



The Advocates' *E-Brief*

Vol. 21, No. 3, Summer 2010

What is the current environment for accounting experts?

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The use of an accounting expert is usually a critical component of any litigation case involving a business valuation or economic losses. Accordingly, it is important for both accounting experts and litigators to understand the environment in which an accounting expert performs his or her work. For example, a qualified accounting expert has professional practice standards and a code of ethics that must be adhered to in the conduct of the assignment. Further, recent changes to the Ontario *Rules of Civil Procedure* pertaining to all expert witnesses must be complied with. Lastly, the accounting expert is impacted by the growing trend of the courts to require the expert's working papers and draft reports be produced prior to the commencement of trial. In this article we examine how these factors impact the accounting expert's conduct, as well as the expert's interaction with clients and counsel.

Professional practice standards and code of ethics

The Canadian Institute of Chartered Business Valuators ("CICBV") has practice standards that address the types of reports a Chartered Business Valuator ("CBV") can prepare, the scope of work required for each type of report, and the required file documentation. It also has a Code of Ethics to which CBVs must adhere.¹ While other accounting professionals, such as Investigative and Forensic Accountants ("IFA") also have professional standards and a code of ethics, this article will focus on the Practice Standards and Code of Ethics of the CICBV.

The types of reports a CBV can prepare in a litigation context and the relevant CICBV standards include "valuation reports" (CBV Practice Standards 110/120/130) and "expert reports" (CBV Practice Standards 310/320/330) (the "CBV Practice Standards"). CBV Practice Standards 110 and 310 detail what must be included in each type of report. These also require that the CBV be retained as an "independent" expert to provide the mandated financial conclusion (CBV Practice Standards 110-1 and 310-1) and require a statement in the report that it was prepared by the expert acting "independently" and "objectively" (CBV Practice Standards 110-10.1H and 310-6.1G).

CBV Practice Standards 120 and 320 address the scope of work required for valuation and expert reports. In particular, these standards state, "The work shall be performed by a person or persons having adequate technical training and proficiency in financial analysis and/or business valuation concepts, principles and techniques, with due care and with an objective state of mind" (CBV Practice Standard 120-3.1B, 320-4A).

The following CBV Practice Standards are noteworthy from the perspective of file documentation and report disclosure given the increasing trend for experts to provide disclosure of their working paper files:

- Work performed in the course of a valuation assignment/expert report engagement "shall be documented and files must be maintained in an organized manner" (CBV Practice Standards 130/330-4A);
- "Summaries of key meetings, discussions and correspondence shall be retained on file" (CBV Practice Standards 130/330-5C);
- An expert shall disclose the "assumptions used and the procedures followed to determine the reasonableness and appropriate-



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ness of key assumptions" (CBV Practice Standard 310-9.2E); and

- A draft report referenced in a client representation letter shall be retained on file (CBV Practice Standards 130-5G, 330-5H).

The CBV Code of Ethics also states that a CBV is to perform work within his or her area of expertise, in an objective and independent manner. The following are key sections of the CBV Code of Ethics:

- "A member shall only undertake to provide professional services which he/she is competent to provide by virtue of training or experience, or is able to become competent in without undue delay, risk or expense to the client" (Section 102.2); and,
- "A member providing independent professional services shall, in respect of the particular engagement, be and remain free of any influence, interest or relationship which, in respect of the engagement, impairs the professional judgement or objectivity of the member or which, in the view of a reasonable observer, would impair the professional judgement or objectivity of the member" (Section 401.2).

Recent changes to the *Rules of Civil Procedure* of Ontario

Recent changes to the *Rules of Civil Procedure* relating to expert reports (Section 53.03), which became effective on January 1, 2010, focus on an expert's duty to assist the court, maintain independence and objectivity, and provide evidence in relation to matters only within the expert's area of expertise. The changes also include minimum report disclosure requirements, which include disclosing the nature of the opinion being sought, the expert's opinion pertaining to each relevant issue and the reasons supporting the opinion.

As discussed above, the existing CBV Practice Standards and Code of Ethics already cover the requirements of the above-noted new rules. However, a new requirement for experts is the express written "Acknowledgement of Expert's Duty" (Form 53), certifying their duty to assist the court in an objective manner, which has to be signed by them and attached to their report. Contrary to the impact the changes to the *Rules of Civil Procedure* may have on other experts, the changes should not have a significant impact on CBVs, given the CBV Practice Standards and Code of Ethics.

Recent case law relating to the production of working papers and draft reports

It is becoming more common for the courts to order the production of an expert's working paper files and draft reports. In the recent case of *Alfano v. Piersanti*, [2009] O.J. No. 1224, the defendants' accounting expert was ordered to produce all docket/time entries as well as all e-mails, some of which had been referred to in the expert's docket/time entries. The plaintiffs in this matter challenged the impartiality and independence of the defendants' accounting expert and, as result, the judge, the Honourable Ellen Macdonald, ordered a voir dire, which lasted three days, to investigate the expert's independence and relationship with counsel and the client. The judge ultimately found, based largely on the content of various e-mails between the expert and the client, that the defendants' accounting expert was not acting independently and had assumed the role of an advocate. Consequently, the accounting expert was disqualified from testifying.

Given the increased use of electronic correspondence, it is important for both experts and counsel to be mindful that e-mail correspondence will be treated the same as traditional letter correspondence when the court orders production of an expert's working paper file. E-mail typically represents an informal method of communication and, as a result, can sometimes include content that would not otherwise be included in a traditional letter. Care must be taken when using e-mail as a form of correspondence to ensure that the content is appropriate and the context in which it is written is apparent, and consideration should be given to how it could be interpreted by third parties and in particular the court.

It is also important to note that the judge in *Alfano v. Piersanti* stated that it was not necessarily an acceptable response for an expert to indicate that their practice was to destroy draft reports. For experts to maintain their credibility and demonstrate that they were not unduly influenced by counsel or the client in the drafting of their report, it is better for them to retain draft report(s)² and be able to explain any differences between the draft(s) and final report; otherwise, there may be a negative inference drawn by the court. Accordingly, counsel should understand and discuss an expert's practice with respect to draft reports in order to ensure that it meets the expectations of the court and that the expert's credibility is maintained.

Summary

The expert's role is to assist the court in arriving at an objective conclusion. In doing so, a CBV must adhere to the CBV Practice Standards and Code of Ethics and comply with the recent changes to the *Rules of Civil Procedure*, all of which require experts to maintain independence and objectivity and provide evidence only within their area of expertise. Further, it is imperative that experts and counsel keep abreast and be cognizant of recent case law to ensure that the experts' professional practices relating to the maintenance of working papers, retention of draft reports and correspondence are appropriate and will endure the scrutiny of the court and leave the experts' credibility intact.

Notes:

1. The CICBV Practice Standards and Code of Ethics are available on the CICBV website at www.cicbv.ca.
2. Typically unfinalized reports that have been distributed externally to third-parties are considered draft reports. ■