ABSTRACT

This paper focuses on what constitutes "an attitude that includes a questioning mind and a critical assessment of audit evidence", namely professional scepticism. It also briefly considers factors and reasons contributory to the ever increasing use of (and the need for) professionals who exercise professional scepticism – that is an attitude that includes a questioning mind and a critical assessment of audit evidence.

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Forensic Accounting and the Law: The Forensic Accountant in the Capacity of an Expert Witness

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A. Introduction

In Re Kingston Cotton Mills (No 2),[2] LJ Lopes of the Appeal Court stated that the auditor was a watchdog but not a bloodhound. This remark underlines the fact that the auditor's primary role is not the detection of fraud.

Professional Scepticism

- Statements of Auditing Standards (SAS) 1 states that, in exercising professional scepticism, an auditor "neither assumes that management is dishonest nor assumes unquestioned honesty." In practice, maintaining this attitude of professional scepticism can be difficult because, despite some recent high profile examples of fraudulent financial statements, material frauds are infrequent compared to the number of audits of financial statements conducted annually. SAS 99 provides guidance to auditors in assessing the risk of fraud – they must maintain a level of professional scepticism when considering a broad set of information, including fraud risk factors to identify and respond to fraud risk.[3]

The level of professional scepticism required by an auditor could be considered to be lower than that required by forensic accountants. Even though professional scepticism embraces an attitude which includes a questioning mind and a critical assessment of audit evidence, auditors can be said to have a less questioning attitude and assess audit evidence with a less critical approach than is the case with forensic accountants.

Forensic accountants consider the real and economic values attributed to records or figures. They do not just accept such figures at their face value. In this sense, they are able to detect instances where practices associated with "creative accounting" appear to be in operation.

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[1] MB Ojo, Department of Accounting, College of Development Studies, Covenant University, Ota, Nigeria
[2] *Re Kingston Cotton Mill Co (No 2),* [1896] 2 Ch 279 at 288 CA
[3] See D Mukoro et al, *Forensic Accounting and Fraud Management Perspective: An Integrated Approach* First Edition 2011 at page 27

Hence forensic accountants take a more "sceptical and proactive" approach in exposing fraud – rather than merely verifying statements (as is the case with auditors).

The utilization of statistics to determine the probability that material errors will or will not be ascertained is of concern since statistical sampling is involved (with just a sample of events being evaluated) – such practice being synonymous with traditional accounting and auditing techniques.

Forensic accountants not only use:

- Physical evidence
- Testimonial evidence
- Documentary evidence
- Demonstrative evidence,

As aids in the identification of suspects, but also investigate and interpret financial statements and testify in court.[4] Forensic Accounting embodies two particular areas, namely:

- Litigation Support
- Investigative Accounting or Fraud Auditing

Whilst litigation support involves the provision of assistance of an accounting nature in matters involving existing or pending litigation, and deals primarily with issues related to the quantification of economic damages, investigative/fraud accounting places emphasis on two particular areas, namely:

- Seeking out evidence of criminal conduct
- Dispelling or support of damages.[5]

This paper focuses on what constitutes "an attitude that includes a questioning mind and a critical assessment of audit evidence", namely professional scepticism. It also briefly considers factors and reasons contributory to the ever increasing use of (and the need for) professionals who exercise professional scepticism – that is an attitude that includes a questioning mind and a critical assessment of audit evidence.

[4] OS Faboyede, "Forensic Accounting and the Law: Two Sides of a Coin" (2009)
[5] Ibid

B. Forensic Accounting and Audit Planning

According to Mukoro et al,[6] during audit planning, the need to maintain a questioning mind must be discussed by the engagement team throughout the audit in identifying fraud risks and critically evaluating audit evidence. Furthermore, they argue that, in maintaining a questioning mind, auditors should set aside any prior beliefs about management's integrity and honesty and should consider the potential for management override of controls, given that fraud is possible in any audit.

- The integration of accounting, auditing and investigative skills generates the speciality known as Forensic Accounting. Forensic implies belonging to, used in or suitable to courts of judicature or to public discussion and debate. Forensic Accounting provides an analysis of accounting information that is suitable to the court – which will constitute the basis for discussion, debate, and ultimately dispute resolution."[7]

In this sense auditing will be linked to forensic accounting through its investigative aspect – as well as its critical assessment of audit evidence. As highlighted under the introductory section, forensic accounting embodies litigation support, as well as investigative or fraud auditing. For the purposes of this paper, greater focus will be dedicated to investigative or fraud auditing.

Even though forensic accountants engage in many other capacities in the litigation support and investigative accounting processes – such capacities including:

- The analysis of accounting information – as a means of "identifying misappropriations, asset recovery analysis, the reconstruction of financial documents, solvency analysis, transactional tracing" (investigative accounting capacities)[8]

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[6] D Mukoro et al, *Forensic Accounting and Fraud Management Perspective: An Integrated Approach* First Edition 2011 at page 27

[7] See "What is Forensic Accounting" <http://www.forensicaccounting.com/one.htm>

[8] Sobel CPA, "Forensic Accounting _Litigation Support" <http://www.sobel-cpa.com/services/forensic-accounting-litigation-support>

- Consultation on legal strategies involving the securities market regulator, corporate governance, accounting and auditing matters, consultations involving "class matter suits", statutes, witness preparation (litigation support capacities)[9]

Their capacities also extend toward the area of computer forensics.

Owing to the nature and sophistication of fraudulent crimes in recent years, it has become increasingly important to adopt a more robust means and approach to the documentation of evidence in Forensic Accounting. Perpetrators of fraud appear to be not only cleverer and creative in covering their trails but also have been aided in doing so as a result of the ease with which computer data could easily be eliminated.

Consequently, forensic experts who are specialised in computer forensics are also able to retrieve such easily eliminative computer data in certain circumstances which include:

- Provided expert has the right training and adequate experience in his field;
- provided that the lapse of time does not make certain information or data irretrievable;
- provided that the person who tried to eliminate or delete such data is not so skilfully trained as to cover his fraudulent acts effectively.

According to Mukoro et al,[10] tools used in investigation are referred to as the three ¨Is¨, namely:

- Information
- Interrogation
- Instrumentation

C. Analysis and Critical Assessment of Audit Evidence: The Conduction of Interviews as an Audit Tool

"Auditors should thoroughly probe the issues, acquire additional evidence as necessary, and consult with other team members rather than rationalize or dismiss information or other conditions that indicate a material misstatement due to fraud may have occurred. "[11]

¨Fraud and forensic investigations usually involve collection of evidence, a review of previous statements and further interviews. Depending on allegations, some types of evidence which may be useful for interviewing purposes may include whistle blower complaints, emails, books and records of the business. Another type of evidence that may be useful for

[9] ibid
[10] D Mukoro et al, Forensic *Accounting and Fraud Management Perspective: An Integrated Approach*, 2011 at page 182
[11] ibid at page 28

the forensic accountant, and that should never be overlooked is the existence of previous statements made by persons.¨[12]

During an investigation, the immediate collection and analysis of evidence is considered to be vital. Whilst it is important to make copies of documents immediately (as later access might prove impossible), the marking of originals is strongly discouraged[13] – this being attributable to the need ¨to identify if marks on documents were made by victim of fraud, friend, another accountant, or the perpetrator.¨

An information inventory is also encouraged right from the beginning of the examination. ¨Correspondence, junk mail, trash, catalogues and mailed items¨ should not be discounted as potential items of evidence and special stamps could also serve as labels in the identification of documents[14] – rather than marking these documents. An information inventory could also be aided with the use of time lines and ease of storing such information via the use of spreadsheets.

As highlighted previously, the immediate collection and analysis of evidence is very vital.

The initial steps implemented following the initial discovery of suspected fraud are critical. Whilst forensic accountants may wish to advise their clients to secure data, documents and information before initiating the interview process, any delay in securing electronic and documentary evidence may result in the alteration, destruction or deletion of documents or computer data – once it is known that an investigation may be under way.¨[15]

A distinction is drawn by Krstic[16] between internal and external auditors' contribution to the area of forensic accounting: "In all cases of suspected fraud which cannot be solved by forensic accountants, they cooperate with an internal auditor. Reason being that an internal auditor is better acquainted with the enterprise, ongoing transactions etc than a forensic accountant.....Then for a forensic accountant, insight provided by an external auditor in respect of types of risk, business transactions, documentation, etc is of special importance."

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[12] AICPA, ¨Conducting Effective Interviews¨ www.aicpa.org/..../10834-378 (not dated)
[13] L Saunders, ¨Financial Exploitation of Elders¨ 2001
[14] ibid
[15] AICPA, ¨Conducting Effective Interviews¨ www.aicpa.org/..../10834-378
[16] J Krstic, The Role of Forensic Accountants in Detecting Frauds in Financial Statements , Economics and Organization Vol. 6, No 3, 2009 at page 301

D. The Forensic Accountant in the Capacity of an Expert Witness

Expert opinions provided by the forensic accountant has resulted in compelling businesses to restructure – as well as in huge payouts (in the region of millions) in damages. Expert testimonies are accorded the same weight as that of other witnesses – such testimonies being determined by the trier of fact on a "case-by-case-basis."

Expert witnesses often "assist in professional negligence claims where they assess and comment on the work of other professionals."

In certain common law jurisdictions like the United States, certain standards for Expert Testimony must be satisfied before such testimony is considered to be admissible.

The "proposed" testimony must be adjudged by the court to be sufficiently ***reliable and relevant***.[17]

Reliable in the sense that it constitutes "valid scientific knowledge" in cases involving scientific evidence, and relevant in the sense that it will "assist the trier of fact to understand the evidence or to determine a fact in issue."

Factors used by the Supreme Court in the case of *Daubert,*[18] in determining the reliability and relevance of an expert testimony include:

- Whether the theory or technique at issue can be, or has been tested
- Whether the theory or technique has been subjected to peer review and publication
- The extent to which the theory or technique at issue has attained "general acceptance" in the relevant field.

The principle derived from *Daubert* is namely, "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom, the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[19]

According to the rules of evidence,[20] an expert is a person qualified by knowledge, skill, experience, training or education.

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[17] See M Vouras et al, "Examination of Expert Witnesses" (2000) at page 2 of 114
[18] Ibid; Also see Daubert v Merrell Dow Pharms Inc
[19] "In assessing the reliability of an expert's proposed testimony, a trial court is afforded considerate level of discretion. In relation to the direct examination of an expert witness, and with particular respect to qualifications, an expert is not considered in a narrow sense."
[20] Ibid; See Federal Rules of Evidence 702

Expert testimonies are not only required to assume the form of opinions (under certain laws), but would also prove to be inadmissible if members of the jury are competent to draw their own conclusions. An expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue."

E. CONCLUSION

According to accounting literature, the traditional role of the audit was primarily the detection and prevention of fraud and error. Evidence has been provided to support the fact that the auditor's role has changed over the years (particularly during the nineties) from that reminiscent of watchdog to a less vigilant and scrutinising role. The move to a less vigilant role is attributed to growing investment in the railway, insurance and banking sectors and increased dispersed ownership/holdings in these industries.

Evidence provided to support the fact that the auditor's role has changed over the years (particularly during the nineties) from that reminiscent of watchdog to a less vigilant and scrutinising role include:

- The widening scope of audit firm services beyond the audit function – which has resulted in relationships which affect audit firms' independence.
- Increase in accounting irregularities during the 1990s – in the form of widespread premature revenue recognition and other forms of creative accounting.

The continual emphasis on audit independence not only results from "creative accounting" but justifies many calls that auditors audit internal controls over financial reporting. The role of the forensic accountant therefore becomes even more significant. By providing greater checks and more rigorous scrutiny of accounting figures, the forensic accountant not only serves as a deterrent to "creative accounting" practices, but also consolidates efforts aimed at bolstering accountability.

According to Vouras et al, the single most important obligation of an expert witness is to approach every question with independence and objectivity. Further, it is vital to ensure that a sharp distinction is maintained between the roles of lawyers who work closely with expert witnesses – this being particularly the case where experts are inclined to consider the expert as another member of the litigation team and because there are lawyers who will attempt to "influence the content of an expert's testimony."

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