

National Litigation Consultants' Review

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Practice Tips

Does Your Expert Report Need a Peer Review?

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Some professional firms that provide financial litigation consulting services, determine economic damages, perform fraud and other investigations, and perform similar professional services adopt a series of quality control and risk management and policies practices. Some of those policies and practices may exceed minimum professional standards and incur additional professional costs—but those firms implement those policies and procedures because the stakeholders in those firms view them as necessary to manage engagement risk.

One way of managing engagement risk is to subject more significant client deliverables to a peer review. Generally, this review occurs pre-issuance. The purpose of this article is to consider key issues related to peer review.¹

1. What, in the context of an expert report, is a peer review?

Peer review is a process, usually taking place at or near the issuance of “significant engagement deliverables” (discussed and defined below), where another professional (hereafter “the reviewer”), reviews the engagement deliverables and concurs with the conclusions reached and/or other materials that the author has prepared.²

The reviewer can be another experienced consultant from the author's firm (a member, director, senior manager, or retired partner) or a respected associate, a “peer,” at another firm or an outside consultant engaged specifically for review purposes. Clearly, the reviewer must be competent in the area that they are reviewing, and in a high-risk engagement, it may be prudent to have more than one reviewer.

Significant engagement deliverables appropriate for review would be the expert report, declaration, affidavit, letter, rebuttal report, and/or similar work product signed and/or issued by the practitioner, but could also include any key information and/or documentation.

2. What procedures should a peer review include?

The purpose of peer review is to mitigate engagement risk so the process is engagement specific and there are no hard and fast rules. At a minimum, the reviewer should read all documents that the author will issue—for example, the expert report or declaration or affidavit. Arguably, that includes all schedules and exhibits accompanying such reports, though the reviewer may elect to limit the review to an inquiry regarding the quality control procedures followed in preparing the schedules and exhibits.³ Similarly, some reviewers may foot and cross-foot charts and tables in the body of the report; others may merely inquire as to the quality control procedures the author has already applied. There is no hard and fast rule here because the nature, timing, and extent of review procedures should be based on an assessment

of engagement risk. Some firms also require the reviewer to sign a checklist and/or prepare a peer review memorandum for the file.⁴

As Brian Brinig has suggested:⁵

One of the great challenges in a litigation services project is to develop a theoretically sound financial opinion that embraces all of the facts, adopts reasonable assumptions when necessary, and applies sound rationale to derive a conclusion. In order to accomplish this lofty goal, a practitioner must aggressively develop and repeatedly challenge the underlying facts and theoretical concepts of the case during the analysis phase.

Usually, before a review can occur, the author should have reached his or her conclusions and expressed his or her opinions in the report, affidavit, declaration, or equivalent. The reviewer should ensure that the author's conclusions and opinions are relevant and reliable; that those conclusions are based on applicable economic and legal theories; and that the deliverable identifies the facts, assumptions, reasoning, and analyses supporting those conclusions. Arguably, a competent reviewer is the expert witness's expert.

3. What steps should the peer review not include?

Again, since peer review is driven by engagement risk, there is no global rule. However, the reviewer should avoid focusing on issues such as font, pagination, and the author's writing and presentation style. While flagging a typo, finding a rounding error, or noting a better way of expressing a thought may (or may not) be helpful, the focus of the peer reviewer should be identifying serious and substantive flaws in the expert report that may lead to awkward challenges to the report by clients, opposing parties or judges that, in turn, damage the author's credibility with a jury or other fact-finder.

4. What are the advantages and disadvantages of a peer review?

The primary advantages of a competent review are that it assists the expert witness to verify that he or she complied with essential professional rules or standards (to the extent that they may apply) and helps the expert witness prepare for upcoming testimony and/or rebuttal. This article considers two specific sets of applicable standards: the National Association of Certified Valuators and Analysts' (NACVA) Professional Standards and Federal Rule of Evidence 702 (FRE 702).⁶

The NACVA developed and issued its Professional Standards to provide guidance to NACVA members⁷ in performing professional services. The current NACVA General and Ethical Standards address:⁸

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- **Integrity and Objectivity:** A member shall remain objective, maintain professional integrity, shall not knowingly misrepresent facts, or subrogate judgment to others. The member must not act in a manner that is misleading or fraudulent.
- **Professional Competence:** A member shall only accept engagements the member can reasonably expect to complete with a high degree of professional competence.
- **Due Professional Care:** A member must exercise due professional care in the performance of services, including completing sufficient research and obtaining adequate documentation.
- **Understandings and Communications with Clients:** A member shall establish with the client a written or oral understanding of the nature, scope, and limitations of services to be performed and the responsibilities of the parties.
- **Planning and Supervision:** A member shall adequately plan and supervise the performance of services.
- **Sufficient Relevant Data:** A member shall obtain sufficient relevant data to afford a reasonable basis for conclusions, recommendations, or positions.
- **Acts Discreditable:** A member shall not commit any act discreditable to the profession.
- **Client Interest:** A member shall serve the client interest by seeking to accomplish the objectives established with the client, while maintaining integrity and objectivity.

FRE 702⁹ permits expert testimony “in the form of an opinion or otherwise if (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”

The major disadvantages of the review are the additional cost of the review; the additional engagement time to complete and respond to the review; the potential discoverability of the reviewer’s comments and/or the draft documents he or she reviewed; and the need to reconcile disagreements between the expert witness and the reviewer.¹⁰

PPC¹¹ (a non-authoritative text) notes that many CPA firms have a requirement that a member of the firm, who has no other responsibility for the engagement, review engagement documents and report drafts. PPC observes that an “independent review” helps ensure the engagement team has followed the firm’s quality control policies and procedures and provides an additional check for errors or inconsistencies in the report.

5. When should the peer review take place?

In a perfect world, the review should take place after the expert witness has completed his or her work and finalized the engagement deliverable. In a perfect world, this “pre-issue” process should be completed within a reasonable time before the delivery deadline. However, financial litigation professionals often operate in less than perfect conditions—clients, staff, and others may run late on providing key information and/or documentation or the time available for the engagement as a whole is short.

Invariably despite best efforts in the real world, time and/or scheduling pressures may shorten the time available for a full,

complete, and diligent review. Time and/or scheduling difficulties may even prevent the review from taking place before issuing the engagement deliverables. In those cases, even if the author has already issued the expert report, affidavit or declaration, a review may still be prudent.

A “post-issue” review may alert the expert witness (and/or the other members of his or her firm) to potential flaws or minefields that may require issuing corrected or supplementary reports (if permitted) or enable the expert witness to focus on preparing for certain key issues that may arise at deposition or trial.

6. Should clients be expected to pay for the peer review?

Expert witnesses and firms view this issue differently. Answering that question comes down to anticipating the questions that the client may ask of the expert witness: Is it firm policy to charge for this time? Do all firms charge for the review time? Was the time provided for in the original engagement letter (or budget)? Did the review add value to the engagement as a whole? If so, why was that value not originally provided by the expert witness? Why was spending that time essential to the engagement? Some firms may write off the review time before or after the client asks some or all of these questions.

7. What can sole practitioners do regarding peer reviews?

Sole practitioners who recognize that the benefits of peer review likely outweigh the costs could have reciprocal arrangements with other sole practitioners, retired practitioners, and/or academics whose opinions and expertise they trust. NACVA has a practitioner referral system¹² where expert witnesses can search for NACVA professionals by area of specialization, keyword, or industry expertise and geographical location.¹³

8. Is the peer review (and draft expert report) discoverable?

It may or may not be. In part, it depends on whether the matter is a consulting-only engagement or is not part of a litigation project. If the matter is part of litigation, discoverability depends on the procedural rules of the jurisdiction in which the matter is pending.

Because of 2010 revisions to the Federal Rules of Civil Procedure, draft expert reports and all but certain specified communications between attorneys and expert witnesses is not discoverable in federal court. Instead, the attorney work-product doctrine applies to draft expert reports and most communications between counsel and expert witnesses.

Whether these revisions shield the reviewer’s comments and/or changes to the practitioner’s report from discovery is presently unresolved, but it is best to consult with retaining counsel on the issue. Depending on the specific circumstances of the case, a court or arbitrator may rule that the reviewer’s comments, the pre-issue drafts, and/or any memoranda to the files regarding the review are discoverable.

9. How should peer review disagreements be resolved?

Some publications suggest that a litigation services engagement involves a great deal of judgment. Professional disputes sometimes arise between members of an engagement team or between the practitioner and the reviewer. Disputes may involve the sufficiency of data needed to complete an engagement, the interpretation of engagement results, and/or reporting issues. Additional research, obtaining the opinion of specialists, or discussion with retaining


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counsel can resolve many of these disputes. The firm's quality control policies and procedures should specify a process for resolving professional disputes. Ultimately the expert signing the report bears responsibility for resolving issues that arise in the engagement, including the review.

10. Is it ever appropriate *not* to have a peer review on an engagement?

No one can really say, "Never say never." Clearly, the review is a good practice and, arguably, even a "best practice." Whether the review

will control, reduce, and/or minimize engagement risk is the ultimate determinant of utility. So, ultimately, practitioners and their firms must assess "engagement risk."¹⁴ Engagement risk, in the context of expert witness or valuation consulting engagements, includes the risk that the expert will fail to comply with one or more requirements and expose himself or herself to a malpractice claim. Engagement risk includes the risk that a court will not admit the expert's opinion and/or that the fact finder will find the expert's conclusions not credible, irrelevant, or unreliable. 

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- 1 While this article contemplates primarily an economic damages engagement and focuses mainly on a testifying witness signing an expert report, the issues are relevant to professionals completing business valuations, investigations, and other financial-litigation services engagements.
- 2 Some CPAs and their firms refer to this peer review process as a "second partner review." Some testifying experts refer to this peer review process as a "concurring review."
- 3 It is possible that this data already would be provided to the reviewer.
- 4 The process could also include or exclude an initial conversation between author and reviewer regarding the key matters addressed in the report. Some expert witnesses find it useful to involve the reviewer in significant planning or field work issues like determining an appropriate discount rate.
- 5 Brian P. Brinig, JD, CPA, ASA, *Developing the Financial Opinion in Litigation: The Process of Legal Reasoning*, AICPA Forensic and Valuation Services Conference, November 2012.
- 6 For authors who are also CPAs, the review also should address compliance with American Institute of CPAs' Code of Professional Conduct Rule 201, which requires that a CPA should undertake only those professional services that the member can reasonably expect to complete with professional competence; exercise due professional care in the performance of

- professional services; adequately plan and supervise the performance of professional services; and obtain sufficient relevant data to afford a reasonable basis for the conclusions reached.
- 7 Including valuation professionals who perform valuation services.
- 8 Effective for engagements accepted on or after June 1, 1011. See http://www.nacva.com/PDF/NACVA_new_standards 2011.pdf
- 9 Depending on the circumstances, the reviewer also may address whether the expert report complies with Rule 26(a)(2)(b) of the Federal Rules of Civil Procedure (FRCP 26). FRCP 26 mandates certain disclosures for testifying experts in civil matters.
- 10 Potentially, a review of timesheets may, depending on the procedural rules of the jurisdiction, lead to a demand for the deposition of the reviewer and/or other participants in the review.
- 11 *PPC's Guide to Litigation Support Services*; Volume 1; Section 206.10; Eighteenth Edition (July 2013); Thomson Reuters
- 12 NACVA Member Referral Directory, National Association of Certified Valuators and Analysts, <http://www.nacva.com/DIRReferral/>
- 13 Some NACVA members offer these types of peer review services to financial expert witnesses.
- 14 Engagement risk is a term often used in attest engagements to mean the risk of issuing an incorrect report, for example, issuing an unqualified audit report and later finding material misstatements in the financial statements.