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Santa Barbara County Bar Association Taking and Defending an Accountant's Deposition

Presented by:

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September 5, 2018

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Why Depose the Expert?

- Find out what the expert has to say
- Observe how well the expert says it
- Set in stone what the expert has said
- Limit what the expert will say

**Taking a CPA's Deposition:
The Fundamental Rule**

Do Not Instruct (i.e., Argue with) the Expert

Defending a CPA's Deposition: The Fundamental Rule

Take Care of Your Expert

- Meet before the deposition
 - Attorney understands expert's work
 - Expert understands the big picture
- Take rest breaks
- Object only when necessary
 - Beyond the scope
 - Speaking objections

Know What the CPA Will Testify About

- **Business valuation**
 - Divorce
 - Estate tax
 - Other Disputes
- **Damage calculations**
- **Investigation and analysis of financial evidence**
 - Forensic accounting
- **Accounting principles**
- **Tax issues**
- **Statistical analysis**
- **Accountant and auditor professional performance**

Who Pays, When and For What?

California Code of Civil Procedure Sections 2034.410 - 2034.470

(2) A party desiring to depose any expert witness ... shall pay the expert's reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed in the deposition subpoena or from the time of the arrival of the expert witness should that time be later than the time noticed in the deposition subpoena, until the time the expert witness is dismissed from the deposition, whether or not the expert is actually deposed by any party attending the deposition.

If any counsel representing the expert or a non-noticing party is late to the deposition, the expert's reasonable and customary hourly or daily fee for the time period determined from the time noticed in the deposition subpoena until the counsel's late arrival, shall be paid by that tardy counsel. However, the hourly or daily fee shall not exceed the fee charged the party who retained the expert except where the expert donated his or her services to a charitable or other nonprofit organization.

A daily fee shall only be charged for a full day of attendance at a deposition or where the expert was required by the deposing party to be available for a full day and the expert necessarily had to forego all business he or she would have otherwise conducted that day but for the request that he or she be available all day for the scheduled deposition.

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The party taking the deposition shall either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition or tender that fee at the commencement of the deposition. The expert's fee shall be delivered to the attorney for the party designating the expert. If the deposition of the expert takes longer than anticipated, the party giving notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an itemized statement from the expert. The party designating the expert is responsible for any fee charged by the expert for preparing for the deposition and for traveling to the place of the deposition, as well as for any travel expenses of the expert.

(3) ... If the party noticing the deposition fails to tender the expert's fee under paragraph (2), the expert shall not be deposed at that time unless the parties stipulate otherwise.

An expert ... shall, no later than three business days before his or her deposition, produce any materials or category of materials, including any electronically stored information, called for by the deposition notice.

CPA License Lookup

1. Go to <http://www.dca.ca.gov/cba/>.
2. Select "License Lookup."
3. Select "California-Licensed CPAs."
4. Enter name or license number.



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CALIFORNIA BOARD OF ACCOUNTANCY

Licensee Name: THOMAS NECHES
License Type: Certified Public Accountant
License Number: 53883
License Status: **CLEAR** [Definition](#)
Experience Completed: **A** [Definition](#)
Expiration Date: January 31, 2015
Issue Date: September 22, 1989
Address: THOMAS NECHES & CO LLP
633 WEST 5TH ST STE 2800
City: LOS ANGELES
State: CA
Zip: 90071-2039
County: LOS ANGELES
Disciplinary Actions/License Restrictions: No

"Clear" -- license is current and valid.
Other status indicators include:
Canceled
Probation
Deceased
Delinquent
Denied
Inactive
Revoked
Surrendered
Suspended

"A" -- licensee is authorized to perform the full range of accounting services, including signing attest reports on attest engagements.
"G" -- licensee is NOT authorized to sign reports on attest engagements.

No records returned

This information is updated Monday through Friday - Last updated: SEP-22-2013

The Basic Questions

- What were you hired to do?
- What did you do?
- What qualifies you to do this?
- What documents and other sources did you rely upon?
 - Who told you what?
- What calculations did you perform?
 - What analyses did you perform to validate the reasonableness of these calculations?
- What assumptions did you make or accept?
 - What analyses did you perform to validate the reasonableness of these assumptions?
- What expert opinions do you have?

More Questions

- What were you hired to do?
 - What did the attorneys ask you to do?
 - When were you first contacted in this case?
 - Describe your conversations with the attorneys.
 - Have you worked with attorney ABC before this engagement?
 - Have you worked on behalf of Company ABC before this engagement?
- What did you do?
 - How many hours did you personally spend on this engagement?
 - Other than you, who worked on this engagement?
 - What did they do?
 - Who prepared your work papers?
 - Who cross referenced your work papers?
 - Who reviewed your work papers?
 - Was your work performed in accordance with professional standards?
 - What are those standards?

More Questions

- **What qualifies you to do this?**
 - **Is this resume current, accurate and complete?**
 - **Do you have any relevant qualifications not shown on this resume?**
 - **STOP**
 - **What qualifies you as an expert in this case?**
 - **What certifications do you have?**
 - **How are these certifications relevant to your analysis?**
 - **In what areas do you consider yourself qualified as an expert?**
 - **How much experience do you have in this industry?**
 - **How much experience do you have in this type of analysis?**
 - **Have you published anything relevant to this type of analysis?**
 - **Have you taught courses relevant to this type of analysis?**

More Questions

- How much experience do you have testifying as an expert?
 - Do you do anything other than testify as an expert in trials?
 - How many times have to testified at trial and deposition?
 - How many times have you testified in a jury trial?
 - What percent of your testimony has been on behalf of plaintiffs?
 - Have you ever not been allowed to testify as an expert?
 - Has any appellate court rejected the testimony you gave at trial?
- Have you ever done anything wrong?
 - Has your license ever been suspended?
 - Has your membership in any professional organization ever been suspended?
 - Have you even been convicted of a felony?
- How smart are you?
 - Do you have any honors or awards?
 - Did you pass each part of the CPA exam on the first try?
 - Did you take all four parts of the CPA exam in one sitting?

More Questions

- **What documents and other sources did you rely upon?**
 - Did you get all the documents you wanted?
 - Were you given all the documents you asked for?
 - Describe your conversations with parties in the litigation.
 - What information did they give you that you relied upon in your analysis?
- **What calculations did you perform?**
 - Why did you create this [table, schedule, chart, graph]?
 - Explain this [table, schedule, chart, graph] to me.
 - What factors did you consider?
 - What analyses did you perform to validate the reasonableness of these calculations?

More Questions

- What assumptions did you make or accept?
 - What assumptions did you make yourself?
 - e.g., the appropriate discount rate is 17.5%.
 - What assumptions made by others did you accept?
 - e.g., no non-infringing alternative exists.
 - Who made these assumptions?
 - Who gave you these assumptions?
 - What analyses did you perform to validate the reasonableness of these assumptions?
- What expert opinions do you have?
 - Liability
 - Causation
 - Damages
- Just one last question . . .

Only a CPA (but Not Every CPA) Can Perform an Audit or a Review^(*)

A Certified Public Accountant ("CPA") is a person who has met the requirements of California state law, has been issued a license to practice public accounting by the California Board of Accountancy, and who holds a valid license to practice.

CPAs have a monopoly on audits (CA BPC §5093-50955), but most CPAs don't do audits.

Only persons who are licensed by the Board legally can call themselves a "Certified Public Accountant" (CA BPC §5050)

Not all CPAs can do an audit.

Effective January 1, 2002, some CPAs are authorized to perform a full range of accounting services, including signing reports on attest engagements. Others will be authorized to perform a full range of accounting services, but will not be authorized to sign reports on attest engagements.

Attest services do not include the issuance of compiled financial statements.

Attest Engagement: One in which the practitioner is engaged to issue, or does issue a written communication that expresses a conclusion about the reliability of a written assertion that is the responsibility of another party. Attest services include an audit, a review of financial statements, or an examination of prospective financial information.

^(*)An audit is an examination of a client's accounting records by an independent CPA to formulate an opinion on financial statements and/or financial information. The auditor must follow generally accepted auditing standards.

Reports of Accountants

Compilation

A compilation consists of presenting in the form of financial statements information that is the representation of management without undertaking to express any assurance on the statements. The accountant is not required to make inquiries or perform other procedures to verify, corroborate or review information supplied by the entity.

Review

A review consists of performing inquiry and analytical procedures that permit a Certified Public Accountant to determine whether there is a reasonable basis for expressing limited assurance that there are no material modifications that should be made to financial statements for them to be in conformity with generally accepted accounting principles or, if applicable, with other comprehensive basis of accounting. A review does not require performing many procedures ordinarily performed during an audit. A review may bring to the accountant's attention significant matters affecting the financial statements, but it does not provide assurance that the accountant will become aware of all significant matters that would be disclosed in an audit.

Audit

The objective of an ordinary audit of financial statements by an independent auditor is the expression of an opinion on the fairness with which they present, in all material respects, the financial position, results of operations and its cash flows in conformity with GAAP. The financial statements are management's responsibility. The auditor's responsibility is to express an opinion on the financial statements. An ordinary audit includes gaining an understanding of an entity's internal control structure, assessing control risk, performing tests of accounting records, obtaining corroborating evidential matter through inspection, observation and confirmation, and performing other procedures. The auditor should design the audit to provide reasonable assurance of detecting errors and irregularities that are material to the financial statements.

Litigation Services and Applicable Professional Standards^(*)

- Standards for Consulting Services^[1]
- Code of Professional Conduct^[1]
- Standards for Attestation Engagements^[2]
- Standards for Accounting and Review Services^[2]
- Generally Accepted Auditing Standards ("GAAS")^[2]

^[1] Applies to litigation services engagements.

^[2] Does not apply to litigation services engagements unless the CPA is specifically engaged to perform a service in accordance with those standards.

^(*) Summarized in AICPA Consulting Services Special Report 03-1.

Generally Accepted Auditing Standards ("GAAS")

General Standards

1. The examination is to be performed by a person or persons having adequate technical training and proficiency as an auditor.
2. In all matters relating to the assignment, an independence in mental attitude is to be maintained by the auditor or auditors.
3. Due professional care is to be exercised in the performance of the audit and the preparation of the report.

Standards of Field Work

1. The work is to be adequately planned and assistants, if any, are to be properly supervised.
2. A sufficient understanding of the internal control structure is to be obtained to plan the audit and determine the nature, timing and extent of tests to be performed.
3. Sufficient competent evidential matter is to be obtained through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under audit.

Standards of Reporting

1. The report shall state whether the financial statements are presented in accordance with generally accepted accounting principles.
2. The report shall identify those circumstances in which such principles have not been consistently observed in the current period in relation to the preceding period.
3. Informative disclosures in the financial statements are to be regarded as reasonably adequate unless otherwise stated in the report.
4. The report shall either contain an expression of opinion regarding the financial statements, taken as a whole, or an assertion to the effect that an opinion cannot be expressed. Whenever an overall opinion cannot be expressed, the reasons therefore should be stated. In all cases where an auditor's name is associated with financial statements, the report should contain a clear-cut indication of the character of the auditor's work, if any, and the degree of responsibility the auditor is taking.

Sources of GAAS

Public Company Accounting Oversight Board

Sarbanes-Oxley Act of 2002.

Auditing Standards Board

Statements on Auditing Standards ("SAS") are issued by the Auditing Standards Board, the senior technical body of the AICPA designated to issue pronouncements on auditing matters.

American Institute of Certified Public Accountants ("AICPA")

The AICPA's Code of Professional Conduct requires adherence to the applicable GAAS promulgated by the AICPA. It recognizes Statements on Auditing Standards as interpretations of GAAS and requires that members be prepared to justify departures from such Statements.

The staff of the Auditing Standards Division has been authorized to issue Interpretations to provide timely guidance on the application of pronouncements of the Auditing Standards Board. Interpretations are reviewed by members of that Board. An Interpretation is not as authoritative as a pronouncement of the Auditing Standards Board, but members should be aware that they may have to justify a departure from an Interpretation if the quality of their work is questioned.

AICPA Professional Standards, AU Section 100.

Generally Accepted Accounting Principles ("GAAP")

Some Basic Principles

Cost	Amounts in financial statements are stated at their historical cost.
Matching	Revenue is recognized at the time it is earned. Expenses related to the generation of revenues should be recorded in the same period as the revenues.
Substance Over Form	Report transactions and events in accordance with their substance.
Materiality	Strict adherence to accounting principles is not required when the lack of adherence does not materially affect the financial statements.
Consistency	Accounting methods or procedures should be applied on a consistent basis from period to period.
Full Disclosure	Financial statements and their accompanying footnotes should disclose fully all relevant data of a material nature relating to the financial position of the company.
Conservatism	Use the accounting approach which is least likely to overstate assets and income.
Separate Entity	The entity being reported on is distinct from its owners.
Going Concern	Assume the entity being reported on will continue in operation.
Time Period	Assume the entity's activities can be divided into discrete time periods.
Monetary Transactions	The transactions to be reported can be measured in monetary terms.
Recognition	Recognize revenue only when the transaction is complete or virtually completed.

Sources of GAAP

On July 1, 2009, the Financial Accounting Standards Board ("FASB") Accounting Standards Codification ("ASC") became the single source of authoritative U.S. GAAP -- other than guidance issued by the SEC.

The ASC restructured all authoritative U.S. GAAP for non-government entities into one online database using a common referencing system. The ASC did not change U.S. GAAP; it reorganized the thousands of U.S. GAAP pronouncements into roughly 90 accounting topics.

The ASC superseded all previous U.S. GAAP standards issued by a standard-setter. All other accounting literature not included in the ASC is considered non-authoritative.

The ASC is updated via Accounting Standard Updates ("ASU") issued by the FASB.

Factors Affecting Revenue

- Advertising
- Capacity
- Capital Investment
- Competition
- Damage Period
- Economic Climate
- Government Regulation
- Industry Trends
- Lead Time
- Market Saturation
- Market Trends
- Price Changes
- Product Life Cycle
- Product Mix
- Reputation
- Sales and Distribution Methods
- Seasonality
- Service Responsiveness
- Quality
- Warranties

Thomas M. Neches – Resume

Thomas Neches, managing partner of Thomas Neches & Company LLP, provides accounting, financial, business valuation and statistical analyses to assist attorneys involved in litigation. Mr. Neches has testified as an expert in state and federal courts in Arizona, California, Florida, Kentucky, Missouri, Nevada, New York and Oregon. He is a Certified Public Accountant, Accredited in Business Valuation, Certified in Financial Forensics, a Certified Valuation Analyst and a Certified Fraud Examiner. He received his BA in Mathematics and Literature from UC San Diego and his MS in Operations Research from UCLA.

Mr. Neches has testified to juries on behalf of both plaintiffs and defendants in antitrust, breach of contract, fraud, intellectual property, lender liability, personal injury and wrongful termination cases. Examples of the litigation issues he has addressed include lost profits, lost business value, determining a reasonable royalty and piercing the corporate veil. Representative industries include banking, entertainment, insurance, manufacturing, retail, securities and wholesale. Mr. Neches specializes in applying computer database and statistical techniques to assemble and analyze voluminous and complex data.

Mr. Neches has over forty years of professional experience. During the past thirty-three years he has provided litigation services exclusively. Prior to forming Thomas Neches & Company in January 2000, he was Senior Partner of Simpson & Company, a firm of certified public accountants specializing in litigation services. Previously, he was a partner at Coopers & Lybrand (now known as PricewaterhouseCoopers) in its litigation services practice in Los Angeles. Prior to joining Coopers & Lybrand he was a manager in the management consulting group of Arthur Young & Company (now known as Ernst & Young), where he specialized in operations improvement, systems analysis and litigation consulting. Before that he was head of the technical staff at The Assessment Group, a consulting firm which conducted economic and cost analysis for the U.S. Navy. Mr. Neches has acted as a Judicial Arbitrator of the Superior Court of the State of California for the County of Los Angeles.

Mr. Neches was an Adjunct Professor at Loyola Law School during 2003-2013. He has been an instructor in numerous regional and local courses on litigation services. He is the co-author of "Use of Expert Witnesses" in *Prosecuting and Defending Insurance Claims* (John Wiley & Sons, 1989) and "Settling CERCLA Actions" in *Environmental Dispute Handbook: Liability and Claims* (John Wiley & Sons, 1991).

Mr. Neches is a member of the American Institute of Certified Public Accountants, the National Association of Certified Valuators and Analysts, the Association of Certified Fraud Examiners, the American Statistical Association and the American Bar Association.