



Litigation Support Roles of Forensic Accountants

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When I was an FBI Agent, my job was enigmatic to most people. Now, as a “forensic accountant,” I find my job is nearly just as mysterious - and misunderstood. Maybe I should become a plumber!

Forensic accounting has evolved significantly over the last fifteen years and the litigation support roles of forensic accountants have increased and changed dramatically. Nonetheless, I frequently find that many accountants and attorneys still pigeonhole forensic accountants under the classical role/definition, which is primarily associated with providing expert testimony about technical accounting issues in disputes. While that is still a viable, common, and valuable role, many accountants may not be taking advantage of additional service opportunities and many attorneys may not fully appreciate all the ways and how much an experienced forensic accountant can serve and help them.

Before I share some of these forensic accounting roles, it is best to differentiate a “testifying expert” (i.e. “expert witness”) from a “consulting expert.” A testifying expert, as the title implies, is generally used in the context of a legal dispute to prepare a formal report and provide expert testimony regarding a particular topic relevant to the dispute. All of the work of a testifying expert is focused towards testimony, and therefore follows a prescribed set of rules and standards designed to ensure fairness, completeness, legal & procedural compliance, etc....

A “consulting expert” is not primarily associated with providing testimony (though sometimes the role converts to “testifying expert” during the process) and works only within a framework of broad and general rules and standards, much less defined and stringent than those applicable to testifying experts. Instead of focusing on a narrow area for the purpose of testifying, the consulting expert assists counsel by providing expertise in various and relevant areas that enable counsel to better represent, serve, and advise its client(s).

In the field of forensic accounting, the consulting expert role has become commonplace, though still largely underutilized. Some of the most effective attorneys have come to appreciate all the ways in which an experienced forensic accountant can assist them and routinely incorporate forensic accountants into all of their white-collar defense work (corporate and personal) and even in many civil litigation matters.

For some of these attorneys, forensic accountants have become their “secret weapon.” In some respects, forensic accountants may be the “best kept secret” in the litigation support world.

In this paper, I hope to let the secret out by sharing some of the litigation support roles that forensic accountants have come to play. This may be helpful, not just to attorneys who rely on litigation support professionals but have not yet been exposed to the range and variety of ways that forensic accountants can support and

help them, but also for those accountants contemplating a career in forensic accounting or current accountants looking to build or expand their litigation support practices and/or service offerings.

Accounting

It's easiest to start with the most obvious. Most forensic accountants are also Certified Public Accountants (CPAs), who have significant training and experience with accounting principles, methodologies, procedures, standards, and rules. In many litigation matters, particularly those where fraud is a concern, counsel must consider and understand the accounting of its client. Clearly, in situations where there are allegations and/or concerns of financial statement or accounting fraud, such expertise has very significant and direct relevance.

Accounting is also highly and directly relevant in matters where any alleged underlying misconduct had an impact on the financial statements of an organization, such as is commonly seen in government contracting, securities fraud, money laundering, and anti-corruption matters, among others. Accounting may also be important in a variety of related ways, from calculating disgorgement to determining loss under the United States Sentencing Guidelines.

In reality, accounting is important in any fraud matter because accounting is a record of ALL activities (which translate into numbers as "transactions") of an organization. The organization's accounting cannot help but be impacted by any inappropriate and/or illegal activities within or by the organization. A good forensic accountant can help counsel understand and appreciate that impact and put it into the context of the relevant laws and regulations.

Internal Controls

Probably the next most obvious area in which forensic accountants can provide significant litigation support value relates to internal controls, particularly, though not necessarily limited to, those around accounting functions.

All organizations have internal controls, even if some smaller organizations aren't particularly conscious of and/or appreciate it. Very simplistically, from a purely classical accounting perspective, such internal controls are largely in place to help ensure accurate accounting. However, in fulfilling that objective, internal controls have evolved into the primary means by which an organization attempts to prevent and/or detect fraud.

Internal controls do not come in "one size fits all." Aside from where particular internal controls are necessary under regulatory or other requirements, the level of and effectiveness of internal controls is largely dependent on a variety of factors, including, but not limited to, the organization's size, resources, industry, accounting system(s), and risk(s). In many respects, risk(s), plays a key and greatly underappreciated role. Internal controls must be risk-based, not only to maximize its effectiveness, but also to do so at a cost that is reasonable and bearable to an organization.

There are two primary internal control assessments that a forensic accountant would ordinarily conduct: (1) design and (2) effectiveness. The design assessment is meant to assess the design of the overall internal controls structure. This takes into consideration not only any specific regulatory/industry requirements and "best practices" as to design and structure (i.e. personnel responsibilities, reporting, independence, etc.), but also incorporates

the organization's risks and other factors, as was noted above.

An effectiveness assessment is meant to determine how effective the organization's internal controls are in practice and is much more time intensive than a design assessment. An experienced forensic accountant will incorporate into each internal controls effectiveness assessment ways that the internal controls might be circumvented and perform tests to determine how effective the controls are in preventing it.

It should be noted that a very experienced forensic accountant can often determine possible ways that internal controls could be circumvented that those not deeply experienced in fraud matters, including many of those who commit and/or contemplate fraud, would not have imagined. The best forensic accountants not only have significant experience to aid them in these assessments, but also are highly creative in devising means by which circumventions may occur so as to cover the full range of possibilities. The forensic accountant can then, if necessary, "reverse engineer" the internal controls to better prevent circumvention or identify instances where circumventions occurred.

One interesting phenomenon of internal controls is the affect of "over control." Some organizations, in an abundance of fear and caution, place so many internal controls around some functions so as to make a person's ability to perform that function greatly difficult and/or time consuming. While well intended, my experience has found that such over control often leads to employee discontent, causing them, with no ill intent, to devise creative ways to "work-around" the controls in order to perform their job functions. Not only does this cause a

control failure in and of itself, but it also plants the seeds feeding the perception that controls are not that important, which can blossom into a serious and systematic ethical tone problem. A good forensic accountant can identify over controls and provide guidance to an organization about how to find an appropriate balance.

In instances of alleged misconduct and/or fraud, internal controls, or the lack thereof, will have necessarily played some role. Forensic accountants can help counsel understand how effective internal controls were and are in preventing and/or detecting fraud. As is frequently the case, forensic accountants can also help counsel understand how internal controls may have been circumvented. Very experienced forensic accountants also recognize and understand government expectations about internal controls and how they fit within the context of prosecutorial and/or regulatory resolutions and can assist counsel with demonstrating those instances where internal controls were strong and successful - where they worked. Such positive demonstrations of effective internal controls can have a significant impact on government decisions.

Where internal controls were not well designed and/or effective, the expertise of a forensic accountant can be invaluable in providing counsel with the information needed to best advise and guide the organization about how to improve/strengthen those internal controls. As counsel is keenly aware, robust and timely remedial measures can be a highly favorable factor when discussing and/or negotiating resolutions with the government.

Corporate Compliance and Ethics Programs

§8B2.1 of the United States Sentencing Guidelines (“Effective Compliance and Ethics Program”) is widely recognized as the foundation and measuring stick for corporate liability, both criminally and generally (i.e. suspension & debarment matters). This is evidenced by various policies and procedures, as well as informal guidance, used and/or publicly communicated by various government agencies (i.e. United States Attorneys’ Manual, FAR, SEC Enforcement Manual & Seaboard Report, etc...). Ultimately, the design and effectiveness of an organization’s corporate compliance and ethics program plays a central and key role in the reporting and resolution of all matters involving corporate fraud and/or misconduct.

One of the key elements of an effective compliance and ethics program under §8B2.1 is the inclusion of monitoring and auditing to detect criminal conduct (§8B2.1(b)(5)(A)). Forensic accountants, as was previously noted regarding “internal controls,” are perfectly suited to this task. Moreover, an experienced forensic accountant can place the organization’s efforts in monitoring and detecting criminal conduct into the context of §8B2.1(b)(5)(A) and the underlying alleged misconduct.

Some experienced forensic accountants, having recognized the importance and role of compliance and ethics programs in corporate internal investigations, have taken the time to become experts in this field, which is not a traditional “accounting” field. They have joined organizations such as the Society of Corporate Compliance and Ethics (SCCE) and/or the Ethics and Compliance Officers Association (ECO), which, as leaders in

the industry of corporate compliance and ethics programs, provide these forensic accountants with access to publications, resource materials, training and networking opportunities that improve and/or hone the forensic accountants ability to better assist counsel in these key areas.

The SCCE offers a formal “certification” as a Certified Compliance and Ethics Professional, which is presently the preeminent credential for those in the compliance and ethics industry, requiring not only the passing of a thorough, formal, and proctored exam, but on-going continuing education of at least twenty (20) hours of professional education annually. Forensic accountants looking to expand services in these areas should seriously look into credentials in this field (as many have done with valuations, etc.).

Similar to the previously described expert assistance that a forensic accountant can provide counsel on internal controls, forensic accountants who are also experts on corporate compliance and ethics programs provide significant assistance to counsel in assessing, understanding, and remediating overall corporate compliance and ethics programs. Moreover, such a forensic accountant can help counsel understand and articulate the successes and failings of such programs in the context of **all** of §8B2.1, both in preventing & detecting misconduct and fraud generally, as well as its relevance to the specific underlying alleged misconduct.

As experienced counsel is well aware, this is a central consideration of the government in its considerations and negotiations regarding punishment and/or what it will require of the organization.

Government Mentality & Counsel Liability

Some of the best forensic accountants often come from the ranks of law enforcement. This background enables such forensic accountants to plan and conduct their work not only with more credibility to the government, but with a greater grasp of the government's concerns, investigative techniques/tools, and mentality. Additionally, such experience enables such a forensic accountant to better avoid actions that, as an "agent" of counsel, might be adverse to counsel's ethical obligations and standards of practice.

Where a forensic accountant does not have such law enforcement experience, they may gain a degree of relevant fraud understanding, training and knowledge through the Association of Certified Fraud Examiners (ACFE). The ACFE is the oldest and most established and reputed organization serving this field, providing accountants and others interested in fraud examinations with resource materials, training, publications, and a peer network that better enables them to effectively assist counsel and avoid issues. The ACFE also offers a credential, the Certified Fraud Examiner (CFE), that requires the passing of a test and on-going relevant continuing education requirements.

In those instances where counsel does not have prosecutorial experience, a forensic accountant's law enforcement experience may be invaluable, affecting counsel's actions and guidance to the organization significantly, as well as counsel's negotiations with government agencies. Such a forensic accountant's experience may also enable him or her to help counsel avoid ethical and/or standards of practice pitfalls.

Where counsel has former prosecutorial experience, a forensic accountant's law enforcement experience supplements counsel's experience. In the same way that, for example, an Assistant United States Attorney (AUSA) and Office of Inspector General Special Agent coordinate and work together on matters, such a forensic accountant works with an organization's counsel to assure the best possible uncovering of relevant facts & evidence and determine and articulate the arguments/defenses/strategies most relevant and effective towards defending the organization and/or negotiating reasonable settlement terms. The dynamic, trust, and roles that make an AUSA/Agent team formidable and effective inside the government transition to and work to the same affect for those who have left the government for the private sector.

A forensic accountant's prior law enforcement experience can significantly assist counsel in, among other ways:

- Understanding relevant law enforcement policies & procedures and identifying the government's compliance (or lack thereof) with such policies & procedures;
- Identifying and calculating the impact of United States Sentencing Guidelines considerations and enhancements;
- Identifying likely and relevant government investigative techniques (i.e. cooperating witnesses, Title IIIs ("wiretaps"), informants, surveillance, trash covers, search warrants, etc...) consistent with the government's likely prosecutorial strategies/arguments and history;
- Negotiating more efficient and relevant subpoena responses and returns;
- Identifying possible Brady, Jencks and/or Giglio material(s)/evidence;
- Negotiating the return of records seized by the government;
- Identifying experts in areas of relevance to counsel's arguments and/or in anticipation of the government's allegations;
- Identifying likely key evidence to be offered by the government and its role and impact on

the government's prosecutorial/regulatory strategy;

- Determining, in matters involving suspension and debarment, compliance and internal control measures relevant to a government contractor's "present responsibility" obligations/requirements under the FAR;
- Identifying relevant mitigating circumstances/evidence and;
- Identifying relevant and key system weaknesses/failures and providing counsel and the organization guidance and assistance towards timely designing and implementing effective and reasonable remedial measures.

Credibility

Though it is an intangible, counsel is also keenly aware of the importance of counsel's credibility with the relevant government agencies with whom it interacts during the course of representing an organization in an internal investigation or self-disclosure of misconduct. The more credible counsel is in the eyes of the government, the greater the likelihood for smooth exchanges of information, less operational disruption on the organization, and even a more favorable outcome for the organization.

Though there are many other factors that contribute to government credibility, most of which must be earned, counsel who once served in government enforcement roles (i.e. AUSAs) often have a "credibility advantage" at the outset of interactions with the government. Though this is certainly not always the case, current government enforcement persons may tend to initially more trust former government enforcement persons than those with no such experience.

Those in government enforcement roles swear an oath to support and defend the constitution of the United States upon taking office and, during their government tenure, share a sense of purpose, duty, and justice that goes beyond mere job duties

and responsibilities. In the FBI, we liked to say that our profession was more akin to a "calling" than a "career," more similar in nature to that of a Priest than an employee.

It has been my experience and I like to believe that most who take this oath take it not only seriously, but also carry its values beyond their government service. Right or wrong and however much one may attempt to justify and/or condemn it, this is a reality – it is human nature. The bonds formed through a shared oath tend to go beyond that of a contract, employment or otherwise.

This credibility is not only important for counsel, but for the forensic accountants and other litigation support professionals who work with and for counsel in internal corporate investigations. Forensic accountants with prior law enforcement experience may have a higher degree of initial credibility with government enforcement personnel, particularly those in law enforcement, than those without such experience. This intangible may play a significant role in bolstering the credibility of counsel with former government experience or even help create credibility for counsel who may not have yet earned it.

One example of this intangible benefit is when counsel meets with the government in the early stages of government interactions, whether through a voluntary disclosure or, in matters where the organization was not yet aware of the issue, at the request of the government. In many instances, the organization's counsel will not only meet with government attorneys, but also with government investigators. The presence of a team of persons (counsel and forensic accountant) with credibility in the eyes of both the government attorneys and investigators

can set a more positive and “friendly” tone that may carry throughout the entire matter. This can save not only extensive “heartache” for the organization, but costs.

Interviews

Whether it is a government investigation or an independent internal corporate investigation, the primary investigative tool is interviews. As an FBI Agent, I would estimate that of the various tools and techniques available to me in investigating white-collar crime (i.e. “fraud”), interviews accounted for between eighty and ninety percent (80% - 90%) of my time in each matter. Because of the reliance on interviews in any investigation, it is of utmost importance that interviews be conducted thoroughly, fairly, and competently.

Investigative interviewing is as much an art as it is a science. The science can be learned through training, reading, and study, but the art is only learned through mentorship, combined with extensive and relevant application. Forensic accountants with a law enforcement background will have had significant opportunities to learn and develop both the science and art of investigative interviewing.

For those forensic accountants without the benefit of law enforcement experience, interview training can be gained through a variety of reputable companies and/or organizations, including the ACFE. Such training covers relevant areas such as, but not limited to, legal requirements/pitfalls, rapport building, witness calibration, detecting deception (i.e. cluster changes, non-verbal cues of anxiety, reading body language, etc), evidence taking, and report writing. The best investigative interview training incorporates adult-based learning theories, including hypothetical situations, videos of actual interviews, and role-

playing, so as to be most effective. While such training is invaluable and a must for accountants seeking to move into forensic accounting, it remains very difficult for accountants in general to find sufficient opportunities to apply this training in practice outside of law enforcement – that is to develop and hone the “art” of investigative interviewing.

Many attorneys have developed highly effective investigative interviewing styles, but such effectiveness could be enhanced dramatically by utilizing in their internal investigations forensic accountants with significant training and experience in investigative interviewing. Though there are attorneys who, over many years and a variety of practice experience, have become highly skilled interviewers, there are many more whose skills are still in development.

A deposition is a form of interview, but it is greatly different in purpose, strategy, and form than investigative interviews used in most internal corporate investigations. Deposition skills may provide a good beginning foundation for investigative interviewing, but must be supplemented with additional and specific investigative interviewing training and significant non-deposition, investigative interviewing experience to be most effective in the context of internal investigations.

Because interviews play such a significant, central, and key role in government investigations, forensic accountants with prior law enforcement experience are highly likely to have mastered investigative interviewing. FBI Agents, for example, go through exhaustive training on the science of interviewing, which they begin to see applied when paired with a mentor (“training Agent”) as they begin their career. Throughout an FBI Agent’s career,

they may conduct thousands of investigative interviews, through which they are afforded the opportunity to perfect and hone their styles and investigative interviewing effectiveness. An Agent's investigative interviewing training also continues throughout their career, with innumerable "in-services" and other opportunities to learn about the latest science and legal issues relevant to investigative interviews.

Accountants desiring to most effectively and successfully move into forensic accounting may consider devoting some part of their early career to law enforcement or try to obtain a part-time role whereby they gain some relevant law enforcement experience (i.e. reserve status with local law enforcement). After leaving the FBI for the private sector, I have on many occasions experienced situations where, when working with highly experienced counsel or forensic accountants without law enforcement experience, the investigative interviewing experience and abilities that I gained as an FBI Agent far exceeded their expectations, resulting in more effective and efficient client service and outcomes.

In one such instance, on an internal corruption investigation, I was working with a forensic accountant with no law enforcement experience, but about twenty (20) years of private sector experience. In my preparation for an interview, I found information that led me to believe that the person to be interviewed was highly likely to have key information. As the other forensic accountant and I prepared for the interview, I shared with him my thoughts and devised an interview strategy that I believed might garner the cooperation of the interviewee, if he were not so inclined.

As the interview unfolded and the interviewee's lack of cooperation and lying was apparent to me, I began to apply my strategy, which was utterly foreign (outside of reading about it) to my career forensic accounting partner. The strategy worked and the information provided helped make our internal investigation continue more effectively – and efficiently. Without this cooperation, we could have expended hundreds of more hours to otherwise independently develop the same information, if at all.

Counsel for an organization, particularly those without significant investigative interviewing training and experience, will not only directly benefit in the conduct of the investigation at hand by utilizing such an experienced interviewer, but will also receive mentoring in that process that may greatly benefit their own investigative interviewing style and effectiveness in future matters.

Conclusion

The role(s) of a forensic accountant have changed dramatically over the last fifteen years and it remains a rewarding and growing litigation support practice area.

From its origins as a testifying "expert" witness on technical accounting matters to consulting expert assisting counsel in a variety of key areas, many not accounting related, in internal corporate investigations, forensic accountants have become among the best kept secrets of the most effective and successful white collar defense attorneys.

Though many other forensic accountants have likely had the same experience, it is illustrative and relevant to summarize by sharing comments from an attorney with a relatively small regional law firm whom I worked with a couple of years ago on a civil litigation matter. She had worked with local “forensic accountants” for most of her over twenty years as a lawyer, but never had she worked with one who had such an impact on so many “non-accounting” areas relevant to her case, including her entire case strategy.

Beginning during our first meeting, we shared ideas that immediately impacted her litigation strategy. Over the course of the matter, from among nearly a hundred thousand un-indexed data files and accounting records, we pieced together compelling circumstantial evidence of a significant and deeply hidden fraud and put it into not only what she called a “bullet-proof” report, but into the context of her legal arguments and strategy. She believed that our work effectively forced the opposing party to settle favorably for her client. Simply put, she didn’t know forensic accountants could do that.

We can and we do.

About the Author:

John Hanson has over twenty-three (23) years of fraud investigation, forensic accounting, corporate compliance & ethics programs, and audit experience. Much of John’s professional experience has been in federal criminal law enforcement, having served for nearly ten (10) years as a Special Agent with the Federal Bureau of Investigation. John has conducted hundreds of investigations involving complex fraud schemes, including Ponzi and Pyramid schemes, embezzlements, money laundering, identity theft, telemarketing fraud, bankruptcy fraud, public corruption, anti-corruption, securities fraud, health care fraud, mortgage fraud, charitable fraud and bank fraud.

John has most recently become known for his contributions, work, and thought leadership in the field of Independent Corporate Monitoring, a practice area involving the imposition of an independent third party by a gov’t agency or department upon a corporation to verify that corporation’s compliance with the terms of a settlement agreement. John has previously served in a leadership role in a federal Monitorship and was involved in four other federal monitorships: two as the named Monitor, one as the "Independent Business Ethics Program Evaluator" and the other in support of the named Monitor. In these roles, John has reported to the Department of Justice, the Department of Interior, the Department of Transportation, the Small Business Administration, the Federal Highway Administration and the Massachusetts Department of Transportation.

John is also a Certified Public Accountant (Louisiana), a Certified Fraud Examiner, and a Certified Compliance & Ethics Professional.