engagements, by category, as identified by Management Advisory Services Technical Consulting Practice Aid 7 is included in exhibit 1 below. (Sloane 18)

Exhibit 1.

Damages

- Lost profits
- Lost value
- Extra cost
- Lost cash flow
- Lost revenue
- Mitigation

Valuation

- Business practices
- Pensions
- Intangibles
- Property

Antitrust Analyses

- Price-fixing
- Market share
- Pricing below cost
- Dumping
- Anticompetition actions
- Monopolization

General Consulting

- Statistical analyses
- Actuarial analyses
- Projections
- Industrial engineering
- Computer engineering
- Market analyses

Accounting

Bankruptcy
 Family law
 Tracing
 Contract cost and claims
 Regulated industries
 Fraud, civil and criminal
 Historical analyses

Analyses

Tax bases
 Cost allocations
 Tax treatment of specific
 transactions

Most large CPA firms have established specialized groups in the areas mentioned to assist current clients, as well as, bring in additional business to the firm. Increased competition within the public accounting profession in areas of audit, tax and consulting combined with the increased demand for litigation support services has persuaded firms to expand their practice. However, many decisions must be made by the firm in order to select litigation support engagements: act as a consultant or expert witness in court proceedings, and calculate damages for the client's case.

ENGAGEMENT SELECTION

When presented with a possible litigation support engagement, the CPA must first be certain no conflicts of interest exist. A conflict of interest could arise if any of the potential parties to the lawsuit are former or existing clients. As specified by Rule 301 of the AICPA Code of Professional Conduct, the CPA must consider the following to determine if a conflict with a former client exists: the type of confidential information the CPA firm possesses, the length of time the party was a client, and the amount of time that has elapsed since the relationship was ended. (Sloane 19) The CPA must also have a

good working relationship with the attorney, and be supportive of the position he or she is taking with the case. Any potential conflicts should be disclosed to the attorney and the attorney's client and they should make the final decision.

Objectivity in decision making, like in auditing, is also of utmost importance. The litigation support services profession does not have any specific written codes to consult for guidance when ethical considerations arise. However, Rule 102-Integrity and Objectivity and Rule 201-General Standards of the AICPA Code of Professional Conduct (See exhibit 2.) apply to all CPA services, including litigation support. Minor modifications may be necessary to adapt to the legal environment.

Exhibit 2.

Rule 102-Integrity and Objectivity

In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others.

Rule 201-General Standards

A. Professional Competence.

Undertake only those professional services that the member or the member's firm can reasonably expect to be completed with professional competence.

B. Due Professional Care.

Exercise due professional care in the performance of professional services.

C. Planning and Supervision.

Adequately plan and supervise the performance of professional services.

D. Sufficient Relevant Data.

Obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.

Another relevant authorized pronouncement is the Management Advisory Services Technical Consulting Practice Aid 7, which "does not establish any standards, but is designed to assist the practitioner in applying his or her knowledge." (Leeman 4) This reference material provides guidance on engagement acceptance criteria and case strategy roles, as well as, suggestions for the issuance of expert opinions and presentation of evidence in court.

tt It is important for the accountant to keep these standards and pronouncements in mind when deciding to accept an engagement. An assessment of the competence and technical expertise of the CPA or that of others in the firm should be made. Knowledge of the industry and subject matter is particularly important. This knowledge and skill must be applied to the work performed using due professional care. In addition to adequately planning and supervising the work done, the CPA will be expected to evaluate the quality of work performed. For this reason, sufficient relevant data should be used in forming conclusions for the case.

The CPA must also assess the integrity of the attorney. As in any business transaction, avoiding association with someone who has a bad reputation is wise. Therefore, respect for the lawyer the CPA will be working with is a must. After careful

consideration of the aforementioned topics, the CPA will either accept or reject the engagement.

CPAs ROLE

Upon deciding to accept a litigation support engagement, the attorney will designate the CPA as either a consultant or an expert witness. This designation is important because the type of work performed and the susceptibility of that work to discovery is different for both designations. Discovery is a fact finding process where both parties attempt to gather as much information about the opposing party's strategies. One can never be sure what type of documents will be subpoenaed during discovery. Therefore, CPAs must be careful not to produce, in writing, any projections or damage calculations which can be easily misinterpreted if obtained by the opposition. By identifying the distinctions between the roles and responsibilities of a consultant and an expert witness, one can better understand the impact of the CPA on the outcome of the case.

Consultant

Most frequently, the CPA acts in the capacity of a consultant. In this situation, the CPAs client is the attorney. A consultant assists the attorney in developing a case strategy by preparing necessary analyses of financial information and identifies the cases' strengths and weaknesses. The primary reason for this designation is because the attorney work-product privilege protects the CPAs work from discovery. (This will be

discussed in further detail later in the paper.) However, it is common for the designation of consultants to be switched to expert witness. When this happens, all work the CPA did as a consultant on the case is now subject to discovery. For this reason, a CPA must always be careful when documenting work for any litigation support case.

Expert Witness

By designating the CPA an expert witness, the accounting expert will be required to form objective opinions and present them openly in court. A distinction between a lay witness and an expert witness becomes obvious when one examines the evidence used as a basis for the testimony presented by both. Unlike lay witnesses which base their testimony on their view of the same objective instance by testifying according to facts only and leaving inferences or conclusions to the judge or jury, expert witnesses may have theoretical bases which are radically different from another. For example, in calculating damages to a claim it may be necessary to make assumptions about future events. Opposing sides may assume different hypothetical scenarios, both of which have valid justification. As an expert witness, objectivity must be maintained; by no means should the expert be an advocate, even for the attorney's client. All work will be subject to discovery, therefore, care must be taken as to what information is documented.

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LEGAL PROCESS

The typical sequence of events in court involving an expert witness begins when the plaintiff files a complaint which outlines the statutes involved, the actions that led to the injury, and the monetary value of the damages. Next, the defendant's attorney files an answer denying any or all of the allegations. Both documents provide an excellent case introduction for the accountant. The CPA must gather as much information as possible in order to provide the attorney with necessary analyses.

Discovery

After the pleadings have been served, the case moves into the discovery stage. Discovery is done through interrogatories and depositions. Interrogatories are series of questions requesting specific information about the opposing party and its position. Because CPAs have a better understanding of the specific documents needed, they can be of great assistance to the attorney in formulating and responding to interrogatories. A deposition is "testimony taken under oath, usually under less formal conditions than in a courtroom, but subject to the rules and regulations of the court as though the testimony were being taken in the courtroom." (Dykeman 5) This allows both sides to get a feel for where the opposition is heading with the case and the type of witnesses they plan on using.

Accounting consultants and experts can provide help by interpreting the testimony and raising pertinent questions to

clarify the issues. The accountant can't directly ask the questions in a deposition, however, notes can be passed to the attorney. Both parties attempt to get as much information regarding the opposition's facts and theories as possible during discovery. This information gathering is crucial because of the complexity and importance of expert testimony in the outcome of a lawsuit.

In order to discover the foundation of the expert's case, expert witnesses are often called upon to testify in depositions. "Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon." (Rossi 119) A definite time constraint would exist if the attorney waited until the trial to discover the theoretical bases of the witness' opinion. Also, additional advice of the attorney's own experts may be needed to expose vulnerable spots in the testimony.

Both sides of the case are called upon in a deposition. Therefore, it is necessary to remember that although the CPA provides excellent assistance analyzing the opposition's testimony, the accounting expert witness must also take the stand. The CPAs testimony is crucial. The opposition will attempt to show weaknesses in the financial analyses and raise question regarding the CPAs credibility. The CPA must take great care in determining word choice, and organization so as not to contradict oneself or give too many generalizations. A written transcript can be reviewed and expanded afterwards. If

necessary, any clarifications should be made; deposition testimony must be consistent with trial testimony. "The deposition may be the most important event during discovery in commercial litigation because many cases settle before trial, based, in large measure, upon the attorneys' evaluation of the testimony and demeanor of witnesses." (Sloane 22)

Testimony

Although a consultant may play an integral role in the case up to this stage of the legal process, only an expert witness can take the stand in court. Expert testimony at trial begins with a series of questions aimed to establish a foundation which qualifies the witness as an expert in the field. According to the Federal Rule of Evidence 702, expert testimony is admissible

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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 or an opinion or otherwise. (Zoeller 17)

The first condition that must be considered is whether or not that testimony will assist the trier of fact in understanding the case. The information provided by an expert should only be used if the fact finders of the case are not able to understand the facts of the case without assistance.

The second condition for admissibility of expert testimony is to have a qualified witness. This is important because the expert must be qualified in the field in which he or she is to testify, and the testimony must be confined to that field of expertise. Questions regarding the expert's education,

professional credentials, and work experience in the specified area will be asked in order to establish credibility in the expert's testimony. The attorney usually requests a ruling from the bench as to the witness' qualifications as an expert before evidence to the case is presented.

The presentation of the remaining testimony under oath is physically taxing on the expert because of the high demands it places on mental alertness. Technical competence, good professional judgment, integrity, and an open mind are expected to be demonstrated by the expert on the witness stand. Although the accounting witness must fully prepare the testimony he or she expects to present, there are several other considerations that should be kept in mind. First, the expert must make certain the question is understood before he or she starts to answer it. If any uncertainty exists, one should ask for clarification.

Next, the expert should answer questions as directly, concisely, and honestly as possible (Dykeman 48). It is not wise for the witness to volunteer information that is not required. Only necessary details should be included so as to avoid confusing the judge or jury, and providing information which can be used by the opposing party to discredit one's testimony.

Other considerations are to avoid using accounting jargon and other technical language, and to maintain a courteous and professional attitude throughout the testimony when possible. Jurors, and judges, and maybe even the opposing attorney, may not understand the point that the accounting expert witness is trying

8 to make. Jokes and personal exchanges with the opposing counsel should be avoided.

Finally, the witness must maintain confidence in oneself. "The attorney cannot compel a witness to change answers or testimony; a witness is on the stand to tell what one knows and to give an opinion based upon reasonable certainty." (Dykeman 49) By testifying according to fact and basing opinions on sound accounting principles, problems arising in this area should be avoided. Expert testimony, if presented with aforementioned considerations in mind, has the ability to make a significant impact on the outcome of the case.

Damage Calculation

8 In order for the CPA to have sound testimony, many hours must be spent developing the case and calculating damages. This task involves much more than just number crunching; there are no set formulas to simplify calculations. According to Dan B. Dobbs in *Remedies-Damages, Equity, Restitution*, "Damages must be calculated from evidence, and evidence must vary from case to case." (Love 36) Since no two cases are exactly alike, the CPA must sift through a vast amount of information to determine what is relevant to the case at hand. He or she may have to develop assumptions that underlie approaches to get the numbers, and locate business documents needed to develop or refute the calculations at issue. It may be necessary to reconstruct a model of what was done, and apply accounting knowledge to hypothetical, "what-if" situations. A great deal of creativity

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is necessary. Each situation or problem must be looked at with a fresh mind; one should not prejudge or get locked into a preconceived strategy.

Most commercial cases can be broken into two groups according to the different types of damage remedy: compensation damages and restitution. Compensation damages are "dollar damages intended to compensate an injured party for a loss" (Love 38) for the purpose of making the plaintiff whole again. A calculation for compensation damages must consider three factors: the value of promised performance, "incidental" and "consequential" losses resulting from the breach, and costs or losses the plaintiff avoided as a result of not having to perform the agreement. (Love 38) First, the value of promised performance, known as "general" damages, is considered a natural result of the breach, and is normally measured at fair market value. The second factor, also known as "special" damages, is typically unique to the particular case, and includes any lost profit or additional costs incurred as a result of the breach. Making a distinction between the amount relating to "general" or "special" damages is important because the law requires stricter proof of the amounts and causes for "special" damages. Finally, the savings resulting from the plaintiff not carrying out the agreement are subtracted from the first two factors to arrive at the total compensation damages.

Restitution damages are awarded to prevent "unjust enrichment" of the defendant. The amount of restitution damages

sought represents the value of the benefits the plaintiff received on a breaching defendant. A common example of a situation where a client may attempt to recover restitution damages is when he or she has made partial payment of a contract. After breach by the other party, your client may seek to get that partial payment returned. Other remedies are available, however, an accountant's assistance is less likely to be necessary in those cases.

No matter what type of remedy is being calculated by the CPA in the litigation support case, there is a limit as to the amount of special damages that can be awarded. The cause of the plaintiff's injury must be a direct result of the defendant's actions and not due to other outside factors. The CPA must be certain to have a "reasonable basis" for the assumptions made in calculating the damages. In addition, the special damages must have been "foreseeable" at the time the agreement was made. These and other legal theories should be kept in mind when generating possible damage calculations. If the CPA is not certain of the legal ramifications, he or she should ask the attorney for advice. It is the attorney's responsibility to know the law. The accountant, on the other hand, should have an excellent understanding of the current economy, the industry the case is dealing with, and the client's business in order to make the most accurate predictions possible. With this knowledge and his or her skill in working with numbers, the CPA should be able

to arrive at a remedy which will provide the most benefit for the party being represented.

CONCLUSION

As one can see, the accountant's role in litigation support services is rather extensive. Many considerations must be made early in the process regarding which engagements to accept and what capacity the accountant should assist the attorney. The CPA will be involved through all stages of the legal proceedings, including testifying on the witness stand, if the CPA qualifies as an expert witness. Much general business knowledge and expertise of accounting is required of the individual when calculating damages. In addition to technical computations, CPAs also have the opportunity to show their courtroom savvy as expert witnesses. Litigation support services is a growing area for accountants in today's business environment. Hopefully, accountants will be able to play a significant role in the successful outcome of future lawsuits, as well as, reap both personal and financial benefits.

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