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The Critical Final Stage of Your Investigation: The Forensic Investigator's Guide to Using the Litigation Process

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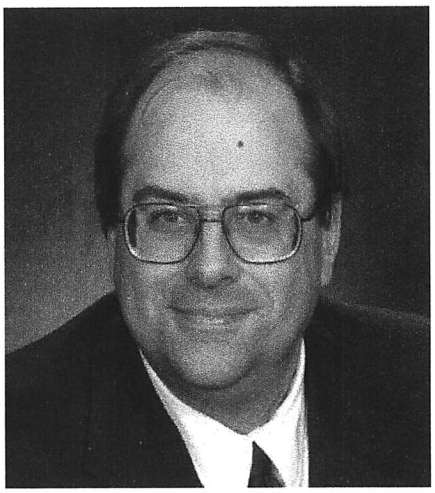

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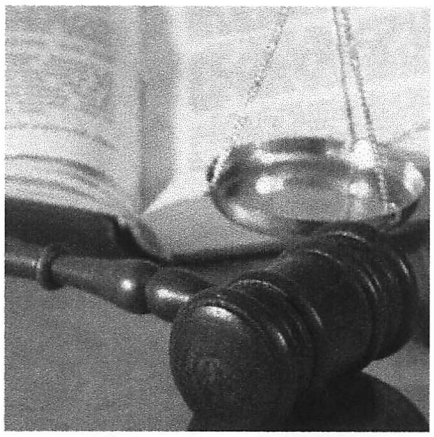
Introduction

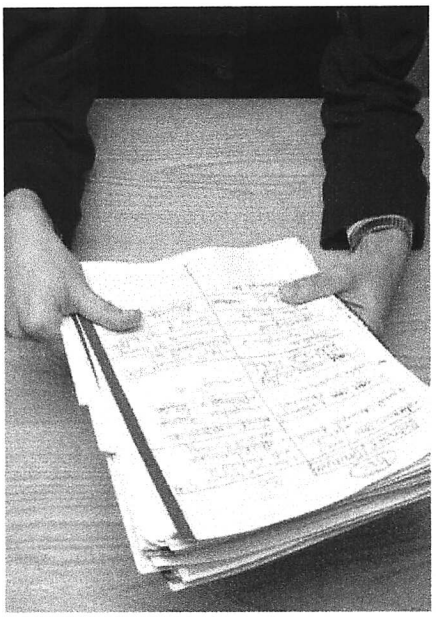


A textbook approach to an investigation involves the pre-engagement and planning phase, the "freeze and formulate" stage, the investigation stage, and the reporting and wrap up phase.[1] Normally, the forensic investigator assumes that the reporting and wrap up phase ends when they have provided a report to their client that either leads to litigation, or is presented in the process of litigation. That should not be the case. **The investigation continues until the conclusion of trial, unless there is a scope restriction in your retainer. The civil and criminal litigation process is a system "marked by a search for truth"[2] and that search does not stop at the courthouse steps. It continues throughout the litigation process.** The standards of professional conduct require the forensic investigator to assess the sufficiency and appropriateness of the evidence, and account for alternative theories to explain why the evidence, when taken as a whole or in significant part, is sufficiently persuasive to support the conclusion reached.[3] This implies that the forensic investigator should consider the quality and quantity of the evidence supplied by the suspect during the litigation process, as well as the evidence relied upon in their report after it has been examined by the suspect's lawyer during the litigation process itself.

The word "forensic" comes from the Latin, and means "belonging to the forum," ancient Rome's venue for public debate. Forensic science therefore means the study and practice of advocacy in public debate, either in court or a tribunal. Forensic testimony is used to assist the court in public, usually legal, disputes. Forensic investigation involves the gathering and collation of evidence for the purpose of its introduction before a tribunal or court, often in the form of testimony. **At the very minimum the forensic investigator should be part of the evidentiary collation and presentation process by examining evidence as it is procured and tested throughout the litigation process, rather than leave it solely to lawyers who have no professional training in investigatory techniques, including how to identify of industry-specific "red flags."** In order to be able to perform your proper function during the litigation process you have to understand the investigatory features of the litigation process itself. This paper is an introduction to that subject.

Why is this topic particularly timely? In 2010 Ontario's Rules of Civil Procedure will undergo a major overhaul to truncate the length of the pre-trial Discovery process, including the Discovery of electronic documents. **This will mean that clients can no longer rely on their lawyers to uncover all of the relevant evidence in the course of the litigation process itself, and will be turning to you as never before. This, coupled with the fact that investigators will find themselves being increasingly sued for negligent investigations, means that you and your respective client's lawyer now need each other to complete your respective investigations.** This paper describes why this is the case. We start with an explanation of why forensic investigators are now finding themselves as potential defendants in lawsuits claiming damages for doing a negligent investigation, when historically this was never the case.

The Legal Standard for Your Investigation



Investigators are in a position of great power. As a result, you have the capacity to inflict grave harm as well as serve the greater good. It has traditionally been thought that police officers and other public officials were solely accountable to their internal disciplinary bodies, and private investigators to their licensing authorities. By their 2007 decision *in Hill* v. *Hamilton-Wentworth*[4] the Supreme Court of Canada reminded everyone that the common law duty to be careful in the conduct of one's affairs also applies to public investigators, so that police officers can be sued for conducting a negligent investigation that has led to a false accusation of guilt. In *Correia* v. *Canac Kitchens*[5] the Ontario Court of Appeal held that the same principle applied to private investigators. Employees who have been wrongfully dismissed may now sue the investigator when their employer relied on a negligently prepared investigator's report to fire them. This type of litigation provides a further incentive to ensure that your investigations are prepared properly in the eyes of the law, and encourages the investigator to always be mindful of any evidence that may point to innocence as well as guilt. However the idea that the investigated may now sue the investigator leads to the obvious question, "What do courts expect of an investigator?" The short answer is that courts expect investigators to act reasonably in the circumstances.

A reasonable investigation is one that is conducted thoroughly, and in a systematic fashion within the ambit of the investigator's purported level of expertise, and which produces a fair and unbiased report of your findings to their employer or client. **That standard implicitly suggests that the investigator has an obligation to hear the suspect's side of the case, and to review the suspect's evidence, whenever the opportunity presents itself. Quite often that opportunity only presents itself during the course of criminal or civil litigation. It therefore follows that litigation should be the final stage of your investigation.**

The courts recognize that at the outset of an investigation, the investigator may have little more than hearsay, suspicion and a hunch. In the face of having a paucity of evidence to go on at the start of the investigation, the investigator must proceed in a "reasonable" manner. What is reasonable is determined on the basis of what a reasonable investigator in similar circumstances is expected to do. To the extent that the investigator holds himself as an expert to the client or employer, the courts will raise the level of professionalism and expertise that is expected of the investigator during the course of the investigation, but apply this higher standard in a manner that still gives due recognition to the discretion inherent in any investigation.[6] Like other professionals, investigators are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because an investigator exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to an investigator, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. Investigators, like other professionals, may make minor errors in judgment that cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere 'errors in judgment' which any reasonable professional might have made and therefore, which do not breach the standard of care.[7] To the extent that the results of the actual investigation fall short of what the actual state of affairs turned out to be, the greater the need on the part of the investigator to show that the errors did not result from a lack of skill, competence, or diligence on their part. **The onus of proving an investigation was done properly is not on the investigator as a matter of law, but as a matter of common sense.**[8]

In determining what is reasonable in the circumstances, the courts will examine the applicable statutes, regulations, the published standards of the profession, and standard practices. If there is some practice in a particular profession, some accepted standard of conduct that is laid down by a professional institute or sanctioned by common usage, evidence of that will be received in determining the standard of care. Rules of professional conduct and policies that have been carefully and thoughtfully crafted, do not constitute the standard of care *per se*, but they are very important factors in the court's consideration of whether the standard of care has been met.[9] It is said that failure to apply the common practices is often the strongest possible indication of want of care, while at the same time conformity with general practice usually dispels negligence: It is important to note, though, that adherence to common practice is not conclusive. Even a common practice may itself be condemned as negligence because in the last analysis the standard of reasonable care is measured by what the court finds ought ordinarily to be done, rather than what is ordinarily done.[10] In *Neuzen* v. *Korn*[11] the Supreme Court of Canada suggested the following questions be asked: (1) is there a standard of practice that pertains to the fact situation before the court?, (2) if so, did the professional in question conform to that practice? (3) if so, there is no negligence unless the standard itself obviously falls below a standard of reasonable behavior, (4) a court will not find that the standard falls below the legal standard in complex, technical matters, and (5) if there is no published standard, the plaintiff must establish the appropriate standard by expert evidence in technical complex matters, and by common sense in the case of a matter easily understood by the ordinary person with no particular expertise in the practices of the profession.

If a standard is issued under legislative authority it is binding, and non-compliance may be treated as negligence *per se*. But even if the standards are of lesser authority (for example, if they are issued by a professional body), they have an important role in the determination of negligence, for they are usually highly persuasive evidence as to minimum requirements of reasonable conduct. Thus, non-compliance with a professional standard is at least evidence of negligence which may call for a convincing explanation as to why the standard in question is adhered to by everyone else but not were not followed in this case. In this manner, standards issued by the profession form an expert opinion of the commonly accepted standard of reasonable practice of the profession which often form the legal standard of requisite care.[12] Expert evidence may be received to ascertain if the standard was followed.[13] So is there a recognized standard for investigators?

A forensic investigation is one that has to sustain the rigours of a court proceeding. The Association of Certified Forensic Investigators of Canada ("ACFI") have published standards that a court would likely find useful, and in the case of those with a C.F.I. designation, they would be virtually conclusive. They are not dissimilar to the standards published for Investigators and Forensic Accountants (those with a CA-IFA designation) and the Association of Certified Fraud Examiners (those with a C.F.E. designation). The ACFI standards require that forensic investigations be performed with due care, meaning that they must comply with the standards set out in (1) relevant legislation and regulations and accepted standards, rules and practices of the courts or tribunals likely to be a forum for dispute resolution, and (2) accepted theories and principles of forensic investigation to which the forensic investigator should refer to support his or her analyses, all with a view to providing complete, truthful, reliable and admissible testimony and demonstrable and documentary evidence, as a lay witness or expert witness. Given the nature of forensic investigative engagements, an inductive approach is utilized whereby evidence gathering and collation is an ongoing, continuous process, with all conclusions being necessarily tentative since the circumstances of the engagement change as new facts are brought to light by the forensic investigator's work and as events unfold based on all "relevant information." "Relevant information" means all information that is available to investigators that relates to the matter at hand, whether supportive of the investigator's earlier conclusions or not. It includes information that the trier of fact or other forum could potentially use in reaching a conclusion.[14] The logical conclusion is that the forensic investigator must examine all of the evidence available to him or her and to "account for alternative theories that might explain the evidence when taken as a whole."[15] **The obvious conclusion is that the investigator should carefully examine the evidence proffered by the suspect during the course of the litigation process and fully and fairly account for same in their final reports to the court. To do otherwise would be an incomplete, and probably negligent, investigation.**

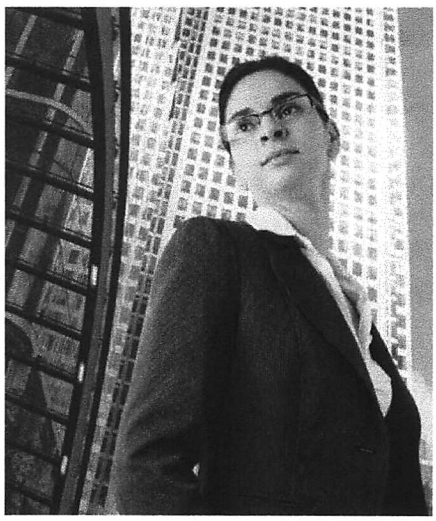
So what are the telltale signs of a negligent investigation? There is the obvious. Falsely accusing someone without any involvement because of an elementary mistake in identity, an unjustified interpolation or extrapolation of the available evidence into an accusation, taking a biased view of the available evidence, or disregarding evidence that was inconsistent with a pre-determined conclusion that a client or employer wants to hear. An investigation which does not question any of the suspect's colleagues or superiors, ignores other investigative reports or audits, makes serious allegations against the suspect amounting to fraud or moral turpitude without providing the suspect an opportunity to answer those allegations, or which reaches conclusions devastating to the suspect's reputation without substantial supporting evidence, leaves the investigator open to a claim of negligent investigation,[16] (either because it missed the rudimentary elements expected of a competent investigation, or because it was so biased that it was not an investigation at all but a "witch hunt" or "hatchet job" performed under the disguise of an independent investigation).

I have written elsewhere about the self-defeating practice of some clients who try to "guide" the investigator to a particular result by withholding evidence, limiting access to relevant evidence, and concluding the investigation before investigating the suspect's story. A failure to fully investigate the suspect's defence, either before or during the litigation, invites a court to conclude that the investigation was negligently conducted, and that the investigator was a dupe, willing participant, or hired gun, in a "witch hunt." **The tell-tale signs of a witch hunt are that the investigator (1) judged the accused before seeking all the available evidence, (2) took extraordinary measures to extract accusations and obtain and tailor evidence to the "correct" conclusion, (3) accepted incriminating evidence from whatever source and of whatever quality without critical evaluation, (4) emphasized corroborating evidence and discounted evidence that questions the prevailing thesis that the investigation is designed to prove, (5) threatened anyone providing evidence in support of the accused as being an accessory, and coerced any alternate suspects to provide testimony to support the "correct" view or face their own witch hunt (on their theory that the accused has committed such heinous wrong that they could not have acted alone and the misconduct in question must be the tip of the iceberg), (6) treated the accused as a dangerous threat to the common good, and therefore unworthy of respect for his or her basic rights, (7) attempted to avoid any scrutiny of the investigation in the interests of security, (8) justified any conduct on the basis that the greater common good in addressing the danger warrants the cutting of corners to achieve the accepted end, and thereby (9) ensured one, inevitable conclusion to the investigation which turns out to be wrong based on the findings of the court.**[17]

The question to be answered is whether or not, during his investigation, the investigator acted reasonably in the circumstances.

Since the limitation period for negligence begins to run not when the negligent act is committed, but rather when the harmful consequences of the negligence result,[18] an investigator may have an opportunity to correct any defects in the investigation at any time before the final verdict in a case is rendered.[19] This is another reason why the forensic investigator should continue to review and collate evidence right up until the time their testimony is concluded so that any errors disclosed by expert and lay testimony at trial can be corrected in a timely fashion. **It follows that the forensic investigator must be an active participant in the litigation.**

The Role of the Expert Witness in the Litigation Process



An expert stands in a position of privilege when compared to lay witnesses, for only an expert is allowed to offer opinions in the course of giving evidence. Those opinions are only admissible on matters within the expert's area of expertise. A party seeking to call expert evidence must show that the subject matter of the expert's opinion falls outside the likely range of knowledge and experience of the trier of fact such that the court benefits from an expert's opinion on a complex technical matter outside the ordinary experience and education of a judge or jury. Because it is unclear to the lay person where the boundaries of a witness's expertise lies, and when an expert is crossing the line between an expert opinion and a lay opinion being disguised by technical jargon, the court expects the expert to know his or her professional limitations and expects the expert to decline to speak to matters beyond them. **Where an expert crosses this boundary, it may only be another expert who can identify this transgression, and so it is the duty of all experts to ensure that proper forensic boundaries are respected by not only policing their own testimony, but also that of other experts. For that reason, it is the duty of all experts to distinguish between "fact" witnesses and expert opinion, and to ensure that expert opinion is not interlaced with lay opinion or opinion outside the recognized expertise for which the expert purports to give opinion evidence before the court.**

Because the opinions stated by an expert are predicated upon expertise that the court does not possess, the court must be confident in relying upon the expert to provide a thorough, balanced and technically sound analysis. An expert witness should state the facts or assumptions upon which his or her opinion is based. Experts must identify material facts that could detract from any concluded opinion. If an expert's opinion is not properly researched because he or she considers there to be insufficient data available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report. For that reason, a forensic investigator who has not interviewed the suspect should always give a provisional or restricted opinion, and no opinion should be considered final until all of the evidence given in the litigation process has been reviewed.[20]

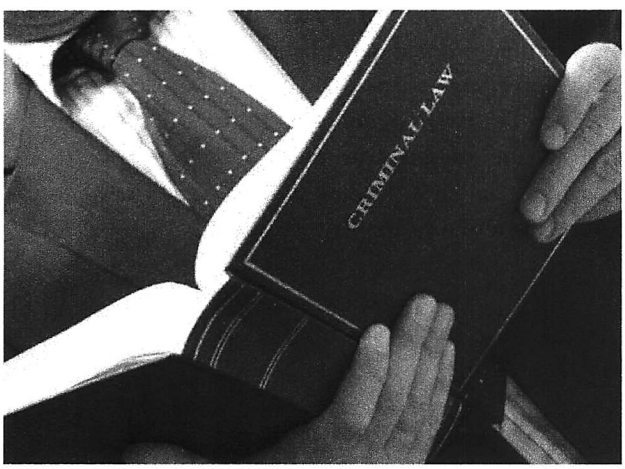
A forensic investigator may be a lay witness, giving evidence on what he or she has found in the course of an investigation, or an expert witness. In either case, the forensic investigator must be an active participant in the proceeding to ensure all of the evidence they proffer is within the rules of court as well as the standards of the profession. **Therefore a basic understanding of the criminal and civil process from this perspective is required as part of the forensic process.**

Investigators and Criminal Proceedings

Police officers are trained to continue their investigation until trial, and to follow up on exculpatory evidence even after a guilty verdict in order to avoid a miscarriage of justice, so we need not deal with criminal matters in any great detail here. Suffice it to say that criminal pleadings consist of either an "Indictment," or, an "Information." An Indictment is a written accusation generally signed by Crown counsel in the name of the Queen alleging that the accused committed an indictable offence on a particular date by doing a particular act. It is un-sworn. The Information is a sworn document that sets out the charge or charges against the accused. Anyone may "lay" an Information by attending before a justice of the peace and describing the alleged criminal conduct. The informant must swear to the truth of the Information under oath. A "count" in an Indictment, or in an Information, is a claim (charge) that a criminal offence has been committed in a particular way. Any number of counts may be included in

a single Information or Indictment. A "count" is analogous to a cause of action in civil proceedings. The evidence with respect to each "count" must meet the "beyond a reasonable doubt" standard for a conviction.

The accused is guaranteed the right to the disclosure of all relevant information in the possession or control of the Crown, with the exception of privileged information. Investigators for both sides have to participate in ensuring that the burden of managing large quantities of information in large and complex criminal matters is made available to the defence.[21] Before trial, the criminal law seeks to protect an accused from being conscripted to give evidence against him- or herself by entrenching the right to remain silent in the face of state interrogation into suspected criminal conduct. This means that, as a general principle, there is no reciprocal duty of disclosure on the part of the defence.[22] While the defence in Canada is under no legal obligation to cooperate with or assist the Crown by announcing any special defence, such as an alibi, or by producing documentary or physical evidence, this protection against disclosure is not an absolute one. For example, failure to disclose an alibi defence in a timely manner may affect the weight given to the defence because the police have not been given an opportunity to investigate the veracity of the alibi.[23] Accordingly, investigators have to be attuned to oblique references to possible defenses given by defence counsel who will seek to rely on that reference as proof of timely disclosure. **The overall point is that the investigator is intimately involved in the criminal litigation process from formulation of the charges in the charge to the verdict at trial. This historically has not been the case in civil litigation.**



Combining Civil and Criminal Proceedings

Because a criminal proceeding does not involve the Crown, and involves a different onus of proof, a civil judgment does not affect a criminal proceeding both in terms of a finding of whether a criminal offence has occurred, or whether a compensation order can be issued.[24] Civil Judgments have a statute of limitations such that the proceeding must usually be commenced within two (2) years, whereas the Crown usually has no limitation period for criminal charges, although it has to proceed expeditiously after charges have been laid. This means that civil cases are often started expeditiously and then proceed slowly, while criminal charges take some time to be laid, but when they are, the case proceeds relatively swiftly in comparison to civil cases.

There is an assumption on behalf of many clients that the criminal proceedings should run their course before commencing a civil proceeding. After all, a restitution/compensation order may form part of the sentence, and a criminal conviction may be used as *prima facie*,[25] or even conclusive[26] proof of civil liability with respect to a cause of action which relies on the same facts as the charge upon which the defendant was convicted.

Many clients also assume that any criminal proceeding will be halted, or "stayed" pending the outcome of the criminal proceeding to preserve the accused's right not to have to give evidence that might tend to incriminate himself, or to a fair trial. Such is not the case. There is a heavy onus on the accused who is also a defendant in a civil proceeding to establish "exceptional and extraordinary circumstances" beyond the fact that they are the subject of a criminal charge before the court will exercise its discretion to stay a civil action when there are parallel criminal proceedings. In Canada, a person who is both a litigant in a civil proceeding and an accused in a parallel criminal proceeding is protected by both the Charter[27] and the *Canada Evidence Act*,[28] from having evidence given by the accused at a civil Discovery or trial being used against the accused in the criminal proceeding. Therefore unless the defendant can show some "specific and peculiar" prejudice in their case, the civil proceeding will proceed.[29]

While the law prevents direct use of Discovery and trial evidence given by the accused in a civil proceeding being used against him in the criminal trial, as well as documents disclosed by the documentary Discovery

rules in civil proceedings, the fact of the matter is that if the defendant wants to meaningfully defend himself in the civil proceeding by way of affidavit on a motion for summary judgment, that affidavit is ordinarily not confidential but is an open court document. So too is the evidence of any supporting witnesses. Moreover the accused's evidence on cross-examination and at trial tips their hand in any related criminal proceeding.

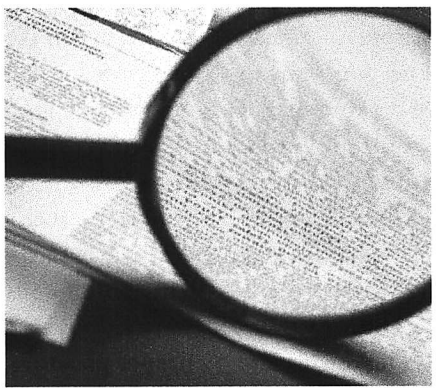
Section 5 of the *Canada Evidence Act* provides that "No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, ... then although the witness is compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter..."[30] Section 13 of the Charter[31] elevates this to a constitutional right. Under the regime of the *Canada Evidence Act* and the *Charter*, a witness must provide evidence in any proceeding, whether voluntarily or under legal compulsion, and he or she cannot refuse to answer a question that may tend to incriminate the witness. The witness is only offered protection against the subsequent use of that evidence. In the United States, a different arrangement is in place: faced with the prospect of self-incrimination, any witness can claim the Fifth Amendment, and refuse to provide the incriminating answer. The state then has to dispense with the witness' evidence altogether.

In the United States, a defendant (i.e. a party to a lawsuit, not just a witness) who is facing both civil litigation and criminal charges has the option either to waive his or her Fifth Amendment right to silence and to testify in the civil proceeding, or to refuse to testify and run the risk of an adverse inference being drawn against him or her in the civil proceeding. In Canada, the defendant has to give evidence on Discovery, as the *Charter* right preventing self-incrimination only applies to criminal proceedings,[32] and not only runs the risk of an adverse inference being drawn if they refuse to testify at trial, but also the risk that the adverse party will either summons them to testify at trial,[33] and/or use any admissions given in the Discovery process to be read into the trial transcript to assist the plaintiff's case at trial.[34]

The testimony of a person who chooses to testify in a civil proceeding cannot be used as part of the prosecution's case against that person as an accused in any later criminal proceeding. However, any evidence that same person voluntarily gives in the civil proceeding may be used to cross-examine that person on a prior inconsistent statement should he or she testify as an accused at the subsequent criminal trial.[35]

The implied undertaking rule in civil proceedings protects the criminal accused's evidence on a civil examination for Discovery, or documents produced as part of the civil Discovery process, where that production is compelled by the Rules. However it is not protected where the accused decides to voluntarily produce it in response to, for example, a motion for summary judgment. Rule 30.1(5) makes it clear that the implied undertaking not to use evidence in one civil proceeding in another proceeding does not apply to evidence filed with the court, or information voluntarily obtained from evidence filed with the court. While evidence that the accused is compelled to give as a matter of law is protected from the criminal proceeding, the decision to defend civil litigation, complete with pleadings and evidence to resist motions will be the cost of the accused's defence, rendering valuable evidence for the investigator to mine in terms of the accused's evidence, and that of any supporting witness, who may not be entitled to protect their evidence from the criminal proceeding if it does not incriminate that witness. Therefore it is not a foregone conclusion that the proper tactical decision is to wait for the criminal proceeding to be completed before starting civil proceedings, particularly in Ontario where there is a two year limitation period with respect to most claims.[36] **Indeed the investigator may want to promote the idea that the civil process may be very useful to the completion of a proper investigation.**

Litigation as the Final Stage of Your Investigation



The investigator should be an active participant in civil litigation from the drafting of pleadings to the final verdict. Pleadings set forth the material facts and causes of action that the plaintiff wishes to establish, and the defendant wishes to rely on, at the trial. The investigator plays a critical role prior to commencing any lawsuit, as the case law provides that a plaintiff may not plead a claim for the purpose of using Discovery process for what is colloquially referred to as a "fishing expedition." The plaintiff must plead material facts that lay the foundation for a cause of action for which he already has evidence. If at the outset of a proceeding, a party does not have knowledge of facts to support allegations of fraud, conspiracy to injure, malice, or breach of duty and therefore cannot plead them with particularity at the outset of a proceeding, then it is an abuse of process to make those allegations in a pleading.[37] **However if the investigator has some specific evidence of wrongdoing that he wishes to pursue by an examination of the suspect's testimony under oath and the documents in the suspect's possession or within his control, it is entirely proper for the investigator to ensure that the allegations for which he seeks additional evidence are pleaded even though they are not yet proven, and then uses the court's Discovery process to acquire the balance of the evidence needed from the suspect.** In the words of one judge:

> "While the expression 'fishing expedition' is hallowed by usage, it really does not provide a principle upon which a decision can be founded. Some fishing expeditions are, if I may put it so, licensed by the Rules of Court and authority; others are not. Perhaps it is not too fanciful to say that a litigant cannot have a licence to fish in his opponent's private swimming pool unless he can provide some evidence from which it can be inferred that there may be fish in that pool. If there is no such evidence, the defendant need not let him in to see if there is a fish."[38]

Once the investigator has accumulated sufficient evidence to start a lawsuit against each of the proposed defendants, the investigator can and should, use the Discovery process to test their conclusions and accumulate further evidence from the defendants, and possibly other witnesses.

The purposes of pleadings are to notify a party of the case it must meet at trial and to define the issues joined in the pleadings for the purpose of relevance in the Discovery process and of evidence at trial.[39] **Once the investigator has accumulated sufficient evidence to start a lawsuit against each of the proposed defendants, the investigator can and should, use the Discovery process to test not only existing conclusions but also to accumulate further evidence from the defendants, and possibly other witnesses, to either sustain or reject other hypotheses that the defendants' themselves can provide additional relevant evidence.**

It is important to remember that at the outset of civil litigation you must only plead allegations of fact, and not the evidence to support those facts. In between the concept of "material facts" and the concept of "evidence," is the concept of "particulars." These are additional bits of information, or data, or detail, that flesh out the "material facts," but they are not so detailed as to amount to "evidence." These additional bits of information, known as "particulars," can be obtained by an opposing party if the party swears an affidavit showing that the particulars are necessary to enable him to plead a response to a pleading that appears vague because the "particulars" are not within the knowledge of the party asking for them. By asking for particulars, a party can see whether a party is simply engaging on a "fishing expedition" in the form of purely speculative allegations, or whether there is some specific factual allegation that has to be addressed.

In cases of fraud, the fraudster's "modus operandi" is part of proving your case at trial because it establishes that the fraudster did not accidentally or mistakenly make an innocent error, but rather this is part of his standard pattern of behaviour. **Therefore other examples of frauds perpetrated by the suspect are important to establish that the misconduct in question was intentional rather**

than a "mistake" or the result of "sloppiness." However pleading these "similar facts" without pleading evidence is a tricky proposition, and so most lawyers avoid trying to do so. **As an investigator however, *modus operandi* may be an important part of your report and you want to ensure it is admitted at trial. Therefore it is important that you consult with the client's lawyer and ensure that the similar fact evidence of other similar frauds is pleaded so that it is admissible at trial.** The following principles pertain. If similar facts will be material to a portion of the claim (a) they may be pleaded in order to give fair notice that they will form part of the Discovery and will be part of the case at trial, so long as they are (b) similar facts and not similar evidence, which means a factual statement of a similar practice, protocol or procedure used in other cases with details of when, where and how that practice was used, and how they are similar to the case at hand, but it does not include any reference to the evidence to establish any of these facts, and (c) even if they are they are material, similar facts with other victims can still be struck out if they will prejudice or delay the fair trial of the action, for even in those cases where the similar facts are relevant and material, they should not be permitted if the added complexity arising from their pleading does not outweigh their potential probative value.[40] A good way to avoid condition (c) is for all the victims to be part of the same lawsuit.

A particularly difficult proposition is the pleading of damages. It is a common practice to start a lawsuit and claim that damages will be particularized prior to trial. **The problem with this approach is that trial lawyers forget about the proper pleading of damages prior to trial and they may forget to particularize the damage claim and handcuff a forensic accountant giving evidence for either party at trial.** Ontario Rule 25.06(9) specifies that where a pleading contains a claim for damages, (*a*) the amount claimed for each claimant in respect of each claim shall be stated; and (*b*) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial. The meaning of the phrase "special damages" in rule 25.06(9) (*b*) is open to interpretation, but the very least it means out of pocket expenses and loss of earnings. It may be that the plaintiff has not made all its calculations but it must have available much of the information necessary to make the calculations. Obviously, the circumstances of each case will dictate the extent to which particulars can be pleaded and some element of reasonableness must be observed. A defendant's expert witness has a right to all the details of a damage claim well in advance of trial, and a plaintiff's expert should ensure that the heads of damages set forth in their report are properly pleaded so that their evidence of those damages may be received by the court.[41] **Therefore forensic accountants should be particularly wary of boilerplate damage pleadings and insist on a proper pleading as part of their due diligence prior to testifying at trial.**

The first question in any pleading, however, is who are the proper parties to the lawsuit?

Who Should be the Parties to the Litigation?

The forensic investigator has an important role to play in identifying the parties to the litigation. The plaintiff has two (2) years from the date that he or she knew, or ought to have known, that there was a cause of action against a person to commence a lawsuit against him. The court has very limited jurisdiction to add new parties after a limitation period has expired,[42] and naming unidentified parties as "John Doe" and "Jane Doe" within the limitation period is also of limited utility.[43] This is important because any person who is part of a group of two or more people who jointly harmed a plaintiff, whether they acted in concert or not, are each liable for the full amount of the plaintiff's damages. This is called "*in solidum*" liability, as opposed to proportional liability, where a person 1% liable would only have to pay 1% of the plaintiff's claim against him. The plaintiff is entitled to judgment against all the defendants for the full amount of her damages. Contribution between the defendants is a matter of interest to the defendants, but of indifference to the plaintiff. Usually the interaction of several, though independent, wrongful acts produces a single indivisible result. They may have been simultaneous, as when two cars collide injuring a passenger; or successive as where one car is dangerously parked and another piles into it. The resulting harm (to which both contributed) being indivisible, each will be answerable for all the damage in solidum though the plaintiff is not entitled to more than a single satisfaction of his claim. This means that the

insolvency of one of the defendants does not affect the plaintiff so long as the remaining defendants are solvent. For that reason it is often critical for a forensic investigator to establish the personal responsibility of individuals who are acting on behalf of insolvent or shell corporations within the applicable limitation period.[44]

In doing an investigation, one must not forget the doctrine of vicarious liability. The most obvious example is an employer's liability for his employee, or a principal for the acts of his agent. In *Bazley* v. *Curry*[45] the Supreme Court of Canada posited that those in authority are vicariously liable for the acts of subordinates who were (1) authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. Therefore there may be vicarious liability for fraud.[46] Since vicarious liability is not limited to employer-employee relationships and other relationships of command or control may give rise to vicarious liability, and unauthorized acts may still result in vicarious liability, the forensic investigator must be sensitive to the command and control structure of any group of people, and consider whether vicarious liability might pertain to the acts of the fraudster or other wrongdoer even though such actions are beyond the scope of their employment. **To the extent that all the evidence you need is not available prior to the initiation of litigation, you may have to rely on the Discovery mechanisms of a civil lawsuit before you can complete your report.**

The investigator who can establish any responsibility for a participant does a yeoman's service for his client, because the client can recover against any defendant found at any degree of fault has to pay all of the damages suffered, and then leave that defendant to recover from the co-defendants their proportionate share of responsibility. **This, of course, puts the "cat amongst the pigeons" as one of the co-conspirators gives evidence against the others in order to avoid bearing the entire burden of a judgment by himself.**

On the other hand, a less than diligent investigator who does not identify and report all of the possible defendants within the limitation period (and not every limitation period is two years) may be robbing their client of an important means of recovering their loss, as the court will not allow an amendment to sue such parties after the limitation period has expired, because to do so would be "to permit the plaintiff[s] through determined strategy, willful blindness, *or negligence on the part of their agents,* to flout the limitation period."[47] Such an investigator leaves himself open to a lawsuit by his client. Therefore investigators will want to ensure all possible defendants have been identified in their report to the client in a timely fashion, as well as the particulars of their participation in causing damage to the plaintiff so the claim can be properly pleaded against them.

Using the Courts to Get Evidence from Non-Parties to the Litigation

To the extent that you need to acquire evidence from third parties who are not part of the lawsuit prior to trial, you can rely on a number of Rules. Rule 30.10 deals with getting documents from witnesses, and Rule 31.10 deals with getting witnesses to testify on Discovery before trial. These rules are very similar, and provide that upon motion, a court may grant leave to examine for Discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by, or on behalf of, a party in preparation for contemplated or pending litigation if (a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for Discovery, or from the person the party seeks to examine; (b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and (c) the examination will not (d) unduly delay the commencement of the trial of the action, (e) will not entail unreasonable expense for other parties, and (f) will not result in unfairness to the person the moving party seeks to examine. Although the court only grants leave to do this in rare and exceptional cases,[48] the court may grant leave where there is an eyewitness to a crucial event which none of the parties witnessed and whose evidence would be critical to the outcome of the case. For example, someone who witnessed an explosion and fire could give important evidence as to whether an accelerant was used and therefore whether arson had been committed, and a claim of insurance fraud was properly sustainable.[49] Otherwise you will simply have to issue a summons to a reluctant witness to appear at trial with their documents and take your chances.[50]

The other approach is to issue a summons to witness for an impending Application, or a motion such as a motion for judgment, and get their evidence under oath

in transcript form for use on the Application or motion.[51] The court controls abuse of this process through various cost sanctions, and other means, so do not assume that summons to witnesses are used as a matter of course in civil litigation – in fact the opposite is true. That does not mean that it should not be used in a proper case.

Applications and Motions

Civil litigation may be commenced by way of Application, or by way of pleadings. An Application contains a Notice of Application asking the court for various court orders by way of interim and final orders, with a supporting affidavit. A Notice of Application used to be called an "Originating Notice of Motion" because an Application really is a motion that commences a lawsuit. The party defending the Application is called a Respondent, and they have to respond with their own affidavit setting out their evidence on the matters in issue. If there are no material facts in dispute, the court can decide the case based on the affidavit evidence without the need for a trial. If there are conflicting affidavits, the court will order a trial of those issues in which the conflicting affidavits raise issues of credibility. A fraudster who swears an affidavit that he has not committed a fraud, or who issues blanket denials or who makes bald assertions is not giving evidence, and will not prevent a judge from rendering judgment on an Application.[52]In fraud cases you want to start the proceeding by way of Application if you possibly can, because the suspect is forced to respond by way of affidavit rather than a rather pro forma pleading that simply delays matters. Normally fraudsters shy away from giving evidence under oath, particularly when criminal charges are pending, and so proceeding by way of Application may result in a default judgment. On the other hand, if the suspect chooses to defend the Application, any witness who puts in a responding affidavit can be cross-examined on the subject matter of the entire Application. The test for whether a question should be answered on a cross-examination of an affiant in motions or Applications is whether the information to be elicited has a semblance of relevance to the issues on the motion or Application. An affiant may be asked questions not only about the facts deposed in his or her affidavit, but also questions within his or her knowledge which are relevant to any issue on the motion or Application. If the affiant puts any statement or document into an affidavit, he or she admits its relevance and can be cross-examined on it. However the affiant can't avoid cross-examination on a relevant issue by leaving it out, nor can you get the right to cross-examine another affiant or witness on an irrelevant issue by putting that issue in your affidavit. **Any question with a semblance of relevancy on any issue on a motion or in an Application can be asked and must be answered by the affiant, whether their own evidence deals with the issue or not.**[53]

Taking Advantage of Affidavits on Motions and Applications

Affidavits are sworn statements expressed in the first person, stating facts with the personal knowledge of the deponent that he/she could testify to in Court.[54] Affidavit evidence may contain hearsay if the source of the information is disclosed and the affidavit swears that he/she believes it to be true.[55] That means that an affiant must disclose the identity of any witness he/she seeks to rely on for hearsay evidence,[56] as well as how the hearsay source came into possession of this information.[57] **This means that opposing affidavits may provide important clues as to the identity of additional witnesses as they are listed as sources of information, and your role in corroborating or refuting the evidence of a hearsay witness may prove how invaluable your services are during the course of the litigation.** To the extent someone relies on your report as a source of hearsay, it is important to identify your first-hand knowledge and the circumstances under which you acquired it, and to ensure that information you rely on as hearsay is not passed on to other witnesses and become inadmissible as "double hearsay."[58] Your reports should also clearly distinguish between first-hand observation and expert opinions, because people cannot introduce expert opinions via their own hearsay affidavit – the expert has to swear his or her own affidavit.[59]

If the matter does not proceed by way of Application but by way of an "Action" involving pleadings without cross-examinations on affidavits, you can still have all your questions answered through the Discovery process.

Taking Advantage of the Discovery Process

The word "Discoveries" in civil litigation refers to several distinct rights to obtain information. They include:

(a) an Affidavit of Documents: being a sworn statement of all the documents within a party's power, possession or control;

(b) the right to examine the documents listed in Schedule A to a party's Affidavit of Documents, and to obtain a copy of them;

(c) an Examination for Discovery: The right to question an adverse party under oath prior to trial and obtain a transcript of their proposed testimony and that of several witnesses to the extent that the deponent has knowledge of their evidence;

(d) a request to admit: being a right to obtain admission of facts and the authenticity of documents that should not be contested, with possible cost consequences if a party contests facts or the authenticity of documents that should have been admitted; and

(e) a right to physical examination of people or objects prior to trial.

It is important for a forensic investigator to be aware of these powerful tools, and ensure that they are fully exploited by counsel in order to maximize the benefits to any "loose ends" in the investigation, or to prevent opposing counsel from suggesting that your investigation was anything but fair minded and complete. Let us start with the Affidavit of Documents.

Examine Affidavits of Documents with a Critical Eye

A document produced by any party, whether it is helpful or harmful to their cause, if it has a semblance of relevancy to the action. This means, for example, that if a first draft to a contract could be possibly relevant to the interpretation of the second and final draft, it must be produced. If you can think of a plausible reason why a document might be relevant, you can force the opposing party to produce it.

What, however, if the opposing party wants to claim privilege over the document? They still have to list it in the Affidavit of Documents under "Schedule B," which requires that an Affidavit of Documents list all of its privileged documents in it, as well as the relevant non-privileged documents listed in Schedule A, and all the relevant but lost documents in Schedule C. In other words Schedule B deals with potentially relevant documents for which privilege is claimed, and requires all such documents be listed and described in the affidavit. The Rule is rarely observed, with most counsel putting in a "boilerplate" claim to privilege so that the other parties do not insist on their client producing an Affidavit of Documents in retaliation. That practice can be fatal in fraud cases, as the fraudster uses dubious claims of privilege to hide important evidence that otherwise would have to be produced. Rule 30.03(2)(b) requires each party to "list and describe" all documents where privilege is claimed. The Rules do not permit a "less-than-detailed" Affidavit of Documents. The listings' degree of detail must be enough to allow a court to make a *prima facie* determination on the claim for privilege, but not so much as to destroy the benefit of the privilege.[60] Many counsel are content with "boilerplate" claims of privilege in Schedule B, on the tacit understanding that if they do not challenge a deficient Schedule B in opposing parties' Affidavits of Documents, their own boilerplate will go unchallenged. That may be fine for most cases, but not where fraud is suspected. **Fraudsters will seek to hide anything, anywhere, and once you allow the proceedings to proceed without a challenge to a deficient Affidavit of Documents, it may be too late to object once you learn that the fraudster is using their counsel's boilerplate to hide important, relevant, and non-privileged documents from you under the guise of claiming privilege.[61] Since the Discovery of documents from the suspect is a critical part of the final stage of your investigation, you should ensure that legal counsel do not allow a slipshod Affidavit of Documents to go unchallenged.**

Lawyers inexperienced in representing fraudsters often forget that they cannot rely on their clients to follow their instructions as well as their advice to follow the Rules of Court. The decision of what is, and what is not, relevant or privileged, for the purpose of disclosure in an Affidavit of Documents, lies initially upon counsel preparing the list of documents. The Rules of Court depend upon counsel

using diligence in searching out from the client what documents are or have been in its possession, and upon his integrity in listing those that are relevant. The decision of relevance must not be left to the client even if the client includes on its staff a member of the bar of this or any other country. The case law confirms that the decision must be counsel's.[62] **Because counsel are not trained to discover the fraudulent breach of the Rules of Court by their client, the victim's forensic accountant must focus on the suspect's Affidavit of Documents to ensure that any documents they believe to be missing from their investigation is disclosed by the suspect in either Schedule A, B, or C of their Affidavit of Documents, so that the victim's counsel can take up the lack of disclosure with the suspect's counsel, and ultimately with the court.** If there is an allusion to previous correspondence in documents you have, but you do not have copies of that correspondence for example, **do not be shy about alerting the retaining counsel of the omission and diligently pursuing any gaps in the documentation. That is part of what using the litigation process as the final stage of your investigation is about.**

If charges have been laid against the suspect, they may be in possession of Crown disclosure documents that may assist your investigation. This may include incriminating statements made by the suspect to the police. Subject to certain procedural safeguards, police reports and the Crown brief would have to be disclosed and produced.[63]

The general common law rule is that, with few exceptions, the manner in which evidence is obtained, no matter how improper or illegal, is not an impediment to its admissibility.[64]

Although the Court may exercise its discretion to alleviate the adverse affects of the rule if a party stole a privileged document by compelling the return of the purloined document to its owner prior to disclosure under the rule in "*Ashburton* v. *Pape,*" the rule still requires the disclosure of such a document in an Affidavit of Documents, and the claim to privilege to be adjudicated. If the claim to privilege is rejected, as is the case in most, if not all admissions obtained by the police whether there was a *Charter* challenge to same or not, then it must be produced. **As a forensic investigator, you must be careful not to let assumptions about the availability and admissibility of evidence limit the scope of your investigation.**[65]

As an investigator, you should gently remind the lawyer for the victim (if that is who has retained you) of any latent gaps in the suspect's Affidavit of Documents, and suggest that they remind opposing counsel of their professional obligations to the court when it comes to the Discovery process. Nowhere in civil procedure is the responsibility of the lawyer greater than in the area of Discovery of documents. This is partly because the lawyer's concept of relevancy is ordinarily more extensive than that of the client. It seems rarely to occur to a litigant that such things as cancelled cheques, receipts, birthday cards, telephone bills and the like might have a bearing on the case. Parties usually fail to produce interoffice memos and internal e-mails, which are sometimes a rich, if not critical, source of information. Additionally, the litigant, owing no special duty of loyalty to the integrity of the judicial system, may be unenthusiastic about disclosing the existence of documents harmful to his case. As an officer of the Court, the lawyer has the responsibility to police the conscience of his client in this area. The process of Discovery of documents tends to pinch most, as one might expect, where the party from whom Discovery is sought has numerous records to go through. The task of persuading any client to undertake this duty faithfully can be considerable, but a fraudster will never be persuaded. **Therefore the lawyer for the fraudster must be reminded of their professional obligations to ensure proper disclosure, and that the victim will be seeking costs personally against the fraudster's lawyer should a court order be required to obtain that disclosure. Since you need proper disclosure the most, you should be prodding legal counsel to ensure proper disclosure has been made.** Courts will award costs against the lawyer personally where opposing counsel have served them with fair notice of the existing law, and the court determines that the warned counsel's position was unreasonable after hearing their dispute by way of motion.[66] **It goes without saying that if you act for the suspect, there may also be gaps in the alleged victim's documentation as well. They may have retained a lawyer in the belief that if the whole story was made to their counsel at the outset, that lawyer may not have taken their case.**

Careful attention should be paid to documents which have, either innocently or corruptly, passed out of a party's possession, by destruction or otherwise.[67] All parties are obliged to disclose such documents, and

the circumstances of their loss, in Schedule C of their Affidavit of Documents, but almost invariably Schedule C contains a boilerplate denial that any such documents have been lost, transferred or destroyed. The Rules of Civil Procedure require all parties to give information in writing and on oath of all documents that are, or have been, in his corporeal possession, power or control, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever Affidavit of Documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. "If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to."[68] Counsel who are reminded of this, and who still proffer obviously, and substantially, deficient Affidavit of Documents, risk an award of costs against themselves. Schedule C of an affidavit requires your rapt attention because it garners so little attention by most legal counsel, and because it can tell you what documents are missing, and give you possible leads as to where to look to possibly recover them from non-parties to the lawsuit.[69] Failure to produce a proper Schedule C is enough to procure a court order requiring compliance with Rule 30.03(2)(c).[70] A failure to provide a proper Affidavit of Documents can also result in a Statement of Defence being struck out, allowing for a default judgment.[71]

For every engagement, your investigator checklist should include a review of every party's Affidavit of Documents to ensure each Schedule A, B, and C document is individually identified[72] and, in the case of Schedule B privilege claims, there is sufficient particularity for the claim to privilege to be assessed.[73]

A Corporation may be required to produce all documents in the power, possession, or control of its related companies and so it is part of your job to identify all of those related companies to ensure all relevant documents are identified and produced by the corporate group.[74]

Where forgery is an issue, a party can obtain an Order to inspect and preserve the original document for expert examination.[75]

What Are the "Documents" You Are Entitled to Review?
Under the Rules of Civil Procedure, a "document" includes data and information in electronic form, which means anything created, recorded, transmitted, stored in digital form, or by any electronic, magnetic or optical means.[76] The Discovery of documents includes sound recordings, videotape, film, photographs, books of account, graphs, maps, or computer disks or information on servers.[77] Because the distinction of documents creates a presumption that the evidence that was destroyed was unfavourable to the party who destroyed it,[78] it is critical for you to both preserve evidence where possible and recover the particulars of the destruction of any evidence you become aware of. Schedule C of the Affidavit of Documents requires specific disclosure of the circumstances of the destruction of documents, broadly defined. Many lawyers put in a *pro forma* response to Schedule C. If counsel want to challenge it, it is up to you to provide specific questions you suggest are missing or were destroyed so that questioning Schedule C does not appear to be merely a "fishing expedition."[79] That information may be put to a party on their Examination for Discovery, as a party may be cross-examined on the accuracy and completion of their Affidavit of Documents as part of the oral or written Discovery process.[80]

As noted in my companion paper, "When a Fraudster Claims Privilege," do not be afraid to peruse transcripts of testimony in "private arbitrations" protected by "confidentiality orders,"[81] solicitor – auditor communications,[82] witness statements taken soon after an incident,[83] adjuster's reports forwarded to the Insurance Crime Prevention Bureau,[84] witness statements produced from interviews with your client,[85] diaries,[86] surveillance tapes,[87] or other documents over which privilege may be claimed without a legal opinion confirming the privilege is justified on the facts of your case. **Lawyers argue the evidence. It is your job to find it.**

Pre-Trial Inspections of Computers and Other Forms of Real and Personal Property

> "Ever since Bill Gates turned into a whiny, twitching mess on the stand as his own e-mails were read back to him during the 1998 Microsoft monopoly trial, lawyers have known that digital documents – especially e-mail – are a key to winning cases."[88]

The Discovery process allows for evidence gathering of all forms of real and documentary evidence. Rule 30.04 provides for the inspection of documents. Rule 32 provides for the inspection of real estate or personal property. For our purposes, the most likely inspection would be the inspection of personal computers or servers. Rule 32 provides that the court may make an order for the inspection of real estate or personal property where it appears necessary to do so for the proper adjudication of the lawsuit. The American courts have been the first to address the problems associated with ordering a search of a party's computer system, either by the party itself, or by the opposing party's experts. In *Zubulake* v. *UBS Warburg*,[89] the court limited its consideration of cost-shifting to the circumstance of the data being inaccessible (i.e., if the data was accessible, there would not have likely been a consideration of cost-shifting from producer to requester). The court then considered the following seven factors in descending order of importance:

(1) The extent to which the request is specifically tailored to discover relevant information

(2) The availability of such information from other sources

(3) The total cost of production compared to the amount in controversy

(4) The total cost of production compared to the resources available to each party

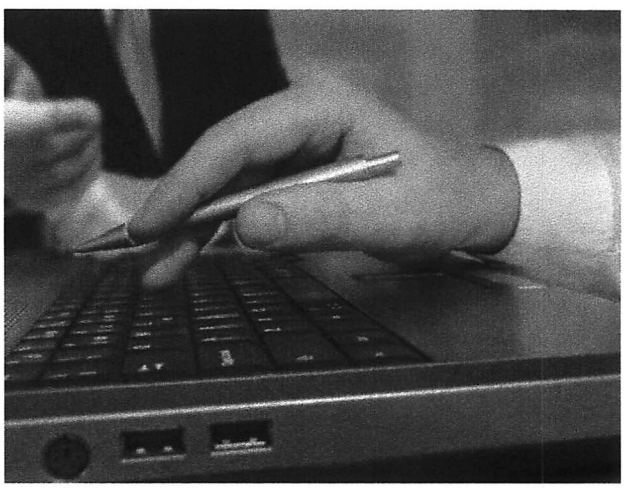
(5) The relative ability of each party to control costs and its incentive to do so

(6) The importance of the issues at stake in the litigation

(7) The relative benefits to the parties of obtaining the information.

In *Vector Transportation Services Inc.* v. *Traffic Tech Inc.*,[90] the Master ordered a party recover, and produce for inspection, documents that had been on a computer that might have a semblance of relevancy to the proceeding. On appeal the appellant argued that, as there was no evidence to suggest that such evidence existed, the court had allowed the respondent to engage in a fishing expedition, and therefore had committed an error in law. The test, it argued, was not whether there is some evidence that documents may have once existed; but rather there must be specific evidence both that documents have not been produced that still exist on the computer and there has been no disclosure. Therefore, they argued, that there was no evidence in this case to demonstrate that there is a real likelihood that documents exist on the computer that have not been produced. The appeals court judge disagreed. The computer in question was personally owned, but was used for business purposes, as shown by business e-mails that others had received from that computer. While the party confirmed that he no longer had e-mails in his possession or control as they had been "deleted" from his computer programs, no forensic search of his computer's memory had been done. The court recognized that it "is now pretty much common knowledge" that deleting a document on a computer does not necessarily make the document disappear. Unless the document is completely overwritten in the computer's electronic memory, it, or remnants of it, may exist to be retrieved in whole or in part by a forensic data recovery expert. Accordingly, the court could not conclude that the computer in question did not have potentially relevant evidence on its hard drive.

The court then went on to applying first principles. The definition of "document" in the Rules of Civil Procedure includes "data and information in electronic form," and "data and information recorded or stored by means of any device." This would include documents stored on a computer's hard drive, a diskette, a tape backup or any



other storage medium. Rule 30.02(1) provides that "every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed," and rule 30.02(2) requires production of such documents for inspection unless privilege is claimed. Pursuant to rule 30.03(1), such documents are to be disclosed in the party's Affidavit of Documents. Rule 30.06 provides that if the court is satisfied "by any evidence" that a relevant document in a party's possession, control or power may have been omitted from the party's Affidavit of Documents, the court may order "the disclosure or production for inspection of the document." Since the definition of document in the Rules includes data stored electronically, then if production for inspection of a document stored on a computer is ordered, then such production can only be made if the court orders a hard copy of all documents to be printed, or orders a duplicate of the electronic data be reproduced and delivered on diskette, or allows an inspection of the storage device in which the electronic information resides. Where a party convinces the court that documents that have not been produced are likely stored on a computer's hard drive or other electronic storage medium, then the only solution would be inspection of the storage medium itself, in this case the firm's hard drive, with proper safeguards. This is supported by rule 32.01(1) which allows the court to make an order for the inspection of property "where it appears to be necessary for the proper determination of an issue in a proceeding." Terms may be imposed such as the "manner of inspection" or "the payment of compensation." The key to the decision is understanding that there must be some indication that the Application of a technological search might result in relevant and previously undisclosed documents that would justify the order being made. The court must be satisfied that the moving party is not (a) fishing for information that might be relevant; (b) seeking information without having demonstrated its relevancy; or (c) seeking information that did not have significant probative value and whatever value it had was outweighed by competing interests. It is your job to satisfy these criteria.

The court may take notice of the "Sedona Canada Principles," or what is more formally called the "Guidelines for the Discovery of Electronic Documents in Ontario" found in the *Supplemental Report of the Task Force on the Discovery Process in Ontario*[91] in which the Report recommends that, the court should balance a variety of factors when they order Discovery of computer related information, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information. A court will order an inspection if it (a) concluded that there was evidence that a relevant document in a party's possession, control or power may have been omitted from the party's Affidavit of Documents; or (b) it balanced a variety of factors to conclude that inspection should be ordered including: the relevance and importance of the evidence being sought, the likelihood of finding new evidence, the carefully defined parameters of the inspection, and the moving party's willingness to pay for the costs of the inspection. In either circumstance, court is justified in making an inspection order.

We suggest that you and your forensic data expert must provide evidence to retaining counsel of the following if you seek to acquire electronic data from the opposing party:

(1) **The burden and expense of the data recovery, collation and duplication, considering among other factors the total cost of production in absolute terms and as compared to the amount in controversy.**

(2) **The need for the Discovery of this information, including the benefit to the requesting party and the availability of the information from other sources.**

(3) **The relationship of the information to the complexity of the case and its importance to understanding and determining those issues.**

(4) **How the need to protect the solicitor-client privilege or litigation privilege is protected by the proposed process of investigation, including the burden and expense of a privilege review by the producing party and the risk of inadvertent disclosure of privileged or protected information despite reasonable diligence on the part of the producing party.**

(5) **How the need to protect trade secrets, and proprietary or confidential information is also addressed by the proposed investigatory techniques.**

(6) **Whether the information or the software needed to access it is proprietary or constitutes confidential business information.**

(7) **The breadth of the Discovery request in relation to the Discovery process as a whole.**

(8) **Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data, and then design a plan that proceeds based on the initial evidence (or lack thereof).**

(9) **The extent to which production would disrupt the normal operations and processing routines of the responding party.**

(10) **Whether the requesting party has offered to pay some or all of the Discovery expenses.**

(11) **The relative ability of each party to the control costs of the inspection and its incentive to do so. In the words of an economist, who is the more efficient person to do the data search and recovery?**

(12) **The resources of each party as compared to the total cost of production.**

(13) **Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, and whether the responding party would so in the ordinary course of its business.**

(14) **Whether responding to the request would impose the burden or expense of converting electronic information into hard copies, or converting hard copies into electronic format.**

(15) **Whether the responding party stores electronic information in a manner designed to make Discovery impracticable or needlessly costly or burdensome in pending or future litigation, and not justified by any legitimate personal, business, or other non-litigation related reason.**

(16) **Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable.**[92]

Once documentary Discovery is completed (paper and E-Discovery), the litigation can move on to questioning the other parties to the litigation, either in writing or orally.

Examinations for Discovery

Examinations for Discovery serve many purposes including: (1) to enable the examining party to know the case he has to meet; (2) to enable him to procure admissions which will dispense with other formal proof of his own case; (3) to procure admissions which will destroy his opponent's case, (4) to facilitate settlement by allowing counsel to give legal opinions based on all the available evidence in advance of trial, (5) to eliminate or narrow issues; and (6) to avoid surprise at trial. The scope of Discovery is established through relevance as defined by the pleadings.[93] After a party serves his Affidavit of Documents, he may serve a Notice of Examination signalling that they wish to begin Examinations for Discovery.

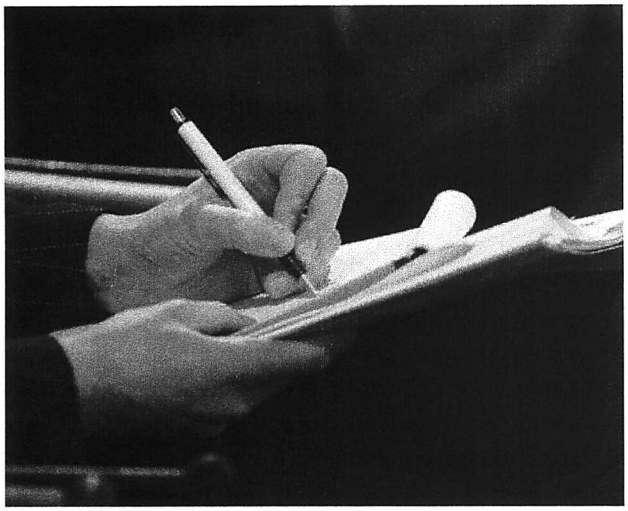
Examination of the parties by questions in writing is used rarely in ordinary litigation, and virtually never in fraud litigation. While it is common to allow to see counsel serve a Notice of Examination asking to examine a representative of a corporate party, and therefore allow the corporation to choose which witness it wants to testify under oath at an Examination for Discovery, there is no obligation to do so.[94] Your client has the right to choose which employee, officer or director of the other corporate party he wants to examine. In the case of a fraud you may wish to examine the suspect, the bookkeeper, the C.F.O. or anyone else who might be expected to have evidence that might assist your investigation, so **it is important that you insist on being part of the decision making process as to which individual is examined on behalf of a corporation.** Any witness you choose must take reasonable steps to inform themselves of all of the information in the possession of their corporate employer, including its productions in Schedule A of its Affidavit of Documents, and other employees, directors, and officers of the corporation he represents,[95] and in some cases, the former employees of that corporation.[96] **The scope of the questions on Discovery must have a "semblance of relevancy," which means that the answers may lead to a chain of inquiry that in the end would produce evidence that would be admissible at trial.**[97] These questions may include mixed questions of fact and law, such as what legal position is that person going to take on a particular legal issue.[98]

Using the Discovery Process to Find Witnesses

A party may obtain disclosure of the names and addresses of the persons who might be expected to have knowledge of transactions or occurrence in issue.[99] This means any witness, not just those witnesses that the opposing party intends to call.[100] On Discovery, a party is required to disclose all the evidence they are aware of, including the sources of their information and a summary of any witness statements.[101] A lawyer cannot claim privilege over the identity of a client who may be a witness,[102] as is more particularly described in the companion paper, "When A Fraudster Claims Privilege."

As an investigative tool, and to the extent the opposing party is withholding valuable evidence from you, use the sanctions available for Discovery misconduct and the Rules allowing limited Discovery of non-parties to rectify any additional evidence you need to procure.[103] If those non-parties reside Ontario, the right to examine them under oath may be more or less expansive under the rules of civil procedure of the jurisdiction the witness resides in. **Thus you may be entitled to get American style Discovery of non-parties outside of Ontario if your witnesses reside in the United States, even though your lawsuit was commenced in Ontario.**[104]

The Discovery of witnesses continues into the pre-trial conference stage. Each party is obliged to list their witnesses and give a summary of their evidence as part of their settlement conference brief.[105] Reluctant or ill witnesses may be videotaped so their evidence is available for trial.[106] A party has a right to call an adverse party, or an employee of an adverse party, as a witness at trial,[107] as well as summons any non-party witness.[108]



Using the Discovery Process to Critically Evaluate Expert Opinions

The Rules of Civil Procedure allow a party to obtain disclosure of the "findings, opinions, and conclusions" of an expert for the opposing party, but the party being examined need not disclose this information or the name of the expert if litigation privilege pertains and the party undertakes not to call that witness at trial.[109] You can obtain all the raw data any other testifying expert intends to rely on at the Discovery stage. You do not have to wait ninety (90) days before trial.[110] The common misconception that you will have to wait for the final expert's report and for his final findings, opinions, and conclusions should be challenged for your benefit, and you should obtain a copy of any relevant expert's report that does not meet the onerous requirements necessary to establish litigation privilege.[111]

It is important to understand that questions regarding the observations of investigators watching a party are like any witness, discoverable as non-expert evidence, and any conclusions may also be discoverable as of right if they are conclusions any witnesses could testify to because they are part of everyday experiences and do not require professional expertise.[112] **Therefore, the suspect may not be able to avoid Discovery of their investigator's working papers by undertaking not to call their investigator at trial.**[113]

To the extent that the opposing party is calling an expert to testify at trial, you are entitled to a report signed by that expert setting out their qualifications and the substance of their proposed testimony.[114] In certain circumstances, the Court may order the delivery of expert's reports to be delivered more than ninety (90) days in advance of the trial if it is in the interest of justice to do so.[115] **Any facts or assumptions upon which testifying experts base their opinions are "discoverable"**[116] **and to the extent that such information was not provided on Discovery previously, discoveries may be continued for that purpose.**[117] This, of course, can be quite helpful in determining what the source of disagreement is between reputable experts.

What is Your Role in Challenging Opposing Experts?

Part of your investigation may involve investigating opposing experts. Courts clearly find it relevant that an expert appears to be a captive of a particular law firm, that he has spent several hours of telephone conversations and meetings with the retaining counsel before preparing his reports, that he has read transcripts of evidence containing facts clearly

different from the facts upon which his opinions were based and without stating that he had done so, let alone explaining why he has not taken the Discovery transcripts into account when proffering an opinion based on facts that appear outside the evidence of any party on Discovery, that he involves about 80% of his time as an expert witness working for defendants, that testifying involved more than 75% of his entire practice, or what have you. As these kinds of facts that cast doubt on the impartiality of the expert are unlikely to appear in their resumé, it may be up to you to do some digging about the expert in order to ensure that your client has the entire picture when it comes to opposing experts. [118]

Should You Destroy Your Own Draft Reports Before Discovery or Trial?

Fraudsters benefit themselves by deceiving others. As an expert it is your task to uncover the deception and quantify the benefit to the fraudster and the loss to the victim. When testifying, you swear an oath to tell the truth, the whole truth, and nothing but the truth, in relation to allegedly fraudulent activities and the damage it has caused. It therefore mystifies me as to how forensic investigators can appear in classrooms and conferences and openly share ideas about how to best destroy their draft expert reports, and camouflage their communications with counsel rather than speaking up to stop these pernicious practices. The reasons are obvious.

Let us start with the code of conduct for forensic accountants, the "*Standard Practices for Investigative and Forensic Accounting Engagements.*"[119] ("The Standards") The forensic accountant is to maintain a chain of custody of all relevant material,[120] maintain an appropriate record of all relevant information received orally,[121] and should maintain copies of all documents and other materials that are relevant to their findings and conclusions.[122] One would presume this includes the extent to which the expert relies on the expertise of the client's lawyer in framing their findings and conclusions for the court.[123] The Standards require notes of all interviews, meetings, and discussions to be maintained in the expert's working papers.[124] The Standards make no exception based on whether those discussions may be privileged, and do not give any licence to exclude draft reports (i.e. those that have been sent to the client or her representative) from the working papers.[125] The courts will draw a negative inference against a professional who fails to keep adequate notes of discussions, and may do so against those who destroy draft reports.[126] The forensic accountant who testifies is supposed to honour the tribunal's requirement of transparency in the decision-making process to ensure that the trier of fact is satisfied with the expert witness's impartiality.[127] Presuming privilege is waived by testifying at trial,[128] how can the expert do this if communications with the client or the client's representative have not been recorded, or if it is left to speculation to determine how much an expert's draft report has been altered after communicating with the client, the client's lawyer, or other third parties?

While you might disagree with my interpretation of the Standards, the ACFI standards are clear on this subject. Rule 9, which addresses the need for the forensic investigator to adequately document their work, states that "*any subsequent Discovery of errors should be memorialized separately. The process of investigation is an inductive process of trial and error that can result in computational errors, careless misstatements, misinterpretations, and other mistakes. The forensic investigator should identify and describe any such errors and be prepared to clearly provide his or her reasoning as to why revisions were considered appropriate.*"[129] While you may disagree with the rule, how can you disagree with the idea that transparency should not only apply to the suspect's activities but to your own as well?

While the CA-IFA standards correctly point out that the case law on the requirement of experts to disclose draft reports is in a state of uncertainty ("evolving" is the word they use), one first has to question regarding whether you are an "expert" in the relevant sense to begin with. You may have documents, or you may have first person, lay evidence, of what you have been told by people you have interviewed, which may be "discoverable," or even admissible under one of the exceptions to the hearsay rule, in which case the destruction of draft reports may be the spoliation of discoverable, non-privileged information. Secondly, while the absence of professional consensus and legal requirements mandating the retention of draft experts' reports explicitly and categorically may be seen as unwarranted, it is difficult to see how one can avoid retaining their draft expert's reports and maintain in a court of law that you have impartially and competently performed your obligations to document your investigation as an inductive process of trial and error involving corrections of careless misstatements, misinterpretations, and other mistakes, identifying and describing any such errors, and being prepared to clearly provide your reasoning as to why

revisions were considered appropriate without having a paper trail from draft(s) to final report.

Even if you disagree on the morality or legality of destroying draft reports, you cannot disagree that destroying drafts makes no sense from a practical point of view. Justice to be done has to be seen to be done, and how can you purport to be an impartial gatherer and collator of the evidence rather than an advocate for one of the parties while at the same time engaging in ostensibly deceptive practices like the destruction of documents? If you speak to someone and you change a report, is it not natural for someone to assume you changed that report as a result of that communication, particularly when you do not record what was said and do not keep a copy of the draft report? Do you expect a judge to believe that a draft report cannot be produced either by your office or the lawyer you sent it to if it was favourable to you or your case? **Why do you think you can use circumstantial evidence of destruction of documents against a fraudster without it being used against you?** If your firm issues detailed time and billing rate reports to some of its clients but you issue "For Services Rendered" accounts to your litigation client in an effort to hide the various conversations that took place between you and the client, isn't a trier of fact going to be convinced that there are some nefarious communications taking place between you and your client that you are trying to hide? **Transparency protects you in cross-examination, and therefore the idea of playing hide and seek with the trier of fact is bad tactics, as well as bad ethics.**

You object. You made some careless mistakes in your draft report that you corrected in the final report, and you are simply saving yourself some embarrassment. You are human after all. That is why it is called a "draft" report. Einstein or Newton likely did not get it entirely right the first time either. The most scientific process is subjected to the rigour of outside examination before a final result is announced. No one is surprised by an opinion being fine-tuned as it is exposed to outside examination. This argument is a red herring, as no trier of fact, judge or jury, is terribly troubled about mechanical mistakes, errors, or refinements. They are more troubled by trying to hide something from them, leading to speculation that something more substantial has occurred that they are not being told about.

But what if you made substantive amendments to your draft report because of something new that the client raised with you after reviewing your draft? This is exactly why you should preserve drafts and memorialize communications. If you make changes because of something new you were told, tribunal expects you to change your conclusions if something new is presented to you – otherwise you are just a "hired gun" who gives a fixed opinion for a fixed fee. If however, you change your substantive conclusions because you have made a substantial blunder, your efforts at camouflaging pre-trial communications is done to save you personal embarrassment on a cross-examination that may cast doubt on your credibility. That is information that the other side and the tribunal is entitled to when it judges your credibility, and by depriving them of this information you are benefiting yourself at the expense of others, leading the outside observer to ask the question about you, "who is the real fraudster in this case?" The O.J. Simpson criminal trial was all about allegations of biased and incompetent investigators hiding, tampering with, or tainting evidence before it came before the jury. Transparency is all about avoiding such lingering suspicions before it can taint the ultimate outcome of the litigation.

If you have made a significant mistake that somehow casts doubt on your ability to testify even after you have discovered it and corrected it, you should not testify rather than attempt to deceive the very tribunal to whom you owe the highest duty of candour as well as impartiality. If your mistake is not so large, then testify as to what you have done, supported by the proper memos of conversations and your draft report, and leave it to the competence of your client's legal counsel to ensure that your mistake is not given undue weight by the trial of fact – that is the job of the advocate and not the expert. Hiding potentially relevant information is contrary to the highest ideals of your profession, your legal obligation to the court, and as a practical matter, something that can only reflect badly on you in the eyes of your peers, the tribunal (as you will be caught out sooner or later), and even your client's counsel who will no longer respect you as a professional if you engage in these types of machinations (and either treat you as a hired gun in future engagements, or no longer retain you for future engagements).

Those who think that these kind of deceptive practices can be supported by legal arguments are mistaken. The argument that these communications are privileged in your jurisdiction misses the mark, even if true. If they

are privileged they can be recorded and kept for posterity without any concern about them being entered into evidence. How does this justify failing to record oral communications or destroying them? Recording does not make privileged communications admissible. Moreover, privilege may be waived, and communications that may be privileged for some proceedings may not be privileged for others. For example, your communications with the lawyer may be admissible at a lawyer's disciplinary hearing, or your own.[130] In these cases the destruction or camouflaging these communications will be depriving a tribunal of an accurate record of vital evidence. In light of recent case law, you may also be destroying evidence of your own investigative process that may assist you if you or your firm want to rely on them if sued for doing a negligent investigation.

This leads to the second objection, which is that this kind of evidence is not relevant. Participants in proceedings do not determine what is relevant, nor should they. Experts are often not privy to all of the evidence and issues in the litigation, and are not in a position (in law or in fact) to determine the question of relevance. As we have just seen, what may be irrelevant in one proceeding may be relevant in another. Your efforts may constitute "spoliation," being the intentional destruction of evidence, which may subject you to a claim for damages in some jurisdictions. Finally, experts who seek to justify their behaviour on legal grounds are on more solid ground if they obtain their own written legal opinion that justifies this conduct on "good faith" grounds, rather than rely on arguments that say that the lawyer acting for your clients had tacit knowledge of what you were doing, particularly when that lawyer is representing a client whose self-interest, and your own, may not coincide.

Where does this leave us? Your machinations in hiding communications with the client or the client's lawyer may be destroying important evidence and therefore be illegal. It is probably unethical, and it is always self-defeating as your cross-examination of a few questions about how the documentation you produced to the tribunal (noting the changes you made to your draft report as a result of outside communications) shifts to a gruelling investigation into the machinations you have undertaken to hide those communications from the tribunal, and the imputation of ill-motives to you for doing so. In other words, why are you leaving yourself open to an investigation that leads the tribunal to compare the suspect's deceptions out of self-interest to those you have undertaken in the course of the pre-trial process to determine who truly is being the fraudster in this case?

In *R.* v. *Norton*[131] the Crown relied on an expert's report commenting on the accused actuarial report which was allegedly a fraudulent report submitted under the *Pension Benefits Act* of Ontario. The Court criticized the Crown's expert by making the following comments:

(1) "*It is my feeling that as the careful meticulous person the witness purported to be, all of the sources of the information going into the final report should have been reflected in his report, and not just a brief reference to peer review with nothing else... it would have been much more preferable for Hall to spell out specifically the names and sources of the persons with whom he had peer review. That information, is in my view, vital to enable the reader of the report, defending counsel, and the court, to understand and test the extent and value of the underlying opinion, and to enable a party to explore with the expert whether he or she has changed views or thoughts along the way, and how and why. ...He may not have intended to mislead a reader of the report, but the absence of this information...causes some concern*";

(2) The witness had lost sight of the principle in Ikarian Reefer, that "*expert evidence to the court should be and should seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation...Having reviewed carefully what in fact was being discussed and amended in the reports, I have considered [counsel's] submission that at the end of the day, the changes were not of substance, not effecting any change in the take that Hall had made of Norton's method from the very outset, and were thus technical in nature, but in my view it was more than 'just simple matters of form or dotting the i's and* crossing the *t's.' [T]he witness and the peer reviewer] are having serious discussions back and forth with regard to this question of whether a certain standard of practice applies to the solvency valuation basis as well as a going concern basis...They are discussing strategy.*" The court was troubled by one e-mail in particular which involved what the court called a "*full scale dialogue*" with the peer reviewer, where

the witness is also expressing concerns as to another actuary perhaps agreeing with the defendant's method that is under review, a concern that a bad precedent may be set, concern about whether the Canadian Institute of Actuaries perhaps should be applying to intervene in the litigation, and asking the peer reviewer to give him any input that he may receive from the Canadian Institute of Actuaries.

(3) "I believe a party to litigation must be afforded the opportunity to carefully investigate with an expert for the other side, whether the expert's views have been revised or altered as the various drafts were being completed, and be given the reasons for the said changes, for scrutiny. These factors have some bearing on the issue of reliability";

(4) The court quoted with approval Section 4150 ("Testimony") of the Practice-specific Standards for Actuarial Evidence advises that:

"– *the actuary's testimony should be objective and responsive';*

"– *the actuary's role as an expert witness...is to assist the court in its search for truth and justice and the actuary is not to be an advocate for one side of the matter in dispute';*

"– *in the course of testifying...the actuary...would present a balanced view of the factors...answer all the questions that are asked...apply best efforts to ensure the testimony is clear, complete...*"

The court went on to find that the report was not sufficiently reliable to find guilt to the requisite degree. The case not only serves to illustrate my views on the destruction of draft reports, but it also highlights the court's concerns about your presence as a background figure throughout the litigation process. This leads to the obvious question, should you actually join counsel at the counsel table at trial or during the pre-trial Discoveries?

Should You Attend on Examinations for Discovery and Trial to Assist Legal Counsel?

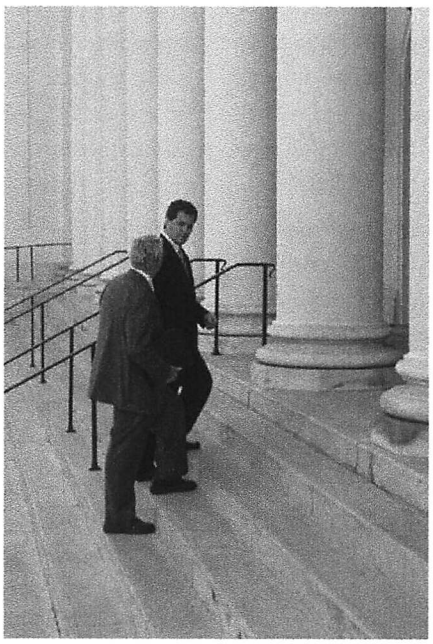
To the extent that counsel may have to dive into technical issues, you may be allowed to attend on Discovery and assist counsel in asking any question with a "semblance of relevancy,"[132] whether or not the evidence would be admissible at trial (so long as it is leading to a line of inquiry that might lead to evidence that would be admissible at trial).[133] The case law confirms that a party may be permitted to have the assistance of an "expert" during an examination for Discovery "to advise and assist examining counsel when the technical complexity of the evidence is of such a nature that the party attempting to justify his or her presence could not proceed or could proceed only with difficulty to a satisfactory examination,":[134] the statement is misleading. While an "expert" can attend, the "expert" cannot testify at trial. The reason is that once an expert has crossed the line by assisting in the advocacy of a party's case, rather than restrict himself to advocating an objective based on the facts and evidence of all parties made known to him, that party cannot properly testify as an expert.[135]

It may be that as an investigator you do not have to provide an "opinion," and therefore need not be qualified as an "expert" who is expected to give an unbiased opinion. However even if you are only giving lay testimony about what you saw or heard, attacking the adequacy of your investigation and alleging bias is still allowable. **It follows that if you are going to testify, the fact of your assistance to any party will be the subject of cross-examination regardless of whether that evidence is lay (non-opinion) evidence or not,[136] and depending on the kind and level of assistance, it may disqualify you as an expert witness. Today's cases really call for two experts, one investigator and another expert to testify and give opinion evidence.**

This leads us to the next topic, how can you prevent being ambushed by a devastating cross-examination at trial?

How Can You Prevent Being Ambushed at Trial?

A properly conducted examination for Discovery can prevent you from being ambushed at trial. A party may cross-examine on an Affidavit of Documents to investigate claims to privilege with a view to ensuring nothing is being improperly withheld from you.[137] Claiming *Charter* Rights cannot avoid questions in a civil Discovery, or that they prejudice an impending criminal trial, as we have seen. Everything with a semblance of relevancy is open to you.[138] The pleadings define the issues and the facts a party seeks to prove at trial and to the extent you want to know what evidence, oral or written, that an opposing party is relying on to make an allegation in their pleading, you simply have to ask them on their examination for Discovery.[139] These include any questions regarding facts that may support their legal arguments at trial.[140] In these circumstances, it is hard to envision any circumstances that would result in your being surprised by an allegation on cross-examination that you have not already investigated.



The Trial and the Admissibility of Evidence

It is critical to understand that just because evidence had to be disclosed during the Discovery does not mean that it is admissible at trial, just as the fact that the evidence you seek would not be admissible at trial does not mean you can not obtain it under the rules regarding discoverability. Rule 30.05 confirms the principle that **discoverability-disclosure obligations are not admissibility rules.**[141] As one court noted "at the documentary and oral Discovery stage, the court is not concerned about ultimate admissibility of the documents at trial, unless the documents are privileged. It is not unusual for the parties to be compelled to produce relevant documents that may not be admissible at trial."[142] Thus, for example, while legislation may make evidence at a disciplinary hearing inadmissible, it would have to be produced unless the court ruled that the evidence was privileged as well.[143]

What Kind of Evidence Are You Looking For?

The Discovery process is the final stage of accumulating leads that may result in evidence that is admissible at trial. There are four types of evidence. (1) "Real" evidence is an object that provides evidence by its very existence, like the murder weapon. (2) "Demonstrative" evidence illustrates the testimony of a witness. Typical examples of demonstrative evidence are maps, diagrams of the scene of an occurrence, animations, and the like. A diagram in an expert's report would be another example. (3) "Documentary" evidence speaks for itself. The document need not be formal, it may be a note or a letter or other form of written communication. (4) "Testimonial" evidence is a reference to the testimony of a witness at the hearing.

Forensic investigators must be concerned with taking all reasonable steps to ensure that the evidence they rely on is admissible. Real evidence is admitted by the testimony of a witness who can identify a particular object in court, often by establishing a chain of custody, but sometimes simply by identifying that object by recognizing its peculiar, individual characteristics. Demonstrative evidence, *because its purpose is to illustrate testimony*, is authenticated by the witness whose testimony is being illustrated. The witness simply confirms that the model or diagram fairly and accurately reflects what he saw on a particular occasion. Photos can be *either real* or *demonstrative* evidence depending on how they are authenticated. A photograph is authenticated by a witness testifying that it accurately reflects what he saw, the photograph is demonstrative evidence. When it is authenticated by a technician or other witness who testifies about the operation of the equipment used to take it, it is real evidence and is, in the language of the courts, a "silent witness."

Documentary evidence is often a kind of real evidence, and is proven the same way as other forms of real evidence. However there may be special admissibility

rules that permit the document to be admitted without any particular witness having to identify it at trial. Some documents, such as public records, official documents, business records, have statutory provisions regarding their admissibility. The best evidence rule provides that, where a written document is offered in evidence, a copy or other secondary evidence of its content will not be received in place of the original document unless an adequate explanation is offered for the absence of the original.

The hearsay rule may be considered the "best evidence" rule applied to testimony. Why is not the actual witness testifying rather than another witness who only heard what the actual witness said testifying in their stead? Why are you seeking to admit a document that records what happened instead of getting the actual witness to the event to testify as to what happened? These are questions that the forensic investigator will be called upon to supply answers to if the best, first person, evidence is not being proffered to the court.

Since witness statements are not the best evidence, why do we take such care in drafting them? Witness statements have several purposes, including for use at trial even though they contain "hearsay" in the form of a recorded out of court statement that cannot be cross-examined on. Let us consider two such uses.

The first is called "Present Recollection Revived." Let us consider a witness who takes the witness stand and says in response to a particular question "I don't remember." A document is shown to the witness (letter, witness statement, or anything). The examining lawyer asks "do you remember now?" If The witness says "now I remember!" and then gives their evidence then it is their testimony that is admissible and the witness statement was just a prop to prompt the recollection and is not used for evidentiary purposes at all. The document is not used for a hearsay purpose, just to twig a memory (real evidence can do this too).

But what if the witness says, "I still do not remember"? If the witness can testify that the writing was an accurate record when it was made; and it was shortly after the event recorded, it qualifies as "Past Recollection Recorded," a form of documentary evidence that has memorialized what the witness believed to be true at a time at which the witness's recollection of the event perceived was fresh. Yes, it is hearsay, but it is an acceptable form of hearsay because it appears reliable and it is necessary given that the actual witness is before the court, cannot recall it, and it is relevant to the issues in question and therefore helpful to the court's determinations.[144]

The idea of hearsay being admitted if it is reliable and necessary permeates the rules regarding testimonial evidence.[145] Part of your task is to show whether relevant hearsay is both reliable and necessary. Before any witness can testify however there are some very basic rules. The witness must take an oath or its substitute. He must have some personal knowledge about the subject of his testimony. In other words, the witness must have perceived something with his senses. He must remember what he perceived. He must be able to communicate what he perceived. Any testimony must meet the following tests. It must be:

(a) **Material:** Evidence is *material* if it is offered to prove a fact that is at issue in the case. The issues in the case are determined by the pleadings in a civil case, the charges and the defences in a criminal case.

(b) **Relevant:** Evidence is *relevant* when it has any tendency in reason to make the material fact that it is offered to prove or disprove either more or less probable. The threshold for relevance is a modest one. It is enough that an item of evidence proffered for reception could reasonably show that the fact sought to be established by its introduction is slightly more probable (or improbable) than the fact would be without the evidence. Evidence is relevant if, as a matter of logic and common experience, it renders the existence or non-existence of a material fact in issue more or less likely.[146]

(c) **Competent:** The evidence is *competent* if it is sufficiently reliable to be admitted by the tribunal. Children or infirmed persons may not be competent witnesses. The hearsay rule prevents the introduction of otherwise relevant and material evidence.

(d) **Not unduly Prejudicial:** Courts also have discretion to exclude otherwise admissible evidence to prevent confusion, delay, waste of time, or the needless presentation of cumulative evidence.

(e) **Not subject to Privilege:** A right is being infringed by the introduction of evidence at trial, or by even being disclosed at all, is not admissible.

(f) **Not Hearsay:** The witness heard the events in question and is not testifying as to what someone else witnessed.

The rule against hearsay, like any rule, it has its own exceptions. Before we explore these we have to identify what is hearsay. Hearsay is defined by the purpose that an out of court statement is being used for. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made.[147] For example, if you heard someone shout "Fire".... it is hearsay to use the statement to prove there was a fire, but it is not hearsay to explain the witness's state of mind or motive for leaving the building. The very fact the statement was made may be relevant.

Why is there a hearsay rule? We have already suggested its purpose. The rule against hearsay was always to seek to exclude evidence that may be *unreliable* because the sense or accuracy may have been lost in the transmission through a third party and *unnecessary* because a better witness exists to give the evidence in question. The other party is unfairly deprived of the opportunity of testing the reliability of that witness in cross-examination because the maker of the statement is not present in court. The rule is therefore an aspect of the "best evidence" rule, as we suggested earlier.

We also suggested that there were exceptions to the rule. There has always been tension where there is clearly relevant and probative evidence, and therefore exceptions to the rule against hearsay were created where the evidence is the *best evidence*, or otherwise *necessary* and *reliable* including:

(a) Confessions, or other admissions against interest are reliable because it is contrary to one's self-interest to admit wrongdoing, and it is necessary because there is no other way to get that evidence before the court if the wrongdoer has recanted.

(b) Statements made by deceased persons. The witness is not available and so it is necessary.

(c) Statements made in public documents and in certain private documents (i.e. business records). They are created at the time by disinterested persons and so are thought reliable, and given that the author is likely unavailable, they are necessary.

(d) "Res Gestae" are spontaneous utterances or dying declarations. These statements made in the heat of the moment without opportunity to reflect and therefore fabricate are thought reliable because they are not susceptible to concoction and they are so close to the event in question.

(e) Statements as to reputation as to character, because there is no other way to get this evidence before the court and so it is necessary to admit hearsay.

(f) expert evidence – opinion evidence is usually provided by persons with no first hand knowledge of the events in question.

In "rare cases," evidence falling within an existing exception may be excluded because the indicia of *necessity* and *reliability* are lacking in the particular circumstances of the case. Confusingly, hearsay that does not fall within these exceptions to the hearsay may still be admitted if the indicia of *reliability* and *necessity* are established.[148] Let us consider an example:

A party seeks to have an incriminating letter admitted into evidence signed by an officer of a corporation.

The Purpose: The letter is being proffered to prove the truth of its contents and is therefore hearsay.

Test No. 1: Does it fall within a traditional hearsay exception? Answer yes, it is admission against interest.

Test No. 2: Does it fall within a principled exception to the hearsay rule? Answer: No. The officer is available

Result: Admissible – Test 1 trumps Test 2 and the document would be admitted save for "rare cases." In other words, the traditional exceptions to the hearsay rule trump the necessity/reliability principle which only dealt with the general rule against the admission of hearsay evidence.[149]

As a general rule, prior statements of a witness, including a complainant, are not admissible to bolster that witness's credibility. There are, however, established exceptions to the rule excluding evidence of prior consistent statements. One of those exceptions is the use of prior consistent statements to rebut a suggestion that a witness should be disbelieved because they recently made up the story told at trial. An important limitation to the admission of prior consistent statements to rebut the suggestion of recent fabrication is that the statements, if admitted, do

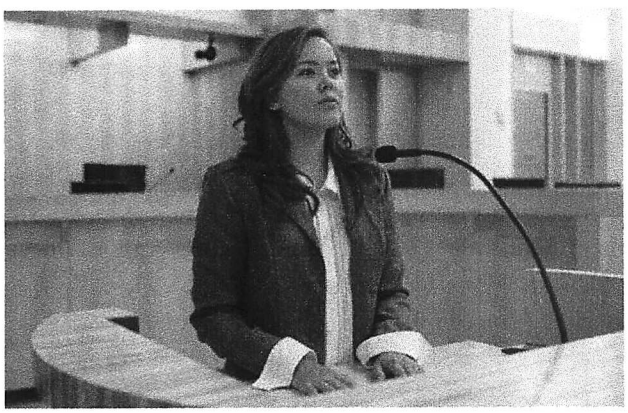
not make the facts asserted more likely. The statements merely speak to the assertion of recent fabrication. In other words, a prior consistent statement will be admitted to rebut any suggestion that the witness has just made up the story to advance a person's case at trial. It cannot be used to bolster their credibility by saying, in effect, "this must be true, I said it then and I am still saying it now." It simply shows that the witness's story did not change as a result of a new motive to fabricate. One cannot assume that because a witness has made the same statement in the past, he or she is more likely to be telling the truth, and any admitted prior consistent statements should not be assessed for the truth of their contents. A concocted statement, repeated on more than one occasion, remains a concocted statement.[150] Obtaining a witness statement contemporaneous with events provides powerful evidence to support or refute allegations of later fabrication.

Using the Suspect's Discovery Evidence Against Him at Trial

In a criminal proceeding a suspect may choose not to testify. In a civil proceeding you may call the opposing party as a (hostile) witness in your case,[151] or you read into evidence as part of his own case any admissions made by the opposite party on their examination for Discovery.[152] Moreover, the transcript of the Discovery may be used in other proceedings[153] or perhaps even to cross-examine an accused in a criminal proceeding.[154]

The Trial and Weighing the Evidence

Investigators often take a course on the Rules of Evidence, focussing on what evidence is admissible. That gets your evidence in the door. It does not get it accepted by the trier of fact as a proper statement of what happened.



Your job is to tell your client, and ultimately the court, what happened. To do that you have to have an understanding of not only what makes evidence admissible, but what makes it acceptable. When you do your cost-benefit analysis regarding when you have accumulated "sufficient, appropriate" evidence, you have to weigh the evidence as much as the trier of fact does. Therefore you should understand how they do it, so you can do it yourself.

Weighing the Evidence

For the forensic investigator to gather evidence, you must understand how it is put to use by those who determine what happened at the hearing ("triers of fact"). We know that a case may be proven by way of direct evidence or circumstantial evidence. Direct evidence is powerful evidence because there is a direct connection between what the witness has said and the findings that the trier of fact makes, so this is important for the investigator to pursue. However, the investigator should also be aware of the fact that direct evidence is subject to human frailties. The evidence may be a lie or it may be an honest mistake. Therefore corroboration should be sought out.

Circumstantial evidence is evidence from which the trier of fact is asked to infer other facts and draw certain conclusions. Circumstantial evidence has two potential dangers. First, the primary finding of fact which underpins any inferences the court is asked to draw must be accurate. Second, even if the primary findings of fact are valid the correct inference or conclusion must be drawn. Those inferences must not be guesses or speculation. They must be based upon facts which are accepted as proven. There is no isolated analysis of the probative force of any strand of circumstantial evidence. The probative effect of circumstantial evidence must be viewed collectively and assessed in light of all of the other evidence. The court considers all of the evidence, both direct and circumstantial and decides what the facts of the matter are.[155] Thus, the investigator must ensure that all circumstances that form the circumstantial evidence have a solid foundation of direct evidence, and the inferences to be drawn from them are both logical and consistent with everyday experience.

Your job as an investigator is not just to acquire admissible evidence, but sufficient and appropriate admissible evidence. This means gathering all of the relevant evidence, whether supportive of your conclusions or not,

so that the court has all the evidence it could potentially make use of in reaching a just conclusion.[156] **Whether testifying as a lay or expert witness, you have a professional obligation to provide the court with complete, truthful, reliable and admissible testimonial and documentary evidence.**[157] **In other words, your job is to ensure that the decision-maker has all the implements of decision with respect to making findings of fact by making the court aware of all the relevant evidence you have found.** It is for the court to weigh the evidence and draw the necessary legal conclusions, not you. **If you do this task correctly, the trier of fact is likely to find you credible as a trustworthy messenger of the relevant evidence.**

So what factors does the court look at in weighing the admissible evidence? These include:

1. The witness' ability to observe the events, record them in memory, recall and describe them accurately.
2. The external consistency of the evidence. Is the testimony consistent with other, independent evidence, which is accepted?
3. Its internal consistency. Does the witness' evidence change during direct examination and cross-examination?
4. The existence of prior inconsistent statements or previous occasions on which the witness has been untruthful.
5. The "sense" of the evidence. When weighed with common sense, does it seem impossible or unlikely? Or does it "make sense"?
6. Motives to lie or mislead the court: bias, prejudice, or advantage. There is an exception: consider the obvious possible motive of every accused person to avoid conviction would place an accused at an unfair disadvantage. As a result, courts do not consider that possible motive when assessing an accused's testimony.
7. The attitude and demeanour of the witness. Are they evasive or forthcoming, belligerent, co-operative, defensive or neutral? In assessing demeanour a judge will consider all possible explanations for the witness' attitude, and will be sensitive to individual and cultural factors, which may affect demeanour.[158]

Courts recognize the danger of misinterpreting demeanour, as nervousness may be brought on by the occasion of the trial process itself, rather than being an indication of uncertainty or lack of candour in the witness's testimony. As such they do not rely on demeanor on the witness stand as the sole factor to judge the witness's credibility.[159] Credibility cannot be gauged solely by whether the personal demeanour of the particular witness carried conviction of the truth – the person may be telling the truth as they see it but be mistaken. **You must examine the witnesses' motives, their powers of observation, their relationship to the parties, the internal consistency of their evidence and inconsistencies and contradictions in relation to other witnesses' evidence.**[160] As one court has noted:

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say 'I believe him because I judge him to be telling the truth,' is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> "The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. **The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses.** And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case. [emphasis added]"[161]

The exercise in finding a witness credible is not some mysterious process that occurs when the Judge observes the witness in the box.[162] It is based on the totality of their story in the context of the documents and the testimony of the other witnesses. **Therefore, the forensic investigator's work prior to any witness giving their testimony will likely be determinative at trial, as the court will not credit or discredit a witness solely on the manner in which he or she gives evidence at trial.** While the dictionary definition of "demeanor" is "behavior through which one reveals one's personality," demeanor alone does not give the court enough evidence in itself to determine credibility, and it is the other factors that engage the skills of the forensic investigator.

The factors that a court weighs in determining credibility give you clues as to what additional evidence you must consider as part of your investigation. Internal and external inconsistencies in the witness's evidence is one example. Is there an internal inconsistency between his evidence on an Examination for Discovery and a witness statement you have? Normally legal counsel are responsible for identifying inconsistencies between testimony on Examinations for Discovery and trial, but given the lack of technical expertise of most counsel, this job is left to expert consultants for the client who know the difference between, for example, the cash and accrual methods of accounting and can catch inconsistencies that are not readily apparent to those who are trained in the law rather than in other fields. A valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness box and what the witness has said on other occasions, whether under oath or not. Where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth and/or an unreliable memory.[163]

In addition, because the judge can consider the motive on the part of a witness to tell untruths, the investigator should investigate those motives. The same is true of the witness's memory, which can be tested by taking more than one statement at different points of time and comparing them. This too gives the investigator an opportunity to observe internal inconsistencies.

Given the common sense approach to credibility, the fact that there is vagueness and discrepancies between the various witnesses' testimony does not mean that the entire testimony of a witness should be discredited. Discrepancies in trivial matters or details are often unimportant. A deliberate falsehood however, is an entirely different matter. In addition, if there is part of a witness's testimony that the court does not accept, that does not mean that the court is obliged to reject the whole of the witness's testimony.[164]

Finally, your report, like a judge's decision, must make sense of the evidence and come to conclusions about how the evidence fits together and must "have an air of reality to it," "make sense as a whole," and tell a story that has the "ring of truth" to it.[165] In other words, the exercise of coming to conclusions is one that considers the capacity and opportunity of each witness to perceive, recollect and communicate the consistency of their evidence, the inherent probability of their evidence, and the presence or absence of bias, interest, or other motives, along with demeanor to determine the facts of what happened based on common sense or experience. Is the evidence of each witness in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable as having taken place in that place and in those conditions?[166] Therefore, your conclusions should consider and comment on a witness's ability and opportunity to observe: his or her appearance and manner when relating their story before you; his or her power of recollection; any interest, bias or prejudice he or she may have; his or her sincerity while telling the story; any inconsistencies in his or her story, both in how it was related directly to you and how it is related by other witnesses; and how this witness related the story to you and he or she related it to others, all in the context considering the reasonableness of his or her testimony when considered in light of all the other evidence. That is, ask yourself: is it reasonable?[167]

You might say that you do not have any expertise in judging the demeanor of a witness, and ask how is a witness's demeanor when speaking to you relevant to the court anyway? A lay witness can give evidence of matters within everyday experience, such as whether someone appears drunk. Under this exception to the rule against the admissibility of lay opinion, a witness may describe a person's emotional state. You can give evidence on voice tone, volume and emotional state when a witness made a statement, although you cannot give evidence that "...he sounded like he was up to something... like he was up to no good... like he did not

know what he was doing... like something bad was going to happen...." However you may describe the witness's voice tone and volume, as well as his emotional state, as sounding "...hyper... excited... inappropriately loud... and nervous" as summarizing remarks that were heard.[168] This may be relevant if the circumstances of your interrogation become relevant at trial.

Comments about demeanor may include (1) the manner of presentation of the way the witness answers your questions, (2) the sureness with which he presents his answers, (3) his organization and preparation of his answers, (4) whether there is corroboration, either by other persons or documentary evidence, (5) any conflicts in the story as it progresses, or as it is recounted later, (7) how the witness stands up to and responds to more intense questioning from you, (8) whether the best evidence is being made available to you in a timely fashion, or is it subject to excuses and evasion? and (9) whether the reasonableness and the practicality of the explanation offered by the witness in relation to any course of conduct, and how important facts are disclosed, come out through your cross-examination only or by the witness's own volition?[169] A word of caution: a trial judge cannot rely on demeanor alone to form conclusions, and the investigator should be even more cautious about ever forming any conclusions on the basis of demeanor. **However your observations about demeanor during interviewing may be relevant evidence and should not be overlooked.**

One interesting problem involves addressing issues of demeanor when a witness uses an interpreter. It would, of course, be unfair and inaccurate to come to any conclusions about a witness who has to use an interpreter because of the language barrier between the interviewer and the witness. However, if the interviewer is an English speaker and the witness knows enough English that he or she may be using the time for translation as an opportunity to formulate an answer, then it may be appropriate to note this as part of making observations about demeanor. There is no doubt that a witness who cannot speak English, and who is thus forced to rely upon an interpreter, has no control over the words and phrases used by the translator, or whether the many nuances and subtleties unique to a language being properly translated, or even are not capable of translation. Moreover the significance of various tones, poses, gestures and the like are highly dependent on a witness's cultural or ethnic background, but where a witness has some knowledge of the English language, and may even be able to correct the interpreter's translation on a number of occasions when he disagreed with how his testimony had been phrased, then these observations may be useful to a trier of fact.[170]

Some matters do not factor into the equation when weighing the evidence. Honesty, integrity, trustworthiness, and a sense of fairness and justice are quite separate from a person's education, wealth, power or position. Persons from the most humble backgrounds may possess the finest human qualities and be totally truthful in their testimony. Conversely, a post-graduate degree does not necessarily equip its holder with a moral compass and truthful tongue, any more or less than does a grade school education. Each person must be assessed on his or her individual human qualities, and the sworn testimony of each witness must be assessed and weighed in the context of the totality of the evidence.[171]

If one doubts the role of the forensic investigator in acquiring evidence relevant to their weighing of evidence at trial, let us consider the factors that a judge considers when weighing the credibility of eyewitness testimony. These include: the time between the identification and the events being described by the witness; is the witness identifying someone they know or someone they have never seen before; what were the physical circumstances at the time of the sighting such as distance, sight line and lighting; the duration of the sighting; the emotional state of the witness at the time of the sighting; the quality of the witness's description of the person; the similarity or difference between the witness's description and that of other witnesses; exposure of the witness to other images of the person being identified such as composite drawings, photos or video clips; any pre-trial identification process that the witness participated in; any influence upon the witness's identification by other witnesses; how the witness's identification of the person compares to the actual appearance of the person at the time of the incident; whether the identification is cross-racial in nature; and how much the reliable circumstantial evidence corroborates the identification evidence.[172] The forensic investigator should investigate and report on each of these factors.

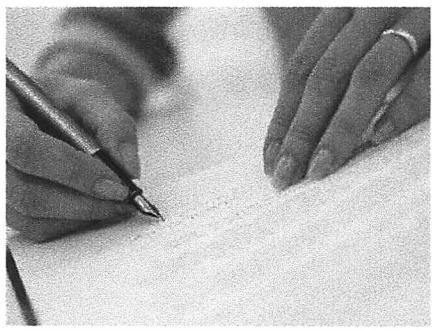
Is the Trial the Final Stage of Your Investigation?

In *Driskell* v. *Dangerfield*[173] the Manitoba Court of Appeal recognized that the Crown had a continuing obligation to disclose exculpatory evidence to the accused in the context of criminal proceedings not only pre-conviction, but also post-conviction, until an accused has fully exhausted his or her right to make full answer and defence and all appeal processes are complete. As the Crown has that obligation, and the Crown acquires that information through the police, the police have an obligation to disclose possibly exculpatory evidence to the Crown post-conviction as well as it comes into their possession. The court went on to rule that if it was proven at trial that the police negligently failed to make full disclosure to the Crown as is alleged (which in turn resulted in a lack of disclosure to Driskell by the Crown), this is capable of forming the basis of a cause of action by Driskell for negligent investigation. Since civil judgments can be set aside on 'fresh evidence', or the Discovery of a judgment being procured by fraud or perjury, one queries if an investigator comes into possession of probative evidence after trial that might have affected their opinion at trial, whether he or she can be sued for not bringing that new evidence to the attention of the court.[174] While ordinarily fresh evidence that might come to your attention after trial does not affect the finality of the trial verdict ("*res judicata*," the matter has been adjudicated), the maxim that "fraud overcomes all [obstacles]" means that fraud vitiates even a final order of the court. It is in the public interest that persons not be able to benefit from fraud, and this principle must take precedence over the legal doctrine of *res judicata*. Even if a party should have been aware of a misrepresentation, a party's lack of due diligence or carelessness is not a defence to another party trying to defend a verdict obtained by fraud; for where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even where it may reasonably have done so) it would be wrong to allow him to retain the judgment thus unfairly procured.[175] **A question for a future court may be that if a forensic investigator becomes aware of evidence after trial that suggests that the court may have been materially and intentionally misled by evidence proffered at trial, will that investigator be liable in negligence for failing to draw that evidence of fraud to the wronged party, or will the investigator's duty to his client protect him from such a lawsuit?** It is hard to believe that a court would find that the investigator's duty of fidelity or confidentiality to his employer would outweigh the public interest in protecting the judicial process from fraudsters gaming the trial process itself.[176]

Investigations After Trial

There are many pre-trial remedies to obtain information and local assets prior to trial. Forensic investigators have become so familiar with *Anton Piller*, *Mareva*, *Norwich Pharmacal* court orders received and similar form of relief that there is no need to mention them here save and except to note the ability to examine the suspect and the witness as part of these processes in the proper circumstances.[177] The only thing of note is that post-judgment, even pending an appeal that otherwise stays the Judgment, the Court may still order these remedies be put in place[178] and allow a searching investigation of the debtor's assets to proceed.[179] These Judgment Debtor Examinations are often handled by newly-hired law students to do during their articling year when, in fact, the skills of a forensic accountant are really required. As part of the process, solicitors may be required to give evidence regarding their client's financial affairs.[180]

Changes in the Rules of Court as a Catalyst for Changing Your Role



The Ontario Ministry of the Attorney General has announced that effective January 1, 2010, the Rules of Civil Procedure will be amended to contain a general principle of proportionality to guide the interpretation of all Rules, that Judges will have the authority to make directions on time-lines, examinations, and a Discovery plan, that Parties will be required to agree on a Discovery plan, that there will be a limit of seven hours for Examination for Discovery unless the parties consent or the court orders otherwise, and expert witnesses must acknowledge a duty to be objective in writing.[181] New Rule 1.04(1.1) announcing that the court shall make Orders and give directions that are proportionate to the importance and complexity of issues and the amount involved in the proceeding is aimed at making all orders surrounding the Discovery process less exhaustive and more efficient. It will result in the need for legal counsel to do a cost-benefit analysis with respect to the documents it needs from the other side, and the questions it needs to ask, as the court is abolishing the semblance of relevance test. This will require your early involvement in the case to ensure that the testifying experts have all of the evidence they need to testify without a lot of surplus evidence being sought.

The need for the early involvement of the forensic investigator is made apparent by proposed Rule 29.01 which requires each party to prepare a written Discovery plan that includes the intended scope of any documentary Discovery that is to occur. Rather than just leave it open to examinations for Discovery to sort out the real issues in the case after all the evidence has been explored as they come up at Discovery, the parties must turn their minds to the Discovery plan at an early date, as the Affidavit of Documents will be drafted with the plan in mind. Questions on Discovery must be relevant, rather than have a semblance of relevancy. The time limit for the Examinations of Discovery also serves to narrow the scope of the Discovery process itself to the most important issues, as each party will only have seven hours to examine the other parties.

The E-Discovery Guidelines will also be formally part of the process as the parties must consult and have regard to the Sedona Canada principles of addressing electronic Discovery. In fact, the proportionality principles that are set out for E-Discovery are likely to be the guidelines for paper Discovery as well. **All of this means that legal counsel are going to have to rely a lot less on the Discovery process itself to acquire evidence and sort out what the real issues are, and rely on you a lot more to acquire that evidence and identify the issues, so that the litigation process is only the final stage of their investigation just as it should be the final stage of yours.**

Conclusion: Lessons Learned

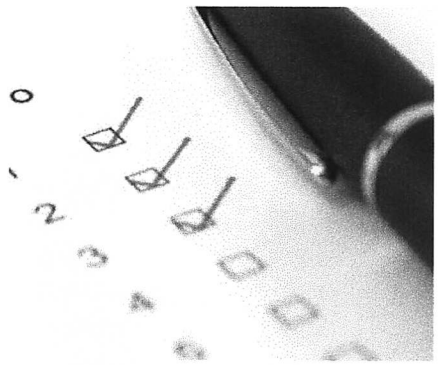
Investigators cannot complete an investigation, hand over a report, and wait to be called at trial. This will deprive the investigator of important evidence that has arisen during the course of the litigation itself, often resulting in the investigator being blindsided on cross-examination. While investigators often blame the client's counsel for poorly preparing them, it is the investigator's obligation to ensure that he has reviewed all of the potentially relevant evidence and made findings and formed conclusions that are based on that evidence. With investigators now subject to professional standards and to lawsuits that might allege they were negligent, a sub-par investigation now carries consequences beyond poor publicity and professional embarrassment. However, with every new challenge comes a new opportunity. Changes in the Rules of Civil Procedure that restrict the time for Examinations for Discovery and the amount of documentary Discovery mean that lawyers cannot simply use the Discovery process as their sole investigatory tool to locate and fumble their way through the evidence until they discern the real issues: They need professional investigators to hand them their case, thereby relegating the Discovery process to the finishing stage of their investigation just as you should use it as the final stage of yours.

The new change in the rules requiring experts to sign a written certificate of their independence, will only further the schism between expert consultants assisting counsel and expert witnesses assisting the court. The result should be a doubling of the market place as two firms are needed to handle complex cases – one to investigate and one to testify.

What specifically should you remember? I call these points "Debenham's Dozen."

Debenham's Dozen

1. **Demand all the evidence be available to you:** A certified Forensic Investigator ("CFI") should proceed on the basis that all relevant evidence should be acquired and examined before they testify, unless told otherwise in a considered legal opinion or a court determination.



2. **Litigation is another stage in your investigation:** It is critical to understand that the commencement of litigation is a second stage of your investigation and not the end of it: the CFI must take advantage of the Discovery process to obtain an order for the production of documents or answers to questions on examination for Discovery that bear any semblance of relevancy to the investigation.
3. **Don't self-censor based on assumptions regarding inadmissibility:** Inadmissible evidence may lead you to admissible evidence. The civil Discovery process entitles you to obtain evidence with a semblance of relevancy, and requires your side to produce evidence with a semblance of relevancy. What is relevant and admissible is generally left to the trial judge. Unless you have a reasoned legal opinion, don't assume privilege pertains.
4. **Getting evidence admitted is also part of your job:** Show the method in your apparent madness in trying to challenge a claim to privilege. Judges are not educated in the red flags of fraud, and therefore cannot readily identify the significance of the evidence you have, or the relevance of the evidence you want to pursue. Admissibility of evidence has a lot to do with the judge's discretion, so your report should illuminate why any particular piece of evidence you want to rely on should be admissible because it is relevant, reliable, and necessary to support a just verdict. Fitting that evidence into the context of the whole case is part of your job. You must show why evidence is "probative," meaning tending to prove or actually proving something. The more compelling the evidence, the harder a court will work to find it admissible in the face of a claim of privilege.
5. **Carefully define boundaries between lawyer/expert/advisor:** Are you actively giving advice on how the case should be handled, or are you passively giving an opinion on whatever evidence someone may choose to disclose to you? Will your report be shared with other experts or with lay witnesses? Who controls the evidence you gather? You want to prevent a lawyer from waiving litigation privilege without your knowledge, and you want to be clear whether you are being retained as an expert witness or a fraud advisor.
6. **Avoid self-limiting assumptions about your role in litigation:** If you understand privilege, you not only understand how to protect your investigation from the prying eyes of the fraudster, you also understand that claims to privilege are not barriers to a proper fraud investigation. Only self-limiting perceptions of privilege acts as a limit to a proper fraud investigation. However experts cannot be giving advice to one side and testifying as experts on the same file.
7. **Strategically plan for claims for privilege:** As CFIs, you have to be aware of the limits to privilege during the interviewing process so that you may take advantage of opportunities for evidence gathering in circumstances where the suspect believes privilege applies, but you know better. Fraudsters are clever, but they may still waive or forfeit privilege by what they say or do in interviews prior to, or during, the litigation.
8. **Be vigilant for waiver/forfeiture of privilege by parties right up to the trial verdict:** Even after they hire a lawyer, parties may inadvertently forfeit privilege via press releases or other communications referring to legal advice. You have to be attuned to the possible waiver or forfeiture of privilege right up until the verdict.

9. **Audit claims to litigation privilege:** The best expert is the one who has the better explanation for all the admissible evidence. You have to be a key participant in challenging any claims to privilege so that you have access to all of the documents, calculations, field notes, raw data, and records made and used by the opposing expert in preparing her report. The CFI's focus cannot be just on her own conduct. It must also be on the conduct of her opposing expert. The opposing expert's success may mean your failure if they had better information on which to base their opinion than you did. You have to ensure you check claims to privilege to ensure a level playing field.
10. **Destroy anything at your peril:** Any report that is shown to anyone outside your office should not be destroyed – to do so leaves you open to allegations of spoliation of evidence, bias (you are providing "your side" with information not available to the other), and it may give an accused a *Charter* argument that you have denied him a fair opportunity to cross-examine you, thereby entitling the accused to a stay of criminal proceedings because of an infringement of a *Charter* right.[182]
11. **Suing to acquire evidence is not wrong:** Limited rights of Discovery of non-parties may cause you to recommend suing a conspirator personally in some jurisdictions in order to acquire their evidence and "give up" those who masterminded the fraud. Different jurisdictions have differing rules of procedure (Discovery), evidence and privilege. Therefore the client's choice of venue will have an important bearing on the evidence that you can acquire during the litigation process. Because evidence gathering is your job, you must play a role in jurisdiction selection in cross-jurisdictional disputes.
12. **Don't be shy about getting your own legal advice:** Your client's lawyer does not advise you. Fraudsters will attack you with a variety of retaliatory claims. If you misstep, your client may also sue you for negligence. Build the cost of your own legal advice into your retainer.

Endnotes

1 See D. Debenham, *The Law of Fraud and the Forensic Investigator*, 180–181 (20060

2 *Schroeder* v. *Korf* (1996), 144 Sask. R. 229 (C.A.); *R.* v. *Voutsis*, [1987] SKQB 2384 (CanLII)

3 See "Standards For Certified Forensic Investigators," paragraph8, http://www.acfi.ca/p.html?Newscurrstandards.htm

4 [2007] SCJ 41

5 [2008]O.J. 2497

6 *Field* v. *Krisco* [2004] ABQB 391 (CanLII)

7 *Hill* v. *Hamilton-Wentworth Regional Police Services Board*,[[2007] 3 S.C.R. 129.

8 *Field* v. *Krisco*, 2004 ABQB 391 (CanLII)

9 *Burbank* v. *R.T.B.*, [2007] BCCA 215 (CanLII); *Nichols* v. *Warner*, [2007] BCSC 1383 (CanLII)

10 *Roberge* v. *Bolduc*, [1991] 1 S.C.R. 374.)

11 [1995] 127 D.L.R. (4th) 544 (SCC)

12 *Bolton* v. *City of Vancouver et al. [2003] BCSC 541.*,

13 *N.B.V.* v. *Rothmans Inc.* [2009] NBJ 60, at para. 29, 30 (Q.B.)

14 Paragraphs 2 and 6 of the Standards for Certified Forensic Investigators, www.acfi.ca ("the Standards")

15 Paragraph 8 of the Standards.

16 *Cf. Francis* v. *C.I.B.C.* (1994) 21 O.R. (3d) 75 (C.A.); *Mercier* v. *Royal Sun Alliance* [2003] Carswell Ont 1089 (S.C.)

17 D. Debenham, Fraud Magazine "Becoming the Fraud Advisors We Were Meant to Be" Fraud Magazine 21, at 52 (Nov.-Dec., 2008); R. Rapley, *Witch Hunts* 137–9 (2007)

18 According to Ontario's *Limitation Act, 2002*,S.O. 2002, c. 24, Sched. B, s.4, 5 (1 A proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. A claim is discovered on the earlier of, (a) the day on which the person with the claim first knew, (i) that the injury, loss or damage had occurred, (ii) that the injury, loss or damage was caused by or contributed to by an act or omission, (iii) that the act or omission was that of the person against whom the claim is made, and (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; Or (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

19 *Roeder* v. *Chamberlain* [2008] BCSC 624, at para. 41 (CanLII)

20 *Frazer* v. *Haukioja*, [2008] CanLII 42207 (ON S.C.)

21 *Driskell* v. *Dangerfield et al.*, [2008] MBCA 60 (CanLII)

22 *R.* v. *Hebert*, [1990] 2 S.C.R. 151.

23 E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (2nd ed. 1987), at para. 16: 8070; mcwilliams, *Canadian Criminal Evidence, supra*, at paras. 28: 10711–10712.

24 *R.* v. *Devgan* (1999), 44 O.R. (3d) 161 (C.A.)

25 *Franco* v. *White* (2001), 53 O.R. (3d) 391 (C.A.)

26 *Caci* v. *Dorkin*, 2008 ONCA 750

27 S.13 of the *Charter*

28 *Canada Evidence Act*, R.S.C. 1985, C. C-5

29 *Gillis* v. *Eagleson et al.*, (1995), 23 O.R. (3rd) 164:

30 See also s. 9 of the *Ontario Evidence Act*, R.S.O. 1990, c. E.23

31 "*13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.*"

32 S 11(c) of the *Charter* only applies to criminal offences, and states that "*any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence;*"

33 Rule 53.07

34 Rules 33.11, 34.18

35 *King* v. *Drabinsky*, [2008] ONCA 566

36 *Limitations Act, 2002*, S.O. 2002, C. 24, Sch. B

37 Rule 25.06(8), *Dionisio* v. *Popular*, [2007] ONSC 52975 (CANLII)

38 *Proconic Electronics Limited and Far East United Electronics Ltd.* v. *Wong* (1985), 67 B.C.L.R. 237, at 239 (S.C.):

39 *Leslie* v. *Mississauga* (City), [2003] CanLII 38558 (ON S.C.)

40 *Toronto (City)* v. *Mfp Financial Services Ltd.*, [2002] CanLII 45516 (ON S.C.)

41 *Attam Investments Inc.* v. *Abrade Investments Inc.* (1985), 6 C.P.C. (2d) 12 (ON S.C.),

42 *Swiderski* v. *Broy Eng'g Ltd.* (1992) 11 O.R. (3d) 594 (Div'l Ct)

43 *Rakowski* v. *Mount Sinai Hosp.* (1987) 59 O.R. (2d) 349

44 *A.C.A. Cooperative Association Ltd.* v. *Associated Freezers Of Canada Inc.*, [1992] CanLII 2452 (N.S.C.A.)

45 [1999] 2 S.C.R. 534

46 *B (P.A.)* v. *Children's Foundation* (1996), 146 D.L.R. (4th) 72 (B.C.C.A.)

47 *Knudsen* v. *Holmes, et al.* (1995), 22 O.R. (3d) 160, at 166 (S.C.J.)

48 *Fasciani* v. *Banca Commerciale Italiana* of Canada [1996] O.J.1399 at para. 20.

49 *Kus* v. *Axa Insurance (Canada)*, 2007 CanLII 5952 (ON S.C.)

50 Rules 53.04 to 53.06

51 Rule 39.02(2)

52 *Demand Air Systems Ltd.* v. *Compangnoni* [2008] CanLII 49328 (ON S.C.); Bildy, [1996] CanLII at para 6–8 (Ont.S.C.)

53 *Silver* v. *Imax Corporation*, 2008 CanLII 34361 (ON S.C.)

54 Rules of Civil Procedure, Subrule 4.06(1).

55 Rules of Civil Procedure, Subrule 39.01(4) and (5).

56 *Attorney General of Ontario* v. *C.U.P.E.* (1981), 31 OR (2d) 618 (H.C.).

57 *City Buick Pontiac Cadillac Ltd.* v. *Allan* (1977), 6 CPC 182 (Ont. H.C.).

58 *Sehdev* v. *Moss, Lawson & Company Ltd.*, 1996 CanLII 498 (On C.A.)

59 *Duton* v. *Hospital Equity Corp.* (1994), 26 CPC (3d) 209 (Ont. Gen. Div.).

60 *Royal & Sunalliance Insurance Company of Canada* v. *Lombard Canada Ltd.*, 2003 CanLII 32182 (ON S.C.)

61 Rule 2.02, *Ontario Securities Commission* v. *Mclaughlin*, [2007] CanLII 14928 (ON S.C.)

62 *Stevanovic* v. *Petrovic*,[2007] BCSC 1392 (CanLII)

63 *D. P.* v. *Wagg*, (2004), 71 O.R. (3d) 229 (C.A)

64 *R.* v. *Wray*, [1971] S.C.R. 272. This general inclusionary rule applies equally in civil cases as well as in criminal cases: *Kuruma, Son of Kaniu* v. *R.*, [1955] 1 All E.R. 236 (P.C.).

65 *P.(D.)* v. *Wagg*, (2002), 61 O.R. (3d) 746, at para 70–71 (Div'l Ct) *D. P.* v. *Wagg*, (2004), 71 O.R. (3d) 229 (C.A.)
See also. *R.* v. *Wray*, [1971] S.C.R. 272; *Kuruma, Son of Kaniu* v. *R.*, [1955] 1 All E.R. 236 (P.C.); Wright, "The Law of Evidence," 20 Can. B. Rev. 714, at 715 (1942); Sopinka, The Law of Evidence in Canada, pp. 404–405 (1992); *R.* v. *Leatham* [1861–73] All E.R. 1646; *Cuthbertson* v. *Cuthbertson* [1951] O.W.N. 845 (H.C.); *Shafie* v. *R.* (1989), 47 C.C.C. (3d) 27 (Ont. C.A.); *R.* v. *Fegan* (1993), 80 C.C.C. (3d) 356 (Ont. C.A.); and *R.* v. *Fitch* (1994), 93 C.C.C.(3d) 185 (B.C.C.A). Re *C.A.S.* v. *Daniels* (1981) 128 D.L.E. (3d) 751, at 754 (Man.C.A.) and *Helliwell* v. *Piggott-Sims* [1980] FSR 582.

66 Rule 57.07 and *Mcdonald* v. *Standard Life Assurance Company*, [2007] CanLII 21959 (ON S.C.)

67 *Boxer* v. *Reesor* (1983), 43 B.C.L.R. 352 at para 21 (S.C.)

68 *Thurston* v. *Blondeau*, [2004] BCCA (CanLII)

69 See also *Henriques* v. *Spraggs*, [2008] BCCA 282.

70 *Barclay's* v. *TD Securities*, [2004] CanLII 24449 (ON S.C.)

71 *First Swiss Financial Corp.* v. *Royal Bank Of Canada*, [2007] CanLII 57935 (ON S.C.)

72 *Mirra* v. *Toronto-Dominion Bank*, [2002] OJ No. 1483 (Master); *Solid Waste Reclamation* (1991), 2 OR (3d) 481 (Gen. Div.).

73 *Waxman* (1990), 42 CPC (2d) 296 (Ont. Master); *Brampton Engineering* (1986), 8 CPC (2d) 418 (Ont. Master).

74 Rules of Civil Procedure, Subrules 30.01(2) and 30.02(4).

75 Rules of Civil Procedure, Rule 32; *Re. MacDonald and Brant* 91982) 25 CPC 252 (Ont. H.C.).

76 Rules of Civil Procedure, Subrule 1.03.

77 Rules of Civil Procedure, Subrule 30.01(1)(a); *Rechmann* v. *Toronto Life Publishing* (1988), 66 OR (2d) 65 (H.C.).

78 *Robb Estate* (1988), 42 OR (3d) 379 (Div. Ct.).

79 A motion under Rule 30.06 requires evidence, as opposed to mere speculation, that potentially relevant undisclosed documents exist. However, the level of proof required should take into account the fact that one party has access to the documents and the other does not: *RCP Inc.* v. *Wilding*, [2002] O.J. No. 2752, at para 12 (Master),

80 Rule 31.06 (1),(c)

81 *White* v. *Johnson* (1986), 10 CPC (2d) 63 (Ont. Dist. Ct.); *Adesh Corp.* v. *Bob Dickenson Machine Services* (2001) 73 OR (3d) 787 (Sup. Ct.).

82 *Biomedical Information Corp.* v. *Pearce* (1985), 49 C.PR (2d) 92 (Master).

83 *Cook* v. *Dufferin-Peel Roman Catholic Separate School Board* (1983), 34 CPC 178 (Master).

84 *Supercom of California* (1988), 37 OR (3d) 597 (Gen. Div.).

85 *Manacdo* v. *Cestho* (1977) 17 OR (2d) 458 (H.C.); *Rotordi* v. *Tadic* (1979), 24 OR (2d) 317 (Master).

86 *Attorney-General of Ontario* v. *CEC Edwards Constructions* (1987), 60 OR (2d) 618 (H.C.). *Buksa* v. *Brumskill* [1999] O.J. 3514; *Benincasa* v. *Agostino* [2008] O.J. 2943 (S.C.J.) leave to appeal granted [2008] O.J. 4172 (S.C.J.)

87 *Gumieniak* v. *Tobin* (1987), 16 CPC (2d) 126 (Ont. dist. Ct.); *Walker* v. *Woodstock Dist. Chamber of commerce* (2001), 7 CPC (5th) 176 (Div. Ct.).

88 J. Krause, "In Search of the perfect Search." ABA Journal, 38 at 40 (April 2009)

89 F.R.D. 309 (S.D.N.Y. 2003),

90 [2008] CanLII 11050 (ON S.C.)

91 (http://www.oba.org/en/pdf_newsletter/E-DiscoveryGuidelines.pdf).

92 http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf

93 *Ratana-Rueangsri* v. *Shorrock*, [2009] CanLII 9450 (ON S.C.)

94 Ontario Rules of Civil Procedure, Rule 31.03(2)(a)

95 *Macrae* v. *Santa*, [2003] CanLII 30232 (ON S.C.)

96 *Air Canada* v. *Macdonnell Douglas* (1995) 22 O.R. (3d) 140 aff'd (1995) 22 O.R. (3d) 382 (Gen Div).

97 *Solomonian* v. *Wilson*, 2004 CanLII 891 (ON S.C.)

98 *Law* v. *Zurich Ins.* (2002) 21 C.P.C (5th) 280 (S.C.J.); *Six Nations of the Grand River Band* v. *Canada* ((2000) 48 O.R. (3d) 377 (Div'l Ct)

99 Rules of Civil Procedure, Subrule 31.06(2).

100 *Temoin* v. *Stanley* (1986), 12 CPC (2d) 69 *var'd* 7 WDCP 71 (Ont. H.C.).

101 *Dionisopoulos* v. *Provias* (1990), 71 O.R. (2d) 547 (H.C.); *Tax Time* v. *National Trust* (1991), 3 O.R. (3d) 44 (H.C.).

102 *Taberner Investments* v. *Price Waterhouse* (2000), 11 CPC (5th) 111 (ON S.C.); *Lukas* v. *Lawson* (1993), 13 OR (3d) 447.

103 Rules of Civil Procedure, Subrules 30.06, 30.08, 30.10, 31.10, and 34.15.

104 28 U.S.C. s. 1782 (a) provides that the district court of the district court in which a person resides or is found may be ordered to give his testimony or provide documents for use in a foreign tribunal. See In re Proctor & Gamble 526 F Supp 2d 417, at 424 (S.D.N.Y., 2007) and Vitapharm Canada Ltd (2001) O.J. No. 237, at para 45 (Sup. Ct) aff'd (2002) 212 D.L.R. (4th) 563 (Ont Div'l Ct) aff'd (2003) 223 D.L.R. (4th) 445 (Ont. C.A.) and V. De Grandper "Obtaining U.S. Discovery in Aid of Canadian Litigation," 7#1 *Commercial Litigation Rev.* 1 (2009), a wonderful exposition of the law in this area.

105 Rules of Civil Procedure, Subrule 77.14(6).

106 Rules of Civil Procedure, Subrule 36.01; *Simpson* 91985), 49 O.R. (2d) 347 (H.C.); *Union Carbide Canada Ltd.* v. *Vanderkop* (1974) 6 OR (2d) 448 (H.C.).

107 Rules of Civil Procedure, Subrule 53.07.

108 Rules of Civil Procedure, Subrules 53.04–53.07.

109 Rules of Civil Procedure, Subrule 31.06(3).

110 *Leerentveld* v. *McCulloch* (1985) 4 CPC (2d) 126 (Ont. Master); *Cheaney* v. *Peel Memorial Hospital* (1990) 73 OR (2d) 794 (Ont. Master); *CACIC* v. *O'Connor* (1990), 71 OR (2d) 751.

111 *Grant* v. *St. Clair Conservation Authority* (1985), 52 OR (2d) 729 (Div. Ct.); *Beck* (1989), 38 CPC (2d) 67 (Ont. Master).

112 *Spata Tora* v. *Wiebe*, [1973] 1 OR 93 (H.C.).

113 *Ibid.*

114 Rules of Civil Procedure, Subrule 53.03(1).

115 *Braddock* v. *Oakville-Trafalgar Memorial Hospital* (2000), 1 CPC (2nd) 364 (ON S.C.).

116 *Piche* v. *Lecours Lumber Co.* (1993), 13 OR (3d) 193 (Gen. Div.).

117 Rules of Civil Procedure, Subrules 30.07 and 30.09.

118 *Frazer* v. *Haukioja* [2008] CanLII 42207 (ON S.C.)

119 CA-IFA (Nov., 2006)

120 Standard, s.400.06

121 Standard s.400.09

122 Standard, ss.400.07,400.08

123 Standard, ss.400.01–400.16

124 Standard s.500.01(h).

125 Standard s.500.01 fn 10

126 *Turi* v. *Swanick* (2002) 61 O.R. (3d) 368 (S.C.J.) and *Goodmans* v. *Scotia Capital Inc.* (2003) Carswell Ont 63G4 (S.C.)

127 Standard, s. 700.01

128 as is the case in most common law provinces

129 http://www.acfi.ca/p.html?NewsCurrStandards.htm

130 *Law Society of Saskatchewan* v. *Merchant Law Group et al.*, [2008] SKCA 128

131 R. v. Norton, [2007] ONCA 414 (CanLII)

132 *Tridici* v. *M.E.P.C. Can Prop.* (1978), 22 OR (2d) 319 (H.C.); *Posluma* (1989), 71 OR (2d) 238 (H.C.).

133 *Air Canada* v. *McDonnell Douglas Corp.* 91995) 22 OR (3d) 140, 382.

134 *Al's Steak House & Tavern* v. *Deloitte & Touche*, 30 C.P.C. (4th) 257, at para 4 (OCGD)

135 *Telemax Communications Inc.* v. *Canquest Communications (Canada) Inc.*, [2006] CanLII 7033 (ON S.C.) *Poulton* v. *A&P Properties Ltd.* [2005] 10 C.P.C.195 At para 13 (Ont. Gen Div) *Al's Steak House Al's Steak House & Tavern* v. *Deloitte & Touche*, 30 C.P.C. (4th) 257 at paragraph 4, *Tridici* v. *M.E.P.C. Canadian Properties Ltd.* (1978), 22 O.R. (2d) 319(H.C.J.). This may not be the law outside Ontario,

136 R. v. Lane, [2008] ONCA 841 (CanLII)

137 *Ansell Canada Inc.* v. *Ions World Corp.* (1998), 28 CPC (4th) 60 (Ont. Gen. div.).

138 *Charles* v. *Royal Bank of Canada* 91987), 60 OR (2d) 537 (Master).

139 *Rule-Bilt Ltd.* v. *Shenkman Corp.* (1997) 18 OR (2d) 276 (Master); *Leliever* v. *Lindson* (1977), 3 CPC 245 (Ont. H.C.); *Rubinoff* v. *Newton*, [1967] 1 OR 402 (H.C.).

140 *Brennan* v. *J. Posluns & Co.*, [1959] OR 22 (H.C.).

141 *R.* v. *Khelawon, [2006] SCC 57*, at para 34

142 *Middleton* v. *Sunmedia Corporation*, [2005] CanLII 37349 (ON S.C.)

143 *Middleton* v. *Sunmedia Corporation*, [2005] CanLII 37349 (ON S.C.)

144 *R.* v. *Arabia*, [2008] ONCA 565, at para. 69.

145 In *R.* v. *Richardson* (2003), 174 O.A.C. 390 at para. 24, leave to appeal refused [2004] S.C.C.A. No. 330, O'Connor A.C.J.O. set out the four (4) essential conditions for admissibility of past recollection recorded as follows:
(1) Reliable record: The past recollections must be recorded in a reliable way. This requirement can be broken down into two separate considerations: First, it requires the witness to have prepared the record personally, or to have reviewed it for accuracy if someone else prepared it. Second, the original record must be used if it is available.
(2) Timeliness: The record must have been made or reviewed within a reasonable time, while the event was sufficiently fresh in the witness' mind to be vivid and likely accurate.
(3) Absence of memory: At the time the witness testifies, he or she must have no memory of the recorded events
(4) Present voucher as to accuracy: The witness, although having no memory of the recorded events, must vouch for the accuracy of the assertions in the record; in other words, the witness must be able to say that he or she was being truthful at the time the assertions were recorded.

146 *R.* v. *Smith*, [1992] 2 S.C.R. 915 and R. v. B. (K.G.),[1993] 1 S.C.R. 740

147 *Subramaniam* v. *Public Prosecutor [1956] 1 WLR 965)*

148 *R.* v. *Mapara*, [2005] SCC 23, at para. 15

149 *R.* v. *Petro-Canada*, 2008 CanLII 29108 (ONCA)

150 *R.* v. *Ward*, [2008] NLCA 38

151 Rule 53.07

152 Rules of Civil Procedure, Subrule 31.11(1).

153 *New Augartia Procupine Mines Ltd.* v. *Grey*, [1953] OWN 24 (H.C.).

154 *Smith* v. *Smith* (19886) 12 CPC (2d) 125 (Ont. Dist. Ct.).

155 *R.* v. *Campbell*, [2008] CanLII 14937 (ON S.C.)

156 ACFI standard 7 (www.acfi.ca)

157 ACFI standard 2 (www.acfi.ca)

158 R. v. Parent,[2000] BCPC 11

159 R. v. Parent, [2000] BCPC 11

160 *Hadzic* v. *Pizza Hut Canada (1999)*, 37 CHRR D/252 (BCHRT);

161 *Faryna* v. *Chorney*, [1952] 2 D.L.R. 354 (N.S.C.A.)

162 A judge cannot refuse to accept evidence, if the following conditions are fulfilled: (a) that the statements of the witness are not, in themselves, improbable or unreasonable; (b) that there is no contradiction of them by other evidence; (c) that the credibility of the witness has not been attacked by evidence against his or her character; (d) that nothing appears in the course of the evidence of the witness, or the evidence of any other witness, tending to throw discredit upon him or her; and, (e) that there is nothing in the demeanour of the witness, while in court during the trial, to suggest untruthfulness. *R.* v. *Covert* (1916), 28 C.C.C. 25, at 37 (Alta. C.A.),

163 *R.* v. *G. (M.)* (1994), 93 C.C.C. (3d) 347 at 354 (Ont. C.A.).

164 *R.* v. *Campbell*, [2008] CanLII 14937 (ON S.C.)

165 *Miller* v. *Burnaby General Hospital*, [2007] BCPC 260 (CanLII)

166 *Essex County Board of Education* v. *Ontario Public School Teachers' Federation (Essex District)*, [2006] CanLII 32316 (ON L.A.)

167 *R.* v. *D., C.*, (2000), 132 O.A.C. 331 (C.A.)

168 *R.* v. *Smith*,[2007] CanLII 24095 (ON S.C.)

169 *Black* v. *The Queen*, [2007] TCC 679 (CanLII)
Black v. *The Queen* [2008] 3 C.T.C. 2001

170 *R.* v. *Bui*, 2005 BCPC 512 (CanLII)

171 *Asad* v. *Kinexus Bioinformatics*, [2008] BCHRT 293, at para 808 (CanLII)

172 *R.* v. *Powell*, [2007] O.J. No. 4196, at para 15 (ON S.C.)

173 [2008] MBCA 60 (CanLII)

174 Rule 59.06(2), *Int'l Corona Resources* v. *LAC Minerals* (1988) 66 O.R. (2d) 610 at 630 (H.C.)

175 *Lawyers' Professional Indemnity Company* v. *Geto Investments Limited*, 2007 CanLII 27756 (ON S.C.)

176 for a related discussion see *Hunt* v. *T & N plc* (1995) 4 B.C.L.R. (3d) 110.

177 *see: US* v. *Levy* (1999), 45 OR (3d) 129 (Gen. Div.).

178 Rules of Civil Procedure, Subrule 60.02(1)(d); *Lamont* v. *Kent* (1999), 30 CPC (4th) 168 (Gen Div.).; *Babist* (1993), 20 CPC (3d) 399 (Ont. C.A.).; *Walter E. Heller Financial Corp.* (1986), 56 O.R. (2d) 257 (C.A.).

179 Rules of Civil Procedure, Subrule 60.18; *Hondalk Industries* (1986), 9 CPC (2d) 26 (Ont. H.C.); *Quabbin International Investments* (1992) 8 OR (2d) 278 (C.A.).

180 *Maynard's Auctioneers appraisers* (1979), 18 CPC 132 (Ont. Master); *Ideal Electric*, [1960] OWN 548 (Master).

181 http://cfcj-fcjc.org/inventory/reform.php?id=62

182 cf. *Carosella* v. *the Queen*, [1997] 1 S.C.R. 80.

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Investigating prudence and probity in Ottawa

BY JUDY VAN RHIJN
For Law Times

If "accountability" is the buzzword in Ottawa these days, then "overspending recovery" is the buzz activity. When fingers start pointing at the likes of former privacy commissioner George Radwanski and former ombudsman for federal prisoners Ron Stewart, the lawyers representing them face enormous challenges in answering charges made by those who hold the power.

Accountability law is becoming the *law de jour*, says David Debenham of Lang Michener LLP in Ottawa. Debenham knows the difficulties of having clients on the receiving end of an accountability scandal.

"Anyone accused of fraud is in a tough situation. Firstly, when the auditor general goes to the press, it affects your chance at a fair trial. Then, the prosecution has access to all the documents and you don't. Once you're in the middle of a lawsuit you can get disclosure, hopefully of both sides of the story, but until then you have nothing. The defendant had his or her expenses approved and filed long ago and did not keep records. The people who approved it have long since disappeared. Years later, you are not able to prove what happened."

Debenham says in fraud cases, the limitation period of two years is no consolation due to the discoverability exception. "If it wasn't discovered until two years ago you can still sue. Of course in the case of fraud, you are going to say you just discovered it, then you can go back as many years as you like."

Debenham sympathizes for Stewart's situation. Stewart has been accused by Auditor General Sheila Fraser of filing phony expense claims, abusing vacation policy, claiming trips to football matches as work related, and doing very little work.

"It's not like he kept any secrets," says Debenham. "The auditor general was able to look at the paperwork and see exactly what happened. There was full disclosure and it's a bit tough, and a bit late in the day, to say it wasn't approved properly."

Tom Conway, of McCarthy Tétrault LLP in Ottawa, saysthe incidents under scrutiny are not really legal events.

"When people are named in an auditor general's report there's a lot of collateral damage. The people who worked in Stewart's group, who were very hardworking, dedicated people, all get tarred with the same brush. It's a concern to people who live and work in this town.

"In the case of Ron Stewart, he was an order-in-council appointment, there at the pleasure of the Prime Minister's Office. His contract kept getting renewed despite the fact that his work habits were notorious throughout the city. For the auditor general to now say that senior management should have done something, rings very hollow."

It is also true that the rules of the playing field have changed as time has gone on.

"We are always judging people by present-day standards when they lived by the standards of the day," says Debenham.

He points out that a component of Stewart's role was as a goodwill ambassador. "He was to show the people that he was one of them and that he was easy to contact. I'm sure he thought he was doing his job by appearing at events. No one was telling him not to."

Conway says the auditor general's investigative techniques wouldn't "cut the mustard" in a police investigation. "The accused is not allowed to speak to people or have access to information that would help them explain. It's fair criticism to say the office of the auditor general was never intended to get involved in this kind of process."

Debenham says there is no recourse for people who are accused so unfairly "unless people come forward and stand by you. But when you are accused of fraud, your friends are few and far between."

In many bureaucratic fraud cases, you face a tough battle proving what expenses were viable, says David Debenham.

Conway also finds fault with the effect of the Accountability Act, passed on Dec. 12.

"I hear a lot of talk in Ottawa amongst senior officials, middle managers, and lawyers who work in or on behalf of the government that the Accountability Act is driving the whole government and is way out of control. The civil servants are actively aware of increased oversight. They don't have the discretion they had before, and the business of government is a lot more cumbersome."

Conway says the rules in place before worked well. "The new rules are penny wise, pound foolish. It ends up in a red tape crisis that the government has to throw money at."

Still, Debenham believes the Accountability Act is a reflection of the growth in the area, not the cause of it.

"Accountability is all the rage in the private sector. Conrad Black is in trouble because of it, and like many other people, he would say he was abiding by the rules of the day. He's been struck by the prevailing wind of accountability."

Professor Daniel Lang, of the department of theory and policy studies in education at the University of Toronto, confirms that the winds are also blowing through the public sector, where accountability is further complicated by the wide range of funding options now in place.

"There was a time when 90 to 95 per cent of funding for health, education, and the like came from the government. Governments were inclined to transfer funds by funding formulas, such as the number of hospital beds occupied or the number of registered students. That was easy to audit and accountability was simple because there was only one paymaster.

"Now we find government funding is often less than half of the total, so it is not so much a question of playing by the rules, but which rules? The relationship a hospital has with a major donor makes them accountable in quite a different way to their accountability to government."

No matter whether the Accountability Act was the chicken or the proverbial egg, accountability law, as a growing subsection of fraud law, seems destined to serve up increasingly challenging work in Ottawa and beyond.