Preparing Deposition Questions: The Critical Role of the Forensic Accountant

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INTRODUCTION

Litigation support is an area of forensic accounting that has steadily grown in visibility over the years, and for many accountants is one of the most interesting and demanding areas of the profession. Not only is a solid background in financial accounting, managerial accounting, auditing, and taxation useful, but general business knowledge and excellent communication skills are extremely important. The one overriding skill, however, that will benefit a forensic accountant almost more than any other skill is that of being creative when analyzing a given situation and then deciding the proper approach for analysis. This creativity does not mean that the forensic accountant can manufacture results with no basis in fact, but rather, being creative in a way to combine skills from the accounting areas mentioned above to offer useful results that will withstand the close scrutiny that is always present in the litigation environment. These services offered as part of litigation support must stand up under the premise of being logical, believable, and understandable. If a forensic accountant cannot convince the judge or jury that the work product meets those three ideals, then credibility suffers, and less value is placed on the accountant’s efforts.

A lawsuit evolves slowly over time with most disputes taking years to either end in a pre-trial settlement, or finally decided at trial. While the forensic accountant can offer a variety of services during the different stages of a lawsuit, one of the most common services is that of producing an expert witness report on business damages. Other services include business

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valuations and property division recommendations, or even working as a consultant on a dispute rather than as an expert witness. But written expert witness reports are the main work product that receives most of the attention. Just as important as preparing expert reports, though, is analyzing thoroughly the results and assumptions of the opposing expert’s report. This analysis should not be underestimated in its importance by the forensic accountant since the financial aspects of a lawsuit is where the accountant’s responsibility rests; not in the legality of the actions of the parties which triggered the suit (that is for the attorneys and the court). And within the analysis of the other expert’s report lies one of the most overlooked services that can be provided, and is the focus of this article: preparing deposition questions used to extract pre-trial testimony from the opposing expert witness.

Often it is said that a successful outcome of a lawsuit is when settlement is reached before going to trial. No matter how strong a case one side or the other believes they have, a trial opens up great risks because of the uncertainty as to the outcome. Both sides certainly want to avoid those risks, but they also want any pre-trial settlement to be in their favor. To have this advantage, however, they must show their side’s strengths or the other side’s weaknesses in such a manner to gain a favorable settlement, and the deposition of an accounting expert is where those strengths and weaknesses, at least in the financial sense, can be brought to light. An early settlement can then possibly be reached, or if not, at least each side knows where their trial preparations need additional work. Knowing what questions should be posed to the other financial expert to gain the specific, needed knowledge is a service the forensic accountant can offer. Experts are usually deposed only once, so there will be only that one pre-trial chance to gather as much information as possible to assess the expert’s position; and this one opportunity
must not be wasted. Thus, it is essential that this valuable service of forming deposition questions be identified and communicated to the attorney for whom the accountant is working.
STAGES OF A LAWSUIT

Before considering the role of the forensic accountant in the development of deposition questions, a brief overview of the stages of a lawsuit and a description of the deposition itself are presented. While the services of a forensic accountant may be important in both civil and criminal cases, most engagements for the forensic accountant involve civil cases. The steps involved in a civil trial are as follows:

1. Plaintiff files a complaint
2. Defendant is notified by a summons
3. Defendant responds
4. Discovery occurs
5. Pre-trial conferences
6. Trial

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2 These are only the most general of steps for a case. For a more in-depth review of various steps from the Dispute Phase to the Post-trial Phase, see American Institute of Certified Public Accountants (AICPA) 2009. Introduction to Civil Litigation Services. Special Report 90-1, FVS Section, 7-13.
A civil case usually begins when an individual or an organization determines that a problem cannot be solved without the intervention of the court system. A lawsuit is initiated when a complaint is filed by the party seeking resolution, the plaintiff, against another party, the defendant, from who damages are sought. The complaint filed with the court states the plaintiff’s version of the facts, the legal theory under which the case is brought (e.g., contract or tort), and asks for financial damages or some other form of relief.

The defendant is notified by a summons that legal action against the defendant has been filed, and once notified, the defendant has a specified period of time to file an answer admitting or denying the allegations made in the complaint. Prior to answering, the defendant’s typical response is an immediate motion to dismiss, which will be based on various deficiencies in the plaintiff’s complaint. For example, a defendant can claim in a motion to dismiss that the court does not have proper jurisdiction\(^3\) or that the plaintiff has failed to include a party necessary to the lawsuit.\(^4\) Most commonly, a defendant will allege that the plaintiff has failed to state a claim upon which relief can be granted, which means the plaintiff cannot win under the law.\(^5\) For example, if a plaintiff has sued the defendant for wrongful termination, but the state does not recognize that claim, the court will dismiss it for failure to identify a claim upon which relief could be granted. If the motion to dismiss is awarded, the defendant does not need to engage in discovery, and there is no reason to settle with the plaintiff since the action has been successfully defeated. If the defendant is unsuccessful with the dismissal motion, however, the complaint must be answered with a response to each of the specific claims in the lawsuit. Responses may include an admission that the claims are true, a denial, or an indication that the defendant does

\(^3\) Fed. R. Civ. P. 12(b)(2).
not have enough information to either admit or deny the claims.\textsuperscript{6} Once a claim has been admitted as true, it cannot later be denied or questioned at trial. Also, the defendant can, and in some cases must, file a counterclaim against the plaintiff in the answer.\textsuperscript{7}

Both sides begin preparing for trial by engaging in discovery, which is the formal process of exchanging information between the parties about the witnesses and evidence they may use at trial. During this discovery phase facts are developed. The process of discovery enables the parties to know before trial begins what evidence may be presented during trial,\textsuperscript{8} thus allowing both sides the opportunity to obtain evidence. Discovery facilitates amendments to the complaint based on new information, plus it can also facilitate a resolution if there is no factual dispute in some area(s). Pre-trial settlement often occurs after discovery with the escalating costs of the discovery process itself possibly impacting the settlement value. Further, after discovery is substantially complete, the parties should have a decent indication of a possible settlement value if they both wish to stop the proceedings from going further. The goal of the system of discovery is to avoid surprises: Settlement should occur, or the case should be decided in court, based on its merits with full knowledge of the facts in the open, not on hidden gamesmanship.\textsuperscript{9}

The process of discovery begins with an initial meeting of the parties, during which they are required to make or arrange for mandatory disclosures and develop a proposed discovery plan. The timing for discovery should be set, and this plan will be used by the judge to help carry out the timeline for completion. This initial meeting is designed to preserve evidence and

\textsuperscript{6} Fed. R. Civ. P. 8(b)(1).
\textsuperscript{7} Fed. R. Civ. P. 13(a)-(b).
determine the method of production, such as photocopies or CDs. A written report outlining the
discovery plan must be submitted within the parameters of the jurisdiction, usually around 14
days. The next step following the initial meeting is mandatory initial disclosures. Mandatory
disclosures must be made “based upon the information then reasonably available.”

The parties
cannot argue that they have not fully investigated, or that the other party has not submitted, their
disclosures. There are four categories of mandatory initial disclosures: witnesses, documents,
computation of damages, and insurance agreements.

Identifying information about witnesses
that may be used by one of the parties to support its claims or defenses must be provided to the
opposing party. Copies or descriptions of all documents within the control, custody, or
possession of the disclosing party and that may be used to help their also case must be provided
to the opposing party.

As a consulting expert, the forensic accountant can offer suggestions as
to which documents to request, and he/she can quickly review documents for relevant
information.

Retaining the forensic accountant during the discovery process is critical.

The computation of damages, which must include each category of damages, is another area in which
the expertise of the forensic accountant is needed. Any insurance policy that might provide
coverage for the judgment must also be provided to the opposing party. In addition, the
mandatory initial disclosures must be provided after the initial meeting within the time frame of
the jurisdiction unless the parties stipulate, or the court approves, a different time.

13 Kevin Flaherty, Fight the Battle on Two Fronts: Liability and Damages, MATSON, DRISCOLL & DAMICO, Nov.
Methods of discovery include depositions, interrogatories, subpoenaing, and asking that a document be submitted for examination to determine if it is genuine.\textsuperscript{14} A forensic accountant can play a critical role in the deposition process, which is further described in a following section of this article. The term “interrogatories” refers to a set of written questions to which the other party submits a set of written answers. Interrogatories may be used for core information gathering, such as names of witnesses or documents that might be used. “Contention interrogatories” flesh out the nature of the complaint, with “mop-up interrogatories” being used to supplement initial disclosures as discovery nears completion.\textsuperscript{15}

A subpoena is a written order issued by a court compelling a person to testify or produce certain physical evidence, such as books, records, or other documents for inspection.\textsuperscript{16} The forensic accountant’s role in determining which documents to request and in analyzing those documents is also important. The scope of the discovery process is broad. The parties can request any information that is relevant, and it does not have to be admissible as long as it is reasonably calculated to lead to admissible evidence. Despite this liberal standard, however, some information is protected from discovery. The main reasons why information would be undisclosable are privilege,\textsuperscript{17} work product doctrine (trial preparation materials),\textsuperscript{18} non-testifying experts,\textsuperscript{19} and court-imposed limits for good cause.\textsuperscript{20}

Following the discovery phase are pre-trial conferences, and judges use these pre-trial conferences for many purposes. A status conference, held after initial pleadings, helps the judge

\textsuperscript{14} See Discovery, supra note 5.
\textsuperscript{16} See Discovery, supra note 5.
\textsuperscript{17} Fed. R. Civ. P. 26(b)(1).
\textsuperscript{18} Fed. R. Civ. P. 26(b)(3).
\textsuperscript{19} Fed. R. Civ. P. 26(b)(4)(D).
\textsuperscript{20} Fed. R. Civ. P. 26(b)(2), 26(c).
manage the case. A time-frame for completing pre-trial activities will be developed, and a court date may be set. Judges also use pre-trial conferences to encourage settlement, but if the case is not settled, an issue conference then provides a way for the attorneys to agree on undisputed facts or points of law. Agreements during the issue conference are called stipulations; stipulations can shorten the actual trial time.

WHAT ARE DEPOSITIONS?

According to Black’s Law Dictionary, a deposition is “a witness’s out-of-court testimony that is reduced to writing (usually by a court reporter), for later use in court or for discovery purposes.” A deposition is also called an examination before trial. An oral deposition, which is the most common form, is a deposition given in response to oral questioning by a lawyer. The deposition is given under oath, as would happen in a court proceeding. A deposition based on written questions, also referred to as a deposition on written interrogatories, is a deposition given in response to a prepared set of written questions. A deposition on written questions has an advantage in that attorneys for the parties need not be physically present at the taking of the deposition. With a deposition on written questions, the attorneys serve on each other questions and cross questions, as well as redirect and recross questions that will be put to the deponent (the person being deposed). These questions are sent to the officer who will be taking the deposition, who then puts the questions to the witness, records the answers, and transcribes the deposition as

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would happen with an oral deposition. If a deposition of an organization is needed, the notice of deposition (subpoena) names the organization and should describe with reasonable particularity the matters for examination. The organization then designates a person to testify about those matters on its behalf. The deposing of the organization does not preclude the deposer from deposing individuals within the organization.

Because depositions are part of the discovery phase, they are designed to help gather any information that may be pertinent or helpful to the case. The content and the questioning involved in depositions are not subject to the restrictions that apply in court proceedings, and the deponent must answer the questions asked. Though not typical in a deposition, the attorney for the deponent may request that the deponent not respond to a particular question, and ask that the judge rule on whether the deponent must respond. The attorney can instruct the deponent not to answer only “when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(b)(3).” Anyone who might have relevant knowledge or expertise of some aspect of the specific case can be deposed, including expert witnesses such as forensic accountants. Each party is permitted up to ten depositions. There is no limit as to the number of questions that can be asked during the deposition; rather, there is a time limit of seven hours on the deposition. One of the purposes for deposing an expert witness is to lock him or her into testimony at trial. Should an expert change an answer at trial, the opposing attorney can

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23 Id.
bring into evidence inconsistent statements in the expert’s deposition.\textsuperscript{26} This is known as impeachment, which can compromise the credibility of the witness at trial.\textsuperscript{27}

The role of the forensic accountant during the deposition is critical. While the forensic accountant may be involved in a deposition as either a non-testifying (consulting) expert or a testifying expert, or in some cases both, it is advisable to engage at least two forensic accountants as experts – one to serve as consulting expert and one to serve as testifying expert. When one forensic accountant serves as both consulting and testifying expert, all working papers, notes, and other documents are discoverable. Because of this, the forensic accountant engaged in both roles will find it necessary to limit the notes taken during depositions and trial testimony, and will at times not be permitted to be present during these proceedings, which limits the opportunity to offer valuable counsel during the testimony and after.

A testifying expert is hired to provide an unbiased, independent opinion. As an expert witness the forensic accountant can be asked about the scope of the assignment, current employment, educational background, professional licenses, work experience, memberships in professional organizations, publications and lectures, fields in which the accountant is qualified as an expert, other work performed as an expert witness or other litigation consultant, the amount of compensation being received (and what percentage is derived from testifying as an expert witness), what opinions have been formed, and the bases for those opinions.\textsuperscript{28} If the forensic accountant is not engaged as a testifying expert, then the development of deposition questions places him or her in the role of a non-testifying or consulting expert, and therefore would be permitted to be present during depositions and trial proceedings. Further, his or her work is not

\textsuperscript{26} D. LARRY CRUMBLEY, LESTER E. HEITGER, \& G. STEVENSON SMITH, FORENSIC AND INVESTIGATIVE ACCOUNTING (2009), ¶8181.
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{Id.}
available to the other party since it is shielded from discovery by the attorney work product doctrine, and is, therefore, not subject to discovery.\textsuperscript{29} Another important benefit of engaging the forensic accountant as a consulting expert is that the consultant can assist with strategy and can work as an advocate for the client.\textsuperscript{30}

Depositions are costly since they involve the attorneys’ time as well as the hiring of a court recorder, and are used to gain valuable information, thus providing the opportunity for the opposition to see the witness in a more informal setting. The attorneys can see how witnesses may perform at trial and possibly get off-the-cuff reactions. While important witnesses will likely be well coached, many witnesses will more likely divulge too much, or unnecessary, information during a deposition.

Not everyone who is deposed will become a witness in court, but some deponents will be selected as witnesses for the trial. While it is generally preferable to have the witness present in court, in some circumstances, the deponent does not actually testify in court; rather, as a substitute, the content of the deposition is submitted in the court proceeding. For example, a deposition from an expert witness who is not available for the court proceedings due to geographic distance or to other demands could be submitted to the court. Thus, the deposition itself is given considerable weight in the discovery phase, as well as in the trial phase.

**BEING DEPOSED**


The deposition itself is typically conducted at the office of the attorney for either the plaintiff or the defendant. Both attorneys are present, as well as a court reporter and the deponent. Typically, these are the only parties present. However, on occasion, the consulting forensic accountant might be present during the deposition so that he/she can listen to the answers of the deponent; if the answer to a question seems incomplete or inaccurate, the forensic accountant can, with a note or during a break, discuss the issue with the attorney, who can then readdress the issue when the deposition continues. The court reporter will conduct the swearing in, and will record the deposition. The court reporter typically tapes the deposition, and may, in addition, take notes during the questioning. If the deponent is a witness for the plaintiff, the defendant’s attorney will ask questions during the deposition. If the deponent is a witness for the defense, the plaintiff’s attorney will ask questions. The deponent’s attorney typically does not ask questions during the deposition. The deponent may be coached by the attorney as to what to wear to the deposition and what to expect while being deposed. The deponent should be circumspect about talking with his or her attorney during breaks; the opposition could overhear the conversation and raise issues that might not otherwise have been raised. The importance of answering the questions by providing no more information than is necessary to answer the question will have been stressed to the deponent. Once the deposition has been given, the court reporter will prepare the written record of the deposition. This written record is given first to the deponent’s attorney for review and correction if needed, then provided to the opposing party.

The deposition is likely the only opportunity before trial to ask the expert to explain his/her report and to question the assumptions used in the report. The deposition is legal

testimony for the court record. Because all answers given during the deposition can be used during trial to try to damage the expert witness’ testimony on the witness stand, the role of the forensic accountant in reviewing reports and tax returns and preparing deposition questions is critical. Failure to involve the forensic accountant during the deposition can result in failure to address pertinent financial questions.
DEPOSITION QUESTIONS AND THE FORENSIC ACCOUNTANT

Many books and articles on forensic accounting discuss in much more depth how to prepare for, and give, testimony during the deposition, as well as how to provide testimony on the witness stand during trial.\(^{32}\) Little, however, has been written about how to actually write deposition questions to be used to depose the opposing expert, other than a quick mention that this service can be provided.\(^{33}\) But this step is where the forensic accountant can provide a valuable, unique service, since next to preparing an expert report and providing quality testimony, writing these questions could well be the most important contribution a forensic accountant can offer.

From the timeline for the various stages of a lawsuit discussed in an earlier section of this article, one can see that deposing an expert witness is the only opportunity before trial that the opposing counsel has to compel the expert to answer direct, specific questions concerning the written report produced by the expert. The report itself should contain, among other items, the amount of business damages the plaintiff is claiming or the defendant is proposing, the documents used to estimate those damages, the methods used to calculate the damages, and the assumptions used to compute the amount of the damages. Also important is to learn why other methods and other assumptions were not used, why a certain discount factor was or was not included, why the period for damages extends for a certain number of years, or why other documents were not considered.\(^{34}\) Not only are the completeness and logic of the answers

\(^{32}\) See, e.g., Crumbley et al., supra note 26, at ¶8181 - ¶8201.

\(^{33}\) AICPA. Serving as an Expert Witness or Consultant, Forensic and Valuation Services Section, Practice Aid 10-1. 2010, p. 59.

\(^{34}\) A more complete expert report on business damages will contain alternative methods, discount rates, etc. that the expert decided not to use with an explanation as to why they were not used. Some experts, however, do not identify those unused alternatives to reduce the risk that the methods selected for use in the case will not be called into
important to assess the strengths and weaknesses of the report, but the attorney can judge what type of witness the expert will be if a trial is to occur. The forensic accountant can help with this assessment of the other expert’s responses to those questions which are directed at the financial analysis.

Use of forensic accountants by attorneys varies: some attorneys appreciate the accountant’s valued expertise in depositions, while others may not understand, or may not have thought of, how to use the accountant in this manner. Of course the attorney who is trained in the area of preparing deposition questions and evaluating responses to gather evidence in pursuing a plaintiff’s claim, or supporting a defendant’s not guilty plea. Plus, a number of attorneys may feel they understand accounting adequately enough to prepare the financial deposition questions themselves, and assess the responses. While some may, most attorneys probably do not; at least not to the degree of a well versed accountant. An accountant should thoroughly analyzing the opposing expert’s written report at some point as the dispute proceeds, so using the accountant’s services before any depositions are taken provides the financial expertise which is necessary to pinpoint areas that should be addressed during a deposition and, if the accountant is also present, provide follow-up questions as needed.

With a proper background that includes financial statement preparation, auditing, taxation, and managerial accounting, an accountant is an ideal professional to call upon for detailed financial analysis in a lawsuit. Accountants understand how financial transactions influence the numbers in a set of financial statements and they can, for example, help interpret

\footnote{question. Also, in other reports, the expert may in fact mention several alternatives, but it is unclear why they were not used.}

\footnote{Other areas of accounting that are also useful include accounting information systems, financial planning, business consulting, business valuations, etc.}
the quality of a balance sheet’s assets or assess the debt structure for liquidity concerns. The quality of earnings shown on an income statement can be evaluated taking into consideration accrual basis accounting versus the cash method, the impact of different inventory methods, and the reasonableness or estimations of expenses. The cash flow statement also can be examined closely for adding insight into sources and uses of cash not readily apparent in the other statements. Tax planning advice and tax return preparation experience are useful skills in helping to understand why and how certain items are reported on the tax returns. Accountants, then, understand the decisions other accountants make to report the numbers for purposes of financial accounting statements and income tax compliance.

In a business damages lawsuit, not only do many factors come into play to determine the amount of damages, but no two cases are exactly alike. So a forensic accountant must closely examine all of the related materials and identify the pertinent documents and aspects that need to be considered in forming an opinion as to the damages amount. Isolating the relevant information to support the expert’s opinion is important no matter if the case involves a relatively simple situation such as the loss of use for only one business asset, or more complex situations such as lost sales from a period of operations shutdown or the breach of a major multi-year manufacturing contract. Identifying those relevant facts by evaluating financial information includes the following concepts that an accountant may work with on a daily basis and that will have a bearing on many business damages cases:

- Fixed and variable costs
- Direct and indirect costs
- Cost allocations
- Non-cash expenses
- Marginal revenues and marginal costs
One intriguing aspect of forensic accounting work in computing business damages is that even with the accounting concepts listed above, the ability to creatively apply the appropriate concepts and then form an opinion on damages that will withstand close scrutiny by the opposing side is crucial. Then, to help convince a judge and/or jury that your estimations are reliable, the estimates must be logical, believable, and understandable since those parties will ultimately decide the exact amount of damages to be awarded (if any). Accountants not only draw from those financial concepts, but also should apply a well-reasoned approach as a basis for an opinion because there are no rules or standards that state precise procedures on how a damages amount must be calculated. This well-reasoned approach is unlike, for example, financial accounting which has numerous standards and principles which must be applied, or auditing that has it standards for acceptable techniques, or even the taxation area which is governed by tax law. You have the flexibility to use professional judgment as long as the result is reliable and based on acceptable, proven methods endorsed by the forensic profession.

From the defense side’s point of view, reviewing and analyzing the plaintiff’s accounting expert’s damages report may be performed either before or after the defense’s expert prepares his/her own report. The timing depends on when the expert is brought into the case or when the

36 This partial list of numerous accounting concepts can be useful in forensic accounting work.
attorney requests the report. The forensic accountant can help write deposition questions for deposing the plaintiff as well, not just questions for when the financial expert is to be deposed. Deposing the plaintiff on financial matters is also important because the plaintiff is the one who is claiming to be damaged and should have first-hand knowledge of the financial situation surrounding the claim. Plus here is a chance to probe for other possible documents not previously requested or submitted as part of discovery. The plaintiff is also the person to answer questions about a commonly overlooked issue that directly impacts the claimed damages amount: mitigation of damages. Establishing what opportunities existed and what actions were taken to mitigation the loss is important, and the opposing expert might not be aware of these; but the plaintiff will.

Early involvement by the forensic accountant in a lawsuit is ideal. With the attorney busy evaluating the legal aspects of a case, having the forensic accountant onboard to assess and evaluate the potential financial matters is crucial as well. From the plaintiff’s point of view, the accountant will be brought in earlier than on the defense side, probably even before the complaint is filed. This early work makes sense because the plaintiff will need to know of the potential damages amount to help decide whether to move forward and seek financial recovery. The accountant working for the plaintiff’s attorney will also file the first written expert report to estimate those damages. So there is probably little concern about the plaintiff bringing the forensic accountant in too late.

On the defense side, however, that concern is real, and attorneys need to understand the importance of bringing the expert on board early to be able to obtain as much value out of the forensic accountant’s abilities as possible. For example, if both the plaintiff and the plaintiff’s
financial expert witness have already been deposed before the defense’s financial expert is even hired, possible discovery opportunities may have already been lost. As mentioned above, the plaintiff knows first-hand the operations of the business and the events that took place to cause potential damages, plus any steps taken to mitigate those damages. A financial expert will be able to answer detailed questions on how the report was prepared with various assumptions and computations being made. But the accountant for the defense, if brought in late, may read those deposition transcripts and see many opportunities that were missed to have additional (and possibly better) financially related questions asked to expose much needed details that might help the defense’s position as to the damages amount. Important financial questions might not have even been asked, or the deposition testimony was not as clear or direct as it should have been, leaving the late arriving defense’s expert possibly asking for more information and documents that may only be available by issuing another subpoena that may or may not be granted. Early in a dispute, even before any depositions are taken, an expert can help identify possible financial records that should be considered in computing damages. So when a forensic accountant is brought into a dispute late, opportunities for more precise and understandable answers may be lost, necessary documents might not even be considered, and the effectiveness to help analyze the financial situation somewhat diminishes.

**PREPARING THE QUESTIONS**

While being deposed, a financial expert is providing testimony under oath as an expert witness who has examined the relevant facts and formed an opinion that was used to produce the

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37 One of the authors of this article has been in this position, reading depositions taken years earlier.
written report of damages. Every answer given is important because not only does the testimony become part of the court record (which can be introduced during trial), but the testimony may also provide keys to understanding possible weaknesses in the expert’s opinion. One of the goals of the opposing attorney, then, is to learn as much as possible about the expert along with the steps taken, and thought process used, to develop the numbers contained in the expert’s report. Remember, a deposition is most likely the only opportunity before going to trial that an opposing side has to question the other expert, so the specific questions being asked are important.

If during the deposition proceedings any existing weaknesses are indeed found, then a possibility arises to lower or maybe severely damage the expert’s credibility as a witness in the case. This outcome can be devastating for the side on which the expert is working: The expert and the expert’s work product, the written report, may no longer be reliable or believable. Once inroads are made into weakening the expert’s testimony, the attorney asking the questions can, with specific questions being put forth, show the expert that known weaknesses exist, and just how far the attorney is willing to go to expose them. By playing this card, an attorney could (and which does in fact happen) place the other side into a position of desiring to settle the case before going to trial. Once an expert becomes damaged, it may be too late to hire another expert.39

Whenever a financial expert witness produces a damages report that is later found to have weaknesses, that does not mean that expert was biased in preparing the report. The weakness could just be that mistakes were made in either the calculations, the assumptions, or the methods of arriving at the numbers in the report. The written report is the product of the expert’s work; hence, any weaknesses in it are a reflection of the expert’s work. Other reports produced in a dispute could be for a business valuation or other purposes, but a business damages report will be used as an example in the remainder of this article.

38 Other reports produced in a dispute could be for a business valuation or other purposes, but a business damages report will be used as an example in the remainder of this article.
39 There are deadlines set after which new experts cannot be brought into a dispute.
used in preparing the report. So the degree of the weakness will be assessed, and could be anywhere in the range of relatively minor to highly severe. As a standard, all experts are expected to produce unbiased work, neither inflating (for the plaintiff) nor understating (for the defense) the amount of estimated damages. The presence of any possible appearance of bias should be so remote as to not deem to exist, since bias is one of the most dangerous of any weaknesses that might arise.

When writing deposition questions, the forensic accountant has a variety of factors to consider, and preparation is crucial. All documents related to the case to date must be thoroughly analyzed, including the opposing expert’s written damages report along with all court filings, plaintiff’s and defendant’s depositions, other parties’ depositions, answers to interrogatories, financial documents submitted, tax returns, etc. A forensic accountant must be active in this phase to be certain that all case-related documents and records are received since some attorneys may only select those items that the attorney deems relevant to the financial aspects of the case. But other apparently non-financial documents may also shed light on financial matters as well, such as medical reports that state the ability of the plaintiff to function in the employment setting.

After reviewing all other documents, the forensic accountant should read the opposing side’s expert report to gain a clear understanding of how and why methods were used for the report, and how the report is written and presented. Is the report prepared in a professional manner and does it appear to use resources that other forensic accountants may have at their disposal? For example, the American Institute of Certified Public Accountants publishes
samples of an expert report’s format showing various sections that should be included. Also, do the report’s results seem reasonable? In other words, would another financial professional deem the results reasonable and, maybe more importantly, would a jury of nonfinancial experts deem the results reasonable? [While possibly most important, trying to guess what a jury would decide is difficult.] Also evaluate the report as to how the results are explained with an eye towards weighing the sometimes voluminous detail included against an easily understood presentation of, or a summary of, the total damages amount. Assessing the report in this overview type of an approach provides a feel for how professionally prepared and written the report appears to be, along with its reasonableness and believability.

After the overall review, the next step is to then comb through the report analyzing every number in every statement or schedule to determine if the facts and actions stated in all case-related documents and records match, or are used in an appropriate manner. While a forensic accountant may during this step find some obviously clear errors, keep in mind, however, that an expert report is prepared using professional judgment on a variety of issues, and so identifying an item that is “absolutely wrong” might not be possible. The “professional judgment” itself is under scrutiny, though, and the procedures used to produce the report must be reviewed closely. The goal is to find specific items which need to be questioned about during the deposition that call for further clarification, with the possibility of locating one or more areas of weakness which can then be pursued in depth during questioning.

40 AICPA. Communicating in Litigation Services: Reports, Practice Aid 96-3.
To prepare for the writing of deposition questions, a major step in evaluating the opposing expert’s report, that itself is the simplest step, is to recalculate all computations. This procedure includes re-footing columns of data, multiplying and dividing, tracing numbers through different spreadsheets, and even re-computing present value/future value results. Never assume the opposing expert’s numbers are correct even if they look to be computer generated since mistakes do happen. Not only evaluate the report itself, but also scrutinize in the same manner any documents the expert relied upon, especially if that expert prepared those other documents, such as tax returns, a compiled set of financial statements, or even a set of audited financial statements. Bringing to light any simple mathematical errors during a deposition will, of course, provide an opportunity for the expert to correct the errors before trial. But these earlier errors can later be brought up in the courtroom (if the case reaches that point) to throw doubt on the overall quality of the expert’s report and testimony. This doubt may enter the mind(s) of the judge and/or jury: if the expert was not careful enough to check his or her own work product for even simple errors, then where else could other or larger mistakes appear? Another possibility is that once errors are located in simple mathematical calculations, then the assumptions that the expert used may also be called into question.

Take note of the documents relied upon to create the report and also note any new documents mentioned during the deposition; do you have access to all of those same documents as well? If not, you need to request, through the attorney, those documents which, as mentioned above, may take a subpoena to acquire. With the deposition questions, the attorney has the chance to ask about (and attack if necessary) the assumptions used by the expert. The forensic accountant, then, must evaluate those assumptions and compare them to the accepted methods in
the forensic literature. Evaluate the reason (if explained well enough in the report) why the expert used a certain assumption; a disagreement with an assumption might not be found. Again, the area of the assumptions is where professional judgment is used, and even though you might not have used those same assumptions, the expert’s report could very well be credible, and thus would be difficult to attack. One example could be that of loss mitigation assumptions in a wrongful discharge employment case. One expert witness may assume that there were no viable income earning alternatives since the plaintiff worked in a specialized field and there were no similar job openings in that particular geographic area. Another expert may take the approach that the plaintiff has the skills (as deemed relevant upon review of the pertinent documents) for a different type of job and could have secured employment in the same geographic area. Either approach may be valid, but which would be considered more reasonable?

Once the forensic accountant has a solid grasp of all facts along with the strengths and weaknesses of the opposing expert’s report, it is time to begin writing the questions. Very specific questions should be written to extract very specific answers, and certain questions should be presented at certain times during a deposition. Thus, the order of the questions is extremely important, and it is imperative to fully understand which questions are more important than others. If, through the analyses work, key questions are identified that could verify a weakness, plan well ahead with lead-in questions before the main question is asked. Use these lead-in questions to build a wall around possible answers to leave as little room as possible for variations of what the answer to that key question might be. For example, if a CPA expert witness used the plaintiff’s income tax returns to estimate lost income, and those same tax returns were also prepared by that expert, determine if anyone else in the CPA firm helped
prepare any part of the returns. If a serious mistake in how an item was reported on one of the returns is found and a decision is made to use that error to damage the witness, then eliminate as an answer that someone else committed the error. So early in the deposition process a question should be asked as to exactly who was involved in the return preparation. If the expert answers that no one else but the expert prepared any part of the return, then later a question can be asked about the mistake. The expert must answer the questions under oath, and at a later point could not place blame on anyone else without having to retract an answer already entered into the record.

One of the first set of questions in a deposition should cover the expert’s credentials, especially if the expert lists special certifications on a vita. In an actual case, one of the authors of this article noticed that an opposing expert had claimed the holding of a forensic-related credential. This was at first surprising (but not out of the question) because the certification was fairly new and the expert worked in a small CPA firm in a small town. Inquiries to the organization which awards that certification were performed to find out if the certification was actually held by that person. The holding of that credential by that expert could not be verified, and a series of questions were written about this for the expert to answer. The expert initially testified in the deposition that he held the credential, but when asked which organization issued him the credential, he could not provide an answer. He even testified that he was not a member of the organization that sponsors the credential. When asked if he had to pass an exam to earn the forensic credential, he first answered yes, and then soon changed his testimony to no. The intent was to possibly impeach the witness; the expert had claimed a credential that he apparently
did not hold, and therefore his work product could be called into question, if the expert was not thrown off the case altogether.

As mentioned earlier in this article, other questions to be asked at the outset of a deposition include ones related to the expert’s experience giving testimony at previous depositions in other cases and/or testimony experience at trial. Also, current occupation and previous business experience questions are usually asked. These are typical questions that the attorney will probably have prepared regardless of whether a forensic accountant is assisting with preparing the questions.

ADAPTED CASE SITUATIONS

Following are two situations are adapted from the involvement in several cases that led, or could have lead, to the financial expert losing credibility.

Mathematical Calculation Error

As mentioned above, at the beginning of an expert’s deposition the degree of assistance from others (if any) to calculate business damages should be established early so that any errors located in the expert’s report can be traced to the correct person. So if the expert testifies that no one else participated in the computation of damages, then all errors will be those of the expert alone. A few deposition questions could be something as simple as:

Were you the only one to calculate the damages estimate, or did someone else either within your firm or outside of your firm assist you? [If others assisted, obtain their names and ask the extent of their contributions to the damage estimate.]
The estimate of total damages you provided in the amount of $5,000,000 represents your best estimate of damages suffered by the plaintiff. Is that correct?

Assume that the CPA expert in this case stated that only he calculated the damages, and that the damages amount was indeed his best estimate. Also assume that in his calculations, however, there was a material mistake in computing the present value of future lost income; a simple mathematical error that was located by the opposing expert when a manual check of the calculations was made. Rather than $5,000,000 as claimed in his report, the correct amount of the damages should have been $3,750,000, a 25% decrease compared to the original amount (same assumptions, but correcting only for the math mistake). At this point the attorney questioning the expert has a decision to make in whether to reveal the error during the deposition to damage the expert’s credibility immediately, or wait until trial. For revealing and exploring the mistake during the deposition, the questioning attorney could hand a calculator or a computer to the expert and ask him to recalculate the numbers himself. If he verifies his own error, his credibility may be so damaged as to encourage a settlement.

Revealing a material error during trial, and identifying it as being the sole responsibility of that expert (especially an error which occurred because of simple math error), could have a more dramatic effect in front of a jury. That error, then, could possibly be used to raise doubt as to the reliability of other calculations and assumptions in the report. The care taken to produce a quality work product would then be called into question, and blame could not be placed upon someone else. The key is to have the appropriate questions asked early enough to place responsibility upon the expert.

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41 Judges will, at times, ask the expert to recalculate the damages as the expert is sitting on the witness stand. A calculator may be handed to the expert and a recess called while the expert recalculates the numbers.
Building a Wall

Take the following scenario gathered from a review of tax returns that were used in a case to compute loss of income due to the inability to work as a result of injuries sustained in an automobile accident.

- Plaintiff was injured and there was no doubt that the defendant was at fault.
- The only issue for the financial expert witnesses was the dollar amount of the non-medical (loss of income) damages.
- Plaintiff owned 100% of an S corporation.
- Plaintiff worked full-time for the S corporation.
- Plaintiff was paid a low annual salary of $1,000 for working more than 40 hours per week for the entire year before the year of injury.
- The S corporation earned $80,000 of net ordinary income for that year.
- Plaintiff’s work hours were reduced for a short period after the injury.
- The plaintiff’s expert, a CPA, also prepared the plaintiff’s corporate and individual tax returns.

One possible issue identified in this short scenario was the fact of a low annual salary paid to the shareholder/employee. It is well known in the area of taxation that sometimes shareholders/employees of S corporations intentionally keep salary payments low to reduce employment (social security) taxes on both the employee and the corporation. Tax law, however, states that a “reasonable” salary must be paid. A $1,000 annual salary for full-time work from a profitable business may not seem reasonable to most people, so if it could be demonstrated that the expert CPA provided incorrect tax advice to the plaintiff, intentionally or not, the expert’s credibility would be weakened and thus the expert’s business damages estimate might possibility be deemed unreliable.

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42 Rev. Rul. 74-44, 1974-1 CB 287.
Specific questions should be prepared in the correct order to finally obtain an answer about any tax advice provided by the expert concerning the salary amount. First, preliminary questions should be used to identify or confirm other items of information for building a wall around the most important question, thus reducing the opportunity of the expert to either deflect responsibility or deny knowledge if the issue. Since this specific issue in question is related to the expert’s prior work of preparing the tax returns, and then indirectly to the damages report itself, the questions should first address the prior work. The questions asked in this case were similar to these:

Did you provide all tax planning advice for the plaintiff’s S corporation and individual income tax returns for the years in question?

Did you prepare the plaintiff’s S corporation and individual income tax returns for those years?

Did anyone else inside or outside your CPA firm prepare any part of those tax returns?

Have you prepared the S corporation’s Form 1120S income tax return from the inception of the business?

How well do you know the plaintiff?

Are you very familiar with the operations of the S corporation? Please explain.

Around how many hours per week did the plaintiff work for the S corporation?

Were you aware that the S corporation paid the plaintiff an annual salary of $1,000?

Were you aware that for the year in question the S corporation earned net ordinary income of $80,000 even after deducting the plaintiff’s salary?

With the above questions answered in the affirmative along with the statement that the expert was very familiar with the plaintiff and the plaintiff’s business (along with knowledge of
the 40-plus hour workweek), the expert is now in a place to answer questions about the tax effects of an unreasonably low salary, with very little room to deflect the answer. The following questions were similar to the ones used for finding answers to the main issue:

Do you consider working 40 or more hours per week a full-time job?

Did the plaintiff work full-time for the S corporation?

Do you consider $1,000 a reasonable salary for a full-time employee who works more than 40 hours per week for a profitable business that has net ordinary income of $80,000?

If the salary of $1,000 was to be deemed unreasonable and thus too low, then would you agree that the United States government was not paid the adequate employment taxes (social security taxes), and possibly the state was also underpaid as to employment taxes?

After this last series of questions, the CPA gave the appearance of being a weak, damaged expert witness. Even during the latter part of the deposition, the attorney for whom the expert was working instructed the expert not to answer certain questions because it was apparent that his expert status was quickly losing credibility because of potential (and maybe intentional) incorrect tax advice. The attorney may also have been worried about the expert perjuring himself. In fact, settlement was agreed upon immediately after the deposition for a much lower amount than the expert’s damages estimate; the attorney knew the expert was now too damaged to appear in court.

As illustrated in the immediate preceding example, building a wall around the important questions that may identify any weaknesses in the expert’s work product is done early in the deposition process to reduce the number of possible doors that could be opened with different answers. The early questions should eventually place all of the responsibility on the expert when
the important questions are finally asked. Reducing the reasons an expert may try to provide for deflecting responsibility, such as by claiming no knowledge of an issue or stating that someone else is responsible, is one of the goals of the deposition questions. In the financial area, the forensic accountant can have the expertise to understand the work of another financial expert, and can help guide the attorney to obtain precise responses to the most important financial questions. This can be done not only with the advance preparation of deposition questions, but also if the forensic accountant is able to be present while the opposing expert is being deposed, because inevitably new questions will arise with some unexpected answers provided during depositions.

**CONCLUSION**

Litigation support work within the area of forensic accounting is challenging in many aspects, and is an interesting alternative to the other more visible areas of the accounting profession such as auditing, tax, and management accounting. In addition to analyzing the financial considerations of a lawsuit, preparing a damages report, and testifying as an expert witness, another service the forensic accountant can provide is an important area as well: helping to prepare deposition questions for posing to the other side’s expert. This importance should not be overlooked as an integral part of litigation support since the deposition of a financial expert witness is the only pre-trial opportunity available to obtain direct answers for gathering as much information as possible about the expert’s damages estimate, along with the reasoning and assumptions used as support for that opinion. The specific questions to be asked, and the order in which they are asked, are crucial in obtaining the precise answers needed to both evaluate the other expert’s work, and evaluate the expert’s ability to provide credible testimony. So, when
the forensic accountant considers accepting a litigation support engagement, this valuable service of writing deposition questions should be discussed and agreed to as well. With clear understanding between the forensic accountant and the attorney about all possible services an accounting expert can offer, a better work product can result.
A forensic accountant can help identify and locate the information you need to build or bolster your case. Forensic accountants understand that during the course of litigation, as well as during the time period prior to filing suit, each step must be carefully calculated and strategized so that counsel can control and develop the litigation process and, ultimately, the outcome of the case. Finally, it is critical for the forensic accountant to attend the deposition so that during breaks he can provide feedback to counsel. A trained forensic accountant is aware that he is not an active part of the deposition, and should only interact with his counsel. The role of the F&I accountant typically includes the following tasks: Let’s now take a look at how real issues were resolved using a forensic accountant