

These comments were prepared as a response to “A 2009 Survey Study of Forensic Economics” by Michael Brookshire, Michael Luthy and Frank Slesnick to be delivered on July 1, 2009 at the NAFE-WEA sessions at the Sheraton Wall Centre, Vancouver, British Columbia. These comments can be quoted without permission of the author.

Reviewer’s Comments
Thomas R. Ireland* 5/25/09

The normal job of a reviewer is to suggest ways that a paper could be improved to increase its chances of publication. I have a few minor suggestions, but this paper is fine as it is and will almost certainly be published without need for other than very minor changes. Another purpose of a review of a paper of this sort might be to make suggested changes for the next survey that can be hoped for in 2012. I have few suggestions along those lines either. I think the survey is fine the way it is. Some in the audience may have suggestions for specific questions that might be added or subtracted, but the suggestions I made in 2006 when I commented on the last version of the paper were followed and I have no new suggestions. Therefore, I will comment about things I found to be of interest in the paper that others may not have noticed or that I consider likely to become issues in litigation. The fact that I may not have commented on a question should not be interpreted as meaning that I did not find the results for that question interesting, but rather that I did not think I had anything interesting to say about the results for that question.

(1) On page 4 of the paper, the authors provide a summary chart for the eight surveys that have been conducted from 1990 to the present, a period of 19 years. The second survey was one year after the first survey. The next three surveys were 2 years after the previous survey and the final three surveys have been after a three year interval. The chart shows the number of persons who were sent copies of the survey. That number reached a maximum in 2003 with 746 and has declined in each of the past two surveys to 585 persons receiving the current survey. That is a decline of 21.6%. That is almost exactly a decline of one sixth from 1997 to 2009. It is even worse if one looks at Since I assume that the number sent is probably indicative of the total membership, it is interesting to ask why the NAFE membership has dropped by more than one fifth over the past six years. I do not know the answer other than that I do not think it is the result of a failure of leadership within NAFE.

Another interesting fact indicated in the chart on page 4 that the authors may mention in their oral presentation is that the response percentage for this survey was the second highest among the eight surveys. The first survey in 1990 was sent to 288 persons, with a response rate of 47.2%. The next survey in 1991 showed a 37% drop in responses to 25%, which was the lowest for any of the surveys. The response rate in 2009 was 32.65%. Perhaps that is because this was the first survey that was conducted exclusively as an electronic survey, but it may also mean that NAFE’s now smaller membership includes a higher percentage of persons who are more actively involved in consulting activities. It is of note that this survey, with 191 responses, had the highest absolute

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number of responses the survey has ever received. The second highest number was 184 in 1999, with a response rate of 27%. This seems to be an indication that NAFE's membership may have declined, but that those members who remain are more actively involved as consultants.

(2) *Question 1.* I thought it was interesting that the median and mean values for the rate of expected inflation in Question 1 on page 6 remained identical from 2006 to 2009 at 3.0% and 3.1%, respectively. The tremendous changes in the American economy from August 2008 to February 2009 have had no impact on inflationary expectations of the NAFE members taking the survey.

(3) *Question 3.* I expect that the results in Question 3 will become important in litigation. The median value for the net discount rate was 1.75% and the mean value was 1.76%. I use a 2.0% rate or an average worker, which was the median rate in both 1999 and 2003. In my practice, I regularly confront plaintiff experts who use 0% net discount rates. This survey will allow me to say that only 8.2% of NAFE respondents in 2009 thought that was a reasonable rate to use. The sentence used by the authors to describe this is unclear. The authors said: "Approximately 8.2% of the responses indicated that the net discount rate was 0% or lower." I interpret "or lower" to mean "more than offset" discount rates greater than 0%. It would be clearer if the authors reworded the "0% or lower" as "0% or more than offset rates." It was interesting that 14 persons taking this survey felt that the net discount rate was either 0% or a more than offset rate.

(4) *Question 9.* This is a question about the use of gender specific data and race specific data. My only note is that I found option d confusing. 7.7% said checked "I would not use such data." Did they mean that they would not use age-earnings data from the BLS tables generally or that they would not use either gender-based or race-based data from the BLS tables?

(5) *Question 11.* This is a question about whether the respondent, if free to make his or her own choice, would subtract the personal consumption of a decedent from family income or only from the decedent's income. The nature of this question creates an unusual hypothetical issue. It would have been better if this question has been worded as an issue of personal preference. As it was asked, it appears to be a question that would probably apply only to the plaintiff side. On the defense side, it is likely that a plaintiff economic expert's report exists. That report will either have subtracted personal consumption from family income or from only the income of the decedent. Ultimately, it is a legal question whether family income or only the individual's income should be considered, but what a defense economic expert would do would probably be significantly influenced by what the plaintiff economic expert has already done. I ask my retaining attorney for direction on this question in almost every wrongful death case in which I become involved. I point out the arguments that can be made for each side of that question. Frequently, I am asked to make my calculations both ways. Ultimately, I think that the standard should be the decedent's own income. I also have the opinion that if most states had test cases on this issue the states would determine that the decedent's own income is the proper basis for reductions in personal consumption. However, what I think is not as important as what my retaining attorney thinks after I have had the opportunity to fully explain the arguments on both

sides of this question.

(6) *Question 25*. This question asked which “taxes” an economist would subtract in a case in which taxes had to be considered and provided a list of taxes that might be subtracted. I think the answers are misleading in that one would not subtract state income taxes in a state that does not have an income tax. One would also not subtract local income tax unless the plaintiff lived in a locality that has an local income tax. The category of “Other” is provided, but the question did not offer the respondent an option to say that the respondent would subtract all *income* taxes that the plaintiff would actually have had to pay. I don’t recall what my response was to this question when I took the survey, but I do not subtract all taxes. I subtract all taxes that are based on income. I subtract local income taxes, but only in cities in which such taxes have to be paid. I clearly would not subtract state income taxes in states in which the plaintiff was not obligated to pay state income taxes. I do subtract Social Security and Medicare taxes based on the fact that federal law requires that I do so. In railroad cases, there is a line of case law that say that Tier I and Tier II taxes do not have to be subtracted if the plaintiff does not claim loss of retirement benefits. There is another line of cases that say that Tier I and Tier II taxes must be subtracted and that the loss of benefits should be calculated according to the Railroad Retirement Board’s formula’s for Tier I and Tier II. In such cases, I ask my retaining attorney for legal instruction and follow that instruction. The format of this question would have made it very difficult for me to communicate that information.

(7) *Question 33*. It is interesting that 17.6% of respondents are willing to use disability work-life expectancy tables produced by Vocational Economics. It is even more interesting that 20.6% of respondents are not familiar with such tables. Given the number of papers that have been published in forensic economics journals and messages that have been posted about these tables on lists for forensic economists the fact that more than one out of five respondents were not familiar with those tables is surprising. This question and its results are likely to be referenced in cases where plaintiff experts attempt to use the tables compiled by Vocational Economics.

(8) *Questions 35 and 37*. Questions 35 and 37 both address the issue of hedonic damages testimony. They do so in a personal injury context which precludes the question of whether it is possible to compensate a dead person. Since a significant portion of my case work involves and has involved opposing the admissibility of hedonic damages calculations, these questions are of special interest to me personally. In my reports and affidavits in hedonic damage cases, I have regularly discussed the percentages in response to these questions from the 1999 and 2003 surveys. This question was omitted in the 2006 survey. As I had expected, the percentage of persons willing to provide hedonic damages calculations in personal injury circumstances has continued to decline from 23.59% in 1999 to 17.82% in 2003 to now 16.2%. Interestingly, the percentage of respondents willing to be retained on defense to oppose hedonic damages testimony dropped from 81.67% in 1999 to 71.84% in 2003, but has bounced back up to 82.2% in the 2009 survey. My experience has been that only a small number of economic experts are providing a large percentage of the hedonic damages reports that I see..

The percentages reported imply that 28 individuals have indicated a willingness to provide hedonic damages testimony and that 143 individuals are willing to critique such a report. In the 2003 survey, 31 persons were willing to provide hedonic damages testimony. The change in the number of persons willing to do so over the 6 year period was a reduction of three persons willing to prepare hedonic damages calculations. There is some overlap in the sense that an individual who was willing to offer hedonic damages testimony might be willing to provide a critique of the hedonic damages testimony provided by another economic expert. For that reason, I think the percentages willing to provide such testimony are a more important indicator of the acceptance of such testimony than the percentages willing to critique such reports. The amount of information that must be known to oppose the admissibility of hedonic damages testimony is significant. This is very much of a niche market in forensic economics.

(9) *Question 50.* This question asks about the percentage of earnings from plaintiff-side and defense-side work. The small increase in the percentage of work done for plaintiffs was something I expected. I did not, however, expect the significant increase in the “Other” category that jumped from 0.29% in 1999 to 0.68% in 2006 to 1.31% in 2009. While each of these numbers is small, the percentage in 2009 is 4.5 times as large as the percentage in 1999. In the next survey, it would be interesting to find out what is meant by “Other.”

This completes my comments. This was a job well done by the authors of the survey.