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Actuarial Testimony for the Pension Actuary

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Summary: In our litigious society, actuaries are called upon in increasing numbers to present expert testimony in various types of lawsuits. This session focuses on the issues important to actuaries who would like to be expert witnesses, and speakers present some guidelines for the actual presentation of testimony.

Mr. Paul E. Pompeo: I was the attorney Joan Boughton worked with on a case for a contractor last year. I've also just filed a complaint in the Court of Federal Claims on another pension matter. That's my involvement in this session.

Mr. Richard Joss: I'm a resource actuary with Watson Wyatt Worldwide. I've been with Watson Wyatt for 16 years, and before that I was with Milliman & Robertson. I was the testifying expert in the case that Joan and Paul were working on, and I have also been to court as an expert on several other matters.

Historically actuaries were used as expert witnesses in marital dissolutions; when a couple is getting divorced, if one of the persons is covered by a pension plan, the spouse has some sort of right to the benefits. The actuary will do a present value calculation. Frequently, the working participant keeps the pension benefit, and the nonworking spouse or nonemployed spouse keeps the house, or in the case of qualified domestic relations orders, you actually split up the pension payments.

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A second area where the actuary historically has been involved in expert witness testimony has been in wrongful death or injury situations. Here the expert is trying to develop a present value of lost earnings or a present value of lost benefits. Sometimes those numbers can be fairly large.

A third one would be miscellaneous financial transactions. I've been involved in my own practice in certain real estate deals, for example. So different financial situations have come up where actuaries have been involved. But we're not going to talk about those situations. We're going to focus most of our attention on the use of actuarial experts in the pension area. We don't want to talk about divorce situations or other kinds of malpractice.

In the pension area we're seeing more and more actuarial testimony for either tax deduction or government contract situations. One that scares the heck out of me, and it should scare the heck out of you too, is actuarial malpractice. These are situations where either a client or another actuary is saying, "I don't like what you did, and I'm going to take you to court, and we're going to drag your head through the wringer."

There are some very good reasons for the increase in testimony in the pension area. Number one is certainly larger company sizes. If a company is really small and there is an actuarial difference of opinion, the dollar amounts are small. But if the firm is a billion dollar company, and one actuary says the interest rate should be 7.5% and another actuary says the interest rate should be 8.0%, then that 0.5% difference can result in hundreds of millions of dollars over a long time. It makes the litigation effort worth the expended energy.

We're operating in a fairly complex environment. I've often felt that if someone gave me a fairly decent plan summary, age/service/salary distribution, assets, and a Hewlett-Packard calculator, that I ought to be able to come up with a reasonable amount to fund that pension plan. Of course, this would just be a ballpark estimate. But this just wouldn't work today; there are so many bounds and limits on the work that we do. We live in a very complex environment. Unfortunately, the more complex it is, the more likely it is that someone will think there is an opportunity to benefit from a lawsuit.

Finally, there are too many lawyers and a general increase in litigation. We're living in a more litigious society, and it's beginning to impact our business as well as those in other professions.

What types of situations are pension actuaries likely to find themselves involved in? Well, first, there are tax deductions under our Internal Revenue Code (IRC) Section

404. IRS can audit a plan sponsor and question the tax deduction for several different reasons. Number one is assumptions. The actuary may have used assumptions that are too calculated and calculated too large a tax deduction. Number two would be methods. I'm currently involved in a situation where the IRS is challenging a method that an actuary used in claiming deductions. Number three is if maximum benefit limitations—IRC Section 415 limits—are not applied correctly, it could result in too large a tax deduction.

Next would be government contract issues. Those are *Cost Accounting Standards (CAS) 412 and 413. CAS 412* deals with ongoing contributions to a pension fund that are reimbursed by the government. *CAS 413* deals with the closure of a segment. When a company has been operating a government segment and it decides to get out of the government contract business, there's a settling-up calculation that's called for under *CAS 413*.

As things are becoming broader for many employee benefit professionals, we now move on to health care. If you have a client who has had a Medicare administrative services contract, which have changed, the Health Care Financing Administration may want to settle up to ensure that the client has been treated fairly in Medicare reimbursement situations. I've seen three or four such situations within my own firm recently.

Another area is contributions under IRC Section 412. In theory, the IRS could approach your client and claim that not enough money is being contributed to the plan under IRC Section 412. In fact, in the small plan audit situations where the IRS has challenged tax deductions, the IRS was also criticized for not bringing to court any clients for not making contributions to the plan. If you're going to be a fair IRS representative, you should work with both the maximum and minimum tax deductions. I am still waiting for the IRS to challenge a client and say, "We don't think you contributed enough to satisfy minimum funding standards." I have yet to see one.

The professional environment in which we operate is becoming less and less collegial, and I don't like to see that. One actuary is somehow able to say, "I don't like your assumptions," and then we get into a legal squabble. In my position, as the resource actuary for Watson Wyatt, I'll get calls from our associates out in the field who say, "I've just taken over a case from XYZ consultants. These guys really goofed up." After we talk about it for a while, there's a different interpretation. It's not really a mistake. We need to keep in mind that there are some reasonable differences of opinion, and if you could stretch what we might think of in our own practices as an error or a mistake into a reasonable difference of opinion, then we are probably all better served. Keep an open mind. Different people use different

systems and might see things in different ways. Also, we all pay a lot in errors and omissions premiums, and we need to keep that in mind.

We've alluded to some of the typical scenarios already. In a tax deduction situation, usually it's the IRS versus the corporation. This would be a case that would go to tax court, and we're going to talk more about what it's like to be in tax court later. Number two might be a government contract case. In this situation, the contractor has put in a claim for pension reimbursement or a claim for a settlement calculation (under *CAS 413*). The government may challenge it, and then it might go to an appeals hearing before something like the Armed Services Board of Contract Appeals (ASBCA). Minimum funding situations would once again be the IRS versus the company. I have not seen that, but I expect it will happen. One we're getting more and more of is where an actuarial consulting firm might propose a benefit improvement. And let's say they price this benefit improvement at a cost of $2 million per year. Later on, some other firm comes in and claims that the former actuary used the wrong early retirement assumption and the wrong interest rate assumption and that the new benefit will really cost $4 million per year. If it's a $2 million increase on a $20 million liability, then let's take these guys to court. There's some mitigation of damages and things like that to help make the numbers smaller, but that same basic scenario is playing out more and more often.

Mr. Pompeo: Before I take us into the next part on types of witnesses, I want to comment on what Dick was just discussing. Some of the scenarios are pretty typical, in which an actuary or the IRS will raise a challenge. Another one of the trends falls particularly to my practice in the government contracts area.

The government—because of the boom in the 1980s, the growth of assets and plans, and so on—is now taking a strong stance against contractors to get that money back. It's affecting many companies: Teledyne is in court about this; Honeywell is in court about this; we just filed with Johnson Controls about this. The case we were handling with Joan and Dick was Gould, Inc. The government is aggressively pursuing contractors, and many of your clients could have both commercial and contract work. And those clients are coming to you with questions regarding what to do because the government wants to take $20 million from the overfunded pension plan.

This certain event, which Dick has mentioned, has happened with regard to segment closure. The government wants to calculate the assets and liabilities differently than we've been doing it, or than we think is appropriate. Because of the significant dollar impact, this is clearly going to be something that you will see more of. The government is looking around and seeing huge dollar signs. Their position is that they have been contributing to your pension plan through the contracts

because you've charged them for pension cost for your employees working on the contracts. So the reason you have so much money in the plan is because of them. While that's not necessarily the answer, these are things that they're just aggressively pursuing. So it's more likely than not that you're going to see these instances more. It's important just to highlight that.

Now let's switch over to the subject of types of witnesses. We're here primarily to talk about expert witnesses and what your role might be as an expert actuary. But you should be aware that there are several types of witnesses. The first is a fact witness. Simply by virtue of being the actuary for your client, you are aware of certain facts. You are at certain meetings; you prepare the valuation reports. Maybe you're involved in decision making, and so forth. So you're not presented as an expert, but you're a witness because you have certain factual knowledge.

The second is the testifying expert, which is our primary concern. This is someone who testifies based on specialized knowledge, in order to assist the finder of fact. The finder of fact may in some instances be a jury. The finder of fact could also be a judge, because there are certain instances where there won't be a jury trial. The specific definition addressing a testifying expert is what the courts call the Federal Rules of Evidence. Federal Rules of Evidence apply uniformly to the federal courts. State courts typically follow the federal courts, although they have their own rules of evidence that are pretty consistent with federal rules anyway.

I think this is a good basis for us to use as a springboard. Scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or a certain fact. A witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

We can break this down into a couple of elements. Let's say it's specialized knowledge—scientific, technical, or other specialized knowledge. Is actuarial science part of this specialized knowledge? I think it's pretty clearly defined, and it's not going to be disputed if what's at issue is in nature. Actuarial science is technical enough that it's not the type of thing that a trier of fact could just—on his or her own knowledge—figure out. So it's appropriate to have an actuary as an expert, for appropriate actuarial science issues.

The second thing is that it has to be the kind of opinion or testimony that's going to assist the trier of fact. Again, you consider whether it is something that the judge or the jury could figure out on their own versus something that's so technical that it requires the explanation. But if it's very specific, say, the proper interest rate to use in a particular circumstance, then the jury isn't going to have that kind of

knowledge, and they're going to need the actuary's assistance to conclude whether 5% versus 7% should be used in the particular scenario.

Finally, you have to be qualified as an expert, and we're going to address issues of qualification later. But that's the final element. Who are you? Are you just Joe Schmoe? Or are you somebody who meets the criteria such that you will be qualified to expound this opinion? Will your testimony be of value to the judge or to the jury?

A third type of witness is a nontestifying expert. Obviously, the difference is, are you going to testify before the judge and jury or are you not? But as a nontestifying expert you are very useful to the litigation team, because you're still providing expert services. You're still helping the attorneys figure out a strategy for the case. You might be somebody who's consulting with a testifying expert, but you're not going to actually testify at the trial. The other important factor about this is, if you're serving as a nontestifying expert, then you're excluded from serving as an expert in any capacity for the other side. If an expert could be valuable for one purpose or another, the attorneys may not necessarily want to have you testify, but they might want to keep you from being available to the other side. That's legitimate. Of course, they would also be using you for your expertise as well. So those are the three types of experts.

Mr. Joss: Just to follow up a bit on that: this tactic not only keeps the other side from using you, but if you suspect this particular expert might be a valuable resource to the other side, then using him or her also becomes a valuable resource to your attorney's case by trying to throw darts at your argument. So a nontestifying expert may be used more than just to keep him or her from being on the other side, but to help pick that expert's brain as to how the other side might approach the case. It helps you to better prepare.

Ms. Joan Boughton: Actuarial Standard of Practice (ASOP) *No. 17* deals with actuaries presenting expert testimony. Basically the standard covers background, talks about a range of situations, discusses the various forms in which an actuary might be giving expert testimony, and then touches on some other issues.

As background, the statement became effective April 15, 1991. What it really does is recognize that more actuaries are being called upon to provide expert witness testimony. Because there are bigger dollars at stake, many more actuaries are providing expert testimony. So this was an effort to give people some guidance as to how they ought to conduct themselves when they're giving testimony.

The profession as a whole has not been a very public group, but we've been moving more into the public spotlight: one, because we want to, but also because some of these big cases need actuarial expert testimony. So we're much more in the public eye.

I will read something from the standard, Section 3.2. The standard mentions that competing actuarial opinions could lessen the public's confidence in what actuaries do. To quote Section 3.2, "On the contrary, actuarial opinions that are supportable and carefully prepared and explained or divergent can generate confidence in actuaries' competence to evaluate future contingent events. The focus of this standard is on the preparation and delivery of sound expert testimony by actuaries." This is responding to the awareness that we are in the public eye, so we should conduct ourselves accordingly.

Mr. Pompeo: This issue of public confidence is actually very important. I was involved in a malpractice for wrongful death situation out in Spokane, Washington. The difference between the two actuaries' estimates was based strictly on assumptions. In other words, the stream of missing payments was identical. One actuary valued the stream of payments at a present value of $750,000, and an economist for the other side valued the stream of payments at $10 million. The sole difference in those two present values was assumptions. One was obviously a very aggressive—high interest rate—assumption and a very slow growth rate stream of payments. The other was a very conservative—or low—interest rate assumption and a fairly high growth rate of the stream of payments. So we had two experts, one saying $750,000 and the other $10 million. The public doesn't think this is OK. That's a real-life issue of public confidence.

Ms. Boughton: I think it can also be confusing to judges and juries. They're viewing us as the technical experts, and they ask, "Well, isn't there one right answer?" We look them straight in the eye and say, "No, there isn't just one answer. This is my answer, and I feel this is the best estimate." Then you look across the table, and there is Dick's best estimate. He's also using a reasonable set of assumptions, but our estimates are very different. So it can be confusing for nonactuaries.

From the Floor: Joan, I think a good analogy that I've heard accountants use to tell our clients what we do is real estate appraisal. One real estate appraiser says a building is worth *x,* and another one says it's worth *y*. And quite often in presenting what I'm doing to my clients, I've used the word "appraisal," and it helps explain the concept.

Ms. Boughton: That's a very good idea. The range of issues covered by the standard are retirement benefits funding, divorce proceedings, insurance company reserve adequacy, lost earnings (say, for personal injury cases), and actuarial malpractice.

The various forums in which you might be called upon to provide testimony would be at administrative hearings, in arbitration, at legislative hearings, in the courts, or through interviews with the media, the last of which is also regarded as providing testimony. The case that Paul, Dick, and I worked on together was an administrative hearing but we were actually in a courtroom setting, where we had to go on the stand before a judge from the ASBCA. It felt very much like a courtroom.

Mr. Joss: Some of you may not be aware that interviews with the media are covered by the ASOP on expert testimony. So if your local newspaper calls you up and asks, what you think about changes in Social Security, remember that you're testifying as an expert when you talk to that reporter.

Ms. Boughton: Another issue covered by the *ASOP No. 17* is conflict of interest. This would be when your objectivity or the duty that you owe to your client or employer would be impaired by a conflict of interest. What would be some of the most common examples of conflict of interest?

Mr. Pompeo: Some of your conflicts are going to be within your firm itself. You have to check for conflicts, especially if you work for a big company. If someone has given inconsistent opinions, there's also conflict, which we, as attorneys, also have to address. If the witness has a financial interest in the particular event, there could be a conflict. So there are a couple of quick examples.

I wanted to interject that I think it's great that the actuarial profession itself has a standard dealing with this. It's important to recognize that we have a responsibility above and beyond what is required under any of the Federal Procedures of Evidence. It also makes you more credible as a profession, in terms of being able to reference *ASOP 17* when you're on the stand.

Another comment on the issue of the media during a trial, apart from the requirements of *ASOP 17*, is that the level of contact will depend on the litigation team that you're working with. Usually there will be restrictions imposed on any contact with the media. The primary litigator will probably be the only one communicating with the media. This way there's a consistent message given to the public. The client side might decide that it wants no comments to the media. So apart from having to follow your own standards, there will be other elements that

will go into play in determining whether or not you communicate with the press or in another public medium.

Ms. Boughton: There's also a section in the standard that deals with how your testimony could impact others. I'll just quickly read from Section 5.5:

> "The actuary's fundamental obligation when giving expert testimony is to provide the forum with a valid actuarial opinion. The actuary has the obligation to express truthfully the facts underlying the actuarial opinion. The actuary has this obligation not only to the client or employer but also to others who may be directly or indirectly affected by the proceedings. These may include the client opponent, the current and potential policyholders, the plan participants and their dependents, and an employee benefits plan action, creditors and bankruptcy court or others."

So basically, even though you're an advocate (for your client), you do also have the responsibility to really anyone who might be affected by your testimony.

There's also a section on consistency with prior results. It's recognizes that you might use different assumptions in different situations, even though the situations might look similar. So you just need to be prepared that you may be called upon to explain why you're using different assumptions. And that is very hard to do, especially when you're testifying to nonactuaries.

Last, there's a section on the background of the audience. This section recognizes that you are testifying to people who are not actuaries. So you have to strike that fine balance between educating them and helping them understand what the technical terms mean, without being condescending, because the last thing you want to do is offend a judge by making him or her think that he or she isn't smart enough to understand what you're talking about. However, you do have to explain what you're talking about, because it's not their bailiwick.

Mr. Joss: Actually that's a very practical issue as well because it will fall into what I'll discuss later.

Mr. Pompeo: The whole concept of selecting a witness who will be a good communicator is consistent with *ASOP 17.* It is also simply a practical matter that makes a lot of sense, because why would you select as an expert someone who's not going to be able to communicate his or her opinion to the judge or the jury?

Ms. Boughton: I have two comments. First, I would like to ask Fred whether there is anything else that you would add that we didn't cover about *ASOP 17*? Second, on the subject of explaining actuarial concepts to a judge, I wanted to share a technique that I tend to use with my clients, because it also turned out to be an effective tool when I was testifying to the judge. The technique is to be simple and straightforward, but then say to the judge—or client—Did I answer your question? The judge seemed to appreciate that, because after I would answer her question, I then allowed her to ask me follow-up questions in such a way that she didn't feel that I was speaking down to her.

Mr. Joss: There was one other point I was going to make on *ASOP 17.* There's one little phrase in the language that I like; it says that the standard for actuarial expert testimony is not designed to impede the creator's application of actuarial science. I love creative applications of actuarial science.

From the Floor: That's why I think the last section of the standard is about the only place where the word "must" is used. No matter what else you do, you must disclose if you deviate from the standard. That's a very important distinction.

Mr. Pompeo: That's fairly consistent with the other ASOP standards too. Take assumption selection: you can pick assumptions however you like, but if you feel another actuary might challenge that your assumptions are outside of a reasonable bound, then disclose why you're doing it and the basis for it.

Mr. Joss: We discussed earlier the issue of qualifications. In the real context, qualifying as an expert really falls into two roles. One is, in my selection of an expert, when I'm trying to find someone for a particular issue, I need to figure out whether they have the qualifications that we're looking for in order to have a credible opinion. Second, it is a technical aspect within the trial itself of qualifying the witness. We'll talk later about the process with witnesses, and Joan can share her personal experience with that as well.

Mr. Joshua David Bank: Joan, since we're on the issue of qualifications, how did you end up being the one on the stand? You said it was your first time on the stand, but aren't there specialists at Towers Perrin who do this? I know everybody has to do it a first time, but I've seen situations where we use the people who already do this. Now, why wouldn't that have happened?

Ms. Boughton: Well, I had some history with the Gould, Inc. case. This was going back ten years when I was a junior member of the firm, but the senior person on the case, with whom I had worked closely, was no longer at the firm. So I was kind of a combination between a fact witness and an expert witness. We had two actuaries,

Dick and me, talking about reasonableness of the assumptions, hence my role as expert witness. But I also had been involved in valuing the plan, doing the CAS cost for the plan, and so on. So I had the historical perspective, hence my role as fact witness. That was kind of how it happened.

Mr. Pompeo: Right, and I think in this particular instance (it's on a case-by-case basis), we did have the unique situation of having Joan so involved in the case from the time of the government's claims in the late 1980s. The other circumstance is that we were in an area where ours was the first case dealing with this issue. There hadn't been any such cases previously, and in fact, we're still awaiting the decision. But there had not yet been a case dealing with *CAS 413*, and so finding people who can espouse an expertise in that area also becomes difficult. But Joan had been dealing with the standards because of her experience with Gould, Inc., and she had also become an internal consultant on government contracts issues at Towers Perrin.

This is generally becoming a hotter topic in the government arena. To be able to identify somebody who had any hands-on practical application with the cost accounting standard as it applies to pensions was another issue that made Joan valuable. Actually, she was then in a rather odd and unique situation of serving both as a fact witness, because of her basic involvement with the client, and as an expert witness. This is the process we went through in order to arrive at this conclusion.

Mr. Joss: Can I follow that just a bit too? A common situation for the first court appearance is for an actuary who was personally involved in the case. Most usually it is as a fact witness, but we also recognize that we are actuaries. Frequently I'll get involved with an actuary who may present a challenge. This person is a great actuary, does great work, but is very apprehensive about being put on the stand. He or she is very apprehensive about giving a public speech of any kind, and particularly so if someone is saying, "I think you made an error." That's a bad word. It adds an extra strain to the element.

It's very important for the attorney then to work with this witness, especially if it's the person's first experience on the stand. And so, as a pension consultant, you could find yourself in this hot seat at some time. It is a decision on the part of the attorney involved in the case. Do we want to call the actuary who did the work? I have yet to see an attorney say, "No I don't want to call that actuary." I've worked with a couple of attorneys very closely. They say, "This actuary could hurt us. He could fly off the handle, or he may not think his case is stated very well." But it would look bad if you did not call the actuary who did the work. And so generally

the attorneys have said, "We do need to call the fact actuary, and we'll try to get him on and off the stand as quickly as possible.

Ms. Boughton: Dick, what were the circumstances of your first testifying experience?

Mr. Joss: My first testifying experience was of a major kind: a medical malpractice situation. It was the one where one expert had said $750,000 is the present value, and another expert had come up with $10 million, and I was called in as sort of an arbitrator on the part of the court.

Ms. Boughton: But having had no experience, how was it that you were called to do it?

Mr. Joss: It so happened that the attorney for one of the sides was a kindergarten friend of mine. We'll talk about that in the context of a conflict of interest in a minute.

Mr. Pompeo: Another point on Josh's question. We did recognize that we couldn't just rely on Joan either. And that's how Dick came into the picture in our particular case. We were looking for an independent person to say, "This is how I would go through things, and this is the conclusion I would come to." This had the effect of verifying what had been done by Joan and her predecessor. So we recognized that we couldn't rely solely on Joan because of the fact that there was too much of that personal involvement (as the client's actuary) and she was our only actuarial expert.

In our particular case we went through what's called alternative dispute resolution (ADR). I don't know if you're familiar with that term. More and more parties are trying to resolve things without going into court. One of the options is arbitration, which Joan mentioned regarding *ASOP 17*. Arbitration is a form of ADR. There are other methods. In our case we used what's called a settlement judge. We were already before a tribunal, the ASBCA, which is the equivalent of the trial court for government contract issues. And they provided for ADR, and we used what's called a settlement judge. Both sides prepared briefs on the particular issues that were in contention. We did counter or responsive briefs to one another. And as part of the briefing process we used affidavits from experts, and we were using only Joan at that early stage of the case. We also had an accounting expert.

Through the ADR process, the settlement judge came to a conclusion as to how he could decide the case. Unfortunately, because of the terms of the ADR, I can't tell you what the outcome was. But I can tell you that the judge specifically made a comment. We had a conference call with the judge—who was in Virginia—as we

were meeting with the government in Chicago. We didn't have the experts with us, so Joan didn't have the benefit of hearing the discussion. But the judge specifically commented that although he had not been presented with Ms. Boughton before, and whereas he had experience with the government's actuarial experts in the past, that he was very much persuaded by what Joan had to say in her affidavit. And so even though Joan had her foot on both sides of the fence (expert and fact), she served a very important role in the ADR. But once it went to trial, unfortunately the parties weren't able to resolve things despite the judge's opinion. That's when we felt that we needed to make sure that we had another independent actuary, and I traveled the globe to find Mr. Joss, who turned out to be in the same city.

Ms. Boughton: It turned out to be really nice having Dick there, because I was in an awkward position of having to defend assumptions that I had helped set, while at the same time having to testify as to why they were reasonable. So Dick served as an outside party blessing the assumptions. This made our case, I think, very persuasive. We'll see.

Mr. Pompeo: We'll move on to the issue of qualifications. As I was saying earlier, this really falls into two contexts: one, for having to qualify literally as an expert at the trial, and two, for the attorney to find someone who's qualified. Relying on the language from Federal Rule of Evidence 702 gives us the basis for determining qualifications of an expert. The language says, "qualified as an expert by knowledge, skill, experience, training or education." Unfortunately, there's no cut-and-dried rule, and it's really more on a case-by-case basis, as to whether or not any individual will be qualified. You might also look in the case law for cases where a judge will find whether an expert is qualified. For it's the judge, by the way, who will determine whether the expert is qualified, unless the parties have already agreed or stipulated that they won't dispute the experts' qualifications as expert witnesses.

In some cases you would expect a person to be qualified, but the judge will turn around and say no. In other cases, the judge might unexpectedly rely on certain aspects of a person's credentials to conclude that he or she is an expert. So there's no cut-and-dried list of x, y, and z, and then you're qualified.

Rule 702 does, however, give us an inkling of what to look for in an expert. One of them is education, certainly to demonstrate that you're educated in the field, you have particular degrees, and so forth. Work experience is another, meaning practical hands-on experience with the particular issue that you are there to express an opinion on. If you don't have that practical experience, a judge might look at you as being unhelpful: because you don't really know what the real world will say

when you're dealing with trying to select an actuarial assumption, or whatever the issue at hand may be.

On the other hand, educators and professors are often found as experts. They may not necessarily have the practical hands-on experience, but more likely than not, they're so entrenched in the issue, they've studied the issue so much, and they might have been teaching in this area for x number of years, that they have become elevated to a level of being considered an expert. For example, in the contracts area, there are a couple of professors who have been teaching for 30 or 40 years, who are considered the icons, and you see their names in many cases.

Another factor is whether or not the expert has knowledge of treatise. Are there particular professional standards in your industry that you need to be aware of? That may not necessarily be the case for a different type of profession. In particular, the financial accounting standards, your own professional code of conduct, and *ASOP 17*—knowledge of treatises like that may affect your qualifications. Some professions require licensing, and I know that you have an exam process that you go through. That will implicate qualifications. Have you completed the whole exam process, or are you through only part of the exams?

Ms. Boughton: For example, are you an ASA versus an FSA?

Mr. Pompeo: The point is that if you're only so far through the process, versus all the way, that can have an implication on how qualified you are perceived to be. Another factor is how many times have you taken the exam? If it's 20 years later and you're still taking the exams, the judge might look at you and say, "hmm." So being a member of your profession's associations, having your own publications and public speaking experience, and writing extensively on a particular subject all raises your credibility as an expert and makes you more qualified as well.

Of course, that can cut two ways, because if you have published, you also become very vulnerable. The other side can pull out your article and say, "In 1987, didn't you say such and such in the Journal of ABC? It's completely contrary to the opinion that you're expressing now." When you're sitting on the stand, hopefully you'll be prepared for this. You'll have spoken with your attorney and should be prepared to discuss the 1987 article. Otherwise, you might be sitting there back-peddling or losing credibility. So things like articles can come back to haunt you.

Ms. Boughton: Another anecdote about that relates to your biography. Your curriculum vitae (CV) is in your written report and therefore becomes a part of your testimony too. One of the actuaries on the other side had a CV that was three pages long, singled spaced, and it listed many articles and speaking engagements at SOA

and other professional meetings every year. So we got copies of all these articles and transcripts, and in 20 or so of these he represented that he had participated by speaking. Actually, he had been in the audience, went to the microphone once and said, "Hi, I'm Mr. So and So, and I have a comment to make 'blah, blah, blah.'" That's how he built up his CV.

Mr. Pompeo: I would now like to briefly cover, as an example, the qualifications for Joan. Joan had been an FSA since 1990, well in advance of when we were at the trial. She was a principal at Towers Perrin, a very respectable firm. She had an outstanding educational background; and she also had worked and had some experience in the particular area that we were dealing with—government cost accounting standards. Joan's qualifications seemed clear.

When we were looking at Dick's qualifications, he was also from a major actuarial firm. He had even more experience. He was well educated, and he also is an FSA. The other good qualification was that Dick had some past experience as an expert. I found him through somebody who handled the *Malcolm* case in the tax court. Although we were going to be doing government contract issues versus being in tax court, the ultimate issue (even though we were in two different tribunals) was the same, as it dealt with selection of actuarial assumptions. In particular, the appropriateness of an interest rate was at issue in one of the cases he previously testified in; the tax court had relied on his testimony. The actual text of the case includes a discussion of Dick's opinion, as well as the court's line of reasoning in coming to its own conclusion. So his past testimony, and especially that it was favorable, added to Dick's qualifications.

The credibility and persuasion of the expert are really independent from the person's qualifications. As I said earlier, it's the judge who will decide whether or not this person is qualified as an expert. It's also the judge who will decide how much weight he or she is going to give to the expert's testimony. The expert could be the best thing since sliced bread, but if for some reason the judge thinks that the expert isn't credible, he or she may consider the other side's expert to be more persuasive.

Certainly credentials that we've already identified for your qualifications will affect the credibility and persuasiveness of an expert. The ability to withstand cross-examination is another. Once you give your opinion and testify on direct examination, the other side will examine. For example, the cross-examination may include a question about an article you authored that appears to contradict your testimony. They will try to make you look less credible, and if you are unable to withstand cross-examination, then you can deteriorate in the eyes of the judge and the jury.

Some of the things that would taint credibility might include a personal bias that has been brought out on cross-examination. Or there might be conflicting statements you have made, either in prior testimony or in your deposition. For example, in the case that we dealt with, the government referenced the transcripts of a prior trial in which our accounting expert had testified and they questioned him: You said X in the pension trial, and you're coming up with opinion Y now. He was put in a position of having to justify the two different opinions, and to explain that he was not being inconsistent with the two opinions because X and Y had two different contexts, and it's perfectly legitimate for X to be appropriate in one set of circumstances, while Y is more appropriate in the other case.

There are also what I would call artificial aspects that might affect your credibility. One of them is the age of the expert. Joan likes the little note I prepared about the old adage of having gray hair, that this is one time to forget using the henna rinse. But there's another statement in a 1994 article in the *Minnesota Law Review,* in which the author wrote about experts. In the article, one attorney describes her ideal expert trial witness as someone who is around 50 years old, has some gray in his hair, wears a tweedy jacket, and smokes a pipe.

But the bottom line is that people will actually consider appearance. They will look at an expert and wonder, just by appearance, whether that person has the age and experience that will make them feel more comfortable. Are they really going to be a credible expert in the area? That's not to say that you can't have an expert who's in his or her 20s or 30s; but it's just one of these artificial things that comes into play. We have to deal with it in life in general, but it plays itself out in the courtroom as well.

Another example is your demeanor. Are you warm and endearing, or are you abrasive?

Ms. Boughton: That goes for the attorneys as well.

Mr. Pompeo: If you're arrogant, it will probably diminish your credibility. Arrogance can also go toward the issue of being patronizing, which we raised earlier. In the case Joan, Dick, and I worked on, there was an accounting expert on the other side who came across as very abrasive in the way he responded to the questions that we posed, and I'm sure that had an impact on the judge. You could almost see the expressions on the judge's face reacting to the way that the accountant was responding to questions.

Ms. Boughton: He almost came across as being uncooperative. The questions were posed to him, and he took a posture along the lines of "You can't question

what I just said, because I am who I am." I think the judge was pretty annoyed by that.

Mr. Pompeo: Another aspect that spins from the concept of demeanor is just demonstrating that you're a human being, that you're not just this icon who is put on the stand to expound on some esoteric topic. You're human. One of the components of that is having a sense of humor. But, as Dick will tell us, having a sense of humor isn't always a good thing.

Mr. Joss: I sometimes try to lighten up the mood of the courtroom. But if you've ever seen your humorous anecdotes (ones that sounded great in the courtroom and even brought laughter) get transcribed into writing, you know they don't read funny at all. You have to be careful with it. There was a point in our case where I was talking about fees, and I had used some Towers Perrin numbers. I said that they charge way too much, and they must have been a sloppy firm to charge so much money. The next day the attorney for this case came and said, "Mr. Joss, yesterday you referred to Towers Perrin as a sloppy firm. Did you really mean that?" And I said, "No, no, I really didn't, they're a good outfit." So I had to backtrack quite a bit, especially since the other expert—Joan—was from Towers Perrin.

Ms. Boughton: Of course, I had also asked the attorney to please make sure that Dick correct what he had said, even though it was meant facetiously.

Mr. Joss: Another point is that if you ever find yourself on the stand, be aware that they will dig up everything they can find on you. When I was involved with Vincent Elkens, the attorneys prepared me by asking, Dick, do you have any problems? I said, no, there's nothing to worry about. In the middle of the trial—in front of the IRS in the tax court—the attorney for the government said, "Mr. Joss, are you familiar with a firm called Spread Resources?" Yes, I am. "Did you sign the Schedule B for 1983 for Spread Resources?" I said, "Yes I did." "How many participants are in the Spread Resources pension plan?" There were seven or so. What they were trying to find was a Schedule B for a small plan where I had used a high interest rate. At that time the attorney I was working with called for a quick recess before the other side could get to the next question. The judge allowed for the recess, and the attorney runs over and says, "Dick is there a problem here?" I said, "No, it's cool." So then the IRS attorney came back after me. Spread Resources, which sponsored a seven- or eight-person plan, was actually a holding company that participated in a joint trust fund with the largest construction company in Washington State. So the assets were invested as if they were a big employer. That was the essence of the testimony. Here the IRS thought they had the smoking gun, and they were ready to nail me. Be ready for absolutely anything that can come up.

Mr. Pompeo: A final point on the issue of credibility would be your ability to communicate. This is very important. If you can't speak in a clear and persuasive tone, if you can't put things in a human context, then you won't be a successful expert witness. As actuaries, you can talk to each other using jargon, and everybody knows what you're talking about. But when you're talking to a judge or a jury, to whom these issues are new, you have to make sure that it's communicated so that a layperson can understand what you're talking about.

Ms. Boughton: You also have to make sure that the attorneys don't keep getting their assets and liabilities mixed up.

Mr. Joss: A very important role for the expert is to keep straightening out the attorneys. They'll keep trying to put certain words in, and they get it confused every now and then.

Ms. Boughton: In fact, there were many times when Dick and I would pass notes to the attorney to help him ask the questions the right way. He knew where he wanted to go and what he wanted to get out of the witness, but he just didn't know exactly how to ask the questions. So we kept passing these little pieces of paper his way.

Mr. Pompeo: This moves us into the selection of an expert. Much of this overlaps the discussion that we had on qualifications, so I'm not going to go into all the detail. Again, the past experience as an expert is important; in Dick's case that was what made him very valuable to us. I used word of mouth to find Dick. I started by calling different actuaries. I knew of an actuary on another case: we couldn't use him, but he knew someone who had dealt in this area. One call led to another, and I ended up calling from Washington to New York to Los Angeles to Detroit to Seattle, back to Washington. This is how the finger ended up pointing at Dick.

Researching through case law might be a way to track down an expert; the case always identifies the law firm. So I can call up Baker & McKenzie in Chicago and say, "I understand that you handled case XYZ. You used an expert. How was he, and how can I get in touch with this person?" I've had the same thing happen with me actually. A firm was considering using Dick. They called and said, "Could you please give us a copy of the report that he had prepared in the Gould Inc. case, because we want to figure out if he's appropriate."

Then again there's the practical experience. There's an issue of being a professional witness. Some people almost do this for a living. One hears pros and cons about selecting a professional witness. On the one hand, they'll be very polished. They'll know how to move in a courtroom, how to respond, how to help the attorney on

their side, and how to deal with the attorney on the other side in the cross-examination. On the other hand, they can end up becoming too slick, such that it implicates their credibility. Also, if the person is a professional expert, he or she may be subject to too many conflicts. If you are testifying in many cases, the likelihood of conflict increases.

Mr. Joss: This brings up a good issue. I get called about expert testimony issues from time to time. I turn down more than half. You have to maintain your own credibility. You may be asked to be a expert because someone thinks you have high credibility, but you may say, No, you guys are on the wrong side. I had an attorney say, "Well, Dick, we owe the client the best defense." I said, "You're the attorney. You owe the client the best defense. I'm the expert. I just go and tell the truth. I don't owe this guy a defense at all." So my advice is, if you think you're contacted by an attorney who is facing an uphill battle or is on the wrong side, be clear that they'll find somebody; don't let it be you.

Ms. Boughton: You want to be careful you don't end up looking like a hired gun. I want to mention something about the practical experience. When the other side was examining me on credentials, one of the questions was, How many clients have you worked with who were government contractors, with U.S. headquarters that had moved from Chicago to Cleveland, and who, during 1987, divested units that made green-colored torpedoes, and who used XYZ pension plan assumptions? Well, when you get down to criteria that specific, there's only one. The other side says, "Ah ha! You don't have very much experience!"

Mr. Joss: I was asked the question, How many municipal plans in the State of Florida have I served as the consulting actuary for? The answer was zero. I had not served as actuary for any municipal plans in the State of Florida. Let's talk about municipalities in Washington State and so forth, which my attorney then asked. But it was sort of the same as Joan's experience: Ah ha! You've not worked with any municipal plans in the State of Florida.

Mr. Pompeo: Another issue that I would consider in terms of selecting an expert, which is really a practical matter, is concerns about cost. If you have a client who has a limited budget, then that's going to determine who you're going to be able to afford, and how many experts you're going to be able to afford. That is certainly a reasonable concern that we always have to be cognizant of.

What's the value of having multiple witnesses? As we discussed earlier, in the case that we were involved in, it was very valuable to have two actuarial experts, in order to support Joan's testimony, which may have been weighted less than if she had not been intimately involved with the client. In our case, we needed another

actuarial expert to show two consistent but independent conclusions. The government side, for example, ended up with three actuaries. Because our case was so good, they just felt like they had to pile on the experts.

Mr. Joss: Even when it's an actuarial case, you end up dealing with a variety of experts. It isn't uncommon, in actuarial cases, to have an economist, an expert on employment patterns, or an expert on career development called to testify. There are more experts out there than you can shake a stick at. The bigger the case, the more likely you are to see a large number of experts.

Mr. Pompeo: That goes back to the cost issue. I need an accountant, an actuary, and an economist, but I also have a budget. So can I have two actuaries, one economist, and one accountant who will suffice? What's the more important issue? Is the actuarial issue really more important? Those questions all have a bearing on the decision.

The American Bar Association's model of professional conduct addresses issues of payment of expert witnesses. It prohibits the use of a contingency for an expert. The concern is that the fear of losing will compromise the expert's ability to be neutral.

From the Floor: What about precedential cases?

Mr. Joss: If it's a precedential case, I find that clients are more willing to spend more money than if it's one that has been tried many times before.

Mr. Pompeo: That's true. In our case, we had to find one. This was probably the reason why the government was equally concerned about having so many actuaries on their side. They did not want to lose this.

Mr. James A. Marple: On the subject of budget, one of the perceptions I have, particularly when you're against the government budget, is that the other side has an unlimited budget. Is that your experience?

Mr. Pompeo: Unfortunately, yes. It becomes very frustrating when the other side is the IRS, or the Air Force, or someone like that. Often, the attorneys on the other side will simply decide they are going to go all out with their experts. What concerns do I have? As a private practitioner I have real concerns about my client's expenses. If I make a representation that a case will cost *x* dollars, then I really have to stay as close as I can to that budget. But you raised a good point: the government, unfortunately for us, may not be concerned about money issues. On the other hand, there may be a reason for that because the government typically has

greater difficulty in obtaining really qualified experts. The best experts are typically in business; they're not working for the government. For example, in our case, a couple of the actuaries that the government used were government actuaries from government agencies.

Many people in private practice also don't want to be experts for the government, because it creates a business conflict. If you have been an expert for the IRS in particular, then it implicates your ability to perform for a whole variety of clients. The bottom line is that you'll serve as an expert, but you are also a practitioner and need to be able to earn future income, perhaps from other expert witness work, so you may not be willing to work for the IRS.

From the Floor: There's even another side to it. It's certainly true that the government will spend more than a corporation. But I've also seen situations where the government gets a contract for an expert, and then they have a mandate and a budget to use that expert. The expert, however, is limited because of that budget and particular time frame. Then if the government wants another expert, they have a very difficult time justifying more budget and another contract. The corporation, on the other hand, can have fewer problems deciding on obtaining more experts.

Mr. Joss: There's another angle too. The government sometimes tries to litigate in situations where I would advise them not to litigate. If I'm working with a private plan sponsor, and I really think there's a problem, I'll advise them that they'll probably lose, and they should therefore settle on some basis. This means I only testify for a company when I really think the government is wrong and I think my client is right. That's the only time I ever will wind up in court. I don't say, "Oh, gee, this is a close one." If it's a close call, we'll go make peace with the government and settle on some basis rather than go to court.

Mr. Pompeo: Let's move quickly through the subject of depositions. As an expert witness you will be deposed. Federal and Civil Procedure 26 requires the parties to identify the testifying experts. The court will probably set the time for when you have to take the experts' depositions. Deposing testifying experts is routine and very likely. So apart from playing your role as assistant to counsel, developing your independent opinion, and ultimately testifying (if there is a trial), you're almost guaranteed to have to testify in a deposition.

A deposition is part of what we call discovery. It's a method of discovering facts, and in your case, discovering your opinions. Generally it's an oral questioning of you by opposing counsel. Your counsel will be there to object. A court reporter will transcribe your testimony, which can show up later in the trial. So you have to be well prepared and make sure that what you're saying is your opinion and that it

is going to be consistent with what you'll be saying at trial. You also have to speak very clearly and articulately because everything is transcribed and will be printed for the judge to read. So just be aware that the transcription of spoken words can come across as having a completely different meaning than what you intended when you gave your testimony.

Fortunately, you have the benefit of being able to review the transcript and submit any necessary changes. But it is something that you have to be cognizant of, because you can't change what you said in your testimony, even though you may have incomplete sentences.

Another purpose of the deposition is for the other side to find out what your opinion is. The other side can more effectively use that for cross-examination at the trial itself. The opposing side will try to discredit you or to point out that you didn't consider certain issues. It's also used for their experts to testify to the contrary. To make sure that opposing experts are going to discuss an issue, we'd better make sure our expert testifies for opinion that's opposite of the other expert.

Let's quickly cover testimony. Once you get to trial, you have to be qualified as an expert. There's a process under the federal rules known as *voir dire*. It is used by the opposing side if they have questions about the expert's qualifications. *Voir dire* is used to try to disqualify the person as an expert. If the opposing counsel is successful, the judge should rule that the person will not be qualified as an expert. That's the first stage of the process. Joan actually went through part of that process when she was on the stand. We also went through the same thing with one of the government's experts.

The government's attorney first asks the expert questions about his or her qualifications. Then we counter by further exploring the person's background and experience, and show how the opponent is not on point. At this point, the opponent typically motions to disqualify the expert or at least temper the weight that the expert's testimony will be given by the judge. When the government proceeded with *voir dire* for Joan, we were successful in demonstrating that she was perfectly qualified. On the other hand, the government was not successful in proving their actuarial expert was qualified. They were attempting to have their expert actuary qualify beyond his experience. We were able to prove he was beyond his experience level. As a result, the judge ruled that the expert was not qualified; she would not accept testimony on a certain area, and about two-thirds of the expert's testimony was struck from the record.

Ms. Boughton: Under Federal Procedure Rule 26, you will have to prepare a written report, which becomes a part of your testimony.

Mr. Joss: In tax court, the written report becomes the direct testimony. All the opposing attorney can do in tax court is say, "Mr. Expert is this your written report?" "Yes." "Does it tell you that the client shouldn't owe any more taxes?" "Yes." End of cross-examination, end of examination on the part of your attorney. That then leads right into the last part of the testimony, which is when you are subject to the other side's cross-examination. So, in tax court, you don't get the advantage of being able to say why you arrived at your opinion. It has to be in the written report. And then the other side can hammer away at you.

Ms. Boughton: And they will.

From the Floor: Are all of the experts allowed to sit in for the entire trial? Are they allowed to hear opponent's experts testify?

Mr. Pompeo: There is no cut-and-dried rule. The judge may determine, usually with the agreement of all the parties, that certain experts may be allowed to sit through the trial. As we mentioned earlier, some experts serve in some way as an assistant to the counsel, which becomes an important and necessary role during the course of the proceedings.

Mr. Joss: Disallowing experts to hear the entire trial can be waived when both sides agree on that. I like to be with my counsel if I'm in court. I've also been involved in a couple of situations where the other side doesn't want me to be there at all. So you have to be ready for anything.

Ms. Boughton: A final point is that being an expert witness is a lot of fun, and it can add some spice to what you're currently doing with your clients. So if you get a chance to do it, I would say to go for it.

From the Floor: Now, you have three things. You have the written report, the deposition, and your testimony. That's a handful to keep track of. What order do you do this in? Do you do the report first, and then make sure your deposition answers consistently with your report, and so on?

Mr. Pompeo: Typically the deposition will come first, because the process called discovery is one of the first stages in the litigation process. So you may or may not have already prepared your written report. You may have thought out your points and have come to an opinion by then, but it's just not in writing. The deposition is typically going to be the first stage. The written report and the testimony are really one and the same in a certain context. It depends on what tribunal you're in. The written report will be prepared before you go to trial, and it has to be exchanged between the parties, typically a couple of weeks before the trial. The judge will also

have a copy of it before trial. The testimony itself will consist of the submission of the report and then your own counsel confirming that it is your opinion. There are some cases, however, where you will be asked further questions to expand on what you said in the report. Your other testimony will be on the cross-examination, specifically, questions by the opposing counsel.