

Court Critique of Expert Witness Testimony
Reasons and Recommendations

Research Project for Emerging Issues/Advanced Topics Course

Diploma in Investigative and Forensic Accounting Program

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An expert is someone who has succeeded in
making decisions and Judgments simpler
through knowing
what to pay attention to and what to ignore.

- **Edward de Bono**

Believe one who has proved it. Believe an expert.

- **Virgil (70 BC - 19 BC), Aeneid**

Table of Contents

1.	Introduction and Objectives.....	5
2.	Summary of Findings.....	7
2.1	The problems judges cite (Analysis of Adverse Judgments).....	7
2.2	Understanding what causes the problems	8
2.3	Recommended solutions	8
3.	Documents reviewed / relied on	9
4.	Background.....	10
4.1	Decreasing tolerance for experts.....	10
4.2	Civil liability of expert witnesses	10
4.3	Existing requirements for expert witness evidence	12
4.4	Admissibility of expert evidence	15
5.	Detailed findings.....	16
5.1	Analysis of Adverse Judgments.....	16
5.1.1	Flaw in methodology	16
5.1.2	Lack of reality/substance, including assumptions that do not appear reasonable	18
5.1.3	Inappropriate “speculation”	20
5.1.4	Conclusions and/or assumptions not supported by evidence at trial	21
5.1.5	Results do not appear reasonable based on common sense	23
5.1.6	Lack of objectivity	25
5.1.7	Other side’s expert more credible	31
5.1.8	Expert opines on the ultimate issue	32
5.1.9	Competing accounting/valuation theories.....	37
5.2	Understanding what causes the problems	39
5.2.1	Low expectation of going to court.....	40
5.2.2	Allegiance to the client and/or influenced by the client	40
5.2.3	Lack of professional standards for the forensic and investigative accountant	44
5.2.4	Inadequate time and resources for the expert	46
5.2.5	Unreasonable or conflicting expectations of the expert.....	47
5.2.6	The expert selected is the ‘wrong’ expert for the case.....	48
5.2.7	Lack of Court experience (the expert himself may have never testified in Court)	48
5.2.8	Expert’s report or testimony is poorly explained and/or too technical for the lay person	49
5.2.9	Expert underestimates level of scrutiny to which report will be subjected.	50
5.3	Recommended solutions	50
5.3.1	Recommendation 1: Training and Education	51

5.3.2	Recommendation 2: Peer networks (for peer reviews and recommendations).....	56
5.3.3	Recommendation 3: Clarifying roles and expectations with counsel and client	56
5.3.4	Recommendation 4: Other recommendations.....	57
5.3.5	Recommendation 5: Court-appointed joint experts	59
5.3.6	Recommendation 6: Appropriate Sanctions for bias	59
5.3.7	Recommendation 7: Legislation	61
5.3.8	Recommendation 8: Professional standards and specialization.....	61
5.3.9	Application of solutions to identified problems.....	62
6.	Conclusion	62
APPENDICES		64
Bibliography		65

1. INTRODUCTION AND OBJECTIVES

Entering the profession of investigative and forensic accounting, I understood the work performed is subject to close scrutiny in an adversarial legal system. Ultimately, the work can be presented in court as “evidence” by the forensic accountant acting as “expert witness”. Criticism of the experts is anticipated in this setting and judges may favour the evidence of one expert over the other even where both are experienced. What I became aware of on entering the profession and in the course of my study in the Diploma in Investigative and Forensic Accounting Program, was the number of cases where the evidence of experienced experts is found to be fundamentally flawed and as a result, is rejected. I refer to judgments expressing serious concerns with the expert evidence hereafter as “Adverse Judgments”.

With this understanding, I set out the following objective for my research paper:

- to establish the problems that judges cite for rejecting the evidence of experts;
- to understand the cause of the problems; and
- to recommend solutions.

I have identified and analysed comments made in ten relevant legal cases (eight from Canada, two from the United Kingdom) involving Adverse Judgments. In order to determine what causes experts to make the types of mistakes described by the judges, I researched written materials on the subject, and then interviewed practising litigation

lawyers and forensic accountants. The results of this research points to suggested solutions which I also discussed with the interviewees.

The relevance of this issue is that Adverse Judgments are contrary to the public interest, as cases can be lost unnecessarily and significant time and resources wasted. In addition to wasting the client's resources and potentially causing harm to their case when the expert opinion is rejected, the usefulness of experts in general is undermined.

At least one judge has noted what can be described as a declining tolerance of experts. As necessary background, the erosion of immunity from civil liability for experts, the existing requirement for expert evidence and the admissibility of evidence are discussed.

An Adverse Judgment can damage or even end an expert's career. Experts should be aware of a development in the United States for conducting due diligence on experts called the "Daubert Tracker."¹ This is a Web based data base allowing anyone for a modest fee to search Judgments involving challenges to expert testimony.

This report does not focus on the training needs for experts with little or no experience who require assistance preparing for Court.

¹ www.dauberttracker.com

2. SUMMARY OF FINDINGS

As background, a judgment detailing an apparent increasing disillusionment with experts is provided. Also detailed is a brief outline of an expert's potential liability and the Courts' expectations of experts.

2.1 The problems judges cite (Analysis of Adverse Judgments)

Based on my review of ten (10) cases I have identified the following primary problems that judges cite for rejecting the evidence of experts:

1. Flaw in methodology;
2. Lack of reality/substance, including assumptions that do not appear reasonable;
3. Inappropriate "speculation";
4. Conclusions and/or assumptions not supported by evidence at trial;
5. Results do not appear reasonable based on common sense;
6. Lack of objectivity; and
7. Other side's expert more credible.

The interviewees also identified and led me to cases referencing these additional problems with expert evidence:

8. Expert opines on the ultimate issue; and
9. Competing accounting/valuation theories.

2.2 Understanding what causes the problems

Based on interviews and published articles, the key causes of the above problems are:

1. Low expectation of going to Court;
2. Allegiance to the client and/or influence by the client;
3. Inadequate time and resources for the expert;
4. Unreasonable or conflicting expectations of the expert;
5. The expert selected is the 'wrong' expert for the case;
6. Lack of Court experience (the expert himself may have never testified in Court);
7. Expert's report or testimony is poorly explained and/or too technical for the lay person;
8. Expert underestimates level of scrutiny to which report will be subjected.

2.3 Recommended solutions

Recommendations for improvement can be segregated into those that are wholly or partly controllable by the expert and/or counsel, and therefore can be addressed before testimony, and those that are external or systemic factors not controllable by either expert or counsel, and therefore may recur without changes to the profession or the legal system.

Recommended controllable improvements include:

1. Training and education;
2. Peer networks (for peer reviews and recommendations);
3. Clarifying roles and expectations with counsel and client; and

4. Other Recommendations (budgeting, meeting other side, refusing assignments).

Recommendations involving external or systemic changes consist of:

5. Court-appointed joint experts;
6. Sanctions;
7. Legislation; and
8. Professional standards and specialization.

3. DOCUMENTS REVIEWED / RELIED ON

This report has analysed cases where expert testimony has been criticized, and in particular analysed the judges' reasons provided, in order to identify factors leading to expert testimony exclusion in those cases. Cases reviewed are listed on the cover page of Appendix "A" and in the Bibliography.

The existing standards in law on which the criticisms were based have also been reviewed as background and to provide context for those comments.

Respected legal counsel and forensic accountants have provided their opinions based on real-life experiences from their perspectives and experience in the field, both in providing expert reports and in testifying. Interviewees are listed in Appendix "C" along with a summary of their qualifications and experience.

Published articles and research in Canada, the United Kingdom, and the United States has been reviewed to test whether findings are in line with other current findings, and provide

an outline for the recommendations which follow. All publications reviewed or referenced are listed in the Bibliography.

4. BACKGROUND

4.1 Decreasing tolerance for experts

The Courts are increasingly intolerant of experts who do not meet the expectations and requirements of expert testimony: in *Pente Investment Management Ltd. v. Schneider Corp.* decision, which did not concern valuations, Justice Farley expressed the following criticism of valuations experts,

“As well as being concerned about the proliferation of offering expert witnesses in the field of junk science, we should also be concerned about the proliferation of unnecessary expert witnesses who distort the process especially when their opinions have no bearing or a twisted bearing on the evidence in the case.”²

4.2 Civil liability of expert witnesses

Traditional immunity from civil liability for the expert is being increasingly challenged in the United States. In an article published in 2003 in the Journal of Forensic Accounting, experts are cautioned not to count on immunity. The article outlines the originating reasons for immunity as being the need for finality of decisions to avoid “an effort to relitigate the underlying conflict,” a need for “open and balanced testimony,” and the possibility of defamation of the expert caused by the filing of a suit. Immunity is

² *Pente Investment Management Ltd. v. Schneider Corp.*, [1998] O.J. No. 6387, ¶ 9.

provided to plaintiffs, witnesses, lawyers and judges, however “while the rationale ... clearly support immunity for witnesses of unique fact or opinion who are otherwise unrelated to the litigation, it does not necessarily contemplate the situation of a professional who voluntarily agrees to assist a party in the litigation process for compensation.”³

As a result of such decisions, clients have in certain cases been able to successfully bring negligence actions against the retained expert witness.

Litigation privilege in the United States depends upon the state; states listed as ignoring privilege for retained experts are Alaska, California, Connecticut, Louisiana, Missouri, New Jersey, Pennsylvania, Texas, and West Virginia. In the article from the Journal of Forensic Accounting, the authors describe a growing trend of an expert not protected from immunity who is “negligent in forming an opinion.” Breach of contract and negligence are the main claims – requiring a definition of duty of care and professional standards.

While Canadian Courts are unlikely to allow lawsuits against expert witnesses as quickly as in the United States, experts should consider the possibility that traditional immunity may not be certain.⁴

³ D.L. Crumbley and W.E. Seago, “Immunity from civil liability for the expert witness: don’t count on it,” Journal of Forensic Accounting 1524-5586/Vol IV (2003): 146.

⁴ Bernard C. LeBlanc, "Suing the Expert Witness," Professional Practice and Liability on the Net, <http://www.sml-law.com/publications/newsletters-detail.asp?DocID=39>; accessed 18 June 2004.

4.3 Existing requirements for expert witness evidence

While specific requirements of expert witnesses vary by jurisdiction, in general the requirements include appropriate knowledge, training and experience to be able to provide the court with an opinion that would normally be outside of its expertise.

In Canada, expert witness standards were laid out in *R. v. Mohan*⁵, where the Supreme Court set out criteria for determining admissibility of expert evidence, of:

- relevance;
- necessity in assisting the trier of fact;
- the absence of any exclusionary rule;
- a properly qualified expert.⁶

The Court added a further requirement to relevance in ¶ 18,

“... a cost benefit analysis ... in terms of its impact on the trial process. Evidence ... may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. ... The

⁵ *R. v. Mohan*, [1994] 2 S.C.R. 9, ¶ 17.

⁶ *Mathew v. Canada*, [2001] T.C.J. No. 491, ¶ 5.

reliability versus effect factor has special significance in assessing the admissibility of expert evidence.”⁷

As summarized in ¶ 23, “...the need for the evidence is assessed in light of its potential to distort the fact-finding process.”

Standards for expert witnesses in civil cases in the UK that are also applicable in Canada are based on *The Ikarian Reefer*⁸ judgment, where Justice Cresswell provides detailed instructions on the duties and responsibilities of expert witnesses. This important judgment is discussed in more detail later in this report.

In the U.S., standards are based on Federal rules of Evidence Rules 104, 401, 402, 403, 702, 703, 803, on CPA professional standards including AICPA Proposed Statement on Responsibilities for Litigations Services,⁹ and on case law, mainly cases cited as *Frye*, *Joiner*, *Kumho*, and *Daubert*. The *Daubert*¹⁰ case, in addition to instructing court that testimony or evidence be relevant and reliable¹¹, requires that Courts act as “gate keepers”, and sets forth the following minimum items to consider, often referred to as “Daubert factors”:

- Whether a theory and/or technique can be or has been tested;

⁷ *R. v. Mohan*, [1994] 2 S.C.R. 9, ¶ 18.

⁸ *National Justice Compania Naviera SA v Prudential Assurance Co Ltd. ("The Ikarian Reefer")*, [1993] 2 Lloyd's Rep 68.

⁹ D.L. Crumbley and W.E. Seago, “Immunity from civil liability for the expert witness: don’t count on it,” *Journal of Forensic Accounting* 1524-5586/Vol IV (2003): 151-153.

¹⁰ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 592, 125 L. Ed. 2d 469, 113 SCt 2786 (1993).

¹¹ Mark W. Shirley, “Daubert – The Evolution of a Profession?” *Journal of Forensic Accounting*, 1524-5586/Vol III (2002): 264.

- Whether a theory and/or technique has been subject to peer review and/or has been published;
- The known or potential error rate of a technique, and the existence and maintenance of standards for use of that technique; and
- Whether there is general acceptance of the theory or technique.

A good summary of the standards in the U.S. is found on the Daubert Tracker web site, which states,

“The U.S. Supreme Court decisions in *Daubert v. Merrell Dow Pharmaceuticals* and its progeny, *Kumho Tire v. Carmichael* and *General Electric v. Joiner*, govern the admissibility of expert testimony in the federal courts, so the federal courts use these cases (known as the “Daubert Trilogy”) to assess (a) whether an expert is qualified, and (b) whether the techniques the expert utilizes are sound.”¹²

The Web site contains references to the current ‘gatekeeping authorities’ for all state and federal decisions, including a listing of the relevant cases and rules of evidence.¹³ The “Daubert Tracker” service tracks standards, maintains and updates a database of cases where an expert has been challenged, and indicates the disposition or result of that challenge. It provides current articles, news and a link to a Web log (‘blog’) on relevant topics on an affiliated site, “Daubert on the Web,”¹⁴ where a June 13, 2005 update advised that the site had received a total of over ten million (10,000,000) hits. Although

¹² <http://www.dauberttracker.com/company/PReleases/lexis-release.cfm>, accessed June 12, 2005.

¹³ <http://www.dauberttracker.com/gatekeepingstandards.cfm>, accessed June 18, 2005.

¹⁴ <http://www.daubertontheweb.com/blog702.html>, accessed 18 June 2005.

there is no stated time frame, a copyright notice at <http://www.daubertontheweb.com/> indicates copyright from 2001-2005. The “Daubert Tracker” was released in August, 2002.¹⁵

The ease of access provided by the above-noted Web sites, apparent popularity of the service, and relatively low cost of the Daubert Tracker (US\$295 for an annual subscription, with options costing as little as US\$10 for a thirty-minute session)¹⁶ suggest that expert witnesses who are challenged in Court will continue to be tracked. In Canada reported cases are available on line and can be searched by key word using Quicklaw.¹⁷ It is thus not unreasonable to expect that a service similar to the Daubert Tracker may either be duplicated in or extended to Canada.

4.4 Admissibility of expert evidence

In general, the admissibility of expert evidence is determined by a process known as “voir dire,” or “qualifying the expert,” a process used to determine the competency of an expert witness to act as an expert,¹⁸ which occurs prior to testimony. In addition, the weight or relevance given to the expert testimony is often determined during the course of the trial process upon judgment.

¹⁵ <http://www.dauberttracker.com/company/news.cfm>, accessed 18 June 2005.

¹⁶ <http://www.dauberttracker.com/product/ordering.cfm>, accessed 18 June 2005.

¹⁷ See http://ql.quicklaw.com/LNC_login_en.html or <http://www.lexisnexis.ca>.

¹⁸ D. Larry Crumbley, Lester E. Heitger and G. Stevenson Smith, *Forensic and Investigative Accounting* (Chicago: CCH Incorporated, 2003), 10-3.

5. DETAILED FINDINGS

5.1 Analysis of Adverse Judgments

I have identified Adverse Judgments from searches of Quicklaw, discussions with my associates in the field, DIFA courses, and the interviewees listed in Appendix “C”.

The attached table at Appendix “A” shows an analysis of reasons provided by judges in actual cases. The most often-cited reasons for exclusion of expert witness testimony can be characterized as due to:

1. Flaw in methodology;
2. Lack of reality/substance, including assumptions that do not appear reasonable;
3. Inappropriate “speculation”;
4. Conclusions and/or assumptions not supported by evidence at trial;
5. Results do not appear reasonable based on common sense;
6. Lack of objectivity;
7. Other side’s expert more credible;
8. Expert opines on the ultimate issue; and
9. Competing accounting/valuation theories.

5.1.1 Flaw in methodology

A flaw in the methodology used by the expert to achieve their results would include, for example, where an expert applies a general statistic or information when more precise

and specific information is available. In *Doe v. O'Dell*, Justice Swinton outlines methods used by each expert, who I will refer to as [DE01] (“defense expert 01”) and [PL01] (“plaintiff expert 01”):¹⁹

“In addition, I find [DE01]'s method of calculating both past and future loss of income to be unreasonable. His starting point for calculations is 1995. He used Statistics Canada data for 1995 to determine the likely income for a community college graduate, picking the age category of 15 to 24 as the baseline for the year 1995. In contrast, [PL01] used the age category of 25 to 34 for that year, given that the plaintiff turned 25 in March, 1995 and ... assumed that he would have been working since 1991. The difference in the figures is significant - \$26,451 versus \$37,066 ... The choice of this number then significantly influenced all of [DE01]'s calculations. In my view, [PL01] 's choice of numbers was more reasonable.”²⁰

In the above example, Justice Swinton points out the differences in methodology used and discusses the more reasonable approach.

Another way in which an expert’s method may be criticized is in the procedures used by the expert in preparing the expert report. In the *Beaudoin* case, the experts are critiqued

¹⁹ In all cases, I have substituted the expert’s names with abbreviations, for example [DE01] is the first defence expert cited in the case, [DE02] is the second, and [PL01] is the first plaintiff expert cited. Where there is only one expert cited, I have substituted the word “[expert]”.

²⁰ *Doe v. O'Dell*, [2003] O.J. No. 3546, Paragraph 326.

for the method of interviewing and of information gathering, which "... the Court finds unacceptable."²¹ and for the methodology used in the firm's expert report.²²

A critique of a flaw in methodology is a criticism of the expert's professional judgment in that it indicates a weakness in the expert's selection of procedures and/or technical proficiency.

5.1.2 Lack of reality/substance, including assumptions that do not appear reasonable

Investigative and forensic accountants, particularly in damages cases, are required to make assumptions in order to perform the required analysis. Consider a damages case where an accountant is required to estimate the profit from the business had it not been destroyed by a fire: the analysis is hypothetical and assumptions will have to be made about the revenues and expenses and the factors that affect these numbers.

This is an area where differences between opposing experts is expected given the subjectivity of assumptions. The cases analysed include the following five judges' comments:

"... the contingencies relied upon by [DE01] are not 'real and substantial possibilities' ..."²³

²¹ *Beaudoin c. Banque de développement du Canada*, [2004] J.Q. no 705 (translated), paragraph 306.

²² *Beaudoin c. Banque de développement du Canada*, [2004] J.Q. no 705 (translated), paragraph 369.

²³ *Doe v. O'Dell*, [2003] O.J. No. 3546, Paragraph 321

Regarding the above comment, the judge's opinion was that the assumptions were speculation not supported by evidence at the trial.

“... Nor does the fact that he has used marijuana suggest the realistic possibility that this would have led to a drug problem affecting his job performance ...”²⁴

The above comment is the subject of much public debate, whether or not the use of marijuana leads to drug problems affecting job performance. The test the judge has applied is whether the above is a ‘real and substantive’ possibility.

“... [PL 01] ... assumed a 10% premium for Ontario wages over national figures. [DE 01] used the Canadian average, and I find that reasonable, as it is not clear where JD would have worked ...”²⁵

The above comment reflects the judge's opinion on where someone who grew up in Ontario may work in the future, and appears to be a subjective opinion.

“... [PL 01] added 10% for loss of benefits ... provided no documentary basis for this figure, drawing upon ... experience. I am not satisfied that the plaintiff has proved 10% is a reasonable figure. No amount is awarded for loss of benefits. ...”²⁶

²⁴ *Doe v. O'Dell*, [2003] O.J. No. 3546, Paragraph 324

²⁵ *Doe v. O'Dell*, [2003] O.J. No. 3546, Paragraph 330

²⁶ *Doe v. O'Dell*, [2003] O.J. No. 3546, Paragraph 333

The judge dismissed the calculation due to a lack of supporting documentation for percentage used for the cost of benefits. In this case, the judge makes it clear that the assumption should have been supported by documented statistics on the cost of benefits.

“... the unknown character of the assumptions relied on is relevant...”²⁷

The above comment also criticizes the expert for not stating all assumptions.

5.1.3 Inappropriate “speculation”

Similar to assumptions, an element of speculation is required by the investigative and forensic accountant in certain cases in order to complete their mandate. To clarify the difference, speculation is defined as “reasoning based on inconclusive evidence, conjecture or supposition”.²⁸ Rather than conclusions based on assumptions, these are conclusions based on guesses.

The cases analysed suggest experts experience difficulties when the assumptions venture into the realm of ‘guesswork’, meaning no expert can either prove or disprove his position. Comments from judges include that it is “speculation that JD’s acne condition would have affected his self esteem so much as to affect his earning capacity. ...”²⁹, “the opinion is based on the expert’s own findings of fact ... which are unknown to the

²⁷ *Mathew v. Canada* [2001] T.C.J. No. 491, Paragraph 29.

²⁸ <http://dictionary.reference.com/>. Accessed June 19, 2005.

²⁹ *Doe v. O’Dell*, [2003] O.J. No. 3546, Paragraph 324.

Court”³⁰, and “what he had to say stands no higher than wildly over-optimistic conjecture, without any real foundation.”³¹

The requirement is clearly set out in the *O’Dell* case,

“The Supreme Court of Canada in *Athey v. Leonati*, supra, observed that future events need not be proved on a balance of probabilities. A future possibility will be given consideration when it is "a real and substantial possibility and not mere speculation" (at paragraph 27).”³²

The comments above suggest that a framework for exercising judgment when considering hypothetical outcomes is required. If there is a choice of having to make one or another guess, the expert should calculate the loss using both scenarios and indicate the reasons for the guess work.

5.1.4 Conclusions and/or assumptions not supported by evidence at trial

This critique is made when evidence at trial does not support or contradicts the expert’s conclusions or assumptions. Some of the judge’s comments from the cases analysed are:

³⁰ *Mathew v. Canada* [2001] T.C.J. No. 491, Paragraph 29.

³¹ *Del Grande v. Toronto Dominion Bank*, [1995] O.J. No. 2005, Paragraph 101.

³² *Doe v. O’Dell*, [2003] O.J. No. 3546, Paragraph 320.

“...a possible learning disability. Neither Dr. Berry nor Dr. Bloom concluded that there was a definite diagnosis of a learning disability. ...scenario put forward by [DE 01] is based on assumptions that are inconsistent with the evidence at trial.”³³

“The city's expert witness assessed Canadair's land as if it were a medium-sized block of vacant land and therefore likely to be sold for immediate high utilization. ... In addition, as mentioned above, Canadair's land is not vacant but is encumbered with depreciated buildings. I do not believe that by agreeing with the City on the value of its buildings Canadair agreed to have its land assessed as if it were vacant when in fact it is not.”³⁴

“[DE 02] acknowledged that Mr. Bourque's testimony concerning the personal work varied significantly between his statement as recorded in the expert report and his testimony in court. Mr. Dupuis' testimony was completely different. ... If the primary source of the investigation has been negated, the expert report is of no value.”³⁵

In each of the above three unrelated examples, the judge criticized the expert for not relying on the facts and evidence of the case.

³³ *Doe v. O'Dell*, [2003] O.J. No. 3546, Paragraph 321.

³⁴ *Saint-Laurent (City) v. Canadair Ltd.*, [1978] 2 S.C.R. 79., page 6.

³⁵ *Beaudoin c. Banque de développement du Canada*, [2004] J.Q. no 705 (translated), Paragraph 284-285.

5.1.5 Results do not appear reasonable based on common sense

It is possible that the methodology and assumptions appear reasonable, but are not because the results achieved do not make sense. In paragraph 327 of *Doe v. O'Dell*, Justice Swinton indicates a problem with the method used leading to results that make no sense:

“Equally problematic is [DE 01]’s method of adjusting that figure. He has adjusted that figure, both forwards and backwards, using a factor based on the average increase of personal income in Canada and the percentage change in that level from year to year - a percentage that reflects increased income from increased participation in the Canadian workforce, as well as increases in the amount of wages paid to individuals. This leads to some results that intuitively make no sense - for example, in the year 2000, he assumed a 7.06% increase.”³⁶

Due to the high percentage increase, it is evident that either or both of the methodology and/or assumptions are not reasonable, but the issue only arises due to a ‘common sense’ review of the result.

Justice Swinton charges the expert with failing to test the ultimate result for reasonability:

³⁶ *Doe v. O'Dell*, [2003] O.J. No. 3546, Paragraph 327.

“... [DE 01] has taken one Statistics Canada figure from 1995 and then worked backwards and forward from that based on his assumptions ... without any effort to do a reality check by looking at more recent Statistics Canada data ...”³⁷

It appears that these comments arise as a result of a failure to test or thoroughly review the results of the analysis.

In the Beaudoin case, the expert conceded that the work product was not reasonable,

“[DE 02] had the honesty to say that if we look at schedule 4, which he prepared at that time, we see that it makes no sense. However, it was that opinion ... that was the basis on which settlement negotiations were undertaken between the lawyers.”³⁸

In the Del Grande case, the judge noted “factual errors in the analysis.”³⁹

It is ultimately the forensic accounting expert witness whose work product will be scrutinized and held responsible for unreasonable results.

Unreasonable results may also point to previously unrecognised issues with the assumptions.

³⁷ *Doe v. O'Dell*, [2003] O.J. No. 3546 Paragraph 329.

³⁸ *Beaudoin c. Banque de développement du Canada*, [2004] J.Q. no 705 (translated), Paragraph 251.

³⁹ *Del Grande v. Toronto Dominion Bank*, [1995] O.J. No. 2005, Paragraph. 101.

5.1.6 *Lack of objectivity*

A lack of objectivity can cause an expert to experience one of the above mentioned difficulties. On the other hand, it is also a state of mind of the expert that the judges assess. Consider the following comments from the cases analysed:

“ ... [DE 01] appeared rather partisan when he gave his evidence ...”⁴⁰

The above critique was from the *Doe v O'Dell* case, and the defence's expert witness [DE 01] had commented that the plaintiff's expert witness appeared to be biased. This comment achieved the opposite of the intended result, and the critique is provided as a matter of the judge's opinion on the witness' state of mind.

In *The Ikarian Reefer*, a case where the judge outlined the duties of the expert witness, the judge commented,

“We do not think that it is an exaggeration to say that the parties seem to have become more intent on winning the battle of the experts than on establishing the facts upon which their respective cases were based.”⁴¹

This lack of objectivity is not the lack of objectivity that arises due to an allegiance to the client, rather it arises due to the adversarial nature of Court. From the comment it would appear that the experts were no longer acting objectively to establish facts, but were

⁴⁰ *Doe v. O'Dell*, [2003] O.J. No. 3546, Paragraph 325.

⁴¹ *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd, (The Ikarian Reefer)*, (1993) 2 Lloyd's Rep. 68. [1994] E.W.J. No. 2139, Paragraph. 134.

instead advocates of their own respective positions in a competition where each was determined to “win”.

Contrast the above examples with the critiques from the *Beaudoin* case.

“... investigation was based on Mr. Bourque's allegations about illegalities committed by Mr. Beaudoin. [DE 01] explained that the job of the investigators ... was to ... "validate" Mr. Bourque's revelations with all of the witnesses interviewed. ... the expert's working hypothesis discredits the report: they were not looking for the truth, they were trying ... “to validate” Mr. Bourque's allegations.”⁴²

In this case, the judge perceives a lack of objectivity as the experts, instead of being hired to find out ‘what happened’, instead appear to be taking the position that what has happened, must be validated, in other words, the allegations were taken as a given. This would represent a case of the expert assuming the role of advocate for his client. The judge stated the issue more clearly in his next critique:

“... [DE 02] could not bring to his work the distance and independence needed by an expert who presents an impartial study to the Court to assist it in rendering judgment. ... it was plain that he had adopted his client's position ... All objectivity was set aside. Any exculpatory evidence was erased, any possibly

⁴² *Beaudoin c. Banque de développement du Canada*, [2004] J.Q. no 705 (translated), Paragraph. 227, 276.

incriminating evidence was amplified. ... admitted ... that his statement was devoid of any scientific foundation. ... devastating ...to the expert's objectivity."⁴³

The judge made the same point regarding a lack of objectivity in relation to the witness interview questions used by the expert's firm:

"After a few preliminary questions, [DE 03] proceeded to make a statement that seems to have come out of nowhere: "More generally, now that we have established that nobody at the Bank, that the only directives that you received from the Bank was to be honest and nobody at [the firm] has told you what you should or should not say. Has anybody else outside of either [the firm] of the Bank told you what you should or should not say concerning this event? (page 007)" ... Where in this question, which established the parameters of the interview, is the expert's critical scepticism and objectivity? ... This type of question is found in all the witness interviews and does considerable damage to the reliability of the information."⁴⁴

In the *Beaudoin* case, the judge's concern about objectivity was one of the factors which caused him to dismiss the expert's report.

In the *Bank of Montreal v. Citak* case, the expert had taken his client's information and prepared a report without confirming the information provided. Moreover, he had advised

⁴³ *Beaudoin c. Banque de développement du Canada*, [2004] J.Q. no 705 (translated), Paragraph. 271, 280, 281.

⁴⁴ *Beaudoin c. Banque de développement du Canada*, [2004] J.Q. no 705 (translated), Paragraph. 317-322.

his client that the Court would not accept the figures if they were based on Mr. Citak's views rather than a proper valuation. The judge agreed:

“To the extent that [expert] has merely used the views of Mr. Citak as to the state of affairs and based his opinion on these views, [expert] is building on a foundation of sand, not rock. . . . [expert] has not demonstrated that he is independent so as to be neutral and objective. This tends to taint the whole of his opinion.”⁴⁵

The expert also indicated that he could be objective and neutral, despite his belief that he acted as advocate for his client. In this case, he was also indebted to the client for a previous favour, and the judge viewed both of these items as contrary to objectivity:

“. . . [expert] indicated that "in every matter of litigation, I always take the position of advocate for my client and that I'm paid a good fee". He did however maintain that . . . he would never give up his independence or objectivity. . . . I cannot accept his views on an objective basis. . . . it appeared that from a previous relationship of asking for assistance from Mr. Citak . . . , afterwards Mr. Citak asked him to help out in this, the subject case. The terms of the engagement are not appropriate for an expert witness who is required to be objective and neutral. . . .”⁴⁶

⁴⁵ *Bank of Montreal v. Citak*, [2001] O.J. No 1096, Paragraph. 5.

⁴⁶ *Bank of Montreal v. Citak*, [2001] O.J. No 1096, Paragraph. 6.

This was a case that the expert should have refused, given his relationship with the client. Instead, the expert additionally set out a fee whereby his payment was contingent on the results of the case. The judge commented:

“... a contingency fee makes [expert] a co-venturer in the litigation. While he may not appreciate that result, the fact is that he had lost his neutrality and objectivity.”⁴⁷

Lack of objectivity appears to have several aspects, and it is implied in the following remarks made by the judge in the *Del Grande* case,

“[expert] went through a financial history analysis ... indicated that he was making no value judgments, but simply acting as an investigative reporter and advising what he had discovered. Perhaps an overly cynical view might suggest that what he had developed was intended to be put to use in a very judgmental way, ...”⁴⁸

In *Pente v. Schneider*, the judge criticized the expert witnesses for advocacy:

“... the reports of the two witnesses in this case were to my view an echo of Captain Collins in this case ... expert evidence takes on the appearance of advocacy dressed up as expert opinion.”⁴⁹

⁴⁷ *Bank of Montreal v. Citak*, [2001] O.J. No 1096, Paragraph. 7.

⁴⁸ *Del Grande v. Toronto Dominion Bank*, [1995] O.J. No. 2005, Paragraph. 112.

⁴⁹ *Pente Investment Management Ltd. v. Schneider Corp.*, [1998] O.J. No. 6387, Commercial List File Nos. 98CL-1011, 98-BK-001935 and 98-BK-001935A., Paragraph. 7.

In *Cala Homes*, the expert believed that the justice system was like a card game and the expert a player in the game, who would only volunteer evidence on direct questioning.

The judge was not impressed:

“... There is a world of difference between not volunteering evidence on topics on which you have not been asked to express a view and giving misleading answers on topics where you have.”⁵⁰

“The whole basis of [expert]'s approach to the drafting of an expert's report is wrong. The function of a court of law is to discover the truth relating to the issues before it. ... the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. ... An expert who has committed himself in writing to a report which is selectively misleading may feel obliged to stick to the views he expressed there when he is cross-examined. Most witnesses would not be prepared to admit at the beginning of cross examination, as [expert] effectively did that he was approaching the drafting of his report as a partisan hired gun. The result is that the expert's report and then his oral evidence will be contaminated by this attempted sleight of mind. ...”⁵¹

⁵⁰ *Cala Homes (South) Ltd. v. Alfred McAlpine Homes East Ltd.*, [1995] E.W.J. No. 66, CH 1993 C NO. 5508, Paragraph. 72.

⁵¹ *Cala Homes (South) Ltd. v. Alfred McAlpine Homes East Ltd.*, [1995] E.W.J. No. 66, CH 1993 C NO. 5508, Paragraph. 73.

Objectivity and its opposite, advocacy, are issues about which the expert should not only be aware, but take steps to prevent. In each case where objectivity is compromised, the expert's evidence and testimony were disregarded.

5.1.7 Other side's expert more credible

This was not commonly cited in the cases. It arose in valuations cases where experts prepared loss figures based on differing criteria and using different assumptions, with differing results.

For example, in *Saint-Laurent v. Canadair*, the City of Saint-Laurent assessed land owned by Canadair at a value close to \$6.6 million. The assessment was maintained by the board of revision and by the Provincial Court, but the Court of Appeal intervened, accepting the valuation of Canadair's expert witness rather than that of the City, reducing the assessment to \$4.5 million⁵². The Supreme Court of Canada reviewed and upheld the decision.

The reasons the Court of Appeal chose the valuation of Canadair's expert witness arose from the conclusion that the City's expert's calculations were flawed, and that there was no reason to exclude the calculations of Canadair's expert:

“If the Court of Appeal was justified in intervening and dismissing the municipal assessment, was it right in adopting the valuation of Canadair's expert witness?

This Court is of opinion that this was the only valuation remaining and that there

⁵² *Saint-Laurent (City) v. Canadair Ltd.*, [1978] 2 S.C.R. 79.

was no reason to reject it. ... the Court of Appeal used its own judgment, as it was obliged to do in a field that is essentially a matter of opinion, and it was right to adopt the valuation of Canadair's expert witness.”

Having recognized an issue with one expert’s report, the other expert’s was taken as the credible and reliable report. In other cases, judges used terms such as ‘reasonable’ and ‘logical’ to describe their reasons for finding the other side’s expert more credible.

In the *Beaudoin* case, the other side’s expert was hired only to review the expert report that had been prepared which had alleged fraud. As a result, the judge agreed that the report alleging fraud was deficient and adopted the criticism of the other side’s expert.

5.1.8 Expert opines on the ultimate issue

The Court has expressed concerns whenever it appeared that an expert has ‘usurped’ the Court’s function. In providing expert evidence, experts have been known to venture from fact to conclusion.

In the cases I reviewed, experts usurped the Court’s function in one of two ways. The first area where the expert oversteps his scope is by not providing expert opinion that assisted the trier of fact, but rather, by offering an opinion that was not beyond the expertise of the Court and therefore should have been formed by the Court.

Justice Farley expressed the following concern in one of his rulings,

“... All too frequently ... we have "damage" experts these so called experts are costing more than persons with (claimed) accounting skills. However, their

conclusions as to loss are mere mathematical calculations based upon figures given them (or pulled from the hat) not upon proven facts. It would also seem that in the vast majority of cases, it would not be the role of an expert to do this but rather, that it would be desirable for the trier of fact to make appropriate findings that it may be a mechanical exercise made easier if the calculations are made thereafter ...”⁵³

A second area is where the expert opines as to the ultimate issue, meaning that the expert makes conclusions in fact and/or in law, which are the purview of the Court.

In *TD v. Goldberger*, the judge states,

“During submissions with respect to this motion Mr. Klug acknowledged that it would not be necessary to call two experts from the Lindquist Avey firm to testify as to the quantification and measurement of damages in the Lindquist Avey report - but rather only one. I would have thought that this proposition would have been self-evident from the very start. However, I do not make that critical observation with a focus on Mr. Klug. Rather, I make it as a general observation as to the flabbiness with which legal cases have become inflicted by the overreliance on experts (and it appears the willingness of experts to offer themselves up to do "everything"). I pause to note that experts must conduct themselves as objective neutral assisters of the court and, if they fail to fulfill this function, their testimony

⁵³ *Pente Investment Management Ltd. v. Schneider Corp.*, [1998] O.J. No. 6387, ¶ 9

should be ruled inadmissible and therefore ignored after they have been eviscerated.”⁵⁴

In *Mathew v. Canada*, the judge’s comments in two separate paragraphs indicated that the expert had similarly opined on the ultimate issue:

“... “[t]he only requirement for the admission of expert opinion is that the 'expert witness possesses special knowledge and experience going beyond that of the trier of fact". ... the evidence at issue contains several conclusions of fact and law in respect of which [expert] does not possess any special knowledge and experience going beyond that of the trier of fact. [expert] readily admitted as much ... with respect to no less than 30 such conclusions.”⁵⁵

“I agree with counsel for the Appellants that [expert]'s conclusion that "a profit-oriented business person acting reasonably would not enter into the transactions, as described herein, in the absence of or excluding income tax considerations" [See Note 3 below] relates to how a reasonable person would behave and would seem to be contrary to the Adam case, ... Note 3: Page 2 of [expert]'s report.] ... [n]either experts nor ordinary witnesses may give their opinions upon matters of legal or moral obligation, or general human nature, or the manner in which other persons would probably act or be influenced.”⁵⁶

⁵⁴ *Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.*, [1999] O.J. No. 5324, Paragraph 2.

⁵⁵ *Mathew v. Canada* [2001] T.C.J. No. 491, Paragraph.30.

⁵⁶ *Mathew v. Canada* [2001] T.C.J. No. 491, Paragraph. 33.

The conclusion as to how someone ‘would have’ acted, is not permitted for either experts or ordinary witnesses in Court, as it is also considered usurping the Court’s function.

In *Bank of Montreal v. Citak*, Justice Farley states:

“... [expert]'s opinion (and report) will not assist the Court in my view. . . .

While I appreciate that [expert] does not believe that he is usurping my function, when one reads his report that is the inevitable conclusion not just on a singular (and perhaps accidental) instance but on a multiple repeated basis. . . .”⁵⁷

The Court will not accept the expert’s report and testimony as evidence where the expert has usurped the function of the Court. In *Pente Investment Management Ltd. v. Schneider Corp.*, the judge indicates that not only had the witnesses made inappropriate legal judgments, but also that expert evidence was not required to assist the trier of fact:

“... it is inappropriate for these two witnesses to draw legal conclusions as to pure law or mixed questions of fact and law. . . . inappropriate and equally unhelpful for them to draw factual determinations. This is not a technical area . . . where a trier of fact would need assistance in understanding the principles and how to apply the facts. . . .”⁵⁸

⁵⁷ *Bank of Montreal v. Citak*, [2001] O.J. No 1096, Paragraph. 12.

⁵⁸ *Pente Investment Management Ltd. v. Schneider Corp.*, [1998] O.J. No. 6387, Commercial List File Nos. 98CL-1011, 98-BK-001935 and 98-BK-001935A., Paragraph. 4.

In *Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.*, the judge clearly states that the expert evidence, is not admissible due to the expert's usurping the function of the trial judge by providing an opinion on the ultimate issue:

“[expert]'s report contained ... the following mandates: "To review the bank's procedures and to provide an opinion with respect to the standard of care of the bank's procedures To provide an opinion with respect to the matter of whether or not the bank adhered to and/or fulfilled all of the terms and conditions ... To provide an opinion with respect to the facts and circumstances leading up to the bank's decision to realize on its security. " As I expressed in the Schneider trial ... such "expert evidence" is inadmissible. It ... usurps the function of the trial judge. It is for the court to determine the standard of care and whether there has been adherence or breach. ... In the end result I would not admit [expert] to give "expert evidence" in this case if he testifies within the above mentioned mandates.”⁵⁹

It is noteworthy that there is no reason for the forensic accountant to provide such a report or opinion in a consulting function for the bank. However, if the required services include providing a report and testimony as an expert in Court, a different standard of care is required. As a result, it is important to be aware of the expectation of any client engagement at the outset.

⁵⁹ *Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.*, [1999] O.J. No. 5324, Paragraph. 4-8.

5.1.9 *Competing accounting/valuation theories*

Due to the variety of assignments that an investigative and forensic accountant may undertake, there are some forensic accountants who advise that if the work product is clear, and the schedules easy to follow, there should be little if any occasion to testify in Court.⁶⁰ In the case of fraud, an area in which both of the experts who held this opinion specialize, the work product would be the production of schedules and documents that show what has happened. If the events are clear from the productions and Counsel clearly understands the report, the expert may never be called to testify.

An expert is usually called to testify only where facts are in doubt and assumptions are required for the Court to reach a conclusion. In the case of valuations, particularly when opining on a potential loss, the expert is required through use of an appropriate valuation theory or methodology to predict or reach conclusions based on hypothetical situations. As a result, experts in valuation will often reach differing conclusions and will need to explain their assumptions and methodology in order for the Courts to determine whether those assumptions and methodologies are reasonable and lead to the correct conclusion. These competing valuation theories result in concerns and criticisms from judges. In *Saint-Laurent (City) v. Canadair Ltd.*, the Appeals Court agreed with the trial judge's selection of a valuation, indicating that the judge was required to use his judgment to make a selection since the valuation method selected is a matter of opinion:

⁶⁰ See Appendix "E", interviews with Messrs. Al Langley and Peter Alexander.

“... That Court preferred the adjusted comparative method used by Canadair's expert witness along with another method, which served the purpose of confirming or weighing the results obtained using the first method. In basing its decision on the results produced by these two valuation methods the Court of Appeal used its own judgment, as it was obliged to do in a field that is essentially a matter of opinion...”⁶¹

In *Del Grande v. Toronto Dominion Bank*, the judge noted that the competing results were due to uncertainty in the economy and the business sector at the time of the valuation, resulting in widely different valuations:

“... both sides were faced in this case with the possible prospect of calling perhaps a dozen witnesses or more to deal with this valuation problem, with no one likely to be able to be very certain in light of the time of valuation, and what else was taking place in the economy and in the business ... sector of that economy at the time.”⁶²

The widely differing outcomes based on competing accounting/valuation theories result in the judge stating an opinion on his selection of a valuation, and depending upon the reasons for an expert's assumptions and selection of methodology, the expert may find his report and/or testimony given little weight or rejected in Court.

⁶¹ *Saint-Laurent (City) v. Canadair Ltd.*, [1978] 2 S.C.R. 79., page 1 of 10.

⁶² *Del Grande v. Toronto Dominion Bank*, [1995] O.J. No. 2005, Paragraph 107.

5.2 Understanding what causes the problems

In order to understand why experienced experts are receiving Adverse Judgments, I reviewed articles on the subject and interviewed experienced lawyers and practitioners in the field.

As a result of this analysis, the following were identified as key factors which cause experts to make the errors resulting in Adverse Judgments:

- Low expectation of going to Court;
- Allegiance to the client and/or influenced by the client;
- Lack of professional standards;
- Inadequate time and resources for the expert;
- Unreasonable or conflicting expectations of the expert;
- The expert selected is the 'wrong' expert for the case;
- Lack of Court experience (the expert himself may have never testified in Court);
- Expert's report or testimony is poorly explained and/or too technical for the lay person;
- Expert underestimates level of scrutiny to which report will be subjected.

These factors are largely self-explanatory; however, the research highlighted the following relevant information:

5.2.1 Low expectation of going to court

Due to the large number of cases that settle before proceeding to Court, or before the expert is required to testify, there is generally a low expectation that the expert will need to testify. As a result, the expert's analysis may be tailored towards negotiation and settlement goals and may adopt aggressive positions that are not easy to back away from if the matter proceeds.

A further complication is that there may be the opportunity to amend and re-file the report prior to its being provided to Court.

As a result, the expert may not prepare the report or schedules needed in order to save time, or save resources, or may knowingly present a biased report in order to please the client.

Wherever an expert has a low or no expectation of going to Court, it may create issues that will be highlighted in an Adverse Judgment.

5.2.2 Allegiance to the client and/or influenced by the client

Objectivity and its opposite, advocacy, are issues about which the expert should not only be aware, but take steps to prevent. In each case where objectivity is compromised, the expert's evidence and testimony were disregarded.

A lack of objectivity is the direct result of an expert's allegiance to the client or influence by the client. There may be a lack of independence resulting in the lack or perceived lack of objectivity. The expert is subject to losing objectivity and becoming biased due to a

number of reasons. For discussion purposes, I have discussed bias under four headings: personal bias, client and counsel bias, system bias, and lack of objectivity.

Personal bias

Personal bias is based upon an individual's personal background, culture, experiences, ethics and perceptions. Each individual will by definition therefore have their own personal bias that is discrete and distinct from every other expert, but the differences may be a matter of degree.

A form of personal bias is predicated upon the expert's personal goals and desires. A strong sense of 'competition' and the desire to win, coupled with a willingness to bend the rules, will lead to an expert having difficulties in remaining objective and neutral.

More extreme personal bias would include stereotyping and racial prejudice.

Wherever possible, personal bias should be considered in the context of the legal dispute and the conscientious expert should be aware of the potential impact of personal bias on his objectivity.

Client and counsel bias

I define client bias as the inherent contradiction of an expert's requirement of objectivity while being employed by a person or persons on one side of the dispute.

In our service-oriented industry, there is an expectation that the person paying for a service not only expects good service, but to some extent defines what constitutes 'good'

service. As a result, if the expert's analysis is not favourable to the client or differs from the client's expectations, the expert is placed in a defensive position with the client who is paying significant fees for that expert's work. This might be true even if the expert's opinion generally favours the client position but is critical on some aspects. This contradiction also leads to the commonly used phrase of 'expert witness as a hired gun' to refer to the issue. Client bias is further complicated since the pressure to please the client may be actual where the client has made an inappropriate request or demand, or it may be perceived where client communications may imply an expectation, or it may be an internally-generated allegiance to the client by the expert who is trying to deliver a result pleasing to the client.

In addition, there is the pressure of ensuring that professional fees are paid, and the expert will want to avoid the potential issue of a dissatisfied client refusing or delaying invoice payment.

Counsel bias is similar to client bias in that it is driven by the same issues, with one difference: while repeat business for a client whose dispute is closed is unlikely, legal counsel may have a great influence on the expert's business by providing referrals to clients or other counsel. Conversely the lawyer who is displeased with their expert may dissuade others from working with that expert. The potential of the expert having an on-going source of work through established relationships with legal counsel therefore adds to the pressure to produce the reports expected by either client or counsel.

System bias

Bias may exist, both intentionally and unintentionally, as a result of the expert being hired by one side of the dispute, who present their known facts and documents, while the lack of direct contact with the other side may result in incomplete knowledge of key relevant facts.

Lack of objectivity due to lack of independence

A real and known problem is where the client has hired forensic accounting experts from the same firm with whom it has significant business relationships. ‘Sarbanes-Oxley’ in the United States, and provincial institutes of CAs in Canada lay down independence rules for audit firms acting as experts.

In *Beaudoin*, which pre-dates the Independence Rules, the judge confirmed that lack of independence is an issue,

“the forensic accounting section of [the firm] accepted the job of doing an investigation the facts in which might raise issues about, and even cast doubt on, some elements of the annual internal audit done by the audit section of [the firm]. ... This is not ideal, and the risk of conflict of interest should have prompted [the firm] to refuse the job. [DE 01] in fact pointed out that since the Enron scandal, such dual responsibilities are no longer acceptable.”⁶³

⁶³ *Beaudoin c. Banque de développement du Canada*, [2004] J.Q. no 705 (translated), Paragraph 269-270.

The issue of client allegiance and lack of objectivity is one for which responsibility rests mainly with the expert: while the expert is required to remain objective, the lawyer is necessarily an advocate for their client. Sanctions are limited to the expert, and usually by way of criticism by the Court rather than sanctions from professional bodies or an independent review of peers, except in cases of gross negligence for which professional accounting bodies would discipline their respective members.

Due to the low probability of proceeding to court, the expert's ability to reissue their opinion, and the limited sanctions for inappropriate or unethical behaviours, the issue remains difficult to resolve, although criticism by the Courts can be very damaging.

The issue of perceived or actual allegiance to the client is fundamental to the work of the forensic accountant, whose work product and testimony requires that he be objective and neutral. Without objectivity and neutrality, the expert's testimony will be refused in Court.

5.2.3 Lack of professional standards for the forensic and investigative accountant

Background of the Accounting Expert Witness

Expert forensic accounting witnesses may be from a variety of backgrounds. Due to the specialized knowledge and/or experience required of the forensic accounting expert witness, many are Chartered Accountants ("CAs"), Certified General Accountants ("CGAs"), Certified Management Accountants ("CMAs").

In order to become a CA, a person is required to spend several years working as an auditor. The work product of an auditor is an audit opinion on a company's financial statements. Specifically, an auditor is asked to state an opinion whether the financial statements present fairly, in all material respects, the financial position of a company⁶⁴. In other words, the auditor is required to reach a conclusion and in effect, acts as judge and jury.

Professional accountants working in industry are also expected to reach conclusions in a number of ways. Reviews of company performance are expected to result in recommendations on how to improve performance.

These are all different functions than the function provided by the expert witness, who provides expertise to assist the trier of fact to reach the ultimate conclusion.

Current Standards

Currently, standards are being developed by various professional bodies. The forensic accountant currently must abide by the general standards of duty of care and professionalism as set out by the regulatory body of the relevant accounting designation, but with no additional standards set specifically for forensic and investigative accounting assignments. The American Institute of Certified Public Accountants (AICPA) have drafted guidelines for forensic accountants explaining how the existing standards apply to expert assignments. The Canadian Institute of Chartered Accountants (CICA) are in the

⁶⁴ CICA Handbook, Section 5090.

process of drafting IFA standards and have issued a “Conceptual Framework”. IFA standards have been issued in Australia. The UK has no IFA standards at this time.

The CICA standard will only be enforceable against CAs and would only extend to Certified General Accountants (CGAs) and Certified Management Accountants (CMAs) who also provide forensic accounting services if adopted by Courts and/or these other professional bodies.

There are currently three other professional bodies that may apply standards to the forensic and investigative accountant. The Canadian Institute of Chartered Business Valuators provides training and professional standards for experts performing valuations. The Association of Certified Fraud Examiners is a US-based international organization for experts specializing in fraud. The Association of Certified Forensic Investigators of Canada is a not-for-profit organization also targeting experts specializing in fraud.

5.2.4 Inadequate time and resources for the expert

In order to understand the issues of inadequate time and/or inadequate resources, it is important to appreciate the timing of the hiring and services provided by the expert. For complex cases with experienced Counsel, the expert is hired close to the beginning of the process, as this provides the expert with sufficient time to review the facts of the case, the documents available, and discuss the engagement and timing with Counsel.

In many cases, the forensic accountant is not hired in the early stages either due to careful management of the client’s resources or the need for an expert is not determined until later in the case. Most forensic accountants will understand the need to avoid wasting

client resources, and the cases analyzed highlight the consequences of hiring an expert witness when none is required. As a result, the profession has developed a reputation for long hours and overtime as a standard, due to the shortage of time to adequately prepare reports prior to the time when the reports or testimony is required. In interviews, Mr. Alan Langley speculated that the issues faced by the forensic accountants working on the Gomery inquiry were probably that the firm has insufficient time to appropriately review and analyze the large volumes of documents involved.⁶⁵ In general however, the issue of time and resources is perceived to be an issue of practise management, with most professionals accepting as that there will always be ‘last-minute’ work assignments, and planning their time accordingly. Interestingly, Counsel interviewed did not mention time and resources as an issue.

5.2.5 Unreasonable or conflicting expectations of the expert

Related to the issue of time and resources, is the issue of unreasonable or conflicting expectations of the expert.

Time and resources issues can lead to unreasonable expectations. For example, in the case where an expert’s reports is rebutted by another expert, and the expert is required to respond to the rebuttal, this process may be occurring within the framework of specific timelines required to file documents. The expectation is that the expert will produce the work product within the required time and to the highest standards.

⁶⁵ See Appendix “E” Mr. Langley’s response to question 3.

Conflicting expectations include conflicting expectations from judges, where the expectations of the expert witness may differ based on the judge's view of experts, or from Counsel where the expert's report is expected to support the client's position while the expert maintains objectivity.

5.2.6 The expert selected is the 'wrong' expert for the case

It is often Counsel who selects the expert for the case, and the expert selected will depend upon Counsel's understanding of the expert's work. The 'wrong' expert is the person whose expertise is not the expertise required. In interviews, the 'war stories' included a case in Canada related to Canadian banking practises where the expert hired had expertise in the American banking system, and none with the Canadian banking system.⁶⁶

Where the 'wrong' expert is hired, client, expert and Counsel all suffer negative consequences as the expert's evidence may be refused in Court, or if the expert is admitted, may be discredited on cross-examination.

5.2.7 Lack of Court experience (the expert himself may have never testified in Court)

Experts prepare reports as part of the dispute process, but in a large number of cases, the matter settles before proceeding to trial. This leads to a specific skill set that is preferred in an expert – ideally, the expert's analysis provides a clear and objective analysis of the economic factors, which assist both sides in the mediation and settlement process. Early

⁶⁶ See Appendix "E", responses to question 2.

dispute resolution is considered preferable, so the expert who can present clear and compelling facts will assist both counsel and client in determining whether or not to proceed.

Often, the expert is asked to prepare an analysis specifically for mediation or settlement purposes. As a result, an expert who has strong skills in analysis and report presentation may never develop strong skills in presenting evidence in Court.

This is one factor that may lead to an expert not presenting well orally or not responding well to cross-examination despite having an excellent analysis. Conversely, the expert's analysis may appear to be compelling in written form to financially unsophisticated clients, but on close scrutiny fail on legal grounds or other grounds which the expert has not considered.

When an expert does not have significant Court experience, but a high level of experience as a financial expert, it is difficult to analyze the underlying causes of Adverse Judgments, but in all cases both lawyers and forensic accountants interviewed highlighted the importance of gaining experience in Court room skills.

5.2.8 Expert's report or testimony is poorly explained and/or too technical for the lay person

The expert report and supporting schedules are the work product upon which the expert may be called to testify. However, in interviews Mr. Gavin Smyth stressed the importance of a well-written report which avoids accounting terminology and speaks to the reader as a lay person. Charts must be explained and clearly demonstrate the point to

an audience that may include the Judge, legal counsel, the other side's expert, and the clients.

For example, in the case of valuations, where competing methodologies exist, it is important for the expert to outline in his report the differences in valuation techniques and explain why he chose the selected methodology, as well as why other methodologies are less applicable or inapplicable to the facts provided.⁶⁷

5.2.9 Expert underestimates level of scrutiny to which report will be subjected.

Where the expert is aware that his report may be presented in Court, he may not appreciate the level of scrutiny to which the report will be subjected by the Judge, opposing counsel, or other side's expert. This may result in the report not undergoing a sufficiently rigorous review prior to providing the report, with consequences that the expert's authority is undermined and testimony may be underweighted or rejected.

5.3 Recommended solutions

Recommendations for improvement can be segregated into those that are wholly or partly controllable by the expert and/or counsel, and therefore can be addressed before testimony, and those that are external or systemic factors not controllable by either expert or counsel, and therefore may recur without changes to the profession or legal system.

Recommended controllable improvements include:

⁶⁷ See Appendix "E", responses to questions 4 and 5.

1. Training and education;
2. Peer networks (for peer reviews and recommendations);
3. Clarifying roles and expectations with counsel and client; and
4. Other Recommendations (budgeting, meeting other side, refusing assignments).

Recommendations involving external or systemic changes consist of:

5. Court-appointed joint experts;
6. Sanctions;
7. Legislation; and
8. Professional standards and specialization.

Controllable solutions

5.3.1 Recommendation 1: Training and Education

While some experts may have significant experience in the field, continuing education is required to ensure that their knowledge and expertise is current, particularly when testifying in Court. In particular, training and education must include knowledge of Court standards for expert witnesses, expectations of the work product, expectations of objectivity, and preparation by counsel of the expert prior to testifying.

Education of expert: Standards for accounting expert witness qualifications with a requirement for continuing education of expert, designations, training in communications and time management. Improved preparation for Court for the expert with high level expertise but no Court experience.

Education of counsel: Longer preparation times including early hire of expert, sending appropriate documents, ensuring timely communications, and giving the expert sufficient time to respond to new information.

Existing standards that detail specific requirements for the Expert Witness should form a part of the Expert's education. In *The Ikarian Reefer*⁶⁸ judgment, Justice Cresswell provides detailed instructions applicable to any expert witness in a civil case:

“The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation . . .
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise . . . An expert witness in the High Court should never assume the role of advocate.
3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion . . .

⁶⁸ *National Justice Compania Naviera SA v Prudential Assurance Co Ltd. ("The Ikarian Reefer")*, [1993] 2 Lloyd's Rep 68.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one . . .
6. If after exchange of reports, an expert witness changes his view on a material matter . . . such change of view should be communicated . . . to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans, calculations . . . survey reports or other similar documents there must be provided to the opposite party at the same time as the exchange of reports . . .”⁶⁹

The judgment was endorsed with the comment, “At page 81 of his judgment the Judge gave an admirable resumé of the duties and responsibilities of expert witnesses. We have no hesitation in endorsing it.”⁷⁰

Although Web-based tools such as ‘The Daubert Tracker’ allow for broader publication and easier access to challenges to experts, the same technology has provided more access to resources for the accounting expert witness. One example in the United States is a Web site designed specifically for expert witnesses. SEAK, Inc. is an organization in the

⁶⁹ *National Justice Compania Naviera SA v Prudential Assurance Co Ltd. ("The Ikarian Reefer")*, [1993] 2 Lloyd's Rep 68.

⁷⁰ *National Justice Compania Naviera SA v Prudential Assurance Co Ltd. ("The Ikarian Reefer")*, [1994] E.W.J. No. 2139, QBCMF 93/0618/B, Paragraph 299.

United States founded in 1980 by attorney Steven Babitsky to provide training and education.⁷¹ In addition to an annual conference, the web site sells various guides and tools for experts mainly aimed at medical experts, but among other items, the following tools are relevant to all expert witnesses:

Books:

- Cross-Examination: The Comprehensive Guide For Experts
- Writing and Defending Your Expert Report
- How to Excel During Deposition
- How to Excel During Cross Examination

Videos/DVDs:

- The Most Difficult Questions For Experts: With Answers
- Cross-Examination: How to Be an Effective and Ethical Expert Witness
- The Expert Deposition (non-medical)
- Winning Over The Jury: Techniques For Experts That Work

Audio Programs:

- Law School for Experts

⁷¹ “About SEAK, Inc.” <http://seak.com/corporate.htm>. Accessed 17 June 2005.

According to their web site, “SEAK's expert witness training courses include the Annual National Expert Witness Conference, Expert Witness Summit, the Expert Report Writing Workshop, the Testifying Skills Workshop and How To Become A Dangerous Expert.”⁷²

A search of the internet, for example by typing ‘expert witness training’ in the search engine Google, reveals a growing list of sources for expert witness training mainly in the United States, the United Kingdom and Australia, but also highlighted a Canadian four-day seminar provided by the British Columbia Institute of Technology.⁷³

Counsel can assist the expert in understanding or adding to the expert’s knowledge of the case. Assumptions made by the expert should be communicated and discussed with counsel.

Training of the expert accounting witness by Counsel should include preparing the expert for Court by use of a mock cross-examination of the expert by Counsel, even where the experienced expert has some Court experience. One reason for this is the same reason a public speaker will prepare his speech and practise it in front of family members and friends, and that is to ensure that the message he is preparing, is the same message as his audience is receiving. The Court is no place for “ums” and “ahs” – although you will find them in transcripts, they do not add to the appearance of credibility and professionalism. A ‘dry run’ with Counsel will assist the expert in responding to questions, even when feeling intimidated by the Court room, in a calm and professional manner. By becoming

⁷² “SEAK, Inc. National Directory Of Expert Witnesses”,
<http://www.seakexperts.com/expertsapplication.htm>. Accessed 17 June 2005.

⁷³ <http://nobel.scas.bcit.ca/forensic/events/ExpertWitness.htm>. Accessed June 19, 2005.

familiar and comfortable with the process and the attention of Court, the expert will be able to focus instead on his testimony, and with practise deliver his responses in a clear, succinct and easily understood manner.

5.3.2 Recommendation 2: Peer networks (for peer reviews and recommendations)

To the extent possible, the expert should develop peer networks both within and outside the firm. Validation and verification procedures should include review by experts who may not know the file, but can ask the expert probing questions to determine his level of understanding and objectivity.

An external peer network will allow the expert to recommend alternatives when he realizes at a client and counsel proposal meeting that he may be the ‘wrong’ type of expert for the assignment.

5.3.3 Recommendation 3: Clarifying roles and expectations with counsel and client

The forensic accountant should meet with the client and Counsel to clarify the roles and expectations of the proposed assignment prior to accepting any engagement.

Given that a forensic accountant may also accept assignments which are not intended to lead to expert testimony, for those assignments issues of objectivity and independence may be of lesser concern. If a company has hired a forensic accountant to review its internal controls, look for fraud, and suggest controls improvements, then the work

product will be expected to provide conclusions and recommendations. Valuations of goodwill may also be conducted without the expectation of a legal dispute.

It is therefore important that the expert and client have a clear understanding of the expected roles that each will assume for the assignment, and whether or not the matter could eventually be disputed in Court, an eventuality for which the investigative accountant must always be prepared.

The forensic accountant should meet with the client and Counsel to determine the nature of the assignment, whether the accountant is the 'right' expert for the assignment, and the expectation of the work product, including whether or not the accountant may be required to testify as an expert witness. The expectations of all sides should be clarified in the engagement letter to avoid possible misunderstanding.

5.3.4 Recommendation 4: Other recommendations

Budgeting

A budget should be discussed with client and counsel, whether in terms of anticipated hours and hourly rates, or a total fee. In all cases, the client should be made aware of the hourly rate charged for time spent preparing for and participating in Court proceedings ahead of time. Alternatively, if the expert wishes to provide a quote to the client, that

quote should presuppose that the expert will be required to testify to avoid future surprises.⁷⁴

Refusing assignments

In the event that the expert has been requested to “confirm”, “validate”, “provide an opinion” or take any action that suggests direction of the client rather than objectivity, the expert should determine whether the work product is or may be required for expert testimony. If so, the expert should attempt to discuss the terms of the engagement and propose a more suitable assignment. If the client resists, the expert should be prepared to refuse the engagement.

Meeting the other side

One of the interviewees’ main concerns with experts was a lack or perceived lack of objectivity and independence. His suggested solution was to request a meeting with the other side, in order that the expert may gain first-hand knowledge of the issues as perceived by the other side.

If the other side agrees to meet, the expert has an opportunity to understand all sides of the dispute and prepare his analysis with more complete information. If the other side does not agree to meet, the expert can also indicate that refusal in his report.⁷⁵

⁷⁴ See Appendix “E”, Mr. Alan Langley.

⁷⁵ See Appendix “E”, Mr. Alan Langley.

Acknowledging controversy

The expert should understand that there will be some issues that will remain controversial, and attempt to mitigate the effects of controversial assumptions in his calculations.

For example, in cases where the assumption is debated and no statistics are available to support the expert's assumptions, the expert should consider recalculating using at least two separate scenarios.

Recommendations involving external or systemic changes

5.3.5 Recommendation 5: Court-appointed joint experts

One solution to the issue of allegiance to the client is for the Courts to appoint two joint experts; the first expert to provide the analysis of the situation as needed, and the second expert to review and comment on the work product of the first expert.

In a sense, the above duplicates the current system, but may allow the Court-appointed expert greater access to each side's documents and facts.

5.3.6 Recommendation 6: Appropriate Sanctions for bias

It has been suggested that experts are not always acting without bias, often due to pressure from counsel and/or their clients. Since many cases never go to Court, experts may prepare reports without expecting sanctions for the opinions contained therein.

Recommendations follow for the expert, for counsel, and for the legal system.

Expert: The expert should clarify his role with legal counsel before accepting any engagement. The engagement letter should stipulate the independence of expert as well as the client's obligations to the expert, regardless of the final result. An expert should never accept engagements where counsel advises the expert of a specifically required end result, or where fees are contingent upon results. The expert must also be prepared to be prepared for testimony by counsel in order to provide clear and logical responses in the Court room, while remaining objective, neutral and professional in his testimony.

Counsel: Similarly, counsel should clarify the expected role of expert and ensure that despite counsel's position of advocacy, the independence requirement is understood. Counsel must ensure that his own communications with the expert cannot be misunderstood, that he does not direct the expert's work, and that the expert understands that the lawyer is necessarily an advocate and so will have a preference for a result favourable to his client. That being said, counsel must stress that the expert's results be professional and unbiased and accept that the expert's results may even be unfavourable to the client, and be prepared to support the expert should this be the result.

System: While legal counsel is necessarily an advocate of his client's position, the expert witness is necessarily objective. Legal counsel does not assume responsibility for expert witness bias, so it is strictly the expert's responsibility to remain impartial. In some of the United States, expert witness immunity from civil liability is being ignored, due to the recognition that an expert has a responsibility to provide a 'duty of care' towards the client. As a result, lawsuits most often under breach of contract and negligence are allowed. It is too early to tell, but it may be that the loss of immunity acts as a motivation

for experts to testify truthfully and apply a higher level of care to their work product and testimony.⁷⁶ Canada would be well advised to observe the result of a loss of immunity in the United States, to determine whether it acts as an improvement to the system, or detracts from the legal requirements for avoiding relitigating the underlying conflict, open and balanced testimony, and avoiding defamation of the expert caused by the filing of a suit, to determine whether to consider allowing immunity to be challenged in Canada.

5.3.7 Recommendation 7: Legislation

Requirements for experts are currently as set out by case law, but expert witness requirements could also be legislated.

If legislated, the rules would be applicable to all experts and easily referenced, and it is possible that some of the present problems would be avoided.

Regardless of the rules imposed, sanctions must then apply. As a result, the Court system could also be further congested by experts who disagree with the sanctions.

5.3.8 Recommendation 8: Professional standards and specialization

A solution which appears to be currently in the process of being implemented is the creation and implementation of standards and training leading to specialization in the field of investigative and forensic accounting. As previously mentioned standards or

⁷⁶ Larry D. Crumbley and W. Eugene Seago, "Immunity from Civil Liability for the Expert Witness: Don't Count on It" *Journal of Forensic Accounting*, 1524-5586/Vol IV (2003): 145.

proposed standards currently exist for members of any or all of the CICA, AICPA, ACFE, and ACFI.

Professional standard-setting bodies also provide formal professional training and a specialist designation.

The forensic and investigative accounting profession appears to be at a phase where adoption of a universal set of standards would benefit both the profession and its clients.

5.3.9 Application of solutions to identified problems

In Appendix “F”, I have presented a chart listing the problem causes leading to the critique of expert testimony. To the right and across the top of the chart, the recommended solutions are listed, and where the solution applies to the problem cause, the chart is marked with an “X”. The chart shows which recommendations apply to which of the underlying causes for critiques of expert testimony.

6. CONCLUSION

Based on my analysis of the problems cited by judges, publications detailing issues with experts, and discussions with authorities in the field, it is apparent that there are workable solutions to a number of the problems outlined as causing rejection of expert witness testimony.

By addressing the controllable issues and applying the recommended solutions, individual Investigative and Forensic Accountants can reduce the problem as it applies to accounting expert witnesses. On a wider scale, professional organizations can address

systemic problems including the development of standards and the improvement of the profession as a whole.

Certain systemic problems will continue to exist, such as the sometimes contradictory instructions provided to experts by the Courts. Expert witnesses have both detractors and supporters within the legal profession, and judges who do not hold experts in high regard are unlikely to change their opinions. In addition, some judgment are and will continue to be subjective by nature. The best solution for the forensic accountant is to be aware of these situations, which may be unsatisfactory, but ‘forewarned is forearmed.’