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The Art of the Expert Witness

Track: Pension

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Summary: Learn from two skilled professionals about the reason for expert witness testimony, the process involved in preparing expert witness reports, and the joys and pitfalls encountered. The proposed Actuarial Standard of Practice on expert witness work is also incorporated.

Mr. Colin E. Southcote-Want: I am an actuary from Seattle, Washington. I have been involved in actuarial testimony for about 20 years, specifically in the area of valuing pensions in marital dissolution. I run my own actuarial consulting firm, Albion Actuarial Consulting, Inc.

Mike Conefry is with us today. I spent a very pleasant time at breakfast this morning, talking with him about his experience. Mike is originally from New York, but has lived for many years in New Orleans, Louisiana, where he is now a principal of Slabaugh, Morgan, Conefry & Associates, working in pensions and health. He also spent a couple years working for Bethlehem Steel during a very interesting time in the early 1970s when they were renegotiating some union contracts. Mike has some interesting war stories to relate to us. I am looking forward to that.

Mr. Michael A. Conefry: I am going to give an overview. My background in expert witness work is quite broad. I have done the usual things such as qualified domestic relations orders (QDROs) and actuarial valuation-type testimony. But I have also done quite a few others.

I am going to go over the nuts and bolts—the background and the procedures. I will spend a little less time than planned on it, since we have a lot of somewhat experienced people attending. Then Colin will go into his presentation.

Civil litigation. What we lay people call lawsuits, are not called that, of course, in civil litigation. The initial filing of a suit is variously called pleadings, a complaint, or a petition, or some such similar name. The response by the defendant is the answer. The initial filing is concise, to the point, and composed of prose style itemized paragraphs stating the facts behind the suit, the

name of the corporation, the lay of the land, the issues involved and the request for relief from the court.

That is followed by an answer, which typically is almost useless. Usually the response is along the lines that the defendant denies all of the allegations, except to acknowledge that it is a Delaware corporation. Of course, that does not get us very far.

Then we get into the nuts and bolts—the motions and briefs; motions to the summary judgment, which, of course, are attempts to throw the issue out completely on some legal or other definitive issue. That is where you start getting a feel for the issues involved and the opinions and the positions of both parties.

Beyond that, the discovery process involves depositions, the production of document requests, and interrogatories, which are simply formal questions filed with the court for mandatory response.

We have all developed conceptions about what is permissible questioning in a legal proceeding and what is a permissible request for a document, due process, and so forth. That is primarily oriented toward criminal rather than toward civil litigation. In civil litigation it is an open ball game when you're talking about discovery. It was best described by an attorney I once dealt with in terms of, "In a criminal case, it's the state, all the people, everybody against one individual. In civil litigation, it's one individual against another; consequently, the court typically takes the view, when it comes to discovery, that anything is discoverable: notes, transcripts of telephone conversations, nowadays more importantly electronic media, e-mail, diskettes, hard disk files. Anything is discoverable and the court will sort out its admissibility or propriety in the proceeding."

So it is important to understand the distinction between an expert witness and a consultant. That is of profound importance, and it is especially important, if you are an expert witness, that you keep to a minimum the amount of written documentation and files that you have in your possession, because it is all discoverable. I will get to the ways in which it may be possible to protect certain things as confidential, if you decide not to work as an expert.

There are two important concepts: the work product doctrine and the attorney-client privilege. Under the federal rule of civil procedure, the work product doctrine protects from discovery any materials containing the mental impressions, conclusions, or analysis prepared in anticipation or in the course of litigation, unless the party seeking discovery demonstrates a substantial need for the document. Of course, that demonstration would be to the court. In similar fashion, the attorney-client privilege applies to communications made in confidence by a client to an attorney for the purposes of obtaining legal advice, as well as the confidential communications made by the attorney to the client if such communications contain legal advice or reveal confidential information on which the client seeks advice.

Now, the fundamental distinction, between whether things are discoverable or not, is often misunderstood, even by attorneys with whom I have had contact. I find that hard to believe, but it has been true.

Federal court rules and procedures are fairly explicit about the need for a report, and what it must contain. When we get to the expert report and how to prepare an effective one, I will discuss that more deeply.

In state court, at least in Louisiana, which I am the most familiar with, and in Kentucky and New York, the requirements are much less formal. But in federal court, the expert report is quite vital and necessary by the rules of the procedure. In tax court, there are some additional special issues. In *United States v. Scanlon*, because the expert had a relatively elliptical report, and then attempted to expand on his opinion at court itself, the court threw out anything that he did not have in his initial report. He was not allowed to testify on behalf of his client as to anything except the relatively elliptical and brief issues that he had outlined in his expert report. So, clearly, in federal court and especially in tax court, the expert report should be quite comprehensive

On the issue of how to define one's role, an expert is retained to render an expert opinion at trial, and, of course, that can be in the context of the expert report as enhanced and expanded upon by testimony. A consultant is retained to assist the attorney throughout the litigation process, but specifically without the intention of testifying at trial and being presented and qualified as an expert. In a moment I will get on to some of the reasons why you should choose one path over another, but the discovery rules I have already mentioned are very, very different with respect to each. A consultant can be protected within the attorney-client privilege and in the work product doctrine; an expert cannot.

Briefly, I would like to describe my approach to expert testimony when contacted by an attorney. Those of you who have had the experience, I am sure, know that you are not always contacted at the outset. As a matter of fact, more often that not, you are contacted when there is a severe crisis and things are out of control. They need you yesterday, and they need you to deliver an expert report or they are going to be thrown out of court, and so forth. The latter is more common than the former.

My philosophy is to look at the entire case—look at the pleadings, the response, the answer, any briefs and motions, as well as listen to what the attorney wants you to present, and develop your own objective, friend-of-the-court style. This is my philosophy, but I feel strongly about the friend-of-the-court style opinion about the issues involved. Indeed there has been a recent move by a lot of judges in federal court and in the state of Louisiana to retain their own experts, particularly in highly complex and technical areas. There has been a tendency for a number of experts to become advocates. We are going to talk a little bit about the advocacy situation, which should be interesting, because Colin and I have somewhat differences of opinion about that.

Because they are so tired of trying to separate the wheat from the chaff, especially in front of a jury, the courts have actually retained their own experts for an objective, true friend-of-the-court opinion about issues that come before the court. I prefer to approach it that way—truly objectively. And then, in determining my role with the attorney, I use my developed opinion in discussing it with the attorney to come to a meeting of the minds on the best way to approach utilization of my services, including none at all.

If my opinion is strongly consistent with the intentions and desires of the attorney, then being used as an expert would clearly be indicated. Now, even within that, there is a tactical and even strategic game, which has to be played regarding when you come out as an expert and when you are really formally announced as an expert. The discovery rules require and the court will usually establish a calendar of deadlines for various things such as expert reports and, before that, there is a disclosure of the experts to be presented by either side. There is an advantage in delaying that disclosure as long as possible, because something may develop which would cause you to much prefer to remain in the background as a consultant, as opposed to being a true formal expert.

Conflicts of interest should be addressed as a first issue. Clearly, if there is a legal conflict or if one of your firm's clients happens to be the opposing side, you have a legal conflict and a professional conflict. There could be political business conflicts or philosophy conflicts. For example, my background has been oriented more toward corporate and governmental clients, toward employers as opposed to employees. So, quite often in certain types of litigation, I would be professionally uncomfortable at representing a union, for example, against a large employer who either is or has been or could be a client of mine. That is just a philosophical and business background conflict, which is just there. It's a fact of life. Those types of things should be determined up-front and discussed with the attorney before your role proceeds any further.

What are the qualities of a good expert witness? Again, my philosophy is to have my true, comfortable, professional opinion—something that I can and do believe in, that I can present in depositions, sworn testimony, affidavits, and court with full conviction. Objectivity goes a long way toward supporting that type of a role as an expert. I believe that that is one of the fundamental prerequisites of being a good expert witness. Experience, of course, goes without saying.

Creativity. One of the reasons I like to get familiar with all of the aspects of the case is that the attorney may feel that he or she wants an actuary to represent the case, but really does not know why. If you are familiar with the entire case and all of the issues, there are many situations where, based on your experience and your analytical skills, you could be of considerable help in channeling the arguments in the case. Of course, our analytical skills are a briar patch. We are actuaries and that should be and often is, of course, one of our biggest strengths.

Then there is the advocacy issue; credibility, to me. I have seen strong advocates in court and at depositions. Nothing comes across as more transparent than an

advocate who does not truly believe in his or her opinion, who is promoting an agenda just for its own expeditious purposes. Of course, a judge is going to see right through that, and those jury members will see right through that. It's a tangled web. Even if your principles would accept it, in my view, advocacy is something that is a very, very difficult slippery slope to get on.

Communication skills are of paramount importance in being an expert and a consultant, especially in writing an expert report and in testifying. Composure and the ability to think under pressure are important, especially at depositions. You will be placed under pressure at depositions. There is not any traffic cop; there is no judge at a deposition. Some attorneys will have a style that will be downright abusive. I have actually chastised an attorney by whom I was retained for abusing the opposing actuary who was relatively inexperienced. During a break I chastised him strongly because it was inappropriate. Even the adversaries can still maintain respect and cordiality, despite differences of opinion.

Mr. **Southcote-Want:** Mike, it seems to me that sometimes the whole purpose of a deposition is to get the expert to make statements that he or she would not normally make, so that they can then be used against him or her.

Mr. **Conefry:** That is exactly right, and losing composure is one of the best ways to make a rash statement or an inappropriate statement that you'll easily regret. The depositions are very difficult. They are tedious by definition. They will last for hours on most occasions. They start at the cradle. It is just extremely tedious, and it is very easy to lose your patience and composure, especially when the attorney, who is much more experienced at this type of thing, deliberately tries to rattle you or unsettle you, back you into a corner, or get you to acknowledge something uncomfortably.

A typical question might be, how many papers have you published? "Well, I have never published a paper, but I have been doing expert witness testimony for 20 years. Publishing papers just is not my thing." Now, your knee-jerk reaction to answering that question is going to be to show embarrassment, maybe blush. Well, I do not. I am not ashamed of the fact that I have not published papers. I have a long resume with my experience on it, and I just answer the questions factually and quickly and let them go on to the next one. I say "none" and go on.

In areas where there is back-and-forth questioning, where an attorney is probing, sometimes they might try to be sarcastic. Not all attorneys are this way, but this is the style of many attorneys. They will be sarcastic or contemptuous of statements you made. A clever attorney can be abusive and sarcastic and uncivil, and the transcript will not always show it. With the less clever ones, the transcript shows it; of course, it is shown there for what it is.

Mr. **Southcote-Want:** Mike, I think in my experience that the deposition has been worse than the court appearance. One war story I have is of a situation where I was asked to bring to the deposition work papers. I had worked on this particular project over a period of several months. I have a habit, of each new day I work on

a project, to cross out the date at the top and write the new date. Some of these pages had dates after dates after dates written on the top. The opposing attorney seemed to delight in going through this and saying, "So, you worked on this on May the fourth, and May the seventh, and June the third, and July the second, etc," just, really, to make me feel awkward. That was all he was doing.

Mr. Conefry: Point quite well taken. On the subject of depositions and the tedium, I have to tell a quick story from a few months ago when I was to give a deposition that was mandated by the court. By the way, attorneys typically are hysterical, last-minute, crisis-management-type people; litigation attorneys in particular. This particular attorney was especially bad. He was so bad that this particular deposition of mine was mandated on a specific date. He told me about it with only three or four days notice. I had a client conflict—a meeting that had been set up with a client going out of town, and it was set for about four hours after the beginning of the deposition. Then he proceeded to tell me that the attorney for the opposing side was very tedious. Well, of course, depositions are tedious to begin with. I had a really bad attitude going into this deposition. It was raining and windy in New Orleans that day, and by the time I got to the conference room I was really not in a good frame of mind.

I walked in and there was a 30-foot long conference table with a huge television camera aimed at the chair at the end of the table where I was going to sit. It was rather like the videographer or photographer at a wedding. He was running the show. Finally, we got into the deposition, and it could not have gone more smoothly. The attorney was an absolute professional and was solicitous of my time. He knew I had a meeting and said that at the beginning on the record. He kept his questions concise and respectful. After it was over he shook my hand and said, "Mr. Conefry, I enjoyed taking the deposition of a true expert. I always learn something."

Well, here I went into it with a bad attitude and someone rewarded me. It was a wonderful experience, so sometimes good things happen at depositions.

Mr. Southcote-Want: Sometime after you have given the deposition you'll get a phone call telling you that the transcript is ready for your review. When this has happened to me, the tone of voice that has come across has been, "We really don't think you should bother." But it is actually very, very important to make sure you take a look at the transcript of the deposition. There will be loads of errors in there; loads of things that you have said that have been typed as something completely different. So it is very, very important to go over the transcript afterwards.

Mr. Edward H. Baker: I am self-employed. You should never give a deposition without providing initially that you be able to review it, correct it, and sign it. It would be a mistake to let a deposition go unchecked because, among other things, the court reporters or recorders will misunderstand words and you will get some really strange things into that deposition. Then the attorney will take it to someone

else and say, "What do you think of this?" and, of course, it gets very confusing. So always require that you see and sign the deposition.

Mr. Conefry: That is an excellent point. It has become almost a matter of routine. Any good attorney will almost always insist that you do that. It is really the best way to do it.

On that point, I will skip ahead to one or two of the pointers I was going to give from my experience in depositions and in court.

In a deposition, your audience—you should always know your audience is the court stenographer. That is really your audience, because what you say at that deposition is going to be used out of context quite often, by definition, because it is hours and hours of testimony. Snippets are taken from it. If the court stenographer has misinterpreted or misconstrued what you have said, of course, that is what the court is going to see. It is what the jury is going to see and what the judge is going to see, and it is what opposing counsel is going to use.

Here are some key pointers in testifying. Know your audience. In a deposition, it is the court stenographer. In court it is the jury if it is a jury trial; the judge then is the traffic cop. If it is a nonjury trial, the judge is the audience. Look at that jury when you are speaking. Speak slowly and avoid jargon and acronyms, which we love in our profession, especially. If you are giving a deposition about some purely actuarial things, you really have to remember to speak slowly to avoid acronyms such as FIL and UAL and PBGC, because nobody knows what they mean. Nobody outside a relatively tight circle of professionals really knows those acronyms and all that jargon.

What we are trying to communicate, especially the technical issues about which we are often called upon to testify, is totally foreign to the attorney on the other side, let alone to the court stenographer. It is very important to keep that in mind.

I have a tendency to speak too quickly when I get into a subject that I know about, and especially if I get into the fray. The stenographers will start waving their hands if that happens. No matter how much you try to keep it in mind, it is easy to lose sight of it.

Some of the other interesting venues that I've been involved in as an expert witness, that you might not think of and for which you can be called upon, have been arbitration hearings. I was on a case a number of years ago regarding a dispute between a large governmental utility and a coal company. It was under the auspices of the U.S. Arbitration Association. The general counsel of Delta Airlines, who was a really excellent professional, took two weeks of his time off to be the neutral arbitrator, which of course is the judge. Each side picks a partial arbitrator and then there's a neutral arbitrator. He epitomized what a judge should be. It was an excellent experience and I really, truly believe justice was done in a complex civil matter.

Legislative hearings and impact reports, especially at the state level, end in mediation. If the case gets bogged down somewhere along the way, the attorneys will retain a mediator. It can be much more effective to serve as an expert witness, again in a friend-of-the-court type of a context, with a mediator who is not going to listen to advocacy or opinions. He is going to cut to the chase and truly listen to objectives and supported opinions and help get justice done.

The obvious area where a pension actuary might be involved as an expert witness is, of course, the valuation of benefits in divorce. Both Colin and I live in community property states. That provides a wealth of opportunity for what I prefer is the mediation role. I always try to shift into mediation, avoiding QDROs and that type of thing, and use one of the other assets to offset and avoid the complexities and uncertainties and just the pure hassles of having a QDRO hanging around for many years.

Other areas in need of an actuarial expert witness are tort liability; loss of earnings; fiduciary liability; collective bargaining disputes; all areas of actuarial funding, both for tax purposes and accounting disclosure; stockholder disputes; mergers and acquisitions; breaches of contract; benefit calculations and disputes involving benefit calculations; plan document interpretation; and annuity contract interpretation. One of the toughest of all, of course, is malpractice. There is very little case law in the area of actuarial malpractice.

Malpractice is always a very, very uncomfortable area for any professional to get involved in. I have been involved once or twice; my firm has been involved once or twice in issues involving either malpractice or breach of contract, or misunderstandings. My opinion is that everyone deserves a fair hearing and a fair day in court. If the issues are true, objective issues, I will not decline to represent a client, even though it's against one of my fellow professionals.

Of course, it is much more difficult and challenging to handle that type of an issue emotionally, but I believe it has to be done, because fair representation should be available to all. But it is a tough area and there is very little case law, so fortunately for us most attorneys want to avoid it. There is nothing to go on, except a couple of highly publicized cases involving some steel companies. So it is an area that is kind of virgin territory.

If we have time toward the end, I will talk about a couple of very interesting types of cases I have been involved in. These include valuation of restricted stock and stock options using actuarial principles and techniques and extending the child support table, which is a simple arithmetic table that most of you have probably seen. It stops at $10,000, and there have been attempts to extend it beyond $10,000. I have succeeded twice in court in doing so, using very simple, high-school level arithmetic.

Mr. Southcote-Want: Could I see a show of hands of those who have worked to some extent in the pension field? That is a good number of you. I hope that those of you who do not will bear with us for a little bit here. I think you will gain

something from what I am going to share, but largely what I am going to talk about right now is really at the other end of the spectrum from what Mike does.

Mike has been involved in a number of high-dollar, unusual cases. I work quite often at the other end of the spectrum; that is, valuing pensions in dissolution situations. There are still a lot of situations where people are in defined benefit (DB) plans and have come to the end of their marriage, and that is one of their largest assets. Somebody needs to put a value on the benefit for them.

Is there anybody here from the Actuarial Standards Board (ASB), or who has been on any of the committees of the ASB? Ah, there is. Good! You may have some comments on some of the things I have to say in a moment." There are a number of items that, over the years, I have pulled together as things that have been particularly useful for me.'.

The first one is a publication authored by Murray Projector. It was published in the *Proceedings of the Conference of Actuaries in Public Practice* (PCAPP XXXIII, 1983) and is called "Actuarial Involvement in Divorce Litigation." It has been the granddaddy, if you like, of papers in this particular area and was included for 11 years on the exam for the Actuary as Expert Witness. That was P-564, which is now a defunct exam, but that paper was included in all years.

Stu Thompson, told me that 35 years ago he wrote a paper that ended up in the actuarial newsletter under the heading "The Actuary Has His Day in Court." Stu's paper was the real granddaddy of these kinds of papers. Mr. Thompson was also involved in the first $1 million tort case in Arizona back in the early 1960's.

A couple of quotes from Murray Projector's paper, which strike a special chord with me are:" "Small is beautiful" and "comprehensibility is paramount." Murray goes to the point that when you are preparing your actuarial report, the people who are going to be receiving this report are not looking for an epistle; they are looking really for a number. What is the pension worth? That is really what they want to see.

Clearly your report needs to have enough information in it so that they can see how your numbers were developed, but really you should try to keep it as brief as possible. There is a little bit of a conflict with the new *Actuarial Standard of Practice (ASOP) No. 34*, which has added in some things which I do not really think are necessary in the report. It certainly means that I am going to have to add another page or two to my letter or report that I provide people with when I am valuing pensions.

A third quote from Murray's paper is also worth remembering: "It's nice to win in court, but it's nicer not to be there in the first place." I think that goes on from what Mike was saying, where you really want to mediate if you can. One judge said that any agreement is better than any judgement.

Mr. Conefry: Mediation is particularly valuable in family law and pensions. I have found that more often than not, I have become the mediator to both sides in explaining to them what the real issues are so that they have a full comprehension of why it is probably disadvantageous to both to have something as uncertain as the interest in a DB plan hanging around for 25 years.

One of the issues we were discussing at breakfast, and one of the very difficult issues in a DB plan, is post-community compensation increases, which then, of course, translate into a higher future DB at normal retirement age. That is just a very, very difficult issue to address, and the courts have failed miserably whenever they have tried to address it. So, mediation and objectively quantifying so both sides understand, using communication skills, is the way to go, especially with family law.

Mr. Southcote-Want: It is not your job to coax a settlement, but if you can reasonably facilitate a settlement, I think you should do so. It is very tempting when you, perhaps, see a report from the expert on the other side and the methodology is wrong, the mortality table is outdated, and the interest rate is wrong. It is very tempting to say that report is just rubbish and your report is going to be the right one. It is tempting to get the attorney or the client you are working with to put a lot of effort into supporting your particular report. But really and truly, oftentimes in these cases, the dollars involved are not worth it, and it is far better for everybody if you can help to facilitate the settlement.

The second item "is "Actuarial Testimony" from the *RECORD of the Society of Actuaries* (RSA 14 [1988]). I believe this was a session held in Canada. One of the things I drew from this particular resource was what I call the "Ten Commandments of Appearing on the Witness Stand."

Bill Smith, then head of the SOA' Pension Section, provided us with this list: (1) Be prepared; (2) Prepare your attorney; (3) Dress neatly and conservatively; (4) When you're sworn in, listen; (5) Try not to ramble; (6) Try never to show anger; (7) Try to be a help to the judge and jury; (8) Don't be intimidated; (9) Don't be arrogant or pompous. Be polite, competent, and helpful; and (10) Be honest.

I really like number five: "Try not to ramble." I wish I had seen this before my first experience of appearing in court, when I got into a dialogue with the opposing attorney about economic development in the third world. How that happened I have no idea. He asked me some question and kept following it up. It had to do with interest rates and somehow he succeeded in making me look like a complete idiot, because I was rambling.

Number seven I like: "Try to be a help to the judge and jury." That is, if the judge asks if you could recalculate your number using different interest rates. If you think it is reasonably possible, then I think you should do so. Not necessarily on the stand, but you could step down for a while and then come back with a revised number. I have done that and it proves helpful to the court.

Mr. **Conefry:** By the way, if the judge starts asking you questions, you can consider yourself highly successful as an expert witness. That is really a good determinant that the judge is not only listening, but also understanding what you have said. That is very important and you should consider yourself victorious at that point, at least in terms of getting in the door and getting his or her attention. That is very important.

Mr. **Southcote-Want:** There is another side to that. I have spoken to one CPA in the Seattle area who said that he would never recalculate a number in court because he did not want the judge to realize how easy it was!

Mr. **Conefry:** Of course, ours isn't easy!

Mr. **Southcote-Want:** Number one: "Be prepared." Obviously, when you go to court you have to be fully on top of the subject.

Number ten: "Be honest." It speaks for itself, but it can be tempting sometimes to push the truth one way or another. "

The third item is Session 82RP of the Palm Desert Spring Meeting in May 1997 called the "Actuarial Testimony for The Pension Actuary" from the *RECORD of the Society of Actuaries*. These are really quite useful papers. Read through them to get other people's experiences and find out how things have worked out for them.

In the May/June 1994 issue of *Contingencies*, there was an article titled "Matrimonial Mathematics" that had some of the details of how to do some of the calculations that are sort of explained and asked of you in the new *ASOP No. 34*.

The two Internal Revenue Code (IRC) sections there relate to the code sections that establish the concept of a QDRO and how money can be paid out of a qualified pension plan to somebody who is not a plan beneficiary, without bad taxation effects.

Two things we are going to talk about in a moment are two ASOPs. The first is *ASOP No. 17*, "Expert Testimony by Actuaries." The second and" more detailed one is *ASOP No. 34*, "Actuarial Practice Concerning Retirement Plan Benefits and Domestic Relations Actions."

Finally, there are two books. One is *Value of Pensions in Divorce* by Marvin Snyder (Aspen Publishers, 1999) and the other is *Dividing Pensions in Divorce* by Gary A. Shulman and David I. Kelly (Aspen Publishers, 1996). I don't know if any of you already have these, but they may be worthwhile to at least look through on an approval basis to see if you want to keep them. Snyder's book is in a question and answer format. I'm not sure about Shulman and Kelly; I have not personally seen this book yet.

And finally, just about every session of the spring meetings of the Society has a panel on expert witnesses, so there are a lot of things available from those sources.

Importance of Case Law. One of the things that is important if you work in this area is to find out what the case law is. And, ideally, if you are lucky, you can get somebody to put together for you a notebook of cases. This notebook here was put together for me by my wife. She is my assistant and she is an attorney. She did some research of cases in Washington State that have formed the basis of the case law.

I have three examples. Obviously these are not going to apply to anybody other than those people in Washington State, but each of the states will have similar kinds of situations. The first example, which deals with the effect of substandard health, is in re Marriage of Pilant (42 Wn.App. 173 [1983]). In that particular case, the wife's actuary valued the pension using standard mortality, despite the fact that her husband had diabetes and heart surgery. They came up with a value of the pension of about $95,000. The court said, "Well, this person is in substandard health," and came up with a value of $47,000. That was approved by the appeals court. That laid the basis in Washington State for using substandard mortality in doing those kinds of calculations.

The second example, the Marriage of Bulicek (59 Wn.App. 630 [1990]), relates to the effect of future salary increases. In the Marriage of Bulicek, a 1990 case, the court said that the pension would be divided through a QDRO. The pension would be subdivided upon receipt. The pension paid to the spouse would be one-half of the full pension, multiplied by the ratio of years of work while married over the total years of work. Future salary increases, as they affected the pension, were therefore automatically built into the pension that was going to be subdivided. It was not just a case of taking the pension that had been earned as of the date of separation, freezing that, and paying half of that to the wife. She was entitled to one-half of the final pension that was paid out.

The third example, the Marriage of Hurd (69 Wn.App. 38 [1993]), relates to the assumed retirement date for calculation purposes. In this 1993 case, Mr. Hurd was eligible for early retirement with an unreduced pension. The court called this "a vested and matured benefit";" therefore the pension had to be valued assuming immediate retirement. I think he was a policeman and was eligible for early retirement with an unreduced pension. The court said, "We are going to have to value it as if you retire now," even though he did not.

Those are some of the case laws that we are dealing with, and there will be similar case law in each of your own states.

Mr. Conefry: There is an opportunity to really make law. One of the points to consider is that it is not just your client that you may affect. If you make law, it is there. It is a precedent, and it affects many, many people. This issue of salary increases beyond the termination of the community or the divorce, even in non-community property states, is a very troublesome issue as I pointed out before.

At the discussion before the meeting, I made the observation that it is logically inconsistent because an alternative for the pension plan participant is simply to quit that job and take another job with a pension somewhere else; the pension disappears, or post-community salary increases disappear as an issue. Given that that is true, it is my opinion that the Hurd decision is bad law. The missing link in the DB plan, valuing a future benefit, is not whether future salary increases are taken into account. It is the preservation of the purchasing power, and there should be some indexed way of doing that without invading post-community salary increases, which may, in some cases, have clearly nothing to do with anything that existed during the community. It is a troublesome issue, and one that if any of you want to get involved in, if you happen to be in a community property state, you could do quite a good deed for the case law system by getting involved in the right way.

Mr. Southcote-Want: Of course, these particular rulings or appeals do not give all the answers. For example, in the Bulicek case, the pension was to be paid out through a QDRO. Well, what if you wanted to do a lump-sum settlement on that now? Should you still take future pay increases into account? With the Hurd case, where you have to assume that the person could retire immediately, what happens in a situation where the person cannot retire immediately but could retire in two years with a subsidized or unreduced pension? Must you make your calculations assuming retirement in two years?

Some of these situations are not resolved; they are open issues. They may give you some room for discussion with your attorney in planning the way you do your calculations.

It is very important that, as a professional consulting actuary in this field, you work with the attorney in your calculations, rather than just running some numbers and telling him, "This is it."

For example, you could always use a service prorate to calculate the accrued benefit. You could always use the 30-year Treasury rate to make your calculations. If a cost of living adjustment (COLA) is necessary, you could always use 3%. Or, you could always use no salary increases. You could lay out what your particular methodology is and stick with it. In my opinion, if you do that you are not really providing proper service.

In my opinion, you should give a preliminary oral report discussing the methods, assumptions, and results to the attorney. Talk to him or her. Tell him what you have done and what the numbers are looking like. You do not know the whole story of these kinds of cases. The pension part is just one part of the overall picture. He or she may or may not be looking for certain things from that particular asset, so it is important to work with the attorney in doing that.

Check with the attorney regarding unusual circumstances, such as medical concerns that could affect the calculation. It is tempting sometimes, when you get

a request, to rush ahead and run some numbers. But then you find out that the person has a serious heart condition, or some other health consideration, that should really have resulted in substandard mortality being applied. Try to get that information up-front.

If there is an opposing expert, make sure you review the qualifications of that opposing expert. The actuary, quite frankly, is superbly qualified for doing this kind of work, but you will often find that courts tend to let in almost anybody as an expert in this area. They will let in CPAs, bankers, etc. Basically, anybody who appears to be numerate is often allowed in as an expert.

Mr. **Conefry:** Economists often testify.

Mr. **Southcote-Want:** But oftentimes those people do not have the experience that actuaries have with pension plans. They do not know how to read plan documents. They ignore cost of living increases. If there is a substandard health issue they will not know how to adjust for it, or they might adjust for it by increasing the interest rate, for example. The chances of their using a reasonable mortality table are close to nil. So you need to take a look at what the opposing expert is doing and discuss that with your attorney.

Help your attorney with case law. Try to get something like a case law journal put together, so you can talk to the attorney about the applicable rulings. A number of times I have told attorneys what the case law was, and they have been most appreciative for that. However, be careful not to do this in court. Judges do not take kindly to being told what the law is by a non-lawyer.

If you are going to appear in court, make sure you prepare your attorney for your examination. You do not want to get on the stand and get your own attorney asking you surprise questions. Make sure you talk to your attorney beforehand, so you can find out the kinds of things that he or she is going to ask. Tell him what some of the questions are that he or she should ask. Give him or her advice on cross-examining the other expert.

At this point, I would like to talk about the ASOPs. In this field of practice we are really dealing with two standards. The first one, which came out in 1991, *ASOP No. 17*, recognizes the increasing role of actuaries as expert witnesses.

I must say that this particular standard is really mostly common sense. You do not have to read through this and worry that it is going to say something in there that you really do not want to be doing. It is pretty straightforward.

Item 5.5 is kind of interesting. It reads that, "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 others may include the client's opponent."

I think that some attorneys might be just a little bit worried about that. Certainly the attorney for a client usually has no particular interest in their hired expert being careful about how an opponent may be hurt by his or her report. But this standard points out that, as professionals and as actuaries, we need to be a little bit careful about how we do our work. I think Mike may have something to add to that.

Mr. Conefry: One of the comments in *ASOP No. 17* says it is not clear whether the actuary has a duty to volunteer information, if withholding that information compromises "the truth." In litigation, there is the proper forum for determining the whole truth and nothing but the truth, and that is by questioning and by cross-examining.

First of all, within the context of the procedural rules, it is not possible except by technically breaking the rules to volunteer something. However, in response to a direct question on an issue, responding truthfully and in the whole truth is just the only way to do it, even if it is detrimental to one's client. That is just a fact of life. That is the way the process should work, in my opinion, and I believe in the opinion of the Standards Board and in the opinion of the judiciary. Justice is there to be served, or the court is there to serve justice. It is a give-and-take in an adversarial system, but nonetheless if clever and proper and intelligent cross-examination by the opposing attorney uncovers something that is detrimental to your client, so be it.

Again, this gets back to my philosophy. It is kind of a winner-take-all philosophy. Stop and think about it practically, the philosophy, which I espouse as an expert witness. If I will only accept as an expert witness and testify about those cases where I have a strong opinion in favor of the client who retains me, it pretty much ensures success.

If the case is weak, you have to presume that the opposing attorney and the opposing expert are going to be competent enough to uncover any weaknesses in the case. Again, this is my opinion, but I think it is an effective opinion and one that is justified because sooner or later if that competence is there, you will be under oath saying things that your attorney does not want to hear you say.

Mr. Southcote-Want: Another item in this standard that I want to mention is 5. 8. It talks about actuarial assumptions and then says, "The actuary should be prepared to conduct additional calculations in certain forums when asked, either by opposing counsel or the presiding member at the forum." This echoes my practical experience about being asked by the judge to recalculate some numbers. I think this standard is basically saying we should be prepared to do that.

Item 6.9 is interesting. It talks about discovery of error. This is tricky. Let us say you are in a case where you have run some numbers and the court has accepted your numbers, and now you have found out that there is an error: "If after delivering expert testimony the actuary discovers that a material error has been made in it, the actuary has an obligation to make the appropriate disclosure of the

error as soon as possible." So you should let the attorney know that something happened. The standard says we need to do that.

And finally, from item 6.11, if you deviate from the standard you need to disclose that; but the wording here is kind of interesting: "subject to the constraints imposed by the nature of the forum." When we get, in a moment, to *ASOP No. 34*, you will see that the standard for disclosure on deviation from the standard is a little bit higher under *34* than under *17*. You could argue that if you are dealing in a legal situation where you have a court fight on your hands, that any disclosure you make of deviation from standard is going to be used against you.

You could argue that there are constraints imposed by the nature of the forum, so that perhaps you should not disclose deviations from the standard. This possible argument could be made under *ASOP No. 17*, but I do not think that under *ASOP No. 34* you could make that same argument.

Let's' now take a look at *ASOP No. 34*. You may have received in the mail recently, for those of you who are members of the Academy, *Professionalism 1999 Annual Reports*.

On page nine it talks about the Pension Committee. The Pension Committee completed two important standards this year. The first, *ASOP No. 34*, Actuarial Practice Concerning Retirement Plan Benefits in Domestic Relations Actions, provides guidance to pension actuaries practicing in the area of divorce proceedings. So, they have called this an important standard.

Earlier on I think I said that maybe the opinions you were going to hear here were not those necessarily of the organizations. I think that my opinion here is definitely not going to be the opinion of the Academy or the Society. This particular standard which provides guidance to pension actuaries practicing in the area of divorce proceedings was not requested by pension actuaries practicing in the area of divorce proceedings. This standard was requested by the Actuarial Board for Counseling and Discipline (ABCD). Take a look at the background, on page v of the standard.

ASOP No. 34 was prepared at the request of the ABCD. They requested it to be developed because a number of cases involving this type of practice had been referred to the ABCD. It is very unfortunate; they do not tell us anything about any of these cases that may have been referred. So, as a body, we don't know if this actuarial standard is an appropriate response to those cases that were referred to the ABCD.

I am particularly concerned by the severe lack of input by members of the profession in the writing of this standard. For the first disclosure, there were 27 comments. We have 15,000 actuaries and 27 comments. That is, less than 0.2 of 1% of the membership commented on this standard.

For the revised version, the one that is now final and which came out effective March 31, presumably because they did not want to make if effective April 1, there were only 13 comments, which is less than 0.1 of 1% of the membership. I am not saying that the people on the ABCD are not doing their best, but there has been essentially no input from the members of the profession on this standard. As we look at a couple of areas of the standard, we can see there are some things in here that simply do not make sense.

Mr. **Conefry:** When Colin and I were discussing this before the meeting, I made the general observation that the difference in style and type of content between *ASOP No. 17* and *ASOP No. 34* is really palpable. Standard number 34 very much gets into micromanagement, which in any complex area I believe is really not to be recommended. If I have a general criticism of the Standard it would be in that area. And one of two or many of the specific criticisms Colin had are the direct result of that micromanagement style. I think that may be a cultural phenomenon. Our whole society, not just actuaries, seems to be attending more toward micromanagement across the board. That can be a bad thing.

Mr. Frederick W. Kilbourne: I just wanted to comment on the 27 people who responded to *ASOP No. 34*. I was on the Standards Board when *ASOP No. 17* was passed. In fact, before I was on the Standards Board, I headed the committee that wrote *ASOP No. 17*. And we had not many more; we had maybe a few dozen responses, which was the most response that any proposed standard had received to that time. Of course, "Expert Testimony by Actuaries," *ASOP No. 17*, applies broadly to most actuaries, whereas *ASOP No. 34* is going to be quite focused in its interest, I think.

I am not arguing with you, but I would point out the perspective that, at that time, we felt that a few dozen was pretty good. For *ASOP No. 34*, if I were to have guessed how many responses, I would have thought much fewer.

Mr. **Southcote-Want:** Yes, there were 42 responses to *ASOP No. 17*. You are right. The problem is that none of us have the time to read these things when they come through. They are very time-consuming to look at and review and make comments on. So it is not surprising that we do not get a good response rate from people.

I am going to go through this quite quickly, because I want to get to one particular issue. But the first points are obviously pretty similar to the other standard: disclose potential conflicts of interest, avoid the unauthorized practice of law, be familiar with the applicable law, and get the data you need.

But then we come to selection of methods, and there we have a major issue. As an illustration of what we are dealing with here I put together a little play. I hope you will bear with us for a moment. Mike is going to play an attorney and I'm going to play an actuary who has done some calculations in a pension dissolution matter. So, I'm going to give him a call. "Ring, ring."

Mr. **Conefry:** Good morning, Mike Conefry.

Mr. **Southcote-Want:** Good morning, Mike. This is Colin Southcote-Want. I have run some numbers on the Smith pension and want to let you know what they look like.

Mr. **Conefry:** Fire away.

Mr. **Southcote-Want:** The big issue here is the allocation method. There are a couple of different ways to determine how much of the pension was earned during the marriage.

Mr. **Conefry:** What do you have?

Mr. **Southcote-Want:** If I take the current accrued pension and prorate it by years of marriage over years of work, I get a present value lump sum of $50,000. If I use the information about the accrued pension when they got married, and subtract it from the current accrued pension, I get a lump sum of $75,000.

Mr. **Conefry:** Are both methods OK?

Mr. **Southcote-Want:** Yes. They are both recognized and approved methods.

Mr. **Conefry:** Great. Use $75,000.

Mr. **Southcote-Want:** I knew you were going to say that! Unfortunately, I once had a similar case and used the prorate method. On similar cases I am now restricted to using the same method.

Mr. **Conefry:** What? I thought you said that both methods were recognized and approved.

Mr. **Southcote-Want:** They are! But the ASB has released a new ASOP that prevents me from changing my method just because you ask me to. They say that this is to protect both the actuarial profession and the public.

Mr. **Conefry:** That doesn't seem to protect my client.

Mr. **Southcote-Want:** If you want to use the higher number, you can get another actuary to calculate that for you. I can recommend someone if you like.

Mr. **Conefry:** How does <u>that</u> protect your profession or anyone else? It sounds like I can always get the result I want; I may just have to switch back-and-forth between actuaries.

Mr. **Southcote-Want:** Yes. It looks like, on cases similar to this, that I am a "fractional rule" actuary. I will call another actuary I know. If he or she is a "direct tracing" actuary, on cases like this, I will have him or her give you a call.

Mr. **Conefry:** This brought to mind, when we went through this earlier, my favorite actuary joke about how much is two plus two, and I'm sure you have all heard it. We deal in probabilities and we are going to have, in some cases, a wide band of acceptable results. It is unfortunate, but codifying them in standards is what I think Colin has problems with. It makes it that much more difficult to present the correct frame of reference in which to explain things that are difficult enough in the first place.

Mr. **Southcote-Want:** Let me tell you where these things are in *ASOP No. 34*. On page seven, 3.3.2a, is where the standard specifically acknowledges two different allocation methods. It acknowledges the direct tracing method and the fractional rule method. The direct tracing method would say we know how much of a pension was earned when they got married, and we know how much the pension was when they got separated. We just subtract one from the other, and that is the pension that was earned during the marriage.

The fractional rule approach says we do not necessarily know the pension when they got married. We know the pension now, so we are going to multiply by the ratio of years of service while married over total years of service to calculate how much of that pension is community property to be subdivided.

So, first of all, the standard recognizes two different approaches as being appropriate: the direct tracing method and the fractional rule method.

On page eight, 3.3.2c, "Different Results from Different Methods," reads: "Different types of allocation methods can produce significantly different results. An actuary working in situations where different methods are used should educate his or her client as to the differences between the methods and the general financial impact of those differences."

So, *ASOP No. 34* recognizes the 2 methods and instructs the actuary to tell the client about them.

On page 13, at 3.3.7, is the consistency with the actuary's previous actuarial valuations. The second sentence reads: "The actuary should not select different dates, methods, or assumptions than the actuary would ordinarily use solely to accommodate the litigation position of the actuary's client."

So there, basically, it is saying that you should not select different methods to accommodate the position of your client. There are two allocation methods. You must tell your client about them, but you may not be able to do the calculation for your client because of this standard.

When this was raised a couple of months ago at a seminar in Chicago, the reaction was one of, how are we going to spin this so that we still get to do the calculations that we want? I was not surprised by that reaction and I think you can probably find ways to do that. I think it is unfortunate that, as it stands, we are in a place where

we may have to do that. I hope you can see my point here, and that you can see there is maybe an issue.

Mr. **Conefry:** Colin, do you view this 3.3.7 in the context of previous valuations for the same purpose? In other words, for community property or divorce, family law, would you extend it to the point where determining the portion accruing during a period of time for any purpose: costs, allocation, cost accounting for a client? It is not explicit.

Mr. **Southcote-Want:** Well, I think this does refer strictly to valuing pensions in dissolutions, but I think you make a good point.

Mr. **Conefry:** In Louisiana, there is case law that uses the fractional method. It may or may not be correct, but it is case law and it is there. Now we have a situation where jurisdictions which do not have applicable case law may be influenced by the Standards Board to go one way or the other, or to consider it a controversial issue where it may not have been controversial in the first place. This is a classic example, again, of my point about micromanagement. Professional standards are different from writing a cookbook on how exactly to do each particular endeavor.

Mr. **Southcote-Want:** I guess as a final comment from me, if anybody else amongst the audience here would take a look at this and be even half as outraged as I am, letters to the ASB cannot hurt. Let them know that maybe there is an issue here, and that they have gone over the top. Or, they did not quite follow the logic through, or the people who were doing the work maybe did not quite understand the implications as they actually affect those of us practicing in this area.

On the other hand, maybe you think it is fine. Maybe you think it is right, and maybe you want to let them know that—to fight off those of us who want to see a change. These things are difficult to change, though, once they are in. That is why it is so important, I think, for all of us to respond early to the drafts of the actuarial standards when they come out.

Mr. **Conefry:** Does anyone have any comments or opinions? We are on the same path here. Colin feels somewhat more strongly because it more directly affects, I believe, his day-to-day expert witness work. I tend not to have been involved in too many cases where this would be a particular issue, but I still agree with his position, again, from the micromanagement standpoint.

Mr. Baker: I should, before making the comment, point out that I have never had any experience with domestic relations litigation and really do not give a hang about this particular actuarial standard, other than to state that it does seem a little overblown. Whereas the actuarial profession, at least when I entered it, seemed to be an honorable and scholarly profession, it is becoming more like an extension of the accounting profession with all of these standards.

It does seem that we are taking away the ability for an actuary to perform as a professional by putting him into this straightjacket. I think that Colin and Mike's sketch a little while ago had a hidden agenda or hidden motive. It seemed to me that they were trying to illustrate that the actuarial profession is becoming more and more like the legal profession. We heard the word "justice" used once this morning, and we heard the words "whole truth" used a couple of times. One should understand that the judicial system is not seeking truth. Justice and truth aren't equivalent.

You get various sides. The judicial system is playing a game. The lawyers acknowledge that they are playing a game, and now it sounds like the actuaries are being forced to play the game, too. That is my comment.

Mr. Conefry: Let me defend, at least psychologically, the Standards Board. In the pension area, we have been awfully softened up in the last 15 to 20 years by the tens of thousands of pages of regulations and ad nauseam changes to the IRC with unbelievably complex scenarios. By comparison, *ASOP No. 34* is a very concise document compared to what we have been living with for 20 years. That may not be a valid defense, but at least it is an explanation or a partial explanation.

You have to realize that the topic of this session is expert witness testimony and, as such, it is in the context of the judicial process. It necessarily must involve concepts of law and justice. Again, I will go back to my philosophy. I will support and pursue the truth in pursuit of justice, as opposed to the lack of truth or vagueness or evasiveness in pursuit of justice. I hope that came through clearly. I think that is our mandate as professionals, as opposed to playing games such as attorneys do.

As experts we're in a very powerful position to do that and to force the attorneys not to establish the way the game will be played. That is why I always express my opinion. If it is adverse to what is desired by the attorney, we talk about it. Use me as a consultant for damage control or for a devil's advocate type of work, or just do not use me at all. Find someone whose opinion agrees with what you want to present.

Earlier, I mentioned the child support table. I found this project particularly intriguing. The table was purportedly developed by some federal agency somewhere along the way. It has been adopted by most states. It may be familiar to many of you. It is a table with combined monthly compensation in one of the index columns or one of the axes; then it is basically a matrix with amounts of child support on behalf of one child, two children, three children, four children, and then on down the line.

I was asked to analyze this table. I was told, I think it was in Colorado, that an attorney paid a consulting firm to do multiple regression analysis on this table to determine what formula would enable one to extend it beyond the maximum of $10,000 a month. Well, I looked at the table. I had never seen it before.

I looked at the table for about an hour or so, played with it, and started to develop some differences, trying to see what the underlying format was. I immediately determined that the values for one child, two children, three children, and so on were direct multiples of the values for one child: 1.55 in the case of two children, 1.94 for three children, and so on.

I determined by inspection that it was clearly inversely graduated. I was able to develop in no more than two or three hours, playing with trial and error on a computer database, that there were seven simple arithmetic formulas that would reproduce the entire table in bands; just like the income tax tables, only in reverse up to $10,000 a month.

I am very fond of analogies as a way of communicating, especially to a lay audience, which the jury and the judge would be. So I developed the size of the bands. The smallest band was $2,000 in monthly compensation, and I furthermore developed the multiple of one successive band to the one immediately before it. I picked the one that was most favorable to the opposing side, and then, rather than extend the table arithmetically, I extended each band geometrically so it approached an asymptotic limit.

It turned out that the table flattened out at about $80,000 per month. But more importantly, I was able to demonstrate to the court by reproducing the entire table to within one dollar that there was a mathematical basis to it. And this was high school arithmetic, or high school algebra. This was not anything esoteric.

The court accepted that. I have done it twice so far in two different jurisdictions. To extend the table beyond $10,000, the knee-jerk reaction in several courts was to take the amount at $10,000 and just multiply it for the income being considered. Well, the immediate refutation to that is to see that the amount for $10,000 is not twice the $5,000 amount. By extending it beyond the $10,000 per month it was possible to come up with a reasonable, mathematical representation of what would happen if one were to extend the properties of the table beyond $10,000. Something that was on the finite differences exam, way back when, enabled me to do that.

Another interesting case was related to restricted stock and stock options. An employee stock option is effectively just a call option to buy, at a predetermined price, some number of shares of stock.

In this particular case the non-employee spouse had retained a Ph.D. in economics to apply a method using partial differential equations and all sorts of esoteric mathematics to value options. The method is accepted for financial disclosure in other areas, but one of its basic premises is that it uses a European option that is exercisable at only one point in time at the end of the option period. American options are exercisable at any time during the option period. But more fundamentally, it produced the illogical and contradictory result that options that were exercisable at the time of valuation were valued at less than the options that were not yet exercisable.

So I looked at the situation and said, "What does this look like to an actuary?" Both sides accepted that the exercise price less the market value, at the time of valuation, was the value of the shares, times the number of the shares. Well, the identical share, that is not exercisable for three years, can be lost in the event of a contingency at termination of employment. It will be immediately exercisable upon death or upon changing control of the company. And it is deliverable at the end of the period. What does it sound like? It is an endowment insurance. So I used an endowment insurance function with contingencies, including the probability of change of control, and I invited the opposing side to give me the probability. I said it was 10%a year. You want to use 5%, that's fine. You want to use 20%? That's fine. I used that to value the restricted stock with the stock option.

The reason the court accepted it was that I got in the door to let them listen to what an endowment insurance was. And why it was more appropriate to value this particular entity that way? With all this mathematics, the economist got a ridiculous result: something that could be lost and which would only be deliverable at some point in the future was worth more, according to his method, than something which was deliverable right now, i.e., simple concepts of the time value of money and contingencies.

It is interesting to discover the areas where our knowledge and experience and actuarial mathematics can involve us. It is just wide-open. That's why you should always look at the entire picture. Look at all of the issues. Look at all of the arguments and what the whole case is about, because you may be amazed at some of the areas that you can get involved in.