

Auditors as Advocates: A Lesson from Legal Ethics

By Albert S. Frank, LL.B.

As the Arthur Andersen firm disintegrates we should realize that they are not the only auditing firm with problems. Their auditing messes are spectacular but not unique.

Why are highly capable professionals getting themselves, their firms, and to some extent their profession, into trouble?

I suggest that it goes far beyond occasional sloppy work or clever management deceit that an auditor should not be expected to catch. The basic problem is not accounting incompetence or management deceit. If that were the whole story, the Andersen debacle would not be giving the accounting profession such a black eye. The real problem seems to be accounting corruption: auditors who have been induced to stray from their proper role.

The way I, as a non-accountant, understand the auditor's role is that the auditor is supposed to protect the shareholders and potential shareholders, and possibly others with a legitimate interest in the company such as lenders and potential lenders. But is that how auditors really behave?

The auditing messes of Andersen – Enron, Sunbeam, Waste Management – and other firms suggest that sometimes auditors support management's preferred impression rather than being objective assessors of the truth. Such auditors act as advocates when they are supposed to be, and are purporting to be, acting as judges.

Lawyers have long had a set of rules – the ethics of advocacy – that govern them when they act as advocates. What if we applied those rules to auditors?

The ethics of advocacy prohibit the very thing auditors are hired to do – express an opinion. Lawyer advocates are prohibited from expressing their own opinions of the justice of their client's side or even as to any of the facts in issue.

There are various reasons for this. One is that cases are supposed to be determined based on the evidence, and the personal opinion of an advocate is not evidence. The statements of the advocate are not made under oath and are not subject to cross-examination. Moreover, if advocates were allowed to express opinions then the side with an older or more renowned advocate could have an unfair advantage.

Over a century ago there was a striking example of this principle in the 1866 case of *Ryves v. A.-G.* There was an issue in the trial of that case as to whether certain documents were authentic. One of the advocates began to say that he believed on his word of honour as a gentleman that the documents – and was then interrupted by the trial judge. The judge said “I insist on you not finishing that sentence. It is a violation of a fundamental rule of conduct which every advocate ought to observe to give a jury your personal opinion.”

If auditors in effect become advocates, shouldn't they also be so prohibited from expressing opinions? Certainly that would be more honest than pretending to give an objective opinion while in fact advocating for management.

Of course auditors could rigorously adhere to their traditional role, in which case it would be perfectly appropriate for them to offer their opinions. Indeed, they are being paid for their opinions.

But if the lure of lucrative consulting work and other inducements that management can offer are too great for the auditors to remain objective, what should auditors write in their reports? Perhaps something like:

This audit is based on information provided by management, which is implicitly assumed by us to be true. Any flat-out lies by management are accordingly uncritically reflected in this audit.

In our opinion, these financial statements are indeed financial statements.

In our opinion, these financial statements present fairly, in all material respects, the impression of the financial position of the Company that management wishes to create. Any relation between these financial statements and objective reality is a pleasing coincidence.

In our opinion, management is, in various ways, paying us well.

#

The above article originally appeared in the Mid-May, 2002 issue of **The Bottom Line**.

#

Research has NOT been done to see if this article is still good law. Also, this is general information that might not apply to your particular situation.

#

*Albert S. Frank is a business and trial
lawyer with over 30 years of experience.
His offices are in Toronto's
financial district:*

*The Exchange Tower
130 King Street West, Suite 1800
Toronto, Ontario M5X 1E3*

*Phone: 416 929 7202
Email: afrank@FrankLaw.ca
Web: www.FrankLaw.ca*

Copyright © Albert S. Frank