

**The role of expert witness in divorce court may not be to every actuary's taste.**

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# More Than Just Numbers

## Actuaries and Family Law

**But if approached correctly, it can add spice to an otherwise bland consulting practice.**

By Robert Preston

**W**HAT'S INCREASING FASTER THAN THE PERCENTAGE OF DIVORCES? YOU GUESSED IT—THE NUMBER OF LAWYERS. While the divorce rate has held fairly steady since the mid-'70s (between 4 and 5 percent per 1,000 people), the number of practicing lawyers has increased by 35 percent in the past 10 years. Any wonder mediation and arbitration haven't become the norm?

Unfortunately, most first-time marriages end in divorce (50 percent). And remarriages have an even more dismal failure record (60 percent), probably because of all the baggage brought into them from prior marriages. For sundry reasons (beyond the scope of this article), Americans are finding it harder and harder to stay committed to their initial partners. While the institution of marriage is alive and thriving (recent data has over 50 percent of the populace hitched), the "silver" and "golden" anniversaries are becoming relics of the past (median duration of marriage now is 7.2 years, while the average length is 9.8 years). More married people today are part of second marriages than first.

Financial planning has taken hold—for retirement, education, major purchases, and estate distributions. Yet the one event that can have the most financial impact on a couple's future is the one for which most do no planning—divorce. A couple may have completed some of the best, most adroit financial thinking possible about their overall financial affairs, but divorce can lay waste to it overnight. All those assets accumulated during a marriage must be divvied up, and current and future income allocated in some "equitable" manner. No easy task.

So marital strife is a booming business, and the attorneys are cashing in, big time. (In 2000, the three top divorce attorneys in the country earned a total of \$6.5 million.) But they often need expert help fighting their battles.

One of the goals of the judicial system is to "equitably" divide property, assuming some sort of voluntary settlement can't be attained. And that's where actuaries come in. In the majori-

ty of divorces, the two largest asset categories are the residence and employee benefits—pensions, stock options, deferred compensation, incentive plans. Valuing a residence requires expert appraisers. Divvying up employee benefits requires experienced "numbers" people—actuaries and accountants.

And while the numbers are important, they're only a small part of what a good actuarial expert witness contributes to the process. We'll assume that most pension actuaries are credible and can use the appropriate tables and mathematical formulas to provide the data attorneys need to evaluate a case. But this is elementary to being a valuable expert in the divorce process. During the course of divorce litigation an expert may become involved with both the plaintiff and defense attorneys, their clients, a judge, another expert, and the legal process itself, including the delays, the need for overnight information, and the overall, emotionally charged atmosphere surrounding a divorce proceeding.

## The role of expert witness in divorce court may not be to every actuary's taste. But if

### Helpless as a Kitten

The divorce process is one of the more inefficient, expensive, frustrating, and occasionally humbling experiences an actuary may encounter. While the worthy goal of the courts and the judicial system is to provide justice (and this is what many first-time litigants hope for), the product more often is "law" rather than justice. And this becomes apparent the more you participate in the legal process.

While you're mired in the judicial system, expect delays, inconsistencies in treatment, an all-too-frequent cavalier attitude toward expenses, and lots of waiting—for discovery (getting the facts out), negotiations, the actual trial (when litigated), and an eventual decision. It all takes time, and a lot more patience than you've probably had to muster in many other areas of life. During much of the proceedings you'll feel as helpless as a newborn kitten in a litter of seven.

An expert must accept the process and fight the temptation to try to influence it in any way. The expert's role is clear: He or she is solely a professional hired to explain data and facts representing employee benefits (pensions, options, deferred compensation). He or she is not there to change the process, alter its timetable, or unduly influence any of the parties. The role is to evaluate, present, and clarify for nonactuarial minds the finances of the client. Nothing else. The temptation to take sides, influence, lobby, and self-aggrandize is strong. Resist it. An expert's reputation depends on neutrality, and the ability to communicate and retain a level, even-tempered approach to the proceedings.

I try to keep reports simple, brief, and nonpartisan. Ideally, the initial report will be stipulated to (accepted without modification) by both attorneys, and you won't have to testify on the stand. I do everything possible, including gratis telephone conversations with opposing counsel and experts, to resolve matters for the case so expert trial testimony is unnecessary. Unfortunately, about 15 percent of the cases I work on require me to testify in court.

### Joint Retention

I'm a proponent of joint retention, when both sides hire the same actuarial expert. Since the expert's role is to present facts and data neutrally, he or she should arrive at the same conclusions no matter which side does the hiring. Joint retention greatly reduces costs, immediately eliminates an area of potential dispute and controversy; and judges like it. And anything judges like smooths the path to a potentially satisfactory outcome for all parties.

It's not uncommon for a judge to become impatient listening to two experts debate the relative merits of actuarial assumptions, methodology, cost methods, and whatever. A judge will



occasionally tell the experts to "go outside" for 10 minutes and come back with one number they can agree on. When two actuaries disagree strongly on a valuation approach, I believe it discredits the profession and diminishes the contribution we were hired to make toward equitable resolution.

The expert's role is to present facts and data neutrally. He or she should arrive at the same conclusions no matter which side does the hiring. Facts are facts—the truth is the truth. Whatever actuarial assumptions are used to

value a lump-sum pension shouldn't change because of the party represented. Whatever methodology used to coverture the marital portion of a pension (tracing or time/fractional/service) shouldn't vary because of client representation.

Actuarial Standards of Practice 17 (currently under revision) and 34 discuss some of these issues. While it won't always be possible to persuade attorneys to use joint retention, the best time to bring it up is at the beginning of the case. Once the other side has hired an expert, joint retention becomes academic. More and more attorneys are receptive to the concept, however, particularly if the expert has a good reputation.

### Educating Attorneys

An attorney will generally be the initial contact for hire. As in any profession, attorneys can be stellar, good, mediocre, and poor. Only experience in court work will enable you to recognize and appreciate the differences.

The stellar ones are generally good in all areas—the most organized, professional, respectful of an expert's contribution—and predictably get the best results for clients. The good ones can teach an expert witness how to really prepare for a case and develop strategy. If an expert does more than a few cases a year, he or she may become selective about which attorneys to work with.

The problem with not being selective is simple. Even the most meticulously prepared expert calculations and presentations can be wasted if the attorney falls short—in delivery, examination, preparation, etc. So the case tanks and the hapless client, even if he or she has strong factual case, gets a poor decision.

It's also common for the better attorneys to know each other and share a circle of influence. Once an actuarial expert has worked for one or two in the circle, referrals are common. So the way to work for the better attorneys is to do very good work for the first good one you have the opportunity to work for.

Unfortunately, many attorneys, even today, have limited knowledge of the field in which pension experts ply their trade. Unless the attorney has a solid working knowledge of pensions and whatever other benefit plans are involved, communication can be difficult. So it's frequently necessary to educate the attorney, not only about what's relevant in the overall review, but also about basic pension theory and terminology. This is particu-

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larly appropriate if another expert is involved, so the direct and cross examinations will be successful. If an attorney isn't up to speed in basic pension tenets, it's easy for an actuary to razzle-dazzle him or her with mumbo jumbo phraseology that can disparage or confuse any testimony, as well as the attorney's case.

How much time to spend educating the attorney is a judgment call, and a fixed budget can make this judgment tricky. The attorney may find it helpful for the actuary to assist in drawing up a suggested list of questions for the opposing expert in direct examination or the initial deposition. It can also be helpful to lend an attorney basic books on pension terminology along with relevant court cases with which the expert is familiar. This is a team effort.

### Judges Like It Clear

Judges are the high priests of the system. Again, all types prevail. A high percentage of judges are genuinely trying to arrive at justice, to be impartial and allow as much of the data and fact pattern to emerge during a trial as possible. However, time constraints and the complexity of pension theory will sometimes prevent worthwhile concepts from being introduced. There are several things an expert can do to make a judge's job easier, while at the same time helping the attorney.

- *Keep it simple.* The more complicated an expert makes things, the more he or she expounds on actuarial expertise and theory, the greater chance a judge's eyes will glaze over. Judges like it clear, in layman's terms, and with a minimum of "what ifs" and "there are several ways of looking at this ...". It's harder to do this than you may think. I've found that in court, genius often lies in simple language and minimal phraseology.
- *Speak to the judge.* The judge is the audience, not the attorneys, not the clients, or anyone else in the courtroom. It's the judge, period. Read body language, facial expressions, and be sincere. Speak the truth. Judges are tired and impatient, and they quickly get fed up with experts who unduly try to influence the process or obviously side with a particular position.

When an expert witness is neutral in presenting the facts, calm, articulate, and self-effacing, it's like handing the judge a cool lemonade on a hot summer afternoon. And the expert will get the judge's attention.

I always take a notebook computer with me to the stand. Many times a judge (and occasionally the attorneys) will ask for numbers or calculations clarified, or with a slightly different twist. Resolving these questions while the scenario is fresh in the judge's mind can not only be impressive, it can help shorten the trial. Occasionally, the ability to work up numbers on the spot can result in a quick settlement, that day, in court. It's happened to me, and all parties present take notice.

Explaining technical issues to the court can be frustrating. Judges frequently aren't able to appreciate pension theory, and they can get impatient with important, basic concepts. A prime example is the valuing of a defined benefit pension at date of di-

vorce using either the accrued benefit (at divorce) or the projected benefit at retirement, apportioned fractionally for marital service.

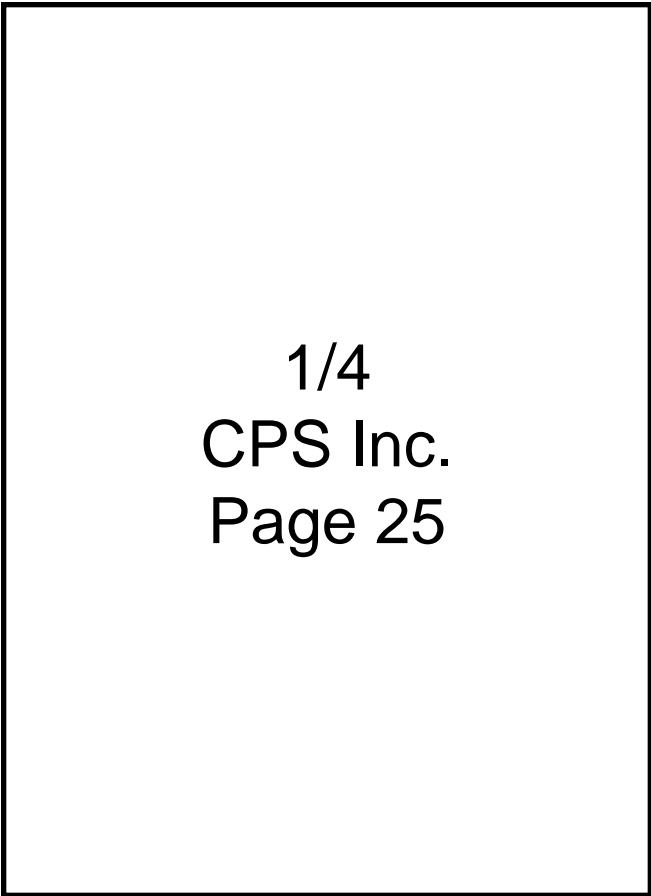
The latter protects alternate payees (nonparticipant spouses) from inflation, and allows them to share in final-average earnings. Using the accrued benefit allows all post-divorce appreciation, based on salary, to inure totally to the participant—but it's simpler to explain and for those present to digest.

Many judges take the position "anything" post-divorce is irrelevant and not part of the marital pot. Consequently, any testimony concerning this may be curtailed. If the expert believes using the projected benefit is more representative of the alternate payee's share, an inability to air this approach can be discouraging.

### Information v. Opinion

Clients are the "team owners" who, unfortunately, often have little say in the drama. With the exception of taking the stand and being interrogated, they pretty much sign checks during the process and often look more and more bedraggled as time elapses.

Since the actuary's main contact during a proceeding are the attorneys, there's generally little interaction with clients. Sometimes, however, clients will call the actuary for a direct opinion or advice, which requires him or her to walk a fine line in def-



erence to the client or the attorney. When in doubt, the ultimate obligation is, of course, to the client.

Because of their lack of experience with the process, clients can become emotionally disoriented and exercise poor judgment. Handling this is the attorney's job, not the expert's, and the better attorneys do it well. If a client calls directly, I give out as much information as seems appropriate and discuss whatever the client brings up, but only to a point.

Sometimes they ask awkward questions such as, "How do you think the case is going?" or "What do you think of my attorney?" These are touchy issues, and an expert has to be both a diplomat and a realist in fielding them.

While honesty is the best policy in life, there are times when responses should be based on the good of the case. An attorney might be doing as well as anyone could, yet the results aren't obvious. Predicting the outcome of a case midstream is as tricky as predicting next week's weather. An expert needs to be extremely cautious about expressing opinions.

Information, on the other hand, is different from opinion. Information is the expert's business, and once the trial is over, any information the client seeks warrants a complete response.

#### **Getting Paid**

Ah! Finally we get to the tail of the lobster! After all, this is what it's all about, isn't it? Making a living.

Billing in court work is only a bit different from normal ac-

tuarial practice. The same problems and procedures are present. First, as with consulting/administration clients, there are those who are collection problems, who want work for below standard rates, who are inordinately demanding and are, in general, to be avoided. The goal is to sort these out early in the process.

I ask for retainers from new attorney clients of at least 50 percent of the anticipated billing amount, along with a signed engagement letter, to be executed by both the attorney and the client. Collection situations can develop where the client and attorney argue over who is to pay the invoice; dual signatures on an engagement letter negate the issue.

It's good policy not to testify unless all outstanding invoices are paid, up to the date of trial, and a retainer for the day in court has been received. Once a trial is over, it's all too easy for both clients and attorneys to "misplace" the expert's invoices, sometimes forever. If an attorney has run up huge bills and the client is unable to pay current expenses, attorneys generally get paid first.

Once an expert has worked for several attorneys, he or she will get to know which ones will lobby to make sure the expert gets paid (even if it means reimbursement out of their office expenses) and which ones are unconcerned about the expert's business. There are firms I trust based on their integrity and past experience. I know I can commence work immediately and payment won't be a problem. But these are established relationships that take time to develop. As a general rule, insist on retainers and signed engagement letters, and keep payment of

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invoices current. The ideal scenario is to walk out after a trial with no invoices to render.

#### Miscellaneous Loose Ends

Familiarity with case law in the state in which one practices is a big plus. I've heard actuaries say that they're not attorneys, implying time spent with case law is irrelevant. I disagree. If a state favors the coverture (time) method for allocating marital service and the expert testifies based on the tracing method, the expert may not be helping the case. In a case involving stock options, there are many different ways of applying coverture (dates of grant, exercise, employment, separation, divorce, vesting). Which ones should be applied? Sometimes the approach with a state or municipal pension can, and should, be different from the approach to an ERISA-covered plan.

While we're not attorneys, I've found it very helpful (and interesting) to keep up with cases in my working jurisdictions involving pensions and stock options. I also find it a drawing card with the attorneys who select my services. I believe they appreciate the extra knowledge I bring to the table, and it may give me an edge over my peers. All of us like to work with professionals with whom it's easy to communicate and who can add to our base of knowledge. Those attorneys with less experience in pension matters particularly appreciate any relevant cases I can bring to their attention.

An expert should be current and totally versed in all standards

of practice affecting expert work—for a whole bunch of reasons. First, professional responsibility demands it. Second, an expert may be queried about certain professional standards under direct or cross examination. Not responding with assurance can instantly diminish credibility. Third, there's guidance in the standards that affects how an expert should practice, subjects such as consistency in approach, dates, allocation methods, data, etc.

As an expert, it's common to interact with peers as opposing witnesses or possibly competing for the same attorney clients. Professional decorum is the key when reviewing the work of others or responding to opposing testimony.

I'd go a step further. It's inappropriate to talk in any but a positive way about professional peers. Negativity will reflect more on the expert than anyone else.

How much divorce work is enough? While it may be tempting to make family law work most or all of a practice, there are good reasons to limit it to a predetermined percentage of revenue and work flow. Hired experts are just that—experts. The normal practice of actuarial consulting (pensions, or whatever) is where an actuary gains expertise and professional savvy. An expert is more credible as a witness if he or she has a heavy, nonlitigation practice, thereby projecting an image of economic neutrality when testifying. Too much income derived from witness work may taint one's ability to appear unbiased and neutral. And good attorneys will often uncover these facts when qualifying a witness, thereby disclosing for all present the expert's work patterns.

Now and then, an expert encounters situations where a deserving client needs help but just can't pay the freight. Pro bono work is a judgment call, and there are no general guidelines. I've worked on some cases for free, and actually benefited immensely, though I had no way of knowing that at the time.

An example is the case of *Krafick v. Krafick* in Connecticut. The client appealed to the state Supreme Court based on fuzzy thinking about pensions in the lower courts. The case ended up becoming a landmark pension case in the state, and my participation resulted in considerable stature and credibility. As an added bonus, the client eventually and unexpectedly volunteered unsolicited reimbursement when she was able.

Unfortunately, family law is here to stay. Unhappy marriages, in today's environment, are like a never-ending annuity. It's an area that needs professionals with high standards, seeking to help in equitable resolution, while simultaneously playing fair with the poor souls whose lives are being torn apart.

Is it for you? Maybe. If you communicate well under pressure, can get along with all types of personalities (attorneys, clients, judges), don't mind intermittent periods of intense work (lawyers often leave matters until the last moment), then divorce work might make a suitable part of your practice. I've found it extremely interesting—more so than the routine administration skills most of my valuation clients require. And variety does add a touch of spice to most situations. ●

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