

Expert accounting witnesses: Avoiding a tricky situation

In September, we Virginians witnessed the devastation of Hurricane Isabel as it swept across our state. Maymont, a historic 100-acre park in Richmond, is beautiful, even now in its devastation — more than 30 percent of the stately trees lay waste. To many, this view is quite disturbing and not at all beautiful.

**By William C. Barrett III,
CPA, CVA, CTP, CCFM**

To you, the professionals who make up the Virginia Society of CPAs, I ask the same question: "Is epidemic devastation beautiful or is it the sheer power, left unchecked, that astounds and awes us?"

During the recent years of accounting scandal and abuse, we have witnessed the decline in public stature of our profession. In many court cases involving accounting improprieties, CPAs are also called upon to serve as expert witnesses.

An expert witness is an authority in a particular field, industry, discipline or profession accepted by the court or arbitrator. The expert's task is to assist the court by evaluating the facts of a case and to render a supportable professional or technical opinion about complex matters of cause and effect. The court, of course, needs assurance of the expert's objectivity.

Unfortunately, even expert witnesses can find themselves in trouble. As an expert witness myself, I have testified on behalf of

both the plaintiff and defense in cases against CPAs involving professional standards and conduct. The cases below detail tricky instances involving expert witnesses.

Expert versus fact witnesses

I was called to opine in federal court on professional standards for CPAs and certified fraud examiners (CFEs). In this case, the expert (a CPA/CFE) did a great job of actually finding fraud — however, he was being presented to the court as a fact witness instead of an expert witness. What are the differences between these two types of witnesses, and how can the classification affect the outcome of a case? Consider the following facts:

- An expert witness helps the court understand the complexities of the case.
- Fact witnesses do not need to have written reports, and are also considered "lay witnesses." Lay witnesses do not belong to a particular profession or are not experts in some field.
- A fact witness can only testify to witnessing actual facts; they cannot draw any conclusions from these facts. Only an expert witness can draw conclusions based on the facts to render an "expert opinion."
- In federal court, a recent trend is to use the expert's report to stand on its own, without the testimony of the expert unless



deemed necessary. However, without expert testimony, cases are usually lost.

- In depositions, fact witnesses have the ability to skirt many issues.

Based on these facts, you can see why using the CPA/CFE as a fact witness, rather than an expert witness, would be detrimental to the case. The CPA/CPE could only discuss his findings up to the point of opinion, without actually giving the opinion. In a tricky situation, however, the defense attorney would probably ask a question that did, indeed, call for an answer just outside of the facts. This quasi-opinion would then tie the plaintiff to the commission of the crimes.

The dilemma for the plaintiff's attorneys was to not let the expert get as far as the stand, but how? To me, it was easy. To become a litigation service/forensic accountant, the CPA must adhere to certain professional standards, rules and codes of conduct when offering expert services. CFE standards and codes also instruct the professional to hold out as an expert witness, which gives the court comfort that the expert is there to assist in reaching a just decision.

My job was to assist the federal judge in making a decision on whether to allow the CPA/CFE to testify as an expert or fact witness. My opinion was that a fraud upon the court would be committed if

the expert was allowed to testify as a fact witness.

The judge agreed and would not allow the "expert in sheep's clothing" as a fact witness. The case was dismissed "with prejudice," meaning it could not be brought back before the court at a later date.

When experts ignore the facts

A medical practice of four highly successful doctors hired an administrator who stole approximately \$400,000 from them in less than nine months. During this period, the administrator was actually out of jail awaiting federal sentencing for the theft of \$600,000 from another institution.

Continued on page 14

Expert Accounting Witnesses

Continued from page 13

The firm doing the monthly practice write-up was being charged with professional malpractice and negligence for not doing proper bank reconciliations.

According to the plaintiff's expert, another CPA/CFE, proper monthly bank reconciliations entailed the review of the front and back of the cancelled checks. Had this proper procedure been done, the firm would have detected phony vendors, forged checks and misuse of credit card charges.

The expert cited Statement on Auditing Standards (SAS) #1, §320.28 on internal control, and various auditing and accounting textbooks to indicate that the consulting firm CPAs were negligent in their professional duties and should be held liable because the firm reconciled only by comparing bank statements to computer journals.

There were, however, a few small problems with the expert's opinion:

- SAS #1 applies to audits. Also, SAS #1 was superseded by SAS #55 in 1988, which itself was amended in 1990 by SAS #78.
- When there is no mention of internal control guidance, write-up work falls under Statements on Standards for Attestation Engagements (SSARS), not SAS.
- The firm had not contracted with the medical practice to take on the liability of occupational fraud.
- The doctors had turned down the accounting firm's request to interview the administrator before the doctors hired her.

- The college texts used by the expert were outdated.

In a similar situation to the previous case, the trier of fact felt the wool was being pulled over his eyes. The judge's ruling — not only was the accounting firm exonerated, it was awarded sizeable monetary compensation.

What's going on?

In the above cases, these experts asked the judge to accept incredible assertions. Why? Were these individuals that represent the CPA profession greedy? Did they have such a need for approval that they may have compromised their own values? Were they so ego-centered that they thought everyone else was below their opinion? Or are they acting out of "group think?"

"Group think" is how individuals are influenced by group dynamics. One of the peculiar features of group dynamics is that clusters of people will come to decisions that are far more extreme than any individual member would have come to on his or her own.

In his book "The Tipping Point," Malcolm Gladwell offers that ideas, behaviors and new products move through a population like a disease, and that behavior can be transmitted from one person to another as easily as the flu or measles. Is this epidemic devastation what we are witnessing in the accounting profession?

We have seen the public stature of our profession violated on every level from international to local, from professional practice areas to moral turpitude in breaching the

public trust. And this stain is just starting to spread, its half-life growing ever more brilliant in a power and size that astounds and awes.

Each of us needs to start a "positive" epidemic of our own. The virtue of an epidemic, after all, is that just a little input is enough to get it started, and it can spread very, very quickly.

Here is mine: The CPA expert can advocate his or her opinion based on the findings of an investigation. As an expert witness, he or she must be objective to whether or not those findings support the goals advocated by the attorney. This objectivity is required to provide services ethically, ensure attraction of the right kind of referral sources and clients and also to give the public renewed confidence in the accounting profession.

What's your epidemic?

William C. Barrett III, CPA, CVA, CTP, CCFM, has more than 20 years of public accounting, tax planning and compliance, operations management, and mergers and acquisitions serving clients in a wide variety of industries. He has investigated fraud and misfeasance in corporations,



boards of directors and medical practices, and has directed teams investigating multi-defendant money laundering, illegal income, tax evasion and white-collar fraud. E-mail him at Bill.Barrett@BarrettPC.com.

VSCPA membership termination

Pursuant to Section 7.3.1 of the bylaws of the Society, the VSCPA membership of Chet Eugene Daniels of Richmond was terminated in August.