

Notes for Comments on “Forensic Economists, Their Methods and Their Estimates of Forecast Variables: A 2006 Survey Study by Michael L. Brookshire, Michael R. Luthy and Frank L. Slesnick, prepared for Presentation at the NAFE Sessions at the meetings of the Western Economic Association, July 1, 2006. Draft date: 6/11/06

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My comments will consist of a series of numbered observations.

(1) As a participant in the survey, I very much appreciated receiving a copy of a three page executive summary of this survey that was distributed to participants by Michael Luthy on April 26, 2006.

(2) In the past, I have been concerned that the surveys would be misused in litigation. My recent experiences have been, however, that the surveys have been far more useful than harmful in dealing with litigation issues.

(3) At the bottom of page 2 of the paper, the authors indicate that the number of useful responses was 170, which is virtually the same number who responded to the “last several surveys.” They point out that the response rate was higher because the NAFE membership was lower than with previous surveys. They also reference the “odd result” that 257 individuals opened the survey instrument, but did not fill it out. They conjecture that this was probably no different from the number of persons who looked at previous paper versions of the survey, but did not fill it out. I think they are probably correct in their interpretation of why 80 persons opened the survey file document, but did not fill it out. I think it would be helpful if the authors explained something I did not think of when I read the Executive Summary last April. NAFE’s membership dropped significantly when the publisher who was supposed to send out membership renewals failed to do so for a number of months. This was apparently not a real drop in NAFE membership that was prompted by changing social trends or any issues with NAFE leadership, but a consequence of bureaucratic mismanagement by business organization that took the place of Nancy Eldredge in sending out renewals. I suspect that the 179 people who filled out this survey probably

correspond closely to the 162 persons who filled out the 1993 survey, the 179 persons who filled out the 1997 survey, the 184 persons who filled out the 1997 survey and the 177 persons who filled out the 2003 survey.

The National Association of Forensic Economics can be thought of as having two types of members. One type of member participates in an active way in the association. They regularly read the *Journal of Forensic Economics*, come to occasional professional sessions and may participate in the NAFE-L or one of the other electronic lists for forensic economists. The other type of member wants to have the credential of belonging to NAFE as evidence of some degree of participation in professional development. This type of member may occasionally read an article in the *Journal of Forensic Economics*, may wander into a NAFE session if otherwise attending a professional meeting, and may subscribe to the NAFE-L, but are not primarily interested in ongoing developments in the field of forensic economics. It is my impression that the first type of member is much more likely to fill out a NAFE survey document than the second type of NAFE member. The first type of member would have been likely to realize quickly that something was amiss when he or she did not get a membership renewal and made sure this was taken care of. As such, I am not surprised that a loss of members through a bureaucratic oversight on the part of a printer did not result in a reduction in participation.

A second factor in limiting participation may be litigation advantage. Suppose, for example, that you were a NAFE member, but regularly presented reports and testimony based on a total offset methodology. If you received a copy of the NAFE Survey instrument knowing that the instrument was not going to support your methodology, you might be better off not participating. Your participation might slightly move the net discount rate toward total offset, but the impact on the outcome would be very small. You might be better off from a litigation perspective not to participate so that you could say that you considered the individuals who took this survey to be generally wrong in their views of net discount rates. For some NAFE members, then, strategic non participation in the survey may be of relevance. I think therefore, that we are surveying the most active members of NAFE and the members whose methods are likely to be closest to the averages that have been shown in the past. At the time of this survey NAFE had 616 members and 179 took the survey. The membership was probably down by 150 persons because of bureaucratic problems with membership renewals. There are about 300 subscribers to the NAFE-L, of whom a number are probably inactive. I am guessing that NAFE has about 240 active members who are working at keeping up with developments in forensic economics and that most of the 179 persons who took this survey came from that group.

In one way this makes the survey unrepresentative of the total NAFE membership, but in another way it makes it more representative of those persons who are trying to improve themselves as forensic economists over time.

(4) In the past, I have been concerned that the survey is not a scientific survey, but is being used in litigation as if it was a scientific survey. For that reason, I am still glad that the qualifying language indicated on page 4 of the paper is still being included. However, I am finding that misuse of the survey instruments is so easily refuted that this may have a real litigation advantage on the defense side. Pointing out what 179 other people have, on average, concluded in a non

scientific survey is a lot less persuasive than demonstrating one's own knowledge concerning the variables and methods one has used to develop one's own opinions. I have made comments in the past about this that I now, on the basis of experience, disagree with. I believe that the survey has more positive than negative consequences from a litigation standpoint.

(5) There are still problems a survey taker may find with the wording of questions. Our methods are sometimes more sophisticated than a short question would allow as answers. Given the qualifying statement in the survey, however, I do not see this as a big problem.

(6) One of the great virtues of the survey are the written comments that participants add. I hope those will be kept in all future editions of the survey.

(7) My biggest disappointment with this version of the survey lay in three questions that were not asked. The first two of those questions related to hedonic damages. In the 1999 and 2003 surveys, Question #10 asked: "A plaintiff's attorney asks you to calculate lost enjoyment of life (hedonic damages) in an injury case. Would you be willing to calculate such damages?" In the 1999 survey, the percentage saying "yes" was 23.59%. In the 2003 survey, the percentage saying "yes" had dropped to 17.82%. I anticipated that the figure in the current survey would have been below 15% and would have used that fact in litigation to demonstrate the continuing decline in support for hedonic damages among forensic economists who are active in the field. My understanding is that the authors dropped these questions because of the small minority who said they would be willing to make these calculations. However, a drop from 24% to 18% represents a drop from slightly less than 1 in 4 to a number significantly less than 1 in 5. The comments in response to this question were also useful as comments to provide to defense attorneys preparing to depose economic experts proffering hedonic damages testimony. In a *Frye* test context of general acceptance (also one of the four *Daubert* factors), the reduction from less than 1 in 4 to significantly less than 1 in 5 is an important demonstration, even in a survey that has less than scientific validity.

(8) Question #11 asked: "A defense attorney asks you to critique an economist's report that has calculated lost enjoyment of life (hedonic damages) allegedly suffered by an injured plaintiff. Would you be willing to critique such a report?" In this case, the percentage saying "yes" fell from 81.67% in 1999 to 71.84% in 2003. While this might appear to counteract the responses to Question #10 to some degree, I think it points out another important development in the field of forensic economics – the increasing specialization of experts. At one point in the past several months, I had 20 case files open in which my role was to oppose the admissibility of hedonic damages testimony in six different states. With the internet and the increasing availability of forensic economic publications, I am being located as an expert who has the background knowledge to oppose hedonic damages testimony. I have had a number of other forensic economists refer attorneys to me in cases involving hedonic damages testimony. The number of persons proffering hedonic damages has been shrinking as well so that knowledge of how to oppose such testimony is becoming less and less relevant to the average forensic economist. When it comes up, it makes sense to refer that task to a specialist rather than spending time familiarizing oneself with the VSL (Value of Statistical Life) literature and the changes in the methodologies of persons who have presented hedonic damages as years have gone by.

Increasingly, we have a small number of specialists who proffer hedonic damages testimony and a small number of specialists who are best able to refute claims in support of hedonic damages testimony.

This, however, is not confined to the issue of hedonic damages. As our subject matter has become more and more sophisticated, it makes sense for specialization to occur in a number of areas. I would like to see the hedonic damages questions brought back for the next version of the survey, but I would also like to have questions included that were designed to find out what kinds of specializations are emerging and what kinds of specializations survey respondents would like to see emerge. I am increasingly being involved in cases in which my role is specialized to deal with certain questions and other economic experts are involved to deal with other questions.

(9) The third missing question on this survey has an interesting litigation consequence that relates to that question. In the 1999 and 2003 surveys, respondents were asked to estimate a net discount rate based on a damage projection that went 30 years into the future. This was Question #4 on the 2003 survey, where the results I will provide are summarized. In 1999, the mean net discount rate was 2.13 percent. In 2003, it was 1.89 percent. The median figure in both surveys was 2.00 percent. On page 29 of the current paper in the Summary and Conclusions section, the authors derive a net discount rate of 1.35% from the average rate of expected wage increase of 3.68% and the average value of the discount rate of 5.08%. They conclude that “(t)his is a decrease of slightly over one-half percentage point since the last survey.” I think this conclusion is incorrect for reasons that had important implications in one of the cases in which I testified last fall. There were no questions about net discount rates in the surveys that were done before 1999 in 1990, 1991, 1993 and 1997. In the 1991 and 1993 surveys, a calculation of net discount rates from the average rate of wage increase resulted in net discount rate calculations of almost exactly 1.0 percent. This fact was cited by Charles Linke in a paper he published on “Another Perspective Of The (i-g) Differential for Discounting Future Earnings,” *Journal of Forensic Economics*, Fall 1997, 10(2):243-254. That paper was cited in his reports for the Illinois case of *Bunch v. Maersk Line, Ltd.* Charles Linke uses 0% and 1% net discount rates in all of his reports. His 1997 JFE paper was his first publication in many years and was probably intended to provide justification for the net discount rates he was using at that time and still uses. He pointed out that using the method used by the authors of the current survey he was able to obtain 0.99% net discount rates from the 1989 (1990) survey and the 1993 survey. 0.99% is very close to 1.00%, which appeared to support his 1.00% net discount rate. His paper was published in 1997, but did not have the benefit of having available the 1997 NAFE survey. However, if it had been available, he would have been able to use it to derive a net discount rate of 1.00 percent.

In the fall of 2005, I had the benefit of having both the 1999 survey and the 2003 survey available. Charles Linke was challenged in his deposition and trial testimonies on the basis of his favorable citation of earlier NAFE surveys that derived net discount rates of 1.0 percent compared with actual survey answers in 1999 and 2003 that showed net discount rates of 2.0 percent and 1.89 percent. For that reason, I wish that the net discount rate question had been asked again in the 2006 survey. I do not believe that the answer would have been the 1.35% cited by the survey authors on page 29. I also don't believe that the net discount rates from the 1990, 1993 and 1997 surveys would have been 0.99 percent. I do not have a simple explanation, but I

do not believe that what was probably essentially the same set of survey respondents found net discount rates of 1.00 in 1990, 1993 and 1997, then 2.0 percent in 1999, 1.89 percent in 2003 and finally 1.35 percent in 2006. I think the answer would have been much closer to the 1.89 percent reported in 2003. This implies that there is an apparent inconsistency between the answer respondent's gave for the average rate of wage increase in the 2006 survey of 3.68 percent and the average discount rate of 5.08 percent in the 2006 survey and the net discount rate I believe they would have reported if asked a direct question about the net discount rate. I believe that just such an apparent inconsistency would have existed in 1990, 1993 and 1997 if the right questions had been asked.

The important story here, however, is that Dr. Linke put himself into an awkward position by using the NAFE Surveys from 1990 and 1993 to support his use of a 1.00 percent net discount rate in a 2005 report by citing his 1997 JFE paper. What others may do is not a useful way to support one's own projections. Having one's own clearly thought out explanations is important in every context but a *Frye* test.

(10) It is interesting to know from Questions 44 and 45 that 66.5 percent of the respondents had Ph.D. degrees and that 64.1 percent of the respondents had their highest degree in economics and 10.3 percent in finance, with another 13.5 in other business areas. That suggests that at least 88 percent of the respondents had at least some formal training in economics.

(11) I was also pleased that 80.8 percent of respondents felt that the NAFE Statement of Ethical Principles and Principles of Professional Practice, which is now a condition of membership, adds to the professional standing of the NAFE membership. I was surprised that 19.2 percent did not think so.

(12) There are many other questions in the survey that would be worth discussing and exploring. The authors should be thanked for the extensive work that went into providing us with this source of information.