SOLUTIONS CHAPTER 2
The Legal Environment of Forensic Accounting

COVERAGE OF LEARNING OBJECTIVES

LEARNING OBJECTIVE	QUESTIONS	WORKPLACE APPLICATIONS	CHAPTER PROBLEMS
LO1. Explain why it is necessary for a forensic accountant to have a working knowledge of the legal environment.	1, 2, 3, 4, 5, 30		52
LO2. Describe the classification (categories) of law and the basic structure (three stages) of a civil trial.	6, 7, 8, 9, 12, 13, 31, 32, 33, 34, 35, 36, 37	51	
LO3. Explain the concepts of burden of proof and standard of proof.	14, 15, 16,38, 39, 41	49	
LO4. Describe the court's gatekeeping role in determining the admissibility of evidence.	11, 40, 42, 43	49, 51	
LO5. Identify the rules of evidence that address expert testimony and the specific criteria for the admissibility of expert testimony.	10, 18, 19, 20, 21, 22, 23, 40, 42, 43	49, 50, 51	53, 55, 56, 57, 58, 61
LO6. Describe the purpose and process of a *Daubert* challenge, and identify the factors that should be considered when evaluating expert testimony.	24, 25, 45	49	59
LO7. Identify the requisite elements for establishing attorney-client privilege.	26, 27, 28, 29, 46, 47, 48		54, 60

Questions

2-1. The rule of law doctrine is the proposition that governance via a cumulative body of legal principles is superior to the rule of any human leader and that all men stand equal in the eyes of the law.

2-2. The three basic functions of law are:

1. Dispute resolution, which could be criminal or civil in nature,
2. Protection of property via contract and other means, and
3. Preservation of the state.

Laws also function to maintain order in society and protect civil liberties of citizens. This is important, as citizens must have faith that the judicial system will function as designed and that the system is designed to ensure all citizens receive equal and fair treatment.

2-3. Subdivisions of public law in which a forensic accountant might perform an engagement include the following:

1. Tax law—a codified system through which a government generates revenue.
2. Labor law—a set of laws and regulations that establish the legal rights of individuals and organizations in the marketplace.
3. Divorce law—dissolves a marriage and sets forth how the rights of each party are protected.
4. Bankruptcy law—helps people who are unable to pay their obligations (debts) to achieve a fresh start by eliminating debt through the sale of assets. The primary guidance is found in Chapter 7, Chapter 11, and Chapter 13 of the Bankruptcy Code.
5. Environmental law—relates to how individuals and organizations impact the environment and establishes rules and/or limitations for such interaction.
6. Securities law—laws and regulations aimed at ensuring fairness in the buying and selling of securities. The two most prominent are The Securities Act of 1933 and The Securities Exchange Act of 1934.

2-4. The categories of private law in which a forensic accountant might be engaged are:

1. Contract law—serves to make agreements enforceable and thereby helps promote the exchange of goods and services in an economy.
2. Tort law—deals with civil wrongs, where an action of one party harms another.
3. Property law—deals with ownership rights related to real and personal property.

4. Agency law—deals with all aspects of relationships that occur when one person (agent) acts for, or represents, the interests of another (principal).

5. Partnership law—laws that deal with rights and obligations of a group that bands together for the purpose of promoting a product, service, or idea.

6. Corporate law—deals with the rights and obligations that set forth how all stakeholders to a legal entity interact with such entity.

7. Sale law—deals with the exchange of goods and services for value given and received.

2-5. Ways in which the U.S. justice system is different from the way it is portrayed in popular television programs are:

1. The law is not fast. Investigations, discovery, and the trial itself can take from several months to several years.

2. There is rarely a "gotcha" moment. The discovery process requires that both sides know what will be entered as evidence and testimony at trial.

3. TV shows are about drama and entertainment, whereas actual trials are about routine and presentation.

4. Jury selection and opening remarks are the most important parts of a real trial, not cross-examination and closing arguments as shown on TV.

5. The role of the jury is not passive, since jurors, as the triers of fact, must engage in active listening in order to determine who and what to believe.

2-6. The three stages of a civil trial are: pleading, discovery, and trial.

1. Pleading starts with the filing of a complaint that identifies the parties, outlines the proposed violation and alleged facts, and presents a demand for relief. Once a defendant has been served with the complaint, there is a limited amount of time to respond or file an answer. The answer addresses each paragraph of the complaint by admitting, denying, or stating the person lacks sufficient knowledge to respond. The answer also asserts affirmative defenses.

2. Discovery allows for the gathering of information from the opposing party as well as third-party witnesses. Information is typically gathered (discovered) via a request for production of documents, subpoenas, interrogatories, and depositions. The discovery process in a civil case is governed by the Rules of Civil Procedure.

3. Trial begins with the selection of a jury (if it's a jury trial). Following jury selection, both sides make their opening arguments (statements). The first to present is the plaintiff, followed by the defendant. After opening arguments, the plaintiff presents witnesses (evidence), followed by the defendant. After all the witnesses have testified and the documentary evidence has been admitted by the court, the parties present closing arguments. Following closing arguments and instructions by the court, the case goes to the jury for deliberation. The jury deliberates and returns a verdict.

2-7. A complaint is a formal document filed by a party who believes he or she has been harmed by an action, or lack of action, of another party. A complaint sets forth the proposed violations, alleged facts, and a demand for relief. See example in the appendix to this chapter.

2-8. An answer addresses each paragraph of a complaint by admitting, denying, or stating that there is a lack of sufficient knowledge to respond. An answer also asserts affirmative defenses. See example in the appendix to this chapter.

2-9. Discovery allows for the gathering of information from an opposing party as well as from third-party witnesses. Information is typically gathered (discovered) via a request for production of documents, subpoenas, interrogatories, and depositions.

2-10. As set forth in the Rules of Civil Procedure, an expert witness's written report must contain:

1. A complete statement of all opinions the witness will express and the basis and reasons for those opinions.
2. The facts or data considered by the witness in forming an opinion.
3. Any exhibits that will be used to summarize or support an opinion.
4. The witness's qualifications, including a list of all publications authored in the previous ten years.
5. A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.
6. A statement of the compensation to be paid for the study and testimony in the case.

2-11. *Voir dire* in the United States is the process used by a court, both by the judge and contesting attorneys, to question prospective jurors about their personal background and prejudices. It is also used to question expert witnesses about their qualifications.

2-12. A civil trial's order of progression generally includes the following steps:

1. Jury selection (if a jury trial)—triers of fact are selected.
2. Plaintiff and defendant make opening arguments—a presentation to trier of fact related to the complaint and the evidence.
3. Plaintiff presents case—evidence and testimony are presented.
4. Defendant presents case—evidence and testimony are presented.
5. Closing arguments by plaintiff and defendant—the last opportunity to set the facts or rebuttals in the minds of a trier of fact.
6. Jury deliberations and verdict.

2-13. In a criminal trial, the pleadings stage is initiated with a criminal complaint accompanied by an investigator's affidavit that summarizes the evidence against the defendant. During the first appearance (arraignment), the defendant is informed of the charges, is advised of his or her rights, and enters a plea to the charges, such as guilty or not guilty.

Also, in a civil case a party is determined to be liable or not liable, whereas in a criminal case a defendant is found guilty or not guilty.

A criminal case also includes a step for sentencing.

2-14. Burden of proof must be met by the plaintiff to prove liability in a civil trial or by a prosecutor to prove guilt in a criminal trial.

2-15. A plaintiff must meet a specific standard when bringing a lawsuit. This standard is different for civil and criminal cases.

1. While the standard varies from jurisdiction to jurisdiction, the common standards for civil cases are:

    a. Preponderance of the evidence—this is a "more likely than not" standard by which there is more than a 50% probability that the truth is being measured as set forth by the facts.

    b. Clear and convincing evidence—this is greater than a preponderance of the evidence. While there is no specific percentage for this standard, one commonly used definition is: more highly probable to be true than not true.

2-16. For a criminal action, the standard is beyond a reasonable doubt. A prosecutor must present evidence that removes any and all reasonable doubt from the mind of a juror. No specific probability can be assigned.

2-17. An expert can provide opinion as evidence, where other witnesses cannot. Rule 705 of the Federal Rules of Evidence allows a testifying expert to state an opinion, without first testifying to the facts or data, with the understanding that the testimony is subject to cross-examination.

This type of testimony is admissible because the expert is considered to possess knowledge and experience in a specific field, and that knowledge will help the triers of fact arrive at a judgment in a case.

2-18. The Federal Rules of Evidence serve to govern if, when, how, and for what purpose evidence is allowed to be presented to a trier of fact in a court of law. Rule 102 sets out the purpose as follows:

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Simply stated, the purpose of the FRE is to seek justice and truth in a fair and reasonable manner.

2-19. Evidence, in the U.S. judicial system, is information that may be presented to persuade a trier of fact of the probability of truth of a specific fact asserted in a case.

2-20. Relevant evidence is defined by FRE 401 as follows: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Relevant evidence is admissible when it has probative value.

2-21. Probative value is a legal concept requiring that evidence be sufficiently useful to help prove something during the course of a trial. Evidence must be considered in view of possible prejudicial impact it might have on a defendant, through that testimony's ability to influence a judge or jury trying a case.

An example might be a prior action by the accused. For example, a past criminal act might not be admissible if it was deemed that such knowledge could influence a judge or jury in a prejudicial manner through its admission into testimony. Or, if the defendant was inclined to use drugs, that might also not be admissible if it lacked probative value to the case being tried.

2-22. Evidence to be submitted by an expert witness is admissible only if:

1. It is based upon sufficient facts or data.
2. It is the product of reliable principles and methods.
3. Principles and methods have a history of successful application in areas consistent with that of the case under consideration.

2-23. An expert's testimony can be challenged in one of the following ways:

1. By a *Daubert* challenge as unreliable—junk science
2. Through cross-examination by opposing counsel

2-24. A *Daubert* challenge is a special hearing with judge and legal counsel present, but not the jury. The purpose is to measure the validity of the expert's opinion through examination of the methodology that was used to arrive at such opinion, and to determine if the methodology is of such general acceptance that the use of such methodology can be relied upon as a basis of evidence. Either party can initiate a challenge, and the judge acts as a gatekeeper in determining admissibility.

2-25. Five factors a judge should consider in the determination of whether evidence should be entered into testimony by an expert include:

1. Whether a methodology used to arrive at an opinion has been tested.
2. Whether a theory or method has been peer reviewed.

3. What known or potential rate of error is inherent in a methodology

4. To what degree a methodology is accepted within the professional community

5. Whether the expert's theory existed before the current trial began

2-26. Privileged communication is a legal principle that protects communication between parties in a protected relationship. Commonly recognized protected relationships include attorney-client, husband-wife, doctor-patient, and clergyman-penitent.

Privilege is a legal right of a client or patient rather than that of an attorney or doctor. The underlying theory of privileged communication, articulated by the U.S. Supreme Court in *Upjohn Co., et al. v. United States, et al.* (1981), is that in certain instances, society is best served by the suppression (protection from disclosure) of information.

2-27. To establish privilege, three criteria must be met. Specifically, a communication must:

1. Relate to the rendering of legal services,

2. Be made in confidence, and

3. Be made to a person the client reasonably believed was an attorney.

2-28. The work product doctrine provides protection from discovery of documents, interviews, statements, and other items prepared by an attorney in anticipation of a trial. The primary purpose is to allow attorneys to prepare for litigation without risk that documents and communications related to such preparation will be revealed to court adversaries.

2-29. Five primary attributes that will serve a forensic accountant well when working with an attorney include the following (the list is not exhaustive):

1. Communicate. Communication of key engagement obligations, such as the specific assignment, time frame, nature of a case, and fee. This is usually established in an engagement letter.

2. Respect. Respect between parties is key to a professional engagement.

3. Responsive. Responsiveness in a timely and helpful manner, including the gathering and analysis of information and the preparation of a report.

4. Competence. Responsibility to conduct the engagement using professional care and competence and to present material in an honest and objective manner.

5. Ethics. Ethical obligations suggest that gray areas be resolved in favor of the opposing party to avoid a claim of adversarial bias.

Multiple-Choice Questions

2-30. A
2-31. B
2-32. B
2-33. B
2-34. A
2-35. E
2-36. B
2-37. C
2-38. D
2-39. A, if the expert is testifying.
2-40. A
2-41. B
2-42. B; expert witnesses can offer opinions.
2-43. D
2-44. B
2-45. E
2-46. B; a testifying expert's final opinion is discoverable.
2-47. B
2-48. A

Workplace Applications

2-49. For the Bonnie Bain case set forth in this chapter, the following are relevant observations and questions related to the conduct of the case:

1. BB&T conducted an internal investigation, and thus the bank's scope was limited to internal documents and employees. Moreover, BB&T had no authority or access to external records (such as Ms. Bain's tax returns or bank accounts) without filing a lawsuit.

2. The BB&T investigators made observations and presented information that was helpful to Ms. Bain for six fundamental reasons.

    a. Investigators work as "fact finders" focused on gathering evidence (good, bad, or ugly)—not as advocates.

    b. Investigators have no interest in wrongfully accusing an employee.

    c. A full and complete development and disclosure of the facts allows for improved management and internal control procedures.

    d. A full and complete development and disclosure of the facts allows for meaningful management decision making regarding the specific case (e.g., take to prosecutors, file an insurance claim).

e. It is expected that other parties (e.g., management, government, insurance) will review and assess the internal report for bias and credibility.

f. It is the ethical thing to do.

3. Ms. Bain was put on paid administrative leave for three fundamental reasons:

   a. To maintain her rights as an employee during the time required to investigate her alleged activity,

   b. To recognize her duty to cooperate with investigations (i.e., access and right to interview), and

   c. To acknowledge that removing Ms. Bain from the workplace protected company assets from being further compromised.

4. Preponderance of the evidence means there must be above a 50% probability that an allegation is true. Beyond a reasonable doubt means that all reasonable doubt has been removed from the minds of a trier of fact.

5. It is unlikely that the BB&T investigators thought the report would be obtainable through discovery, but they should have known.

   Rule 26(A)(ii) of the Federal Rules of Civil Procedure states that a party to a legal action must provide a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

6. Ms. Bain's forensic accountant's report was stated in a legally sufficient manner. An expert's opinion is stated in a legally sufficient manner when it is in writing and based on reliable facts, data, and methodology, and it is stated "within a reasonable degree of certainty."

   The court acknowledged the methodology employed was generally accepted (the net worth method) as well as the rationale used to present the facts, data, and methodology employed.

7. The court rejected the government's expert report because it "was not properly articulated or thoroughly supported." The report also did not address the burden of proof needed in this case. Rather, the report used terms like "could have happened."

   The legal requirement for stating an expert opinion is related directly to the burden of proof that exists. For example, in a civil case the burden is a preponderance of the evidence, and thus the expert's opinion must be so stated.

As illustrated in the ascending ladder of probability, the burden of proof probability goes up as the standard for assessing evidence rises. Plausible indicates a reasonable possibility, and probable means more likely than not.

8. Sufficient facts or data means that a forensic accountant has accumulated adequate material to allow for the development of an opinion. Adequate is defined by the type of evidence reasonably considered and relied on by experts in a particular field.

   Ms. Bain's expert interviewed witnesses, analyzed Ms. Bain's bank records and tax returns, and considered her lifestyle as it related to her behavior. The expert also reviewed the BB&T report and challenged it in several areas as set forth in the case.

   In addition, Ms. Bain's expert challenged the methodology of the BB&T investigators in the areas of:

   1. No determination of how many employees had access to the vault,
   2. No investigation of access by others through password and teller number,
   3. No assessment of possible co-conspirators,
   4. A misunderstanding of the concept of proof,
   5. A finding of an indication of failure, but not proof of the amount of money taken by Ms. Bain,
   6. A speculative report not stated in a reasonable degree of professional certainty.

9. Reliable methodology is one that has been previously tested and is a generally accepted method in the specific area of contention. For example, the use of the scientific method to work through the preliminary examination to final report stage of a forensic engagement would be one example. Another example is the use of the net worth method in the absence of books and records.

   Ms. Bain's expert used the net worth method, which has general acceptance in the profession. It is not clear what method the BB&T investigators used, but the court determined it was not generally accepted and thus lacked reliability for the purpose at hand.

10. Yes. The purpose of the report was to assist the court in determining the amount embezzled.

2-50. The defense will seek to obtain all documents that might pertain to the case. A partial list of items follows:

   1. The report generated by the BB&T investigation team, including all supporting documentation

2. Copies of all suspected transaction documents

3. Depositions from key players: The West Side Branch manager, the operations manager, the internal auditor (including all work papers related to the alleged event), the CI, co-workers, and family members

4. Copies of Ms. Bain's financial records and tax returns

5. Copies of internal control policies

2-51. Students will observe different aspects of a court proceeding based on the stage of the case during the visit: pleading, discovery, or trial. Responses should summarize an observation from the court proceeding followed by a reference to the concept in the chapter that explains why the concept was valuable to the trier of fact.

Chapter Problems

2-52. The document entitled *Characteristics and Skills of the Forensic Accountant* may be accessed via a link at www.pearsonhighered.com/rufus.

The table containing the skill rankings is found on page 11 of the AICPA study. The top five characteristics or skills as rated by attorneys compared to the top five skills preferred by CPAs are set forth in this document, along with other useful information for a forensic accountant. The memo's contents will vary from student to student but should include the following specific items:

a. The top five characteristics by ranking:

	Attorney Rank	CPA Rank
Analytical	1	1
Detail-oriented	2	3
Ethical	3	4
Responsive	4	---
Insightful	5	---
Inquisitive	---	2
Skepticism	---	4
Intuitive	---	5

b. The specific nature of each characteristic or skill is:

Analytical relates to the ability to manipulate numbers as well as the ability to use reasoning in the evaluation of documents and other engagement matters.

Detail-oriented relates to an ability to ensure that all aspects of an issue have been considered, no matter how small.

Ethical relates to knowing the difference between right and wrong as well as following the rules set forth in the guidance for a profession.

Responsive is communicating in a meaningful and timely manner.

Insightful means having the ability to perceive nuances among facts and circumstances related to an engagement.

Inquisitive means that a person is eager to learn and searches for truth or knowledge.

Skepticism is a questioning mindset, while remaining objective. In other words, a person is not accepting of documents or conversations without filtering them through the lens of previous experiences.

Intuitive is the ability to sense something without employing rational thinking. In other words, a person gets a "feeling" about something rather than deducing it through a logical process.

c. The differences in rankings between attorneys and CPAs are set forth in part (a) above. The attorney's list relates to those skills and characteristics attorneys have observed in the forensic accountants with whom they have worked and the skills needed to support an attorney in case preparation.

The rankings for analytical, detail-oriented, and ethical are similar in terms of importance ranking. However, CPAs rank inquisitive and skepticism as (2) and (4), respectively. This appears to be based on CPA professional standards used to perform audits, as both traits are important to a successful audit. Because attorneys are not seeking an audit, this ranking difference is understandable.

Also, intuitive was important to CPAs but not attorneys. This also makes sense because inquisitiveness and skepticism are traits that are needed if one is to be intuitive.

2-53. Rule 26(a)(2)(B) of the Rules of Civil Procedure can be found at http://www.law.cornell.edu/rules/frcp. A student's memo outlining the specific information an expert's written report must contain should include the following key areas; in addition, the report must be written and signed by the testifying witness. The specific items are:

1. A complete statement of all opinions to be expressed,
2. The facts or data used to support the opinion,
3. Any exhibits or other supporting materials that will be used to support an opinion,
4. The witness's qualifications, including any publications that were produced in the past ten years,

5. List of cases in which testimony has been offered at trial, or in deposition, during the past four years, and

6. Statement of compensation to be paid for the current testimony.

If a witness is not required to provide a written report, a disclosure must include a statement about the subject matter to be presented (Rules of Evidence 702, 703, or 705 provides guidance here) and a summary of the facts and opinions that will be presented.

2-54. Rule 26(b) of the Rules of Civil Procedure is found at http://www.law.cornell.edu/rules/frcp/. The memo prepared by students should outline the following rules of discovery, and the first paragraph might summarize the scope of discovery [26 (b)(1)], which indicates that, unless restricted by the court, all nonprivileged items relevant to either party in a court action are discoverable and include such things as documents and the identity of key persons related to a case.

a. Materials are discoverable, except if prepared specifically for the instant case by or for another party or that party's representative, such as attorneys, consultants, surety, agents, or insurers. This may be overcome, in part, if a requesting party can demonstrate to the court that the ability to obtain the information from other sources is without undue hardship or if the materials are otherwise discoverable under 29(b)(4).

b. Experts can be deposed if scheduled to testify at trial unless protected by privilege.

c. If the claim of privilege is advanced, the advancing party must do so overtly and must set forth the reasons why privilege is appropriate.

2-55. Rule 26 (e)(2) of the Rules of Civil Procedure is available at http://www.law.cornell.edu/rules/frcp/. Each student's memo outlining the requirements that a testifying expert must meet to present additional information that is expected to be offered at trial but has not been previously presented to the court or adversaries should include the following.

An expert witness's report must be disclosed under Rule 26(a)(2)(B). If additional facts or materials arise that will amplify the original report or extend its scope in some manner, this material must be disclosed by the date set for pretrial disclosures. This could include additional material or the elimination of material set forth in the original document.

2-56. The Federal Rules of Evidence, Rules 101, 102, 103, and 104, identify key requirements that must be met to qualify something as evidence in a trial. A memo prepared by students should show how each rule impacts testimony in a civil and criminal trial. These rules can be found at: http://federalevidence.com/rules-of-evidence. Important concepts for each rule are:

1. Rule 101 sets forth definitions used in the General Provisions.

2. Rule 102 sets forth the purpose of the rules, which is to administer all proceedings fairly, reduce unnecessary expense and delay, promote the generation of evidence, find the truth, and provide justice in arriving at a judgment.

3. Rule 103 provides guidance for judges in ruling on evidence conflicts, which includes errors in the evidence, maintenance of an objection, the manner in which objections can be administered, prohibitions on presenting inadmissible evidence to a jury, and identification of an error in the presentation of evidence.

4. Rule 104 deals with the qualification of witnesses. Considerations in this area are the basis for a fact, conducting a hearing (jury not present) on evidence in dispute, limitations on cross-examination, and the introduction of relevant evidence.

2-57. The Federal Rules of Evidence, Rules 401 and 402, may be found at http://federalevidence.com/rules-of-evidence. Student memos should include the following:

1. Rule 401 provides a two-part test for relevant evidence: (1) evidence should tend to make a fact more probable, or less probable, than would be the case if the evidence was not presented; and (2) a fact must be capable of making a difference in arriving at a judgment.

2. Rule 402 states that relevant evidence is admissible unless:

   a. It is prohibited by the U.S. Constitution.

   b. Federal statute does not allow admission.

   c. The rules of evidence do not allow admission.

   d. Court-determined rules disallow certain evidence.

   e. The evidence is not relevant to a case.

2-58. Rule 702 of the Federal Rules of Evidence can be found at http://federalevidence.com/rules-of-evidence. A student's memo will address the qualification of a witness as an expert and the conditions under which an expert may testify in court. Primary qualifications are:

1. Expert witness status determinants listed in Rule 702, if relevant to the matter in front of a court, are:

   a. Knowledge
   b. Skill
   c. Experience
   d. Training
   e. Education

2. If an expert is qualified by the factors set forth previously, an expert can present testimony if:

   a. The expert's qualifying knowledge will help the trier of fact understand evidence in a way that will help form a judgment.

b. There are sufficient facts or data to support the opinion.
c. The testimony was developed using a reliable methodology.
d. An expert has used the facts, data, and methods to arrive at an opinion.

2-59. A version of the *Daubert v. Merrell Dow Phar., Inc*. court case may be accessed via a link at www.pearsonhighered.com/rufus. The five criteria a trial judge should consider when evaluating expert testimony, as established by this case (No. 92-102 of the U.S. Court of Appeals, Ninth Circuit), are found in part c of the court's ruling. This ruling references FRE Rule 702 and Rule 104(A) in the following ways:

1. Rule 104(a) requires a judge to make a preliminary assessment of the underlying validity of the reasoning or methodology and whether such reasoning or methodology can be appropriately applied to the current case.

2. The court then mentions the following items as being useful to a preliminary assessment:

   a. The theory or method can be, or has been, tested.
   b. A theory or method has been peer reviewed or published in a reputable source.
   c. The potential error rate related to the theory or method is known.
   d. Standards are set forth how to control the method.
   e. The theory or method is used widely in the profession from which it arose.

   The Court of Appeals further noted that the guidance in part 2 is not meant to be rigid, but rather flexible, as a judge assesses a theory or method's relevance to testimony.

2-60. The Rufus and Miller's (2007) article "Attorney-Client Privilege and the Forensic Accountant" was published in *The Value Examiner*. This article provides a summary of key court cases that helped extend privilege to a forensic accountant. A student's outline of the key court cases that determine how privilege can be extended to a forensic accountant, as well as to his or her work product, will include the following:

1. Work-product doctrine. Allows attorneys to prepare for court without risk that their efforts will be disclosed to an adversary. This includes work papers, interviews, statements, and any other materials prepared or gathered by an attorney. *Hickman v. Taylor* (1947, U.S. Supreme Court).

2. *U.S. v. Kovel* (1961) extended attorney-client privilege to a client and an accountant working for an attorney on the case.

3. *Bauer v. Orser* (1966) extended *Kovel* to include nonemployee consulting accountants engaged by an attorney to perform expert services related to the case.

4. *U.S. v. Cote* (1971) clarified *Kovel* by concluding that privilege does not extend to an accountant employed to provide accounting services to an attorney or advice given is that of an accountant rather than an attorney.

5. *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.* (1996) maintained privilege for a consulting expert but denied privilege to a testifying expert.

6. *Green v. Sauder Mouldings, Inc.* (2004) limited the work product privilege to only the work done by a consulting expert after being retained by an attorney and the work is specifically for pending litigation.

7. A sealed grand jury proceeding relating to privilege determined that work done for an attorney who is preparing for a trial is not protected if the work performed is accounting in nature. To ensure privilege, the court reasoned that the nature of the engagement as a consulting expert must be clearly established, the work files for this type of engagement should be segregated from other files, the attorney is engaged first and then hires the expert, and the attorney must supervise the expert.

8. *Derrickson, et al. v. Circuit City Stores, Inc.* (1999) involved collaboration between a testifying expert and a nontestifying consultant.

9. *Sunrise Opportunities, Inc. v. Regier* (2006) concluded that a nontestifying expert cannot be deposed whereas a testifying expert can be.

10. *Estate of Douglas L. Manship et al. v. U.S.* (2006) established that privilege is protected if a testifying expert changes to a consulting expert before an expert report is generated.

11. Closely related to the previous point, rulings in *Bradley, et al. v. Cooper Tire, et al.* (2007) held that if a re-designated expert has produced a report prior to re-designation, the report is subject to disclosure.

These cases show the line of progression in the extension of privilege to a consulting expert, but care is warranted in crafting the engagement letter. All papers should be clearly labeled as attorney-client privileged and filed separately; all billings should be made directly to the attorney, not the client.

2-61. In the clip illustrating the *voir dire* process, Miss Vito's status as an expert was challenged by the prosecutor on the basis of whether she had sufficient automobile knowledge to serve as an expert. Her status as an expert was established by her ability to demonstrate to the court that she had both skill and experience in the area of automobiles and automobile mechanics.

In the clip illustrating expert testimony, Miss Vito was stating facts, not opinions. Her knowledge of the automobiles of that era was complete. Her testimony:

a. Had sufficient facts or data—Miss Vito was able to demonstrate sufficient background and knowledge to serve as an expert.

b. Was a product of reliable principles or data—Miss Vito's testimony was a product of her experience working in her father's garage.

c. Showed that the principles and methods were applied reliably to the facts in the case—Her experience and knowledge was applied reliably to the facts in the case, as the type of automobile used in a crime was being entered as evidence by the prosecution.

As a result of her testimony, the prosecutor's evidence was called into question, which helped the triers of fact in their determination of probability of the defendant's guilt.