

February 11, 2013

RE: Ethical Issues and Experts on Economic Damages

Mike begins his 38th year as a forensic economist, and George begins his 15th year of work as a forensic economist and a vocational rehabilitation expert. A foundation of the work of this firm is that we are research-based, contribute to the academic literature, and are current on the literature and on research relevant to our testimonies. We expect to have a very busy and productive year in terms of peer-reviewed and other publications. The Brookshire, Slesnick, and Luthy 2012 survey of forensic economists has been accepted for publication in the *Journal of Forensic Economics*, and these results were discussed in our last newsletter.

Both George and Mike have chapters in perhaps the first “textbook” in forensic vocational rehabilitation work. The book is scheduled for publication in Fall 2013. George’s chapter is on approaches to estimating worklife expectancy, and Mike’s chapter discusses the nature of “handoff” issues between vocational rehabilitation experts and forensic economists. Mike and our research associate Gray Forlines will present a paper at the March 2013 meetings of the National Association of Forensic Economics (NAFE), entitled “The P problem and the estimation of worklife expectancy losses in personal injury cases.” The paper focuses upon important issues of data and methods related to labor force participation rates.

Finally, a peer-reviewed article will be published in the *Journal of Forensic Economics* entitled “NAFE and the Ethics Question.” The article is written by Robert Thornton of Lehigh University and Mike. (Bob Thornton was the third NAFE president, and Mike was the fifth president.) The article explains how the NAFE organization and its members have discussed and dealt with ethical issues for forensic economists. Let us use this newsletter to highlight important debates among forensic economists about what the eight principles (and standards) of ethical conduct mean, or should mean. This written statement of ethical standards is binding upon NAFE members, but the NAFE organization has clearly avoided any role in enforcing these standards.

Members of NAFE are clearly divided over the NAFE principle of “Disclosure,” although a majority favored the current NAFE statement in our 2012 survey. The issue is fundamental to the work of trial attorneys and economists in the discovery process and through trial testimony. The NAFE principle is that the economist should “stand ready” to provide sufficient detail in reports for an opposing expert to understand and replicate what he or she is doing. This has allowed some economists to provide no calculations or detail in their written reports and argue that they nevertheless “stand ready” to provide this detail at their discovery deposition. The problem for an opposing expert, of course, is that this detail was needed in order to help his client attorney prepare for this discovery deposition. It has been our policy to provide written reports in all cases, plaintiff and defense, where we are employed as testifying witnesses, and we disclose all assumptions and calculation tables. The point is, however, that written reports vary greatly in their degree of disclosure, and because of the “stand ready” language, those experts with virtually no disclosure in their reports do not fall below the disclosure standard. Interestingly, NAFE has a smaller, sister organization: the American Association of Financial and Economic Experts (AAFEE). Most AAFEE members are also NAFE members, AAFEE has its own statement of ethics, and the AAFEE principle on “Disclosure” does not contain the “stand ready” language.

A second debate among NAFE members continues over the “Consistency” standard. The principle is that the basic assumptions and methods of a forensic economist should not vary between plaintiff-side and defense-side work. An explicit exception is that an economist can make requested, hypothetical calculations for a client attorney provided that any conclusions are clearly labeled as hypothetical. A problem has been that economists have sometimes been less than clear in differentiating their own conclusions from dollar conclusions driven by their client attorney. It is also true that an economist may continue NAFE membership while using a substantially different (net) discount rate when on the plaintiff versus the defense side of a case. A high rate means low present value losses and a low rate means high present value losses. The NAFE organization plays no enforcement or disciplinary role, but the ethical standards have been discussed in courtroom testimony.

Please give us a call if we might answer questions or be of help, and we are always happy to participate in continuing legal education sessions.

Michael L. Brookshire, Ph. D.  
Forensic Economist

George A. Barrett, MBA, MSRC, CRC, CVE  
Forensic Economist / Vocational Analyst