

The Forensic Accountant as Consultant

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Forensic accountants are usually retained in family law cases as expert witnesses, with the intention that they will provide expert opinions and testimony on behalf of the client. Although retention as a consultant is less common, it is an important option to consider. Sometimes, the work of the consultant can be even more important than the work of the testifying expert. The consultant may be able to dig deeper into sensitive issues because there is no fear of testimony or of disclosing the consultant's work.

Maintaining privilege

One of the biggest benefits to retaining a consultant is the fact that the consultant's communications and work product enjoy privilege. Because the consultant is essentially an extension of the law firm, the identity of the consultant, the scope of work, the evidence examined, and the results of the work need not be disclosed to opposing counsel. (Note that documents examined by the consultant may very well need to be disclosed as part of the discovery process, but the consultant's work or impressions of the documents should not be disclosed.)

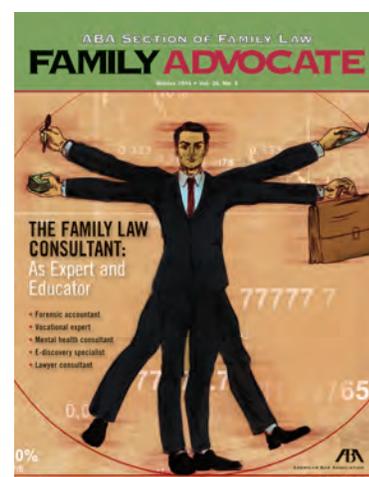
It is important, therefore, to take steps to ensure that privilege is maintained. Counsel should not allow the client to retain the consultant directly. The law firm should retain and pay the consultant to protect all materials shared with and generated by the consultant as attorney work product.

One of the key reasons a consultant may be retained is to evaluate different theories or settlement scenarios. The consultant also may be evaluating documents or information that could actually be detrimental to the client. It is in the attorney's best interest to have the consultant's work and opinions protected as work product, especially if the work or opinions may end up casting the client in a bad light. That is not to say that some detrimental information may not have to be disclosed to the other side at some point. Discovery rules may require that documents and data be turned over to opposing counsel. However, documents, theories, and opinions drafted by the consultant can and should be protected as work product and not disclosed.

Strategy development

One of the most important roles a consultant can play in a divorce is assisting counsel with the development of strategies. Although the expert witness could fill this role, too, having him or her do so has potential pitfalls. An expert witness is expected to maintain objectivity throughout the engagement to add credibility to the expert's opinions and testimony.

Communications between the expert witness and the attorney may be discoverable; therefore, it can be tricky for the expert to maintain the appearance of objectivity. A relationship with counsel and the client that is deemed too cozy might bring into question whether the expert witness is an impartial interpreter of the evidence. Jointly developing a strategy that best benefits the client could cause the trier of fact



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to view the expert witness as more of an advocate than an unbiased observer.

The consultant in the family law case has no such limitations. The forensic accounting consultant and counsel are free to explore potential strategies and evaluate which might provide the best outcome for the client. Strengths and weaknesses of the case can be discussed freely, with little fear that the discussions will be revealed to opposing counsel.

Acting like a testifying expert

Although the forensic accountant or divorce financial analyst may not be filling the role of expert witness, acting like a testifying expert can still aid the case. The first way the consultant can act like a testifying expert is by maintaining his or her file just as an expert witness would. That means keeping a “clean” file, minimizing notes, impressions, extraneous data, or unnecessary documents. The forensic accountant maintains the file in that fashion for the purpose of “what if.”

Sometimes the attorney purposely retains an expert as a consultant first to preview the opinions the forensic accountant develops. The attorney may later decide to convert the forensic accountant to a testifying expert. In this case, the previously undiscoverable file will become discoverable.

Strange things can happen in a divorce. What if a successful challenge is made to the work product doctrine and the forensic accountant’s file materials must be disclosed? What if the case changes course and counsel decides that the forensic accountant must be a testifying expert? What if new financial issues arise about which no one else can testify? The list of “what ifs” goes on.

Most attorneys will agree that although those things are unlikely to happen, in fact, they *could* happen and the file might become discoverable. It is better to have a clean and orderly file from the start, with no unnecessary or embarrassing notes or documents.

The other important way the forensic accountant can act like a testifying expert is by attempting to look at the case objectively. In most cases, an expert is retained by one side and, therefore, is not considered “neutral.” However, the expert still should strive to be objective, to consider issues from several different angles, and to evaluate the evidence fairly.

Even though the trier of fact will likely never hear from the consultant or evaluate his or her credibility, attempting to be objective can still serve the case well. Presumably, counsel is retaining the consultant to help critically evaluate the case, the evidence, and the settlement options. The forensic accountant should not simply agree with counsel’s theory or make people feel good. He or she should tell the truth about the numbers and what they might mean to the divorce case.

A second set of eyes

One important potential role for the consulting forensic accountant, which is often overlooked, is being a “second set of eyes” in the case. While the attorney may have retained a competent testifying expert, having a third party evaluate that expert’s work and opinions as a quality control measure may be beneficial. Differing experts can have differing opinions, and sometimes an expert witness can develop tunnel vision when working on a case.

Bringing in a consultant to critically evaluate your expert’s work can flesh out problems in your case and the numbers. A forensic accountant might poke holes in your expert’s theories, find inaccuracies or inconsistencies in the numbers and calculations, or simply ask questions that bring new issues to the forefront. It is best to face up to the issues in the financial portion of your case before opposing counsel has a chance to discredit your expert.

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It may also be helpful to have that second set of eyes when evaluating the work of opposing counsel's expert. Again, it is simply another quality control measure, and the consulting expert may point out issues or opportunities that the testifying expert didn't see or didn't think were important.

This second set of eyes also can be important in cases in which a financial neutral has been appointed or agreed upon. Although the neutral is supposed to be impartial, counsel may want to have a consultant on his or her side to evaluate the neutral's work and determine if the results are fair and unbiased. Even if the client agreed to the use of a financial neutral, this does not preclude separately retaining a consultant to examine the work of the neutral.

Ugly issues

Having a nontestifying expert evaluate ugly issues can be valuable to the case in much the same way as it is helpful for the consultant to assist in developing strategies. Counsel may not want the testifying expert to look into a dicey issue for fear of having to testify to what was found. The consultant, on the other hand, will hopefully never have to produce his or her file or testify in court. Counsel, therefore, does not need to fear delving into sensitive issues about which the consulting expert's opinions may be detrimental to the client's case.

Ugly issues that may necessitate the input of a consulting forensic accounting expert may include:

- A cash business (which implies a business with cash receipts that are unreported),
- A business with more than one set of books,
- A business paying employees or contractors "under the table,"
- A business with significant income unreported for income tax purposes,
- False income tax returns filed for personal or business purposes,
- Substantially overdue income tax returns,
- An accumulation of cash or other assets that appears unusual,
- Hidden accounts or other assets, or
- Concealed sources of income.

All of these are potentially damaging situations for your client, and the consultant can help develop strategies to minimize the damage. The client risks reputational harm, income tax liabilities, including substantial penalties and interest, and perhaps even criminal prosecution. These matters must be handled delicately during divorce proceedings to reduce the risk to the client.

Benefits outweigh costs

Forensic accountants often are not used as consultants in family law cases due to budgetary concerns. The divorce process is already expensive, and adding another expert to the mix increases costs. However, those costs can be controlled by having the expert limit the scope of his or her work and capping those costs accordingly.

Hopefully, clients can see a longer term benefit from doing so. Counsel will be able to fully investigate sensitive issues without fear of adverse expert witness testimony. Although certain information and documents regarding the sensitive issues will likely need to be disclosed during discovery, the work and the opinions of the consultant will be protected as work product. Knowing the truth about the numbers should help counsel put on a better case, and there is little to no risk of tainting the opinions or compromising the objectivity of the testifying expert. **FA**