

**Expert Economic Testimony: Similarities and Differences in
Regulatory and Civil Litigation Proceedings**

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Expert Economic Testimony: Similarities and Differences in Regulatory and Civil Litigation Proceedings

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I. Introduction

Economists have been called upon to serve as expert witnesses in both regulatory settings dealing with the determination of regulated rates and in civil proceedings involving the assessment of personal injury, wrongful death, and other tort actions. There are similarities and differences between these two venues that deal with the economist's work product, the economist's relationship with the attorneys involved, and the economist's required skill sets. Additionally, there are differences in the prospective audience that affect the role the economist plays in a regulatory proceeding compared to a civil case.

This paper draws on the authors' experiences as economic witnesses in both regulatory and civil proceedings in order to identify these similarities and differences and to comment on how transferable the experience in each type of proceeding is to the other. With respect to regulatory proceedings, the paper focuses largely on the role of the economist serving as an expert witness before public utility commissions. With respect

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to civil proceedings, the paper deals largely with the role of the forensic economist in personal injury, wrongful death, business valuation, and securities cases. After discussing the economist's role in regulatory and civil proceedings, the paper identifies the differences and similarities of each venue with respect to the work product, the economist's relationship with attorneys and the basic required skill sets of the economist. While significant differences exist, the paper concludes that there is sufficient overlap in fundamental principles and required basic skill sets to make transfer between the two fields a viable and practical possibility.

II. Overview of the Two Roles of the Economic Expert

In the regulatory arena, economists have served as consultants and expert witnesses on matters dealing with costing principles and methodologies, overall rate design and pricing structure, the estimation of demand elasticities, the estimation of the required rate of return, and the modeling of consumer behavior and choice. Additionally, economists have been called upon to offer opinions on the measurement and existence of cross-subsidies and anti-competitive behavior, and on changes in the form of regulation in the airline, telecommunications and other regulated industries. Regulatory economic witnesses very often have experience in the industry they testify about and may be employees of the party on whose behalf they are presenting testimony.

The regulatory economic witness primarily addresses an audience that includes the staff of a state public service commission or a federal regulatory body, a hearing examiner or administrative law judge, and perhaps the regulatory commission itself. The objective is to persuade the decision maker (e.g., the administrative law judge or the

regulatory commission) to adopt the point of view advocated by the economist. In addition to the commission staff and other regulatory personnel, the economist's audience regularly includes other parties to the proceeding such as major customers and competitors of the regulated entity, as well as public interest groups who ostensibly represent the interests of residential consumers. Any of these parties may present evidence in the proceeding through their own witnesses, who may or may not be economists. The regulatory witness will not only present written and oral testimony, but will also assist in the preparation of discovery questions to be served on opposing parties and in the preparation of responses to their discovery questions, and they will assist in the deposing and cross-examination of opposing witnesses.

There are important differences in the regulatory economist's target audience compared to that of the forensic economist. First, the regulatory commission, hearing examiners, and other regulatory participants in a regulatory proceeding are professionals who have some knowledge of the regulated industry in question, and who often have access to regulatory staff or other experts to advise them. However, in cases tried in civil litigation, the jury is selected from the population at large and, consequently, exhibits a wide variation in terms of background and experience. Second, and more important, the jury in civil litigation is ostensibly impartial and has no vested interest in the outcome of the case, although they may be influenced by perceived similarities or differences between themselves and the plaintiff and defendant. Because the regulators may be elected or may be political appointees, and because the issues in question often involve the rates to be charged the general public, the decision makers in the regulatory setting are not always disinterested parties. Another difference in the audience addressed in

regulatory and civil proceedings is that the latter have no counterpart to the regulatory proceeding's interveners, parties who introduce themselves into the case because they have a vested interest in the outcome.

The forensic economic witness involved in a personal injury, wrongful death, or medical malpractice case will present analysis and testimony dealing with lost income and benefits, the value of lost household services, and perhaps the present value of expenses presented in a life care plan. In addition, the forensic economist will analyze offsets to these economic losses related to future earnings from alternative employment or, in a wrongful death case, the expected consumption expenditures of the decedent. The basis for a business valuation case is to examine the change in value or economic loss associated with an incident which has allegedly caused the economic loss. In a business valuation case, the forensic economic expert will often examine the expected earnings stream of the business and will discount this stream to present value. Alternatively, the economic expert may value the business on the basis of value as a percentage of sales. For example, in the case of an insurance brokerage firm, the value of the business may be estimated as a percentage of annual premium income. Regardless of the valuation approach taken, adjustments are often necessary to account for differences in company size and for public versus private ownership.

Another type of civil litigation involves economic loss analysis in securities trading or portfolio management disputes. The role of the forensic economic expert is generally to determine the alleged actual loss or opportunity loss by comparing the expected outcome with proper actions taken with the actual outcome. The economic expert needs to have industry or academic experience in securities trading or investing to

be qualified to testify in a securities case. The typical securities case is heard by an NASD or NYSE panel of arbitrators. When cases are heard by an NASD or NYSE panel of arbitrators, there are no depositions before the hearing. This is an important distinction not only between this type of case and a regulatory proceeding but also with most other civil litigation cases. The major consequence of this difference is that the outcome is less predictable because there is less opportunity to prepare for the expected testimony of the opposing sides. Consequently, the skill of the forensic economist in orally presenting arguments and in responding quickly to new information is extremely important in NASD and NYSE arbitration proceedings.

There is another important difference in the target audiences of regulatory and forensic economists, in addition to those noted earlier. In civil litigation cases which are heard in state or federal court or by an arbitration panel, the forensic economic witness's target audience often only consists of the opposing attorney and his retained experts, since many cases settle before going to trial or before even getting to the deposition phase.²

III. The Economist's Work Product

Besides the differences in subject matter and target audience noted above, differences exist between the work product of the regulatory and forensic economic witnesses. These differences are due to procedural and methodological differences in the

² Based on the authors' own experiences, and on limited information concerning the experience of other forensic economists, many civil litigation cases do not result in a deposition, and less than a majority of those cases involving a deposition actually go to trial, with most of these resulting in a settlement rather than a jury verdict. The proportion of regulatory cases resulting in a deposition or testimony in a hearing is closer to seventy percent, with a wide majority of these cases resulting in a hearing followed by a Commission order.

two types of litigation support provided by economic experts. The regulatory witness almost always prepares written testimony in the form of an affidavit or, more often, a series of questions and answers before ever being deposed or setting foot in the hearing room. Moreover, this written testimony will often progress through several rounds of direct, rebuttal and surrebuttal testimony filed either simultaneously or in an alternating sequence by the various parties in a docket. This work product is presumed destined to result in cross-examination at a hearing, and is consequently referred to as “testimony” at the outset. In addition to written testimony, the regulatory witness will assist in the management of the discovery process and in the preparation of deposition and cross-examination questions of opposing witnesses.

By comparison, the forensic economist may or may not prepare a written report of estimated economic damages. For example, a forensic economist retained by the defense may review the report prepared by the plaintiff’s expert and conclude that the damage estimates are reasonable, or at least not grossly overstated. Also, because an estimate proffered by an expert for the defense may be viewed as an admission of liability or create a lower bound on the awarded damages, the forensic economist may be retained by the defense attorney only as an unnamed expert or consultant. Moreover, the term “testimony” is generally not used to refer to the forensic economic witness’s written report but is generally reserved for oral testimony given at deposition or trial. Like the regulatory witness, the forensic economic witness often assists in the preparation of deposition and cross-examination questions of opposing experts.³

³ This may be one of the most important contributions a forensic economic expert for the defense can make to the resolution of a case in civil proceedings. Spizman (1995) notes that the review of plaintiff reports by an opposing economist discourages exaggeration of claims by plaintiffs, thereby encouraging settlement of cases.

IV. Relationship between the Economic Expert and Attorneys

There are both differences and similarities in the forensic and regulatory economic witness's relationship with attorneys. As one might expect, the similarities arise from the need for the economist and the attorney to communicate and work together. In both regulatory and forensic economic work, it is the economist's job to answer the attorney's questions concerning the technical aspects of his testimony so that the attorney can plan strategy for the case. Similarly, the attorney must inform the economist of any legal requirements of the jurisdiction in question that will have an impact on the economist's work. In the regulatory arena, such requirements might have to do with rules concerning the estimation and presentation of service costs or with the ability to present counter-arguments via rebuttal or surrebuttal testimony. For forensic economists, these requirements might deal with the treatment of taxes, the valuation of lost household services provided by an injured party or decedent, or collateral sources of income.

In a regulatory proceeding, the economic witness is engaged in nearly all aspects of the case from the outset, whereas in a civil case, the forensic economist is only concerned with the estimation of economic damages and may not be retained by the defense until the plaintiff expert has already issued a report. One reason for this is that in regulatory cases, substantial overlap between issues occurs while there is generally a clear division between the liability issue and the question of economic damages in civil proceedings. Another reason is that regulatory cases often deal with issues and parties that cut across several jurisdictions over an extended period of time. Also, the heavy

reliance on pre-filed written testimony in regulatory proceedings offers several opportunities to refine the presentation of the underlying argument and results in a closer working relationship between the attorney and the economic expert. In contrast, even though similarities exist among types of civil proceedings, the surrounding facts and the parties involved vary from case to case. As a consequence, the forensic economist will likely work with many different attorneys over short periods of time and have weaker relationships with engaging attorneys, while the regulatory economist may work with the same attorney for longer periods in several jurisdictions and form stronger relationships.

Perhaps the biggest potential source of differences in the economic witness's relationship with the attorney is derived from the identity of the economist's client. Compared to a regulatory proceeding where the public utility, the commission, or an intervener may engage the economist, the forensic economic witness in a civil case is almost always engaged by the attorney and accordingly relies on engaging attorneys as a source of future business. Given this potential leverage by the engaging attorney, one might think that attempts by the attorney to steer or influence the economist's testimony would be greater in civil proceedings. However, the authors' experiences clearly indicate that this is not the case.

One reason for this may be that attorneys in civil litigation proceedings have the latitude to select forensic economists based on the methodology or input values they typically utilize. For example, plaintiff attorneys might gravitate towards economists who employ low discount rates while the reverse would be true for defense attorneys. Pre-selection based on methodology or input values may consequently diminish the incentive to steer the forensic economist's testimony. Another reason for a strong

independent relationship between the economic expert and the engaging attorney is that at the outset, there is no well-defined size of expected economic loss. This number is independently determined by the economist and supplied to the engaging attorney for presentation to the opposing counsel. Settlement is usually the desired result by both parties, and the initial focal point for the case is often on the total amount of estimated economic damages since this estimate may be used as a starting point in negotiations for settlement.

V. Required Skill Sets

There are both differences and overlaps in the types of experience and skill sets required of economic experts in regulatory proceedings compared to the training and experience needed by economic experts in civil litigation. The differences have to do largely with the need for specialized knowledge on the part of the regulatory economic expert witness which can be obtained through industry experience or academic training and experience in regulatory proceedings. Similarly, economic experts in civil litigation possess specialized knowledge that is necessary to perform the analyses needed to formulate their opinions. This specialized knowledge is obtained through a combination of academic training, certifications, and experience in the area of forensic economics.

Particularly when testifying on issues involving the cost of service, the regulatory economic witness needs to have some knowledge of the regulated firm's production process and its overall rate structure and pricing policies. This type of knowledge is commonly acquired through industry experience, either through employment by a regulated firm or by the regulating body. However, for issues dealing with consumer

choice, the cost of capital, market demand, anti-competitive behavior or public policy in general, the requisite knowledge can be obtained through academic training and research. In fact, a well-trained economist who is well-grounded in economic and financial theory is able to quickly apply those theoretical tools and applications in a number of diverse problem-solving arenas

Similarly, work in forensic economics in civil litigation covers subject matters that are not normally addressed by a regulatory economist. Obvious examples include the estimation of future earnings of an individual, the valuation of household services, the estimation of work-life expectancies, the probability of survival, and life expectancies. A notable exception is regulatory testimony concerning the required rate of return for the regulated firm. Such testimony is directly parallel to the determination of an appropriate discount rate in determining the present value of economic losses in personal injury, wrongful death, medical malpractice, and discrimination cases, and of the determination of a required or expected rate of return in commercial cases. Also similarities exist in the use of the same training and background by economic experts in regulatory proceedings and in business valuation and securities cases.

There are many overlaps between types of required knowledge and experience for the two areas of analysis. The economic expert in regulatory proceedings and in civil litigation is required to have familiarity with microeconomics, macroeconomics, the time value of money, forecasting, and the application of statistical techniques. Additionally, economic experts in regulatory proceedings and civil litigation need skills in critical and analytical thinking as well as the ability to identify and explain the essential elements of an argument and to test the argument's underlying assumptions against both theory and

reality. Academic training in economics and finance provide the necessary background for being an economic expert in both venues, and experience gained as a practicing expert economic witness in either transfers readily to the other.

Economic expert witnesses often have academic backgrounds, although that is not always the case. Indeed, it is not uncommon for persons with a background in accounting or industry experience in finance or actuarial science to practice in the field of forensic economics. As noted above, many forensic economic witnesses have academic backgrounds while regulatory economic witnesses tend to have prior work experience in the industries in which they testify.⁴ Consequently, many forensic economic witnesses in civil litigation have doctorate degrees, while regulatory witnesses may, at most, have a master's degree.⁵ This gives rise to the question of whether a Ph.D. in economics or finance is necessary to qualify as a forensic economic witness in either regulatory proceedings or civil litigation. Dr. Gerald Martin has noted that a Ph.D. in economics, or even an economics degree, is not needed to practice successfully as a forensic economic expert:

One need not hold a Ph.D. to qualify as a forensic economist. The field of practicing economists grew dramatically during the 1990's. More people have learned that a good educational background such as a CPA or a Master's degree in a related field provides the foundation for adding the tools necessary to become well-versed in forensic economics. (Martin, 2006, Chapter 1, p. 3)

⁴ There are notable exceptions to this, however. Dr. Alfred Kahn, for example, has testified in many regulatory proceedings involving railroads and airlines even though he has never worked in either industry.

⁵ One possible explanation for the relative incidence of economic experts with advanced degrees may derive from the fact that because it takes time and a flexible schedule to build a forensic economic practice, the pool of potential practitioners is skewed towards academics who, at least initially, earn their main livelihood in a university setting. Likewise, given the regulatory witness's need for relevant industry experience, it is likely that many such individuals chose to enter the workforce with a public utility company and did not pursue a doctoral degree since such a degree was not a requirement for employment or advancement. Exceptions to both of these generalizations are not uncommon, however.

Finally, in a recent case, the U.S. District Court for the Eastern District of Louisiana found that lack of a Ph.D. in economics did not preclude a witness from testifying as an economic expert.⁶

VI. Summary and Conclusion

Both similarities and differences exist in the roles played by the economic expert witness in regulatory proceedings and civil litigation. The primary differences lie in the topics that each expert witness's testimony addresses, the target audience, and the form of the economist's work product. With respect to the latter, the regulatory economist relies more on written argument which is often presented as multiple rounds of direct and responsive testimony. Additionally, the regulatory economist is more likely to end up in deposition or the hearing room. By comparison, the initial emphasis in civil litigation is to estimate total economic damages where, unlike regulatory proceeds, the majority of civil cases dealing with alleged economic losses are settled before going to trial. Although the expectation may be for a settlement in civil litigation, a consulting economic expert must be prepared to explain and defend his opinion of the expected economic loss during deposition and trial.

On balance, a comparison of these differences and similarities demonstrate that an economist with a background of testifying in either regulatory or civil litigation proceedings has the necessary and transferable skills to be able to provide opinions and serve as a testifying expert economic witness in either area. Because none of the

⁶ Specifically, the court found that "The absence of a doctorate does not compel the conclusion that he is not qualified to testify as an expert economist." (Stewart v. Rowan Companies, Inc., 2002 U.S. Dist. LEXIS 4135, E.D.LA 2002)

differences discussed above preclude an economist with a background of testifying in regulatory proceedings from testifying as a forensic economist, and, *vice versa*, the only limitation is that the required technical knowledge must be acquired. In particular, experience as a witness in both settings serves to develop skills in the identification and evaluation of underlying assumptions and in the presentation of the essential elements of an argument. We conclude, therefore, that there is a sufficient overlap in fundamental economic principles and skill sets required by economic experts to qualify them for testifying in both regulatory proceedings and civil litigation.

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