

# Litigation Support and the Forensic Accountant:



## ASSEMBLING A DEFENSIBLE REPORT

By James DiGabriele

**F**orensic accountants are frequently retained to provide litigation support services. These services provide assistance for accounting and financial matters in existing or pending litigation. Within the scope of each service the role of the forensic accountant can range from consultant to expert witness. Despite the function, the chief task remains to communicate specialized knowledge that will assist the trier of fact in understanding the evidence—that is why almost all engagements require the preparation of an expert report. This article addresses techniques for compiling an expert report that will impact the compilation of a well written and defensible report.



## Introduction

Forensic accountants are frequently retained to provide litigation support services. These services provide assistance for accounting and financial matters in existing or pending litigation. Typical litigation support services include:

- Valuation of business interests in shareholder and partnership disputes
- Calculation of economic damages resulting from a personal injury
- Medical malpractice
- Wrongful termination and discrimination matters
- Business interruption, inventory losses, matrimonial disputes
- Losses from contract disputes, and trademark and patent infringements.

Within the scope of each service the role of the forensic accountant can range from consultant to expert witness. Despite the function, the chief task remains to communicate specialized knowledge that will assist the trier of fact (judge, jury, arbitrator, etc.) in understanding the evidence. That is why almost all engagements require the preparation of an expert report.

## Defending your Report

When planning the extent of work for a particular engagement, the expert should always obtain a sufficient understanding of the nature of the dispute and the events that have given rise to the claim. The expert should also investigate whether there will be sufficient relevant data to afford a reasonable basis for the conclusions reached and/or recommendations offered. Once an expert is confident that the analysis or conclusion can be sufficiently supported, expectations for the end work product must be agreed upon as well.

Counsel may want an expert report for various reasons including:

- Court requirements (upon pending litigation—written reports are required in all civil cases in Federal court under Federal Rule of Civil Procedure 26(2)(B) unless otherwise directed by the court)
- For settlement negotiations
- To support a summary judgment
- To be relied on as evidence by a jury

However, no matter what the circumstances are, an expert should not create any written report unless specifically instructed to do so by counsel. A telephone or in-person conference should be held for the expert to determine whether a report is being requested, the type of report that is sought after, the scope of issues the report will cover, the factual assumptions to rely on, the scope of the opinions the expert will offer and any questions the expert might have.

Earmarking logistics before the compilation of a report will avoid future problems with respect to credibility. The reality is that forensic accountants regularly offer to the litigation community expert analyses and testimony services, which is both scrutinized and at times excluded by the court because the principles of objectivity have transformed to biased advocacy.

For example, if opposing counsel can show that the retaining counsel influenced the expert's report, the expert will lose credibility. This is easily accomplished if an expert drafts a report that counsel in turn marks up or makes suggested changes to. Experts need to assume that anything that is written will be discoverable and will ultimately end up in the hands of a jury and/or opposing counsel—even, and perhaps especially, draft reports.

Once it is clear that the expert will provide a written report, as well as the scope of the issues to be addressed, there are an abundance of techniques that will impact the compilation of a well written and defensible report. Those strategies highlighted are born of previous blunders and their negative outcomes in court case proceedings.

## Start with standards

Major national accrediting bodies have issued standards that cover required content in the compilation of an expert report, and it is crucial to adhere to those standards. For example, in cases where the scope of the engagement includes a business valuation, The American Institute of Certified Public Accountants, American Society of Appraisers, Institute of Business Appraisers and National Association of Certified Valuation Analysts have issued business valuation standards that address the required content. Those valuation standards provide an objective roadmap against which to benchmark an expert's valuation report. The first line of attack by the opposing counsel's retained expert is to reveal any ill conformity with the set standards. An example would be the failure to fully discuss key factors that impact value, such as a company overview, facts about management, ownership, the valuation methodology, supporting adjustments, etc. If opposing counsel can reveal ill conformity with the standards, those findings can be used to prove noncompliance and discredit the expert.

## Simple math

Review mathematical computations with a fine-tooth comb, and identify all inputs, methods and assumptions, fully understanding all calculations. Computations are mostly made on computer programs that may have preset formulas that are copied and pasted from spreadsheet to spreadsheet. The range of errors can vary from minor mistakes, to present value

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## Terms to Avoid

Absolutes,  
such as “always”  
and “never”

Red Flag Words:

“Draft”

“Confidential”

“Privileged”

“Obviously”

calculations skewed by hundreds of thousands of dollars—the result is a major blow to the retaining counsel’s case.

### Avoid Bias

Lack of objectivity or the selective use of data to support a theory will be discredited. For example, experts who offer strong opinions may overstep their role as an expert and begin to show signs of partisanship, bringing their lack of prejudice into question.

### Personal Research

Be wary of introducing your own research as the basis for any opinion. Relying on self-authored works born of personal experiences as a consultant to a particular company does not deem that opinion universal to industries alike. Therefore, by introducing personal research the expert becomes an advocate of his or her private experiences and views rather than his or her ability to apply the most relevant assumptions and findings to the engagement.

Beyond the risk of appearing less credible or as an advocate, the introduction of one’s own research is subject to legal scrutiny. A critical ruling in *Daubert v. Merrell Dow Pharmaceuticals* in 1993, along with *Kumho Tire Co. v. Carmichael* in 1999, contributed to the amendment of Federal Rule of Evidence (FRE) 702, which altered the way experts testify in court.

The amended (FRE) 702 became known as the reliability test for expert testimony, aimed at curbing expert testimony that appeared to push a client’s verdict preference. As a result, the U.S. Supreme Court recruited judges as the gatekeepers of expert testimony on the basis of four criteria:

- Whether the theory used by the expert can be and has been tested.
- Whether the theory or technique has been subjected to peer review.
- The known or potential rate of error of the method used.
- The degree of acceptance of the method or conclusion within the relevant scientific community.

Although it is not common for testimony to be rejected on one criterion alone, if the expert cannot pass the FRE 702 threshold then the expert will be limited to what he or she can say at trial if permitted to testify at all.

### Be careful with boilerplate language

Although it is common to use template reports and boilerplate language when issuing a report, the failure to customize and review carefully can result detrimentally. For example, when a report’s language indicates that “no warranty or guarantee, express or implied, is made,” such language may be distracting. When an expert is cross-examined and asked whether he or she can guarantee that the report is accurate and truthful and the expert answers “yes,” the boilerplate language can then be used against the expert. Warranties are not meant for expert reports—that type of boilerplate language only proves to be distracting.

### Steer clear of absolute terms

Terms such as “by no means,” “constantly,” “always,” and “never” make an expert vulnerable. In order to devalue an expert’s report, opposing counsel has to find only one occurrence to negate an absolute claim. The result is diminished credibility.

**Example:** “Absolutely no experience”—An expert report that makes a statement such as “at the time of her divorce, Mrs. Doe had absolutely no experience in the areas of investment and finance” or “at the time of her divorce, Mrs. Doe had a total lack of investment experience or knowledge” is a ticking timebomb when it comes time for cross examination. Opposing counsel can simply ask whether a deposit in a savings account is an investment or if a mortgage is a method of finance—clearly they are, and only a few instances when Mrs. Doe made a deposit into her own savings account or made monthly mortgage payments negates the expert’s absolute affirmation. The claim then becomes an exaggeration to make a point rather than the state-

ment of a truth. The end result is that the expert is forced to admit that they embellished; that willingness to overstate damages credibility. The scenario is avoidable by using the phrase “minimal experience” rather than “absolutely no” or “total lack of”.

### Maintain consistency

If an expert has submitted more than one report, the multiple reports need to be consistent. Inconsistencies translate to wavering opinions, unreliable assumptions, and a lack of credibility.

**Example:** “Different assumption to yield different results”—It is more likely today that opposing counsel can obtain an expert’s reports from other cases to check for inconsistencies. For example, if an expert relies on a 5-year average rate of inflation as a growth rate for projecting factors in a personal injury wage loss analysis, and opposing counsel finds similar reports for different cases that rely on just the most recent year’s rate of inflation, that type of discrepancy may express the use of subjective inputs and pierce the expert’s credibility.

### Avoid ‘red flag’ words

Various terms have been earmarked as being particularly vulnerable to attack by opposing counsel, whose job it is to undermine the expert, his or her opinions and credibility:

**“Draft”**—the use of the term “draft” immediately raises questions such as if there were any changes made subsequent to the issuance of a draft report. If so, why did the retaining counsel have any influence on the changes? It is best to simply avoid such questions altogether by avoiding use of the term.

**“Confidential” or “Privileged”**—the words “confidential,” “privileged” and the like give a reader the impression that there is something to hide. Stamping the affirmation on a report rarely affects whether or not the report is discoverable—therefore, avoid the speculation by not labeling reports.

**“Probable”**—when providing on an opinion that is based on a cause/effect relationship, avoid the use of the word “probable.” In law, “probably” means less than 51%; therefore an assumption that is based on a “probable cause” is an assumption that relies on a cause that may be legally insufficient for an opinion that negates the assumption and outcome.

**“Obviously”**—What is apparent to one may be ambiguous to another, therefore the use of the word “obviously” indicates that an expert is patronizing and presumptive. Rather than summarizing an opinion as “obvious,” an ex-

pert should stress the basis for the opinion; for example, “based on a reasonable degree of certainty.”

### Do not assume

Always rely on supporting information accurately—never assume that because a document is disclosed as the source of information that it will not be scrutinized. Opposing counsel, when retaining an expert to provide a critique, will oftentimes examine all supporting documents to reconcile the information that is specified as support for the actual inputs provided in their report. For example, by relying on specific information from a source but disregarding other pertinent facts that could alter the outcome will discredit the expert’s opinion.

### Organization of supporting documents/ information

The counterpart to accurately using supporting information is the necessity of preserving notes on the calculations, formulas and measurements that support your opinions.

The time elapse from the compilation of a report to providing expert testimony or being deposed often allows one to forget the thought behind an assumption or decision. Organized notes avoid duplicating the work in the future. Furthermore, when questioned, a quick response, rather than a reply intertwined with “umms” or long periods of thought before answering expresses confidence and is less likely to create doubt.

### Conclusion

Techniques for compiling an expert report are

developed with time by a seasoned expert. The importance of a well-written, well-supported expert report is two-fold; not only will the expert’s report become a crucial document in the legal matter it affects, but it will also become a permanent fixture of the expert’s record.

Therefore, a poorly written report, lacking support and successfully attacked by opposing counsel can negate the creditability of the expert for years to come. On the other hand, a carefully drafted and properly supported end product will lead to future referrals. Unfortunately, there is not an expert report on Earth that is invulnerable. Considering that fact, it would be prudent to categorically go over the strengths and weaknesses of your report with the attorney.

Litigation support is an area of accounting that is both challenging and fascinating. The skill of analyzing numbers, providing sound advice and defining the financial merits of a case is in high demand. A forensic accountant’s end product is a valuable tool for the retaining attorney. The challenge lies in preparing a report that is comprehensible to non-financial persons. A report that follows a fluid sequence and clearly describes and addresses the events being investigated, that provides the resources and materials relied on and an unambiguous and brief statement of each opinion will prevail against opposing expert analyses both on paper and against any cross examination time and time again. ■

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