

# LITIGATION ECONOMICS DIGEST

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## Working Together: Some Practical Advice for Lawyers and Forensic Economists

by

Dr. Kent Gilbreath and Robert B. Gilbreath, J. D.\*

The process of assessing and estimating damages in cases involving economic loss is under intense scrutiny in American society today. There is a heightened sensitivity among lawyers to focusing on "reasonable probability" when testimony is presented concerning damages. The "go-for-the gold" approach in presenting testimony for claims of economic loss is giving way to a much more careful assessment of damages and a clear and understandable presentation of the legitimacy of damage claims.

Careful selection of an economics expert who can help identify damages and prepare well-supported, believable reports on the measurement of damages has never been more important. The days of shopping for an expert who will say whatever a lawyer wants him to say is increasingly becoming the approach that is sure to backfire on a lawyer, perhaps resulting in the lawyer's winning the liability but losing the damages. While there are economic bonanzas like the McDonald's spilled-coffee case, more and more of the bread and butter liability cases of plaintiffs' attorneys are being presented to jurors who are skeptical about claims of large economic losses and who demand more proof of the legitimacy of economic damages.

### I. Selecting an Economics Expert Witness

Envision a trial wherein a lawyer has completed the presentation of his arguments concerning the liability in the case. He did a good job; the jury's body language suggests sympathy for the client and empathy with the lawyer. The last witness is called to take the stand. A distinguished looking person approaches the witness stand, stands upright, swears to tell the truth, and takes his seat with a look of seriousness and respect for the process that is about to begin. It is evident that the testimony of this witness may have a crucial impact on the jury's deliberations and the outcome of this case.

In this context, the expression "courtroom drama" is not inappropriate. Hollywood and television may have made the players in the drama appear to be more beautiful or handsome and appear to be leading more complex personal lives than the real-life "actors" in the courtroom; still, no one who has participated in a trial where lives have been damaged or destroyed and millions of dollars are at stake can deny the intensity of the emotions in the courtroom and the seriousness with which the majority of the participants approach the process.

When the distinguished economics expert who has taken the stand to give

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\* Kent Gilbreath is Professor of Economics and holder of the Stevens Chair of Private Enterprise and Entrepreneurship in the Hankamer School of Business, Baylor University, Waco, Texas. Robert G. Gilbreath is an attorney/shareholder with Jenkins & Gilchrist, P.C. in Dallas, Texas and is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization.

testimony that the damages being sought by the plaintiff are unquestionably justified or, if testifying for the defense, that the damages sought are exaggerated and in no way reflect the economic losses suffered by the plaintiff, the wisdom of the lawyer who has employed the economics expert will be apparent to everyone in the courtroom. In other words, in addition to the obvious requirement of finding expertise in a complicated field, the lawyer must also be something of a theatrical casting director, a psychologist, and an excellent judge of character when he selects an economics expert to bring closure to the goal of almost every civil action--proving the legitimacy or illegitimacy of the damages sought in the case.

#### A. Professional Qualifications

When selecting an economics expert, look first at the professional qualifications of the witness: a) what is his educational background--what degrees does he hold; b) what is the witness' publication record; c) what honors has the witness received; d) what positions has he held both in terms of employment and public trust; and e) what are the witness' lifetime accomplishments in general?

Do not assume that the same academic credentials, which give prestige to the economist among his peers, will be equally impressive to juries in your region. In fact, degrees from prestigious but remote universities may not be as well received as degrees from state or regional universities with which the jury is more familiar and for which they are likely to have more trust and respect than more distant academically prestigious universities.

Generally, a Ph.D. in economics will provide a sufficient education in economic theory, statistics, and the other analytical tools necessary for doing forensic economics analyses. However, experience in business consulting and, of course, previous trial experience are invaluable in important cases. A highly skilled economist does not always make a good expert witness. Educational background provides only an initial guide to finding a competent forensic economist.

In addition to being a skilled economist, the economics expert must exude confidence, be empathetic, sincere, and convincing. He must be able to explain difficult economic concepts in simple, concise, ordinary English and, most importantly, present a creditable report backed by reasonable economic assumptions.

#### B. References

How does an attorney find this perfect witness--this embodiment of intellect, charisma, virtue, and honesty? It's not easy. When selecting an economics expert, the attorney should always ask the economist for names of other attorneys he has worked for in the past, and then take the time to call these attorneys and ask about the quality of the economics expert's work. The inquiring attorney should ask his colleagues whether or not the expert was a believable and persuasive witness, whether he alerted the attorney to weaknesses in the economic report, pointed out potential cross examination questions for which redirect questions would be needed, and, finally, whether the attorney would hire the economics expert again. (Nagin, 37)

### C. Oral Presentation Skills

Ideally, an economics expert would never be employed unless the attorney has had a face-to-face meeting with the expert. The single most important element that gives every economic appraisal its value in court and its influence on the judge and jury is the clarity and believability of the expert witness. In interviewing the economics expert, listen to determine if he speaks clearly and audibly. In dealing with juries, oral impressions are of great importance. If the economist speaks too rapidly, has a strong non-regional accent, or is prone to extensively use professional jargon, he may not be a suitable witness despite having a good knowledge of the subject matter.

Less easy to explain, but no less important, is the need to determine if the economist's spoken thought patterns are easy to follow. Perhaps the easiest way to understand this skill is for the attorney to recall the differences between professors who were effective in teaching graduate level classes compared to those professors who were more effective in teaching undergraduate classes. The economist will be explaining complex issues to a group of men and women who, more than likely, have never had a course in economics. For this reason, the forensic economist who is accustomed to teaching undergraduates or speaking before the general public may be a more effective communicator on the witness stand than the economist who is accustomed to teaching graduate level economic theory classes or conducting seminars for professional investment managers.

As you visit with the economist, listen to see if his conclusions about issues are plausible, logically explained and supported with clear, persuasive reasoning. Also, raise some questions that touch on ethical issues and test whether or not the expert seems to have a "flexible conscience". If his conscience seems to be flexible, his ethical standards unclear, and if he is willing to say whatever you want said, this person is not the witness you need.

### D. Personal Appearance

Appearance is important. In describing the perfect profile of expert witnesses, one lawyer said that "they should be middle-aged, wear glasses, dress in a dark suit, and carry a briefcase." However, what constitutes an effective appearance for an expert witness will vary from region to region in the country. In some jurisdictions, an economist who shows up wearing a dark pin-striped suit and looking like the banker who just repossessed one of the juror's cars may doom your case! An experienced economics expert will be sensitive to the dress that is appropriate for your community, and, if smart, they will dress that way when they come to an interview with you.

Effective appearance, however, goes beyond simply the attire of the witness. Here is a tip: when you interview the economics expert, provide him with a rocking, swivel chair and observe whether he swings and rocks in the chair while talking to you. Many witness chairs are rocking swivel chairs, and a witness who is "in motion" while giving testimony will distract the jury from what is being said. Also, notice if the witness has any other distracting personal habits such as: drumming on the table with his fingers, lecturing "to the ceiling" or speaking "to his feet," or frequently using "verbal pauses," e.g., "you know," "like," "uh," or other similar verbal injections which disrupt

the flow and clarity of his testimony. Finally, evaluate the expert's posture, his facial expressions, and his effective use of eye contact with you and others in the room. All of these personal characteristics are critical in determining the witness' effectiveness in delivering testimony to jurors.

#### E. Credibility

Of all the factors that are important in determining the effectiveness of an economics expert's testimony, without doubt, the most important is the witness' credibility. Does the witness have the educational background and experience as a forensic economist to meet the test of expertise required by the court and expected by the jury. At a minimum, economics experts should hold a Ph.D. Certainly, there are effective witnesses giving economic testimony who have not received a Ph.D. in economics; however, since there is an abundance of doctoral level economics experts who are also effective witnesses and highly experienced, why should an attorney settle for less and open the door for challenges to the credentials of his expert?

A second factor crucial to credibility is the substance and accuracy of the written report. It is inevitable that economists will occasionally make errors in their reports. The errors may be minor, and possibly irrelevant, but they will be discovered by the opposing attorneys and used to impeach the witness' testimony or to make the witness appear incompetent. Most competent economics experts will prepare preliminary reports with accompanying statements that any errors discovered will be corrected prior to giving testimony in court and that the report will be modified to reflect any new or additional information that the economist receives. Usually, working with an economist on several cases will give the attorney increased confidence in the substance and accuracy of the economist's reports. However, in every case, the attorney should review the report looking for potentially damaging errors.

Demeanor and style of presentation will also influence the economics expert's credibility with the jury. A degree of humility and honest sincerity is easily perceived by a jury. The jury does not expect the expert to know the answer to every question he may be asked. The expert should also not appear to be an unquestioning advocate for the attorney's client or case. The only advocacy that is proper for an economics expert is to be an advocate for his opinion.

During cross-examination, an economist's credibility will be strengthened by direct answers to questions and by maintaining the same tone and demeanor that was used in answering questions during direct examination. It is not necessary for the economist to be mild or meek in dealing with the cross-examining attorney; however, credibility will be enhanced if the economics expert can clearly and effectively answer with composure, questions that have been asked in a hostile manner.

Finally, the ultimate credibility of the witness depends upon the soundness and believability of the testimony he has given. If the economics expert's estimate of damages is supported by weak and highly questionable assumptions his report will not be credible, regardless of how professional the economist looks, how clearly he speaks, what degrees he has earned, or what universities he has attended.

## II. Other Factors in Selecting an Economics Expert

### A. Confronting the Unexpected

An effective expert witness must be able to confront the unexpected and deal with hostile questions in a concise, articulate, and professional manner while under great psychological and emotional pressure on the witness stand. It is equally important, therefore, that the attorney hiring the economics expert carefully assesses his ability to deal with uncertainty and ability to respond calmly and intelligently when confronted with the possibility of error or earlier contradictory testimony.

### B. Durability and Stamina

Because cases can last several months or even years, it is important that an economics expert have the ability to resurrect a long-dormant case and revise or update his report quickly and accurately. The existence of a lengthy case means that an attorney must consider the economics expert's stamina, attention span and ability to stay focused on a case during its long gestation. Also, it is important that the attorney be confident that the economics expert will remain in business for the duration of a long litigation process.

It is equally important that the economist understand that committing to work on a case is a commitment to work until the case is finished. In the context of lengthy litigation, it is only fair that the attorney and the economist have an understanding from the beginning that if the case continues for more than a year, the fees charged by the economics expert may change.

## III. When to Employ an Economics Expert

In cases involving economic loss, it is important to bring an economics expert into the litigation process as early as possible. In many cases, it may even make sense to bring the economics expert into the process well before the suit is filed. An early examination of the economic merit and potential of a case may clarify the damages issues and enhance the probability of a pre-trial settlement or the decision of the attorney to accept the case.

In cases where the liability is reasonably clear, it is especially important for an attorney to hire an economics expert as soon as possible. When hired early as a consultant, the economist can give an early estimate of the extent of damages, help identify economic materials that are necessary for the case, help select those materials which are most useful for introducing into evidence, suggest a sequence for introducing the economic evidence by relevant witnesses, help prepare questions for the direct examination of these witnesses, and help prepare direct examination questions for his own testimony should testifying become necessary.

In using this well-organized approach to evaluating damages, the economics expert is helping to make potential mountains of data and endless streams of numbers come alive as a clear and understandable depiction of the losses suffered by the client. (O'Hara, 33) The flip side of this coin, however, is that when working for a plaintiff's

attorney, the economist may also show that the damages are minimal and not sufficient to justify an extensive investment by the attorney in developing the case.

The main deterrent to the early and extensive use of an economics expert is often the costs involved. There probably is not a plaintiff's attorney alive who does not hope that he can simply file a lawsuit, make claims for damages, and then secure an early and favorable settlement of a case without any substantial investment of time or resources in developing the case. How often does this happen? Almost never. Thus, if a case is a potentially valuable one and the attorney is confident about the liability, he should not wait to hire an economics expert. The early hiring of an economics expert may be the most cost saving investment an attorney can make in preparing a case.

#### IV. Problems with Economics Experts

Knowing your experts is almost as important as knowing your client. There are pitfalls to watch out for in retaining and using economics expert witnesses. Being aware of these pitfalls can help avoid pre-trial surprises, courtroom catastrophes, and the accompanying sleepless nights.

Obviously, errors in reports, bias in theoretical frameworks, and client advocacy in economic testimony are always problems to be avoided by expert witnesses. Experts need to be accurate, impartial, trustworthy, and objective. Beyond these considerations, however, there are other factors an attorney must consider when hiring an economics expert.

##### A. Examine Past Testimony

Contradictory testimony given by an economics expert in earlier cases is one of the favorite targets of opposing attorneys. Economics experts may have stated contrary opinions in other cases or in their scholarly writings and public presentations. The past writings and testimony of potential economics expert witnesses must be carefully reviewed to see if they are consistent with the theory of damages and methodology that he is presenting in the present case.

One can be certain that the opposing attorneys will have thoroughly investigated previous testimony by the expert and will be well aware of any inconsistencies with the present report or testimony. In almost every deposition, the opposing attorneys will have copies of reports prepared by the expert for earlier cases and will explore in depth any differences that exist.

Thus, attorneys need to find economics experts who are able to effectively explain past testimony in the context of the current trial. If an economics expert does not wish to have his work scrutinized with a fine-toothed comb by opposing attorneys, he should never take the witness stand. If economics experts thought the oral examination for their doctoral dissertation was tough and challenging, just wait until they are in a deposition or on the witness stand and are confronted by a hostile, well-informed team of attorneys!



### B. Changes in Testimony

In assessing economic damages, an economics expert may change methodologies and some basic assumptions over time. It is perfectly legitimate for any expert witness to adjust his approach or methodology in assessing damages when new evidence and information make that necessary.

Forensic economics is a relatively new field of expert witnessing. Every year, the forensic economics journals are full of new ideas, more sophisticated data, and improved theories and methodologies. This is true not only in the field of economics but also in medicine, engineering, and almost every other professional field. If there were never any changes in methodologies and procedures used by expert witnesses, it would imply that knowledge does not advance and that better information never becomes available. An expert witness in forensic economics, or in any other field, who never modifies his approach, is an expert who obviously is not keeping up with developments in the field.

### C. Underestimating the Opposition's Economics Expert

There is a temptation sometimes for attorneys, especially those who do not have business or economics backgrounds, to underestimate the potential impact of an opposing attorney's economics expert. Nothing can be more devastating in the courtroom than the skillful eloquence of a competent expert. If the other side employs an economics expert, always take his deposition, if for no other reason than to assess his effectiveness as a witness.

### D. Defense Attorneys and the Economics Expert

Historically, defense attorneys have often been reluctant to retain economics experts on behalf of their clients. I am often asked in depositions why I think this happens. The answer is simple. If a defense attorney hires an economics expert and uses that expert's testimony in court, any number that his economics expert gives concerning damages puts a bottom line on the potential award by the jury. The defense's preference, of course, is that the minimal award that the jury consider be zero. Putting their own economics expert on the stand will raise the measure of damages, in most cases, well above zero.

In an advocacy legal system such as ours, this defense strategy may make legal sense. However, I find more and more defense attorneys retaining the services of forensic economists--not as expert witnesses, but rather as an economics consultant. Specifically, defense attorneys are increasingly asking economics experts to assess the legitimacy and accuracy of other economics experts' reports. Did the opposition's expert use sound methodologies and accurate and appropriate data in measuring damages? Every economic report concerning damages is challengeable, and the person best able to identify weaknesses in economic reports is another economics expert.

Increased concern about legal malpractice may also be influencing defense counsels' inclination to employ their own economics experts both as consultants and as witnesses. Failures to see errors in opponents' economics reports and to point out these

errors in trial is a growing concern to defense attorneys.

#### V. Working with the Economics Expert

Testimony in trial is generally the last task an economist will undertake, and it is often only the tip of the iceberg of services rendered by an economics expert. The most valuable contributions of an economics expert may be as a consultant and advisor. While all attorneys are interested in the "bottom line" or total damages that the economics expert calculates, some attorneys show little interest in the methodology and theory of damages that the economist is using. This is asking for trouble, especially if the economics expert is an inexperienced witness or if this is the first time the attorney has worked with him.

##### A. Documentation

In working with the economics expert, an attorney should always advise the economist that any paperwork he generates and accumulates is discoverable. This should be kept in mind in dealing with sensitive materials and in preparing any speculative analyses that may not have been requested by the attorney. Periodically the attorney should review with the economist his inventory of materials and documents and carefully assess those materials which are relevant and necessary for the economics expert to do his work.

##### B. Too Much Information

In this context, one of the problems I have encountered in dealing with attorneys is the tendency to provide too much information--information that is not relevant to my work and is not needed to prepare an economic analysis.

One of the services that an economics expert can provide an attorney is to specifically identify those materials which are necessary and to encourage the attorney not to provide reams of materials and stacks of data that are not necessary yet become discoverable if the economist is asked to keep them in his file. Also, as an expert witness, I assume the attorney wants me to be familiar with any materials that are given to me. This may mean unnecessary hours of work becoming familiar with materials I do not need but over which I can be questioned.

##### C. Data and Information Gathering

Economics experts have numerous data sources reflecting historical information and economic trends. However, they may also need to place the individuals or businesses they are studying in statistical cohorts. To do this, they depend on lawyers to provide them with case-specific data reflecting the unique economic characteristics of the individuals or businesses.

If the attorney gathers data concerning his client's damages before soliciting the aid of an economist, the attorney is likely to either gather more data than is necessary or fail to gather all of the relevant data, thereby increasing costs to the client unnecessarily.

If data is gathered without the assistance of an economics expert, the attorney should remember to: 1) gather data for periods of time several years prior to the incident; 2) gather specific data, e.g., income levels at the time of the incident; 3) and gather any economic data that is available subsequent to the incident and prior to the time of trial. The economist will need all of this data and can help the attorney identify and find the relevant information. Because time is necessary to prepare exhibits for trial as well as to calculate damages and to prepare testimony, waiting to bring in an economics expert in order to save money can easily be a false economy.

In order to assist the attorney in gathering the necessary information, most experienced economics experts will have prepared an information form to give attorneys which indicates the types of data they need to prepare a report. These data request forms vary in complexity. (A sample form is attached below.)

#### D. Keep It Simple

In all cases, from measuring the loss of a weekly wage earner's income to highly complex attempts to measure lost profits of a business, different degrees of complexity can be used in preparing the reports prepared for presentation at trial. Some economics experts prefer to use highly complex models in measuring economic losses. In some cases, complex models may be justified. Generally speaking, however, the simpler the presentation of damages in court, the more likely the presentations are to be understood by the jury. The key to being a helpful and successful witness is to be able to explain complex damages issues in a simple-to-understand manner. It is often more effective to explain losses in an uncomplicated manner during direct examination and leave the introduction of complexity to the cross-examination.

#### E. Precision in the Measurement of Damages

Knowing that opposing attorneys will attempt to convince the jury that the economist's testimony is speculative, imprecise, and totally hypothetical, the economist should point out during direct testimony that economic damages are speculative and that he do is not claiming unquestionable precision. However, he should also point out that he is there to assist the court and the jury in considering appropriate methods for measuring losses, and that he understands the jury may adjust his estimates to reflect information presented during the trial which they believe would cause the damages to be greater than or less than those shown in his report.

Admitting an inability to know precisely and without question what the future will bring can only humanize the economist's presentation. Any economics expert who would defend to the last dollar the estimate of losses in his report is an economics expert attorneys should avoid.

#### F. Hearsay Evidence

While a lay witness is allowed to testify only to those things which he has personally seen or experienced, an economics expert is permitted to give opinions based on evidence that might ordinarily be considered "hearsay". The ability of the expert to

use hearsay evidence is very important. Most of the data used in preparing a report is not gathered by the economics expert. He may use life expectancy tables, worklife expectancy tables, inflation rates, interest rates, and other data not personally gathered; however, this "hearsay" data may be presented in court in most cases by an expert witness.

The rules concerning the presentation of evidence are always evolving. However, Rule 703 of the Federal Rules of Evidence permits an expert to base his opinions on facts or data prepared by third parties as long as the material is generally used by other experts in the field and is compiled by reliable sources. What the economics expert does that is unique is to blend case-specific data with statistical cohort data found in widely accepted publications by government agencies and scholarly journals.

It is absolutely necessary that the economics expert be able to testify that statistical data used in his report is data that is reasonably relied on by other economics experts and is data that is generally available in the field of economics. For this reason, I prefer whenever possible, to rely on data prepared by federal government agencies, e.g., data found in the Statistical Abstract, and publications by the Department of Commerce and the Department of Labor.

Attorneys should always ask their economics expert if the approach he is using is one that is customarily used by others in the profession. Since the answer is likely to be "yes," the economist should be asked to identify professional journals which provide evidence that the methodology used in this case is widely used. If nothing else, this allows the attorney to see if the expert is familiar with the leading journals in forensic economics.

#### G. Assessing Strengths and Weaknesses of the Economics Expert's Reports

After the report on damages is completed and before the taking of depositions and testimony at trial, the attorney should sit down with the economics expert and ask him to point out the strengths and weaknesses of the damages report. Among other things, having knowledge of strengths and weaknesses will help the attorney assess settlement offers before the trial—both the making of settlement offers and the accepting of such offers.

While the economics expert should always be an advocate of the work he has done in measuring damages, I have never seen a case wherein certain aspects of the measurement of damages could not be challenged. Being aware of weaknesses can lead to more realistic evaluations of the potential of a case, encourage compromise, and help generate realistic settlements that can be in the interest of all parties.

In addition to assisting in settlement, knowing the strengths and weaknesses of a case will help the attorney and the economics expert prepare responses to potentially effective attacks on the damages report during cross examination.

## VI. The Economics Expert in the Courtroom

As observers of courtroom proceedings know all too well, it is not uncommon for the victory in a case to go to the side making the clearest, most understandable presentation. Style without substance is usually not sufficient for success, but if there is equal substance on both sides, the victory may go to the side with the best communications skills.

### A. Establishing the Witness' Expertise

In presenting the economics expert's testimony at trial, the first thing the attorney must do is establish the professional credentials of the expert. Here, the attorney must walk a fine line. In establishing the credentials of the expert, there are two temptations that the attorney should avoid. One is to skip quickly over the qualifications of the expert and move summarily to have him declared an acceptable witness in the case. Doing this may please the opposing attorney who does not want the jury to be aware of the high qualifications of the distinguished expert. A second procedure that should be avoided in establishing the expert's credentials is a dry reading of qualifications from the expert's resume followed by perfunctory questions certifying that what has been read is accurate.

Juries and even judges can develop confidence in a witness by hearing the expert's qualifications. The key is not to overstate or understate these qualifications. Generally speaking, it is not a good idea for the attorney to ask the expert to simply state his qualifications. The expert may leave out important aspects of his background due to forgetfulness or a natural modesty. It is generally best for the attorney to identify the highlights of the expert's career that he wants the judge and jury to know about, and then to lead the expert through those qualifications making sure to identify important career and educational achievements.

It is equally important not to overstate the qualifications of the expert and alienate the jury by portraying the expert as a "big shot". In establishing the economist's credibility, focus as much on the "witness" part of his title as on the "expert" part. It is always important to try to generate a good first impression of your witness, and to clearly establish his credibility in a manner that does not alienate the jury.

### B. The Expert and the Jury

It is helpful to the economics expert to know something about the profile of the jury before whom he will be testifying. The attorney will have information concerning the background of the jury and should inform the economist about any jury members' special competencies or difficulties in understanding the economics expert's testimony.

In the majority of cases in which I have testified, the lawyers have provided little or no information to me concerning the jury. This is not a particular handicap given my style of testifying, which is to try to explain complex economic issues as simply as possible without "talking down" to the jury.

Occasionally, I will have an attorney tell me that there are individuals on the jury who have a particularly astute understanding of economic and financial issues.

Such knowledge gives the economics expert a bit more freedom to go more deeply into complex matters such as real interest rates, discounting and present value, or the probability of receiving benefits. However, since the majority of jurors are not likely to have a working knowledge of these concepts, the expert still has to be careful not to assume too much understanding of complex financial issues on the part of the jury.

One of the things that I particularly try to avoid is having an attorney tell me which members of the jury possess special competencies. I do not wish to know that information because I want to avoid the temptation of looking at and speaking to any particular member of the jury in a disproportionate manner during my testimony.

The attorney should remind the economics expert before giving testimony that he will be speaking to a group of average men and women who are likely to have many things on their mind besides the trial. Some may be upset about having to serve on a jury; some may be bored with the case and the economist's testimony in particular; some may be irritated by the economist's accent or by the color of his tie; and some may dislike the personality and presentation of the attorney who has employed the witness. (Wang, 30)

In other words, to be effective, an economics expert will have to win the jury's attention and somehow convince them that what he is talking about is fascinating stuff. Winning and holding the jury's attention is the art of expert witnessing.

### C. Jurors' Expectations of the Expert Witness

Contrary to what might seem probable, I have found most juries to be quite interested in the subjects of income growth, benefits, the value of household services, and similar economics topics; these are matters to which they can relate personally. In any economic testimony, however, because numbers and calculations are involved, the jury can quickly lose interest. That is why it is important to present the salient parts of the damages testimony in a brief and tightly focused manner.

The importance of empathy between the witness and the jury cannot be overstated. Appropriate humor, reasonable modesty, and patience throughout the process, on the part of the witness, will help establish rapport with the jury making it more receptive to the expert's opinions. There is a fine line, however, between seeking to identify with the jury and attempting to retain a degree of formality and professional demeanor. Juries do not expect an expert to be "a good old boy." They expect the expert to be competent and clear in his presentation, while simultaneously being helpful to them as they seek to deliver justice in the case. Jurors feel a kinship with the judge and with the legal process. They see themselves as collaborators in a process of seeing that justice is done.

The economics expert, therefore, needs to keep in mind that the underlying theme crucial to success in the courtroom is that the entire process is about the quest for justice. While it is perfectly legitimate for the defense and plaintiff's attorneys to be advocates for their clients, it is equally important for the economics expert not to be seen as an advocate but rather as a contributor to the development of information that will lead to a just and fair result in the case.

It is only natural that the attorneys who have employed the economics expert will want him to be an advocate for their client. However, by becoming an advocate for

a client, the economics expert may diminish the jury's perception of his fairness and objectivity and actually hurt the case of the attorney who has retained his services.

After the trial, the attorney can determine the jury's perception of the objectivity of the expert witness by interviewing jury members. Inevitably, the expert who has rendered what is perceived to be an unbiased, objective opinion will be seen as more "believable" than an expert witness who appears to be an advocate for the attorney's client. Jurors are remarkably observant, and attorneys should always solicit their opinions about witnesses after the trial. This will help the attorney to determine whether or not he wants to use the expert witness in the future.

#### D. Direct Examination

The courtroom procedure for eliciting an economics expert's testimony is simple and straightforward:

- The Person

Establish the economist's personal and educational background, current employment, and specific qualifications to serve as a forensic economist. Do not forget to elicit some personal background. If the expert is married, has children, lives in the local or a nearby community, participates in community life, and is generally familiar with the values and culture of the community, it is important for the jury to know this. Juries like to know whom the person is they are listening to.

- The Task

Ask the economics expert what you have asked him to do in this case. This gives the economist a chance to tell the jury what he is about to explain to them and why he has examined the various topics included in his report.

- The Data

Ask the economist what data or information he has used in preparing the report. Make sure the court record shows that the data and methodology used by the economist are materials that are customarily used by others in his profession in developing similar reports for litigation purposes.

- The Opinion

Ask the economist to state his ultimate opinion in the case concerning the total amount of losses experienced by your client. In some manner, illustrate this total loss visually for the jury.

- The Explanation

Ask the economist to explain the process by which he derived the total losses depicted in the previous question.

#### E. Methods of Presenting Testimony

The method chosen to present the details of the economist's report is a matter of strategy, court requirements, and tradition within the jurisdiction. There are three basic approaches that are typically used:

- Question and Answer

The first approach involves a question and answer process by which the attorney asks a lengthy series of questions about each stage of the report, how these stages were developed, what data was used, and how the calculations were made. This is probably the worst possible method of presenting the economist's report to the jury. It can be tedious, boring, confusing, and is just generally ineffective.

- Narrative

The second method of presenting the report to the jury is to simply ask the economist to explain his report to the jury. In this approach, the economist may leave the witness stand and discuss a series of charts or slides showing how each conclusion was derived.

- Combination Approach

A third method of presentation is a hybrid of the first two. In this approach, the attorney asks general questions that allow the economist to narrate the report. This is the methodology that I have found to be the most effective, because the questions establish a dialog that can make it easier for the jury to understand the economist's presentation. This method also allows the lawyer to clarify and emphasize important issues and conclusions.

In first and third above methods, where questions are asked in order to guide the direction of the economist's presentation, it may be helpful for the economics expert to write questions for the attorney to ask. There was, at one time, an expectation that all opinion evidence rendered by economics expert witnesses would be elicited by way of hypothetical questions. This requirement now seems to have been relaxed, and experts are frequently allowed to use narrative methods in presenting their reports.

Occasionally, opposing attorneys object to a narrative form of presentation. Judges sometimes sustain their objection and instruct the attorney eliciting the direct examination to ask the expert questions. Questions are typically asked for a brief period of time, and then the expert is allowed to lapse into a narrative presentation again, because both attorneys, the judge, and the jury seem to find it the least objectionable method of presentation and the most efficient and quickest way to have the content of



the report presented to the jury.

#### F. Asking Questions

If the attorney is forced to use questions in eliciting the economics expert's opinion evidence and the economist has prepared a list of questions for the attorney to ask, it is important that the questions be brief and that the attorney not recite them verbatim. The reading of questions does not allow the free flow of witness responses. The key to good questioning is spontaneity and interaction. Written questions should only be used as guidelines and as a method of remembering important matters that should be brought to the jury's attention.

In asking questions of the economics expert, a lawyer should ask them as clearly and simply as possible. The use of complex, compound questions full of legalisms and hypotheticals, will frustrate the jury, confuse the witness, and be generally ineffective. For example, consider the following passages, which are asking the same question:

- "With respect to the plaintiff's earning capacity pre- and post-injury, do you have an opinion with regard to the comparison of the respective incomes?"
- "How does the defendant's income before the accident compare to his income after the accident?"

There is no substitute for experience in learning to ask effective questions and no substitute for experience in giving understandable, clear responses on the part of the witness.

#### G. Order of Presentation of the Economics Expert

Ordinarily, the economics expert will be the last, or one of the last, witnesses appearing in direct testimony by a plaintiff's attorney. There are several reasons for this. First, the economist's testimony is, in many ways, a summary of the financial impact of the liability testimony that has been previously presented. Second, the economist's testimony will be opinion testimony that is predicated somewhat on the evidence that has previously been presented in the trial. Using the economics expert as a lead off or early witness dramatically diminishes the impact of his testimony. A plaintiff's attorney usually wants the last thing the jury hears to be the dollar value of losses suffered by his client.

#### H. Concluding the Direct Testimony

The attorney must remember to offer into evidence all reports, charts, and other exhibits used by the economics expert. It is extremely valuable for the jury to have the reports and charts in the jury room with them so that they can refer to them during their deliberations.

- Distributing Reports to the Jury

I have found it preferable to take twelve copies of my report to the courtroom and have my attorney seek to have them distributed to the jury. This allows the jury to follow my presentation of numbers--numbers that in some courtrooms may not be easily seen when displayed at a distance. Often, the view from certain seats in the jury box is not good for seeing charts and slides. Also, some members of the jury may have 1) forgotten their glasses, 2) taken their contact lenses out, or 3) simply prefer not to wear glasses in public.

Problems as simple as these can substantially diminish the visual impact of the economics expert's report. Thus, placing a copy of the report in the jury's hands allows them to be better informed and to more attentively follow the presentation of the economist.

- Total Damages

At the end of his direct testimony, the economist should be asked if his report contains an estimate of all of the damages that have been experienced by the client. The answer is no.

Economists are not likely to testify about the value of damages related to physical pain, mental anguish, lost love and affection, and other intangible losses. The jury will have to wrestle on their own with determining the value of any intangible losses.

- Reasonableness of the Report

On more than one occasion, but especially toward the end of the expert's testimony, the attorney should ask the economist if his work is based on reasonable assumptions, and reflects "reasonable economic probability." The expert should be asked to explain why he feels comfortable in labeling his report as reasonable. This question gives the economist an opportunity to strengthen his testimony by giving examples of unrealistic alternative assumptions.

- Final Questions in Direct Testimony

In concluding the economics expert's testimony, the attorney should ask the economist if his opinion of the amount of damages would have been any different if he had been hired by the other attorney in the case. The economist should be able to honestly answer; "No."

Finally, because the opposing attorney will ask this question, the attorney retaining the economics expert should ask him if he has been paid for his work on this case. I have found it effective to have the attorney ask if I "have been

paid for my testimony." The answer to this question is "No." My testimony is not for sale. I have been paid for my time and my expertise.

#### • Objections and Cross Examinations

I do not recall ever testifying in a case wherein the opposing attorney did not object at some point during my testimony. It almost seems as if attorneys have beeper alarms that go off after so many minutes reminding them to stand and object to something the witness has said or the opposing attorney has done!

It is, of course, entirely appropriate for attorneys to offer objections in court. When this occurs, the proper response for the economics expert is simply to sit back, remain quiet and assume the role of observer as the judge and attorneys sort out legal issues. In all circumstances, the economics expert should maintain a dignified demeanor, a reasonable tone of voice, and never display anger or frustration during direct or cross-examination.

During cross-examination, the economics expert also has a responsibility to make sure that questions he is answering are not compound, complex, vague questions which cannot be answered in a useful and effective manner. The economist should break complex questions down into their component parts and answer each part of the question separately. The economics expert should also attempt to explain his answers if the cross-examining attorney seeks simple yes or no answers which would be misleading.

#### • Redirect Testimony

Finally, before the trial, it is important for the expert witness and the attorney to discuss the importance of redirect examination. An alert attorney and an experienced economics expert can communicate nonverbally in a very effective manner when the economist wants his attorney to follow up on redirect any "misleading" questions that may have been asked during cross examination.

### VII. Conclusion

As the global economy emerges and economic issues become increasingly complex, forecasting lost income, lost profits, and other economic damages will become equally complex. The field of forensic economics is a rapidly evolving discipline. In the future, both plaintiff and defense attorneys will increasingly use economics expertise in trials. The risks of not using an economics expert are too great. Attorneys who hope to successfully represent their clients in civil suits will, of necessity, have to become familiar with the field of forensic economics and develop proficiencies in the use of economics experts.

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