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# OVER EXPOSED

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*The doctrine of witness immunity may be weakening as we speak.*

**By Brian J. Hunt**

CPAs may not only enhance their practice, but also provide a valuable service to clients and the community by acting as expert witnesses in various legal proceedings. Accountants often are asked to perform complex calculations and offer their opinions regarding lost earnings, compliance with tax codes and a multitude of other complicated analyses, all of which are relied upon by the judge, the jury, the parties to the suit and their attorneys.

To encourage such testimonies, the majority of states have attempted to protect witnesses from civil liability by recognizing the doctrine of witness immunity, which protects from civil suits brought about by statements made in judicial proceedings. This doctrine rests upon the idea that liability does not apply when a person is offering testimony in furtherance of some interest of social importance, and has been described by the United States Supreme Court in *Briscoe v. LaHue*, 1983, as “well established” and a tradition “well grounded in history and reason.”

Under current Illinois law, the doctrine provides witnesses with immunity from civil action because public policy favors the free and unhindered flow of information (*Jurgensen v. Haslinger*, 1998). Illinois courts have reasoned that, in the absence of such a privilege, a witness might be reluctant to come forward to testify. Also, once on the witness stand, the witness’s testimony might be distorted by the fear of subsequent liability.

However, not all states continue to pledge allegiance to this longstanding doctrine. Expert witnesses practicing in Pennsylvania and across the country should be aware of Pennsylvania’s recent change of heart regarding application of the witness immunity doctrine to professionals. In *LLMD of Michigan, Inc. v. Jackson-Cross Co.*, 1999, the Pennsylvania Supreme Court held that the doctrine does not bar actions for professional malpractice against professionals hired to perform services related to litigation.

In this pivotal case, a real estate partnership, LLMD, sought recovery of lost profits from financing companies when those companies failed to satisfy mortgage commitments. This prevented a closing of the sale. LLMD’s chairman, Charles Seymour, contracted to quantify the firm’s lost profits. The calculation, which reflected losses of \$6 million, was prepared by David Anderson, an employee of Jackson-Cross Co., using a computerized accounting program. On cross-examination at trial, however, Seymour conceded that the calculation contained a mathematical error, that he was unable to explain the error and that he was unable to recalculate the lost profits while correcting the error on the stand. Upon the motion of the opposing counsel, Seymour’s testimony was stricken. The next day, LLMD accepted a settlement order of \$750,000. Jackson-Cross subsequently

submitted a corrected computation, which estimated the lost profits at \$2.7 million.

LLMD then sought damages of \$2 million from Jackson-Cross based upon breach of contract and professional malpractice. The Pennsylvania Supreme Court held that, despite the importance of seeking forthright testimony, an expert witness must render services to the degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession. Therefore, an expert witness who fails to exhibit the appropriate professional care may be subject to professional malpractice liability.

To date, there have been no Illinois cases directly focused on this same point. However, it is almost assured that Illinois courts will one day face this issue. Until the dilemma is settled, the best advice for experts is to be sure to use the requisite degree of care, skill and proficiency, including adherence to pertinent professional standards. By keeping this point in mind, CPAs can continue to provide the services their clients require by acting as expert witnesses and consultants in litigation.

***About the author:*** Brian J. Hunt is the managing member of The Hunt Law Group, LLC, Chicago, Illinois, and a member of the Defense Research Institute's Professional Liability Committee. His practice focuses on the counseling and representation of CPAs and other business professionals, and on the resolution of business disputes. Brian was selected in 2005, 2006 and 2007 as an Illinois Super Lawyer in Business Litigation. He can be reached at 312.384.2300 or [bhunt@hunt-lawgroup.com](mailto:bhunt@hunt-lawgroup.com).