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LEGAL BUSINESS

Assessing your client's need for forensic accounting services

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Toronto family lawyer Cheryl Goldhart called in forensic accountants when her client believed her divorcing spouse was deliberately hiding assets - and the client had evidence to back up the belief.

John Harper of Hamilton's Harper Jaskot retained forensic accountants for "litigation hide and seek" purposes, but not fraudulent ones.

Len Fishman at Winnipeg's Fishman Peley, hired forensic accountants to "sort out what the real income was when you had professional income and various holding companies in a complex income structure."

Ivor Gottschalk, of Gottschalk Forensic Accounting & Valuations Inc., who is also a board member of the Alliance for Excellence in Investigative and Forensic Accounting defines the practice as "the application of financial, accounting and investigative skills, to a standard acceptable by the courts, to address issues in dispute in the context of civil and criminal litigation."

For many family law scenarios, forensic accountants may also be acting as business valuers. Harper and other family lawyers tend to call them "litigation support accountants" reflecting that they may be acting in this dual capacity.

When looking for allegedly hidden assets, Farley Cohen of Navigant Consulting Inc., said forensic accountants will diligently search through bank account numbers, cheque stubs, old receipts, tax forms, computer hard drives, bank statements, credit card statements and loan applications.

However, family lawyer Nancy Iadeluca cautions her clients that unless they are really sure there's a paper trail that will serve as probative evidence, hiring forensic accountants to merely "find any piece of paper that can verify" deception doesn't make economic sense.

For example, even if a forensic accountant can prove there's an offshore bank account, there may not be sufficient funds on deposit there to pay the accountant's bill.

"They charge by the hour, just like lawyers," said Iadeluca, "and they don't guarantee it's going to be worth your while."

Goldhart also educates her clients to predetermine if the potential results are worth the chase.

"What are you looking for in terms of potential goals?" she asks. "Is this a reality? Do you have an account number? Are understated assets really an issue?"

"It's not a cheap process," said Cohen, "and sometimes the accountant's bills can be even higher than the lawyer's bills - sometimes there's a whole team working on it."

"They're pretty much in line with lawyers' hourly rates," agreed Grant Gold, a family law lawyer with Goodman Carr LLP.

Cohen said his firm typically asks for a retainer and gives an initial estimate as to what the investigation might cost, based on the hourly rates of the people involved. Then the accountants bill regularly so the client knows what the investigation is costing them as it goes along. Finally, they try to perform the investigation in phases, so when they reach a milestone, say \$20,000, the clients can reconsider moving forward.

When it comes to income determination issues, however, forensic accountants may be a very economical choice if they are hired to deflect and resolve issues in order to facilitate earlier settlement.

There are even situations, said Fishman, in which both parties can agree to retain the one accountant to narrow down the financial issues in dispute.

As for litigation, Harper provided two examples of forensic accounting expertise for the purpose of income determination.

In *Bryant v. Bryant* [1999] O.J. No. 2507, the court wrote, "Bruce Horsley, an expert in the area of business evaluation and forensic accounting, was called on behalf of Ms. Bryant to provide the court with his opinion as to what he concluded was Mr. Bryant's 'future achievable income' which Mr. Horsley defines on page 1 of his report, and filed as Exhibit 13, as follows:

'Future achievable income could be defined as estimated future income (or benefits received) available to the individual involved, for the next twelve month period, taking into account the effect of changes based on known facts and established trends to past operating results and

include the effect of any unused available earnings capacity and exclude personal expenses not necessary to generate the income."

In *Bosanac v. Bosanac*, [2001] O.J. No. 1324, the court wrote, "Mr. Harper, through his expert witness, contended that self-employed individuals such as the husband in this case, with varied business interests, have line 150 in their tax returns rarely showing an individual's 'taxable income' coinciding with his or her 'available income' from their various endeavors. At trial, Mr. Mastroluisi had explained how, for instance:

'... given the nature of somebody's employment situation or personal holdings, all of the income available to them would not be reflected on their personal tax returns and often, the amounts reported would even need adjustments to accord with case law and the guidelines... As an example in this case, the rental income reported by the husband and taxable in his hands should have been net of a capital cost allowance by application of the Income Tax Act [I.T.A.]. However, section 11, schedule III of the Child Support Guidelines [F.C.S.G.] compelled him to ignore that deduction under the I.T.A."

When retaining expert accountants, Fishman said he favours certified forensic accountants or business valuers (see sidebar, p.6).

And Gold said that lawyers can learn more about using forensic accountants from continuing legal education programs that touch on the relationship.

"I last spoke in a panel with Farley Cohen," he said, "talking about what he needs as a forensic accountant from the lawyers - and I was talking about what I need as a lawyer from the forensic accountant."