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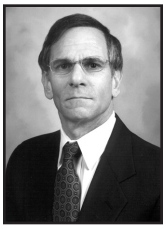
Five Common Evidentiary Issues In Securities Fraud Actions Against Auditors And Accounting Firms



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Since you can anticipate the lines of attack, you can plan the defenses.

AUDITORS AND ACCOUNTING FIRMS have long been a favorite target of the plaintiffs' bar. When a corporate client founders, the auditor is sometimes the last solvent standing. Other times, an auditing firm may simply have a deeper pocket than its client or former client. In these situations, securities fraud plaintiffs sue the auditor as a matter of course. Inevitably, some of these cases will go to trial. Likewise, when the SEC has elected to act against an auditing firm in civil (rather than administrative) proceedings, a trial may be the only way to resolve the dispute.

Unfortunately, the complexity of these cases inherently favors the party claiming fraud or recklessness. The auditor's job is unfamiliar to virtually all potential jurors. Even basic principles of Generally Accepted Accounting Principles ("GAAP") and Generally Accepted Auditing Standards ("GAAS") are usually quite foreign and, in many cases, they can be counterintuitive. But as any securities litigator knows, these cases rarely turn on basic principles—they almost always require careful presentation and thoughtful analysis of accounting and auditing nuances. These issues can be positively mystifying to the lay jury. Plaintiffs' attorneys invariably attempt to use that complexity to their clients' advantage—capitalizing on

the jury's preconceptions about the accounting and auditing professions, inviting the factfinder to jump to easy conclusions on technical questions, and arguing for unwarranted inferences on the basis of evidence taken out of the proper auditing context. A defense attorney must be very aggressive in limine to thwart these trial tactics and keep misleading evidence away from the jury.

In preparing for trial, counsel representing auditors in civil securities fraud actions face certain recurrent evidentiary issues, the resolution of which can be outcome determinative. Set forth below are five such issues that present a particularly strong danger of jury confusion, along with suggested arguments for their successful resolution in favor of the auditor client:

The first line of attack should be to argue that a restatement is hindsight evidence and not probative of alleged prior recklessness or intentionally fraudulent conduct or accounting fraud and should therefore be excluded under Fed. R. Evid. 401 and 402.

- Evidence of a restatement of prior-period financial statements;
- Evidence of settlements in related actions;
- Reference to unrelated corporate wrongdoing;
- Evidence of engagement fees and auditor compensation; and
- Evidence related to prior and subsequent audit opinions for the same client.

EVIDENCE OF A RESTATEMENT OF PRIOR-PERIOD FINANCIAL STATEMENTS

• If a restatement of prior-period financial statements for which the auditor issued an unqualified opinion has been filed with the SEC, or if those financial statements have been withdrawn, the plaintiff will invariably seek to use the restatement (or withdrawal) as evidence that the client company admitted to wrongdoing (or error) and that the auditor was negligent, if not reckless. This is likely to occur whether or not the accounting firm that audited the restated financial statements was also the firm that rendered the initial audit opinion.

Restatements Are Hindsight Evidence

The first line of attack should be to argue that a restatement is hindsight evidence and not probative of alleged prior recklessness or intentionally fraudulent conduct or accounting fraud and should therefore be excluded under Fed. R. Evid. 401 and 402. The U.S. Court of Appeals for the Second Circuit has held that a restatement of prior periods' revenue is not probative of recklessness or intentionally fraudulent accounting ab initio. *See Stevelman v. Alias Research Inc.*, 174 F.3d 79, 84 (2d Cir. 1999); *see also In re CIT Group, Inc. Sec. Litig.*, 349 F. Supp. 2d 685, 690-91 (S.D.N.Y. 2004) (decision to revise amount of loan loss reserves "provides absolutely no reasonable basis" for inferring that defendant company was reckless or intentionally fraudulent for previously asserting that reserves were adequate); *P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp.*, 142 F. Supp. 2d 589, 612 (D.N.J. 2001) ("[A] restatement of earnings, without more, does not support a strong inference of fraud, or for that matter, a weak one." (internal quotation marks, alterations omitted)). The rule in the securities law context that hindsight is not proof of fraud is consistent with the general rule that evidence offered to show, by hindsight, that a duty was breached is not relevant and is therefore inadmissible. *See United States v. Ruffin*, 575 F.2d 346, 355 (2d Cir. 1978) ("testimony based on hindsight…was not at all probative" and therefore properly excluded); *see also Kloepfer v. Honda Motor Co.*, 898 F.2d 1452, 1456 (10th Cir. 1990) (evidence of measures undertaken pursuant to con-

sent decree irrelevant to show culpable conduct two years prior).

Likelihood Of Jury Confusion

Counsel should also argue that evidence of a restatement presents an unusual risk of jury confusion and should therefore be excluded under Fed. R. Evid. 403. The argument to be made should be based on the fact that the jury already will be confronting the complex issues of understanding GAAS and GAAP and the company's business and accounting models. In most cases, the jury will be asked to consider such unfamiliar concepts as:

- That "GAAP tolerates a range of 'reasonable' [accounting] treatments";
- That the goal of a GAAS audit is to obtain *reasonable* assurance that a company's financial statements are "presented fairly, in all material respects"—not to guarantee their perfect accuracy;
- That "there are different methodologies for conducting a GAAS-compliant audit," *see In re WorldCom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472, 479-81 (S.D.N.Y. 2005) (internal quotation marks omitted); as well as
- The concept that scienter must be judged based on knowledge at the time of the alleged fraud—not in hindsight. *See Stevelman*, supra, 174 F.3d at 84-85; *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128-29 (2d Cir. 1994); *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978).

Injection of a restatement—which in many cases will have occurred long after the relevant audit judgments that are the focus of the trial—will only render the jury's task more unfamiliar and difficult. In such cases, cautionary instructions are unlikely to protect defendants from juror misuse of a restatement as a shorthand, hindsight formula for "fraud." *See United States v. Forrester*, 60 F.3d 52, 62 (2d Cir. 1995) (on facts of the case, limiting instruction would be ineffective "shield against the dual risks of misuse and unfair prejudice"); *see also* Fed. R. Evid. 403 (1972 advisory committee's note) ("consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction").

The Restatement As A Subsequent Remedial Measure

It can also sometimes be argued that a restatement is inadmissible under Fed. R. Evid. 407 as evidence of a "subsequent remedial measure." Courts frequently apply Rule 407 in the securities context to exclude evidence conceptually similar to restatements. *See, e.g., Malone v. Microdyne Corp.*, 26 F.3d 471, 480 (4th Cir. 1994) (Form 10-K making remedial disclosures was inadmissible per Fed. R. Evid. 407 to prove earlier misstatements were "akin to a landlord's fixing a stairway after being sued by an injured tenant"); *Krouner v. The Am. Heritage Fund, Inc.*, 899 F. Supp. 142, 147 (S.D.N.Y. 1995) (1994 prospectus inadmissible under Rule 407 as evidence of failure to disclose material information in 1993 offering documents); *cf. In re CIT Group, Inc.*, 349 F. Supp.2d at 690-91 & n.6 (increase in the size of loan loss reserves was a "subsequent remedial measure[]" and provided "absolutely no reasonable basis for concluding" that defendants were dishonest or reckless in earlier disclosure that reserves were adequate).

Note, however, that in some circuits, courts hold that Rule 407 does not apply to exclude subsequent remedial measures taken by a non-party. *See, e.g., Causey v. Zinke*, 871 F.2d 812, 816 (9th Cir. 1989), *cert. denied*, 493 U.S. 917 (1989). Those courts reason that "[t]he purpose of Rule 407 is to ensure that prospective defendants will not forego…improvements because they fear that these improvements will be used against them as evidence of their liability," and that this purpose will not be served by admission of a subsequent remedial measure against somebody else. *Id.* This may be critical when, for example, the defendant auditor was replaced by a new auditor,

and the restatement is executed by the successor. Other courts have, however, recognized a second justification for exclusion of subsequent remedial measures that is particularly important in the context of a complex securities case involving a restatement—that the jury will misinterpret the evidence as an admission of guilt. *See SEC v. Geon Indus., Inc.*, 531 F.2d 39, 52 (2d Cir. 1976) (Friendly, J.); *Smyth v. The Upjohn Co.*, 529 F.2d 803, 805 (2d Cir. 1975) (per curiam) ("'The evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past…and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant.'" (quoting *Columbia & Puget Sound R.R. Co. v. Hawthorne*, 144 U.S. 202, 207 (1892))); *see also* Fed. R. Evid. 407 (1972 advisory committee's note) ("The conduct is not in fact an admission…."); 2 Jack B. Weinstein and Margaret A. Berger, *Weinstein's Federal Evidence* §407.03[2] (evidence of subsequent corrective measures is "inherently unreliable," "unfairly prejudicial," and "has little probative value"). Counsel should craft an argument for exclusion of the restatement based on that reasoning, when applicable.

SEC-Ordered Restatements Are Not Admissions

Finally, when the restatement has been issued at the insistence of the SEC or pursuant to a settlement with the SEC, rather than as a result of the issuer's (and its auditors') independent judgment, it should be argued that the restatement has no relevance whatsoever because it cannot fairly be construed as an "admission" that prior-period financial statements were incorrect. In *Alabaster v. Bastiaens*, 2000 U.S Dist. LEXIS 22354 (D. Mass. July 27, 2000), Judge Gertner of the U.S. District Court for the District of Massachusetts dismissed a complaint for failure to raise an inference of scienter, and explained that a restatement undertaken at the SEC's insistence is not evidence that the prior-period financial statements failed to conform to GAAP when issued or that those involved in their original issuance acted with scienter:

"Plaintiffs also invoke GAAP to demonstrate that [the issuer]'s financial reports, based on its previous accounting methods, were false when issued, pointing to the fact that [the issuer] was required to restate its financials. Plaintiffs argue that the restatement itself amounts to an admission that defendants used accounting methods which were clearly improper at the time and creates a strong inference of scienter.

"It is true that under GAAP, restatements are only required for material accounting errors or irregularities that existed at the time the financial statements were prepared. Nevertheless, such a finding would not necessarily imply, much less establish, that the accounting method at issue was initially employed for the purpose of misleading shareholders. *See, In re Peritus Software Services, Inc.*, 52 F. Supp.2d at 223 (after-the-fact accounting admissions may suffice to show that material misstatements occurred in the financial statements but do not by themselves suffice to show that misstatements occurred knowingly and recklessly).

"Furthermore, the fact that it was the SEC, not [the issuer]'s auditors, which required the…restatements is significant. Plaintiffs offer no evidence that the SEC could only require restatements under the circumstances set forth by GAAP, *i.e.* where the earlier statements were erroneous or irregular. In fact, the record indicates that the SEC had broader, prophylactic goals in conducting the investigation and requiring the restatement. It sought to restore public confidence in financial statements by increasing their transparency."

Alabaster, 2000 U.S Dist. LEXIS 22354, at *22-24. The same reasoning can be utilized to argue for the exclusion altogether of evidence of a restatement.

Sometimes, They Do Get Admitted

Counsel should, however, be aware of instances in which efforts to exclude evidence of a restatement have failed. For example, in *WorldCom*, in view of the particular facts presented, the court rejected the accounting firm's "conclusory assertion" that the restatement of WorldCom's 2000 and 2001 financials was irrelevant, noting that the "company's admission of what its financial statements should have been in prior years [was] highly probative of whether the previously filed documents were false." *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 U.S. Dist. LEXIS 2215, at *23 (S.D.N.Y. Feb. 17, 2005).

EVIDENCE OF SETTLEMENTS IN RELATED ACTIONS WITH PRIVATE PARTIES AND GOVERNMENT AGENCIES • Securities fraud suits against auditors frequently occur after settlements by other individuals and entities involved in preparation and publication of the financial statements at issue. Sometimes settlements have been undertaken with the SEC, which involve consents to findings by the Commission. Such settlements often involve the issuer or its officers and directors. Under Fed. R. Evid. 408, evidence of a settlement is "not admissible…to prove liability for, invalidity of, or amount of a claim." This prohibition is equally applicable to settlements or consent decrees with government agencies, including the SEC. *See U.S. v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981), *cert. denied*, 456 U.S. 946 (1982); *In re Blech Sec. Litig.*, 2003 WL 1610775, at *11 (S.D.N.Y. Mar. 26, 2003); *Option Res. Group v. Chambers Dev. Co., Inc.*, 967 F. Supp. 846 (W.D. Pa. 1996); *In re Cenco Inc. Sec. Litig.*, 601 F. Supp. 336, 337 n.3 (N.D. Ill. 1984). Rule 408, however, "does not require exclusion if the evidence is offered for purposes [including] proving a witness's bias or prejudice." Fed. R. Evid. 408. Thus, defense counsel must argue for exclusion of settlements on other grounds.

Consents, final judgments, offers of settlement, and SEC Orders may be excluded as inadmissible hearsay.

Settlements Offered To Show Bias

When a plaintiff seeks to have the settlement admitted to show the purported bias of a testifying witness, it should be emphasized that Rule 408 does not make settlement evidence *automatically* admissible to prove alleged bias. The evidence is still subject to the requirements of Fed. R. Evid. 401, 402, and 403. *See Santrayll v. Burrell*, 1998 WL 24375, at *2 (S.D.N.Y. Jan. 22, 1998). The settlement being offered must be relevant, more probative than prejudicial, and not tend to waste time or mislead the jury. *See Myers v. Pennzoil Co.*, 889 F.2d 1457, 1460-61 (5th Cir. 1989). It cannot be reliably inferred that a witness is biased *against* the party with whom he or she has settled—indeed, settlements are sometimes used to show the witness's bias in *favor* of the party with whom he or she settled. *See, e.g.*, *United States v. LaSorsa*, 480 F.2d 522, 528 (2d Cir. 1973), *cert. denied*, 414 U.S. 855 (1973); *Tribune Co., v. Purcigliotti*, No. 93 Civ. 7222, 1996 WL 337277, at *3 (S.D.N.Y. June 19, 1996).

Potential For Prejudice

Counsel should argue that it would be unrealistic to expect the jury to compartmentalize settlement evidence and consider it only with respect to witness bias. This argument may be particularly forceful when the settled claims involve the same or similar allegations as in the case at bar. *See Williams v. Chevron U.S.A., Inc.*, 875 F.2d 501, 504 (5th Cir. 1989); *Santrayall*, supra, 1998 WL 24375, at *3 (where prior settlement does not relate to current dispute, "danger of unfair prejudice and confusion of the issues is minimal"). Courts often use Rule 403 to police this danger. *See, e.g, Manko v. U.S.*, 1998 WL 391129, at *10 (S.D.N.Y. July 13, 1998), *aff'd* 2003 WL 197304

(2d Cir. Apr. 28, 2003); *McGee v. Joutras*, 1996 WL 706919, at *5 (N.D. Ill. Dec. 5, 1996).

Hearsay

Consents, final judgments, offers of settlement, and SEC Orders may be excluded as inadmissible hearsay. *See U.S. v. Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976) (SEC release inadmissible hearsay that did not qualify for hearsay exception for public records); *Cenco*, supra, 601 F. Supp. at 337 n.3. They are also excludable under Rule 408 as documents intended, "at least in part," to settle claims, or "as a product of a settlement." *See Trebor Sportswear Co., Inc. v. The Ltd. Stores, Inc.*, 865 F.2d 506, 510 (2d Cir. 1989); *N.J. Tpke. Auth. v. PPG Indus., Inc.*, 16 F. Supp. 2d 460, 473-74 (D.N.J. 1998), *aff'd*, 197 F.3d 96 (3d Cir. 1999); *Berke v. Presstek*, 188 F.R.D. 179, 180 (D.N.H. 1998).

REFERENCE TO UNRELATED CORPORATE WRONGDOING • It may be tempting for plaintiff's counsel to attempt to inflame the jury by references to highly publicized accounting scandals, such as Enron, WorldCom, or Tyco. Counsel for the defendant auditor or auditing firm should argue that this practice would inject irrelevant evidence into the trial and serve only to unfairly prejudice the defendant auditor.

Lack Of Relevance

Federal Rule of Evidence 402 bars the admission of "[e]vidence which is not relevant." Comments about instances of "corporate fraud" or the auditing of corporations allegedly engaged in such fraud are rarely if ever relevant to the particular action being litigated between the instant parties because such anecdotes do not render any fact of consequence more or less probable in this litigation. Fed. R. Evid. 401.

Even assuming for the sake of argument that the existence of "corporate fraud" at other corporations or the litigations and investigations arising in connection with those scandals somehow has probative value, that probative value is likely to be far outweighed by the danger of unfair prejudice and confusion of the issues. Fed. R. Evid. 403. For example, introducing evidence of corporate malfeasance and bankruptcy as to other corporations, as well as the government investigations and civil and criminal actions that followed, may wrongly suggest to the jury that the accounting firm or auditors on trial are culpable simply because they are or are associated with a large national accounting firm.

Even assuming for the sake of argument that the existence of "corporate fraud" at other corporations or the litigations and investigations arising in connection with those scandals somehow has probative value, that probative value is likely to be far outweighed by the danger of unfair prejudice and confusion of the issues.

EVIDENCE OF ENGAGEMENT FEES AND AUDITOR COMPENSATION • A plaintiff may try to argue that the auditing firm was motivated to commit fraud by the promise of engagement fees or that an individual auditor was so motivated by his own compensation. Counsel should argue that an auditor or auditing firm's compensation is not probative of fraud and that the court should exclude that evidence to protect individuals' privacy interest in his individual income.

Privacy Concerns

Courts recognize that "the public exposure of one's wallet or purse is, in the abstract, an invasion of privacy," and "individuals have legitimate expectations of privacy regarding the precise amount of their incomes." *DeMasi v. Weiss*, 669 F.2d 114, 119 (3d Cir. 1982). Moreover, an auditor's normal compensation for performing services has been

repeatedly held insufficient to even plead a fraud claim. *See, e.g., Friedman v. Ariz. World Nurseries Ltd. P'ship*, 730 F. Supp. 521, 532 (S.D.N.Y. 1990), *aff'd* 927 F.2d 594 (2d Cir. 1991) ("It would defy common sense to hold that [scienter] would be satisfied merely by alleging the receipt of normal compensation for professional services rendered, because to do so would effectively abolish the requirement, as against professional defendants in a securities fraud action, of pleading facts which support a strong inference of scienter"); *Zucker v. Sasaki*, 963 F. Supp. 301, 308 (S.D.N.Y. 1997) (holding that "mere receipt of compensation and the maintenance of a profitable professional business relationship for auditing services" is insufficient to show motive); *SEC v. Price Waterhouse*, 797 F. Supp. 1217, 1242 (S.D.N.Y. 1992) ("The Commission's contention that PW's alleged concern for maintaining and keeping a client and the fees associated with that relationship permits an inference of fraud is unconvincing"). An individual's desire to maintain auditing fees his employer receives is not evidence of motive. *See Rombach v. Chang*, 355 F.3d 164, 177 (2d. Cir. 2004); *In re Philip Servs. Corp. Sec. Litig.*, 383 F. Supp. 2d 463, 470 (S.D.N.Y. 2004).

Danger Of Prejudice

In addition, evidence of the defendant's compensation should be excluded because the probative value of such information is plainly outweighed by the danger of unfair prejudice. Fed. R. Evid. 403; *U.S. Football League v. NFL*, 634 F. Supp. 1155, 1173 (S.D.N.Y. 1986) (courts should exclude evidence of slight probative value where counterbalanced by "potentially high emotive impact on a jury of laymen").

EVIDENCE RELATED TO PRIOR AND SUBSEQUENT AUDIT OPINIONS FOR THE SAME CLIENT • The plaintiff in a securities fraud case against an auditor is required to prove all of the elements of fraud with respect to a single audit opinion. This is because each financial statement is a legally separate transaction and occurrence. *See United States v. Gleason*, 616 F.2d 2, 27 (2d Cir. 1979), *cert. denied,* 444 U.S. 1082 (1980)(each financial statement can be properly charged as a separate count in a criminal indictment); *United States v. Huber*, 603 F.2d 387, 398-99 (2d Cir. 1979), *cert. denied,* 445 U.S. 927 (1980) (same); *see also* 15 U.S.C. §78m (requiring annual reports). Likewise, each audit opinion is distinct. *See* AU §§10.01, 390.02, 411.01, 508.06, & 530.01. Thus, counsel for the auditor should argue for exclusion of evidence of audit opinions from other years, or ask for, at the very least, limiting instructions to the effect that each audit opinion must be considered separately.

Hindsight Evidence

Evidence of subsequent audits of later financial statements must be excluded because fraud may not be proven by hindsight evidence. *See Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 53 (2d Cir. 1995) ("defendants' lack of clairvoyance simply does not constitute securities fraud"); *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 188 (7th Cir. 1993) (setting aside jury verdict, in part because of improper admission of evidence post-dating the audit); *Spielman v. Gen. Host Corp.*, 402 F. Supp. 190, 194 (S.D.N.Y. 1975) ("The determination of materiality is to be made upon all the facts as of the time of the transaction and not upon a 20-20 hindsight view long after the event"), *aff'd per curiam*, 538 F.2d 39 (2d. Cir. 1976).

Oftentimes, prior or subsequent audits will have been executed by different individuals, different engagement teams, or even different accounting firms. Permitting the plaintiff to offer evidence or make references at trial which would suggest or imply that a particular auditing firm or individual auditor was responsible for other audit years would unfairly force the particular defendant to defend those other audits, despite the fact that he or it played no role therein. Moreover, such references

will wrongly suggest to the jury that it may infer falsity, scienter, or materiality with respect to the audit opinion at issue in the particular case by reference to facts concerning other, legally distinct, financial statements.

CONCLUSION • Cases of securities fraud presenting complex questions of fact involving the application of GAAP and GAAS to unique modern business operations are inherently challenging for a jury of laymen. Counsel for the plaintiff has a duty to use that practical reality to his or her client's advantage, within the confines of ethical advocacy. It is, therefore, critical for counsel for the auditor defendant to focus on ways to simplify the trial by eliminating confusing or prejudicial evidence from the jury's consideration.

PRACTICE CHECKLIST FOR
Five Common Evidentiary Issues In Securities Fraud Actions Against Auditors And Accounting Firms

Every securities fraud case might be a little different but there are five lines of attack that are so common that the defenses practically raise themselves.

- Evidence of a restatement of prior-period financial statements:

__ The first line of attack should be to argue that a restatement is hindsight evidence and not probative of alleged prior recklessness or intentionally fraudulent conduct or accounting fraud *See Stevelman v. Alias Research Inc.*, 174 F.3d 79, 84 (2d Cir. 1999); *see also In re CIT Group, Inc. Sec. Litig.*, 349 F. Supp. 2d 685, 690-91 (S.D.N.Y. 2004);

__ Also argue that evidence of a restatement presents an unusual risk of jury confusion and should therefore be excluded under Fed. R. Evid. 403;

__ It can also sometimes be argued that a restatement is inadmissible under Fed. R. Evid. 407 as evidence of a "subsequent remedial measure." Courts frequently apply Rule 407 it in the securities context to exclude evidence conceptually similar to restatements. Note, however, that in some circuits, courts hold that Rule 407 does not apply to exclude subsequent remedial measures taken by a non-party;

__ Finally, when the restatement has been issued at the insistence of the SEC or pursuant to a settlement with the SEC, it should be argued that the restatement has no relevance whatsoever because it cannot fairly be construed as an "admission" that prior-period financial statements were incorrect. *See Alabaster v. Bastiaens*, 2000 U.S Dist. LEXIS 22354 (D. Mass. July 27, 2000).

- Evidence of settlements in related actions with private parties and government agencies. Under Fed. R. Evid. 408, settlements are usually inadmissible, but Rule 408, however, "does not require exclusion if the evidence is offered for purposes [including] proving a witness's bias or prejudice." When a plaintiff seeks to have the settlement admitted to show the purported bias of a testifying witness:

__ Emphasize that Rule 408 does not make settlement evidence automatically admissible to prove alleged bias. The evidence is still subject to the requirements of Fed. R. Evid. 401, 402, and 403. Argue that it would be unrealistic to expect the jury to compartmentalize settlement evidence and consider it only with respect to witness bias. This argument may be particularly forceful when the settled claims involve the same or similar allegations as in the case at bar;
__ Consents, final judgments, offers of settlement, and SEC orders may be excluded as inadmissible hearsay. They are also excludable under Rule 408 as documents intended, "at least in part," to settle claims, or "as a product of a settlement."

- Reference to unrelated corporate wrongdoing:

__ Counsel for the defendant auditor or auditing firm should argue that this practice would inject irrelevant evidence into the trial and serve only to unfairly prejudice the defendant auditor.

- Evidence of engagement fees and auditor compensation:

__ Courts recognize that "the public exposure of one's wallet or purse is, in the abstract, an invasion of privacy," and "individuals have legitimate expectations of privacy regarding the precise amount of their incomes." *DeMasi v. Weiss*, 669 F.2d 114, 119 (3d Cir. 1982);
__ In addition, evidence of the defendant's compensation should be excluded because the probative value of such information is plainly outweighed by the danger of unfair prejudice.

- Evidence related to prior and subsequent audit opinions for the same client:

__ The plaintiff in a securities fraud case against an auditor is required to prove all of the elements of fraud with respect to a single audit opinion. This is because each financial statement is a legally separate transaction and occurrence;
__ Evidence of subsequent audits of later financial statements must be excluded because fraud may not be proven by hindsight evidence.