

Members on the Same Team—Forensic Accountants, Attorneys, and Clients

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The Role of the Forensic Accountant

Along with the attorney, the forensic accountant will often play an extremely critical role in a divorce matter. The attorney and client have to place great faith and reliance in a quality work product that will be utilized in a negotiation or trial. On some occasions, an accountant may be court appointed or designated a joint expert for both parties. More often, however, the forensic accountant is retained by one of the parties as his or her expert. Forensic accountants are generally asked to evaluate two discrete areas: the value of closely-held businesses and professional practices and an analysis of income and expenses for a lifestyle report.

Forensic accountants may be asked to offer analysis on any of a variety of economic issues in a divorce case that require an investigation, an interpretation of data, and a conclusion in the form of an expert opinion. A lawyer may ask a forensic accountant to offer expert testimony on virtually any economic issue that the lawyer must address and resolve. By way of example, a forensic accountant may be asked to trace assets to prove the premarital portion of an account or establish the commingling of marital and nonmarital assets. Forensic accountants have been utilized for such unusual issues as the amount of money the opposing party spent on a secret residence, a girlfriend, and purchases made through home shopping television programming. The forensic accountant may be asked to investigate and analyze any specific issue that draws upon his or her expertise and is of importance to the issues in the case.

On the most elemental level, the forensic accountant is simply providing factual information or rendering expert opinions for use by the attorneys and court. However, the forensic accountant often plays a far greater role in a divorce case. The forensic accountant retained by one side or the other is usually a member of the team, working in conjunction with the attorney and client to marshal the facts and information that will serve as evidence in support of the client's position. Because the forensic accountant has knowledge and a skill set that neither the attorney nor client are likely to have, the forensic accountant may be in a unique position to suggest avenues of approach that are helpful to the attorney and client in reaching the client's goals.

The role of the forensic accountant does not end with the production of the report. It is of critical importance that the forensic accountant, as a member of the team, be able to effectively participate in settlement negotiations and be persuasive in support of his or her opinion. If the case is tried, the forensic accountant must possess the necessary skills to testify effectively in a clear, concise, and conjunct manner to communicate to lay persons how the work was performed and the opinions arrived at. Obviously, defending one's position in cross-examination is also of paramount importance. Not every forensic accountant possesses the skills necessary to take the witness stand and perform in court. If we are to hold ourselves out as forensic accountants in family law matters, we must not only have the technical expertise and requisite educational background and credentials, but we must also be prepared to participate beyond the scope of simply producing a report.

What the Attorney Wants

What does the attorney require of the forensic accountant acting as his or her client's expert? The forensic accountant must perform quality work. He or she must be thorough and diligent and able to competently apply the theories of valuation or principles of accounting to the facts. Ultimately, the forensic accountant must produce a good work product: a sound expert report that will establish the value or prove a conclusion to be presented at trial. However, the attorney wants more than competent work. The attorney wants an expert who will make a positive contribution toward achieving the client's goals. Typically, the attorney chooses the forensic accountant or, at least, has great weight in the decision and will naturally want to select a forensic accountant who will be helpful.

The forensic accountant, just as the attorney, is in a service business. The attorney will want someone who will make his or her task easier and benefit the client. Why would the attorney want to involve someone who is going to make his or her job unnecessarily harder or not produce a quality professional report? A successful forensic accountant who wants repeat business from the attorneys with whom he or she has worked should remember that future assignments often depend upon the regard with which he or she is held by the attorneys recommending a forensic accountant. Attorneys judge forensic accountants based on their professional credentials, the quality of the work product produced, and their skill in assisting in negotiation or testifying in litigation. We only get one chance to make a good first impression; we have no do-overs, and being engaged is not a try-out. The client's economic

welfare is at stake, and often, significant sums of money are involved. Forensic accounting, particularly the subject of business valuation, should not be undertaken without considerable thought and evaluation about whether you have the necessary skill set to accomplish the assignment.

More specifically, what are the skills that the forensic accountant must bring to the table? He or she must be able to interact with the client and must have interviewing skills and the ability to gather useful information from the client and other sources. The forensic accountant must be able to think creatively about how factual information will be factored into a conclusion. He or she must be able to present his or her opinion and generate a comprehensive report with supporting schedules. Hopefully, that report will include text, rather than just calculations and numbers on a page. Some experts might prefer to do without text, but it is especially useful to the nonaccountant lawyers and judges who may be more comfortable with narrative explanations. Also, that report must be generated in a timely manner. An attorney cannot be put in the tenuous position of not having the required report by the due date set forth in the case management order. After producing the expert report, the forensic accountant must be able to explain his or her opinion in a confident and persuasive manner. This will be needed during settlement negotiations, at a deposition, or when it becomes necessary to present the expert opinion during trial. The forensic accountant must apply all of these skills to assist the attorney in his or her arguments and be an asset to the client's case. As previously stated, substantial sums of money are often in dispute and dependent on the technical and communicative skills of the forensic accountant.

Being Retained

After the forensic accountant is asked to become involved in a case, a formal written retainer agreement is necessary. Who is retaining the forensic accountant: the attorney or client? The attorney usually chooses the forensic accountant and will direct his or her work, but the client pays the forensic accountant. Often, the client signs the retainer agreement because he or she will be paying for the services.

Although this is the general practice, in some cases, the attorney or client might consider the possible strategic advantage of a retainer in which the attorney hires the expert. Case law provides that the attorney-client privilege will be extended to an agent of an attorney who receives communications that will be used for the purpose of obtaining legal advice from a lawyer. Therefore, if a particular concern exists about the need to limit the forensic accountant's work product from the other side, consideration should be given to the possibility of having the attorney retain the forensic accountant.

The Investigation

Generally, the first event involving the forensic accountant will be a meeting with the attorney and client to discuss the issues to be analyzed and review all the known information or sources of information. The attorney, forensic accountant, and client should discuss which

people may have information relevant to the forensic accountant's analysis, and they should also discuss how the forensic accountant will obtain that information. In a business valuation, for example, the forensic accountant may need to interview the business owner, employees, customers, or other parties with knowledge that would be useful in the analysis.

Often, the forensic accountant will first issue a document demand to the opposing party that sets forth all the documents that he or she determines need to be reviewed as part of the evaluation process. The forensic accountant may issue subsequent document demands indicating additional documents that he or she determines will be needed as the investigation and analysis continues. When the books and records of a business are required, the document demand may be the first step to obtain the necessary information. If the records are inadequate or do not reveal all the information needed for the analysis, the document demand alone will not suffice, and it may be necessary to interview key individuals and third parties.

It is also appropriate for the attorney to pursue formal discovery from individuals with information that the forensic accountant will need to analyze. Issuing a subpoena to obtain relevant documents is an example of information gathering in which the attorney assists the accountant. In some cases, it may be necessary to subpoena a person with relevant knowledge for a deposition. The attorney, forensic accountant, and client should discuss what information is needed and the best method of obtaining it, taking into consideration strategy, efficiency, and cost.

The Forensic Accountant's Interaction With the Opposing Party

The role of the forensic accountant is dramatically different depending on who we are representing. If we represent the business owner or professional, our job is generally much less complex and difficult. If we are representing the nonbusiness owner, it is highly likely that we will be confronted with a much more difficult task. When the forensic accountant performs a business valuation of a business owned by the client's spouse, the forensic accountant should first interview the client to obtain as much background information as possible about the spouse. Typically, the forensic accountant will also seek to interview the business owner and third parties, such as employees or even customers. Considerable thought should be given to how the interview is conducted. In some instances, the accountant simply meets with the business owner, with the opposing business evaluation expert present. This approach is less formal than a deposition and may be efficient and cost effective. In other instances, it may be necessary for counsel for each side to be present at the interview or a formal deposition.

When an expert relies upon a representation of a business owner during such an interview, the problem about what was said may arise. If the interview was conducted by the forensic accountant without either the other accountant or attorney present, there may later be an outright denial of what was said. Relying on statements that could later be refuted must be avoided because they can undermine the integrity of the entire report. One method of avoiding such a factual dispute is to not interview the business owner but instead conduct a deposition where a record is created. This provides greater control on the flow of informa-

tion and reliability about the exact nature of the information provided and relied upon. It is clearly the safest method of proceeding.

It is highly desirable and preferred that a review of the business records be conducted at the place of business. An on-site visit to the business premises can often permit the forensic accountant to gain valuable insight about the operation of the business. Sometimes, these visits can inadvertently reveal information that would not otherwise be obtained if the forensic accountant was not on the business premises.

If we are representing the professional or business owner, our ability to gather information is exponentially enhanced. We can expect that we will have far greater access to information than if we were on the opposing side. Our ability to understand the nuances of any particular business or industry will also be greatly improved, and our report should generally be more authoritative and comprehensive because of this opportunity.

It is often possible for the forensic accountant representing the business owner or professional to influence the report of the forensic accountant of the other side by virtue of an enhanced understanding of the asset being valued. This is an opportunity not to be overlooked, but it must be deftly handled. The skills of the forensic accountant beyond technical expertise can be employed in this area.

Analyzing the Information and Data

After the forensic accountant has obtained all the necessary raw material, he or she must analyze that information and data gathered and form opinions or conclusions that are to be set forth in the expert report. A draft report for preliminary analysis should be circulated to the attorney and client. Once this draft has been properly vetted and discussed, a final report can be prepared.

When the preliminary report is issued, particularly on the subject of the valuation of professional practices and closely-held corporations, several variables need to be thoroughly discussed. Among these variables are reasonable compensation and capitalization (cap) rates. These variables can dramatically shift the valuation conclusion. The forensic accountant must be able to thoroughly explain and defend all the variables in the report to the client and attorney before the final report is issued. Any weakness in this area can be fatal. The forensic accountant should expect to be challenged on all these variables and subjected to intensive questioning by the other side in an effort to undermine the integrity of the report.

The Neutral Forensic Accountant

The neutral forensic accountant, whether jointly retained or court appointed, often plays a greater role than simply assessing the data and offering conclusions. Although officially he or she is simply engaged to perform an analysis, it is possible for the neutral forensic accountant to play an enhanced role. Valuation is not a science because a valuation analysis can fall within certain parameters. A skillful neutral forensic accountant can be useful in establishing a range of values for the consideration of the parties. With no apparent vested interest, the forensic

accountant can assist in the resolution of valuation issues by not having to adhere to a fixed position that would not be conducive to flexibility and compromise. Again, the extent to which the neutral forensic accountant takes on this role is completely dependent upon the wishes of the parties. The forensic accountant may be a resource who helps bridge gaps, but the parties may choose to seek only the factual data or conclusions from the forensic accountant and argue to the judge why those facts or conclusions support their theory of the case.

It is important that the neutral accountant not overplay his or her hand. It is not uncommon for a court-appointed expert in these matters to feel that he or she is vested with some additional authority or responsibility to broker a settlement. That is not an accurate assessment of the expert's role. For example, experience in dealing with these issues in the 39 years that New Jersey has been an equitable distribution state has shown that some accountants have exceeded the boundaries of their authority in the hopes that their participation in the settlement of divorce matters will encourage judges to reappoint them in the future.

Court-appointed accountants and their role in assisting in the resolution of matters have had mixed results. Simply put, some accountants have exceeded their authority and tried to force settlements through marathon negotiation sessions in their offices. Although initially this seemed to be a successful model for accountants to adopt, ultimately, it was counterproductive. Attorneys and clients became wary of accountants who felt that it was their mandate to produce settlements. Accountants found themselves in the quasipractice of law, offering opinions about how nonaccounting issues could be resolved. Although it is desirable to assist in resolving issues, forensic accountants are cautioned to recognize the limits of their authority and expertise. It is better to produce high-quality, professional reports that are reliable and would encourage courts to reappoint you.

Timing of the Production of a Report

Often, the parties are required to produce their expert reports by a date ordered by the court and set forth in a formal case management order. Whether by court order or mutual agreement, a simultaneous exchange is the best methodology. This simultaneous exchange may occur at a meeting between counsels or experts. It could also occur by some other mechanism such as mutual overnight deliveries or faxes or e-mails by a certain time, but such exchanges require some element of trust in the other professional doing what was agreed. It may be that the detailed arrangements take on absurd cloak and dagger proportions, but the integrity of a mutual exchange is desirable.

If one party's expert, let's call him or her the early submitter, produced his or her report first, the other expert may have an advantage. The party who has not yet submitted a report—the late submitter—might have been considering a range of values for some variable, perhaps a cap rate or reasonable compensation or perhaps the overall value. Having seen the opposing party's expert opinion, the late submitter may now be able to use the early submitter's determination as either a floor or ceiling in selecting a range or an exact value for a particular variable. The late submitter may be able to present facts or propositions that refute or discredit some aspect of the early submitter's report.

Usually, both experts will want to avoid giving the other side a sneak preview of their report and will insist upon a mutual exchange. It is not unreasonable to consider allowing one expert to produce a report, with the other side then reviewing that report and commenting on it. This approach can achieve considerable efficiency and cost savings, and it avoids both experts reviewing the same raw data and compiling it in preparation for the report. However, this approach cannot be employed without full knowledge of the quality of work and integrity of the forensic accountant compiling the preliminary report.

Once a preliminary report has been completed, the forensic accountant on the other side should review and critique that report. It is entirely possible at this point that a meeting of the accountants can take place during which the variables in dispute are discussed and a resolution on value is achieved.

Another situation can arise that needs to be considered. In this circumstance, one side is compelled to produce their report preliminarily. In many cases, both parties have a critical interest in valuing a business or other asset, and they intend to invest their full resources and efforts in coming to an answer. However, on some occasions, one party has more of an interest in presenting an expert opinion. Perhaps one party has the legal burden of proof, and the other party knows that if no reports exist, they would win a particular issue. The opposing party may be of the opinion that it may not need its own report or does not want to produce a report unless the other party can meet its burden. In such a situation, there may be an advantage to having the attorney ask that the case management order require the other party to produce a report by a certain date, with a rebuttal report to be produced in a specified period of time thereafter. The forensic accountant should urge the attorney to take this strategic opportunity if it is available.

Depositions

The forensic accountant should assume that he or she will be deposed by the opposing counsel with regard to his or her expert opinion. Like any other witness, the forensic accountant has an obligation to answer the questions truthfully; however, unlike lay deponents, he or she will be asked about much more than objective, concrete facts. He or she will be asked about his or her professional opinion.

The deposition is the first opportunity for the forensic accountant to employ the critical skills of verbally communicating and explaining his or her opinion. The critical importance of this aspect of the services being rendered cannot be stressed enough. A good report without the ability to communicate to lay persons is simply not going to get the job done. A deposition is an information-gathering tool for lawyers. It could also be very important to the forensic accountant in gaining an idea of what testimony would be like at a trial.

The forensic accountant will need to defend the report (that is, explain the report in response to specific questions). A natural inclination exists to want to show the other side, "I am right," or "I am smart and understand this topic." However, that is usually the wrong approach. Like any other witness, the best policy is usually to simply answer the question and not offer any other information that will only provide more material on which to be

questioned by opposing counsel. The forensic accountant should remember that a deposition is not about proving his or her case. The forensic accountant's client does not win the case when the expert provides good deposition testimony. When the deposition is concluded, the opportunity for the parties and their attorneys to evaluate their respective positions has been enhanced and may lead to further discussions and settlement.

The forensic accountant being deposed is on "defense." The deposition is an opportunity for the opposing party to gather information about the forensic accountant's opinion and try to find weaknesses in the forensic accountant's report. It is usually not in the interest of the forensic accountant being deposed to volunteer information or respond to a question outside the boundaries of what is being asked. If the questioning attorney misses the point or fails to grasp some aspect of the expert's opinion, that is the questioner's problem. If the forensic accountant addressed a topic in his or her report, he or she will be able to testify at trial about it, regardless of whether it was a topic at the deposition.

Trial

The trial is the forum where the forensic accountant must be fully prepared to participate in a skillful and an effective manner. One can be a great forensic accountant but lack this particular skill set. Holding oneself out as a forensic accountant without the ability and comfort level to participate in a trial must be avoided. Everything done by the attorney and forensic accountant should be focused toward the goal of presenting a winning case at trial. If the parties cannot settle their case, the trial determines the outcome. The attorney, forensic accountant and client must keep the following old adage in mind: "Cases prepared for trial settle; cases prepared for settlement go to trial." When one side is aware that their opponent is ready to present a compelling and effective case, they need to evaluate their risks and options in proceeding and consider the possibility of coming to an acceptable resolution through settlement instead of losing. If we are aware that the forensic accountant on the other side of a matter has weaknesses in either his or her report or ability to communicate at a trial, that presents the opportunity to go through with the trial and take advantage of the fact that the other side cannot do what they set out to do. We could also drive a hard bargain and achieve an advantageous settlement from a party that knows they cannot go the distance.

To be prepared for trial, the forensic accountant should be confident that he or she has gathered and interpreted the relevant data and can explain his or her conclusions. It is often the case that we will find ourselves testifying in front of judges who are unsophisticated in financial matters. When that is the case, the testimony being offered by the forensic accountant should take on the nature of an educational opportunity, which involves more than simply repeating under oath the information in our report. The attorney and accountant should work together to have the forensic accountant educate the court with basic accounting principles and the underlying rationale for such things as reasonable compensation and building a cap rate.

The entire need for the educational approach can be best illustrated with a brief anecdote. In a trial, one of the attorneys in our office asked an accountant about a company's

earnings before interest, taxes, depreciation, and amortization (EBITDA). The judge interjected and asked, "How do you spell that?" It was quickly apparent that the judge never heard of EBITDA. In fact, the judge was not aware of a C corporation or subchapter S corporation. We then went back to some fundamental educational questions that allowed the judge to grasp basic concepts and ask questions of his own to the forensic accountant. Ultimately, this resulted in somewhat of a bonding experience between the judge and accountant, which needless to say was helpful to our client.

When testifying, it is particularly useful to look at the judge and relate to the judge as if he or she was at a seminar where we are lecturing and explaining. Obviously, we must rely on our attorney to give us guidance about the sophistication level of any individual judge, so that we can direct testimony to his or her needs. During cross-examination, the expert's testimony will be more like the deposition. The expert will answer the questions and not offer additional material for further questioning. He or she should have the opportunity on redirect to explain and elaborate his or her expert opinion to the extent that an explanation is required after cross-examination.

Forensic Accountant Expert Fee

It is not uncommon for the fees of the forensic accountant to be equal to or exceed those of the attorney in complex matters. This is often due to the fact that the volume of work being done by the forensic accountant is much more time intensive than the attorney's work. Divorces are expensive. An old joke asks what a divorce is worth. The answer is every penny.

Notwithstanding the wisdom of that joke, during the divorce process, many clients have tremendous anxiety about the mounting costs of their divorce. The costs of a divorce are not ordinary expenses incurred by a business but, rather, a personal bill that must be paid from the parties' income or life savings. During the divorce process, the clients may view every dollar spent on the divorce as a wasted dollar or a dollar spent to send their lawyers' children to college rather than their own. Both the lawyer and accountant need to be cognizant of, and sensitive to, these legitimate fears and anxieties.

At the time the forensic accountant is retained, he or she should impart a clear understanding to the client and lawyer of the costs involved in performing the requested work. The forensic accountant should be able to estimate the costs associated with reviewing and analyzing the appropriate documents and preparing an expert report. Although the client may not understand the work involved in the required analysis, the forensic accountant does, and he or she also understands that variables, unexpected obstacles, or delays may arise. It is important that the forensic accountant provide the client with a realistic and reasonable estimate of the costs involved, based on experience and familiarity with billing in similar, prior assignments.

At the inception of the case, the forensic accountant will become familiar with the family income and assets. He or she is in a position to evaluate the totality of estimated costs in proceeding with the requested assignment and to consider the parties' ability to pay. It would be a disservice to blindly embark upon a project that will generate a bill that the client can-

not pay or is out of proportion to the economic benefit of the client. Forensic accountants are in business. No one wants to find themselves in accounts receivable land. Serious consideration needs to be given to the scope of the required work, its cost, and the ability to get paid. There is virtually no reason to take on an assignment when the ability to be paid for our services is in significant doubt.

Based on his or her knowledge and experience, the forensic accountant may be in a position to suggest an appropriate, practical, and cost-effective manner to obtain the information that the attorney and client seek. In the case of a business valuation, professional standards require the business evaluator to take certain steps to be in compliance with the promulgated standards. Although the criteria of such standards may represent the best methodology, it may be possible to perform a less expensive analysis by which the forensic accountant can still come to a calculation about value. A calculation of value report may be reliable, admissible evidence that will serve the client's needs at a lesser cost. Similarly, it may be possible for the forensic accountant to first provide an oral report or an oral report with certain supporting schedules. If this information can be utilized as a gauge in settlement negotiations, the client may be able to avoid the expense of a full report.

Staffing

The staffing of a case clearly has a direct effect on the cost. The forensic accountant may appropriately decide to staff a case by having more junior accountants perform various tasks as steps in the forensic analysis. Clearly, it would make sense to have the most junior accountant perform data entry or compare and verify the years against documents. The problems usually arise when the midlevel or other senior accountants are billing for their efforts to become familiar with the client's situation and learn the information that has already been presented to the forensic accountant who was selected as the expert. The client may not understand the nature or legitimacy of other accountants, whom the client does not know, charging him or her.

These problems are multiplied when the forensic accountant staffs the case with an army of people. When the client is billed by five different individuals for the work entrusted to his or her expert, the client may feel that he or she is the victim of a feeding frenzy. The result will be an unhappy client with an astronomical bill that cannot or will not be paid. The client may also attribute blame to his or her attorney who created this "mess." The forensic accountant is in a service business, providing a service to the client and attorney. The attorney will be loath to utilize the services of that forensic accountant in the future if he or she believes that the forensic accountant carried out the assignment in an impractical matter, generating angry feelings on the part of the client toward both the forensic accountant and attorney. It is imperative that the forensic accountant appropriately estimate costs, provide the client with a reasonable expectation of costs, and perform the necessary work in a cost-effective manner, so that the client's goals can be logically and reasonably advanced.

Overstepping Bounds

Respecting the role of the attorney, the forensic accountant should realize that although he or she is playing an integral role in the divorce case, the attorney is ultimately responsible for handling the case. The report of the forensic accountant may address the main issues in the case. The information presented by the forensic accountant may constitute a large part or even all of the substance of the case. However, the attorney is charged with representing the client before the court. It is the attorney who will confirm the final terms of settlement in a fully executed settlement agreement or, alternatively, present the entire case to a judge at trial.

The attorney may call upon the forensic accountant to explain or even advocate the forensic accountant's opinion during settlement discussions. This may occur because the forensic accountant is better suited to explain his or her opinion, as well as the accounting or valuation principles involved. The forensic accountant may present a persuasive analysis but is infringing on the role of the attorney if he or she attempts to negotiate. The attorney may ask the forensic accountant for alternate approaches on an issue or a range of appropriate values, but it is the attorney who will communicate a proposal to the other side in an attempt to reach mutually acceptable terms. In performing his or her role and providing a service to both the client and attorney, the forensic accountant should ensure that he or she is providing what is requested, offering helpful ideas or suggestions, and not usurping the decision-making authority of the attorney.

In a business valuation case, one expert opined that the business was worth \$16 million, but the opposing expert opined that the business was worth \$8 million. After reviewing both reports, our accountant was asked to explain how 2 well-respected accountants could be \$8 million apart in the valuation of the subject business. Our forensic accountant suggested that a member of his firm would meet with a member of the opposing accountant's firm to discuss the elements of each report that were subjective, rather than strictly fact based. Our side agreed to the meeting between the accountants with the intention that we would have a better understanding about the differences; therefore, we would be better able to formulate our trial positions. When the meeting was concluded, our expert reported that both accountants had agreed that the appropriate value of the business was exactly in the middle of the 2 figures: \$12 million. The accountants exceeded their role by negotiating a value in a Solomon-like fashion. Our expert was supposed to meet with the other accountant to evaluate the areas of disagreement; he was not supposed to negotiate an agreement on a value. Our expert clearly exceeded his authority and undermined decisions that should have been in the hands of the attorney.

Conclusion

Forensic accounting in divorce matters is a growing industry. A unique opportunity exists here to develop a business that can afford an accountant a very comfortable income and lifestyle until retirement. However, the forensic accountant should have the requisite credentials, such as CPA, ABV, and CFE. In addition, he or she must be able to effectively communicate,

as has been stressed in this chapter. Judges and attorneys are consistently looking for top-notch experts, and we have no second chance to make a good first impression. If we do our jobs well, judges and lawyers will seek us out, and we can develop a very lucrative specialty. The forensic accountant is an integral part of the team made up of the attorney, client and forensic accountant. Lawyers are extremely reliant on their forensic accountants and are always looking for a symbiotic relationship that works to their mutual advantage.