

CONSULTANTS' CORNER

Litigation and Public Policy: Two More Areas Where Consulting Economists Dare to Tread

By Jennifer Polhemus

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Our guest author this quarter is Jennifer Polhemus, who has operated her forensic economic consulting practice for more than ten years. Jennifer analyzes economic damages (e.g., lost profits, earnings, and fringe benefits) in connection with litigated disputes in state and federal courts and in judicial arbitration—Carolyn Scott, Editor, The Consultants' Corner.

The very nature of consulting means that no projects are routine—they each have different objectives, data, and processes associated with them. Consultants are adept at adapting. This is especially true with the fields of forensic economics and public policy economics. Although both of these areas might fall into one or more other topic areas (e.g., forecasting or industry economics), the arenas in which the work is conducted make them unique.

Forensic Economics

Forensic economics is the practical application of economic knowledge to legal matters. In the broadest sense, it overlaps with “law and economics,” the university-based research discipline that focuses on the more theoretical aspects of the effects of legal rules, particularly rules concerning property rights. I will focus here on forensic economic consulting, services offered mainly to law firms and occasionally to individual companies and judicial systems. As explained in the first issue of the *Journal of Forensic*

Economics in 1987, “The primary focus of the research of the forensic economist is the measurement of market loss (damages) arising from market failures, contract disputes or torts. Taking the law as given, the forensic economist applies economic theory to the problems of valuation presented in litigation.” (Ward and Olson, 1987).

The ways in which economists work within the forensic consulting field are numerous but most commonly involve the estimation of pecuniary damages in litigation. A business lawyer may request that an economist project lost profits for a business that suffered a breach of a contract to deliver raw materials. Employment and personal injury attorneys use economists (and sometimes accountants and actuaries) to estimate lost wages and fringe benefits due to alleged employment discrimination, or due to the inability to work following an automobile accident. Family lawyers ask economists to help value pension plans and to address issues of financial support. An economist may also be engaged to render an opinion concerning causation (i.e., liability), such as analyzing the presence of monopolistic practices for an antitrust matter.

Although the term “expert witness” is often used to describe this field, forensic economists will tell you that the time spent actually testifying—in deposition, arbitration, or trial—is a tiny portion of their work. Most of the forensic economist’s time is devoted to planning and conducting the analysis that may eventually culminate in expert testimony, but which more probably will be used by the litigants and their counsel to settle a dispute outside of court.

Although a small number of institutions offer college-level courses in forensic economics, forensic consulting is an accidental profession. An attorney might know an economist from his neighborhood and ask him to help with a personal injury case. A consulting economist might find that one of his corporate clients is the subject of a business tort action, such as fraud, and be requested by corporate counsel to review the damage claim submitted by the plaintiff. If the economist finds the initial assignment to be a satisfying experience, a forensic consulting practice may be born. A good job in a consulting role opens doors for future assignments. A bad job closes them.

Public Policy Economics

Economists working in the public policy arena address issues of housing, education, health care, employment and training, government efficiency, and more. They provide assistance to governmental units, trade associations, policy organizations, and private firms, both non-profit and for-profit. As such, consulting economists may come to the field from government or business, from the discipline of policy analysis, or cross over from urban planning or public administration.

Economists who consult in public policy areas are likely to work within consulting groups rather than independently. This is especially true when consulting assignments require not only financial expertise, but the services of other professionals as well. A city planning department may use economic consultants to analyze the impacts of various community development alternatives. A city finance department may want to investigate using a tiered structure for business license taxes. A trade association may engage economists to measure the negative impact that a proposed governmental regulation would have on businesses. Or a state agency may request that economists analyze and recommend funding mechanisms for new school construction.

Due to the amorphous nature of public policy itself, consultants working in this field tend to spend a fair amount of time ascertaining the exact nature of the assignment. What questions are the policymakers trying to answer? Are there any policy alternatives that are deemed infeasible—for equity, legal, or political reasons—right from the start? Written proposals are typical in this field and can consume a material amount of time. Typically, public policy consulting work is performed for a flat or tiered fee, while forensic consulting work is performed on an hourly fee basis.

Understanding the Environments

There are numerous stories of talented economists who did an excellent job of applying the theory, using the tools and explaining the conclusions, but who neglected to understand fully the constraints of the environment in which the consulting was taking place. Both fields discussed here face rigid procedural constraints. Civil trial procedure, especially pretrial discovery, is codified in state and federal law and includes rules and deadlines

that must be met. Forensic economists will be expected not only to understand the applicable legal theories and case law (hopefully with assistance from their attorney clients), but also to be fluent in courtroom etiquette, deposition procedure, and pretrial discovery rules. Put plainly, experienced testifying economists know to ask the judge's permission before getting up and to pause before answering questions (to permit an objection).

For forensic economists, the application of relevant legal standards can be a frustrating exercise, because not all laws make economic sense themselves. In Michigan, for example, when discounting a future stream of payments or income, one must utilize a simple interest rate of 5 percent, even though it collides with economic reality. In California, the legal doctrine of "collateral source" prohibits lost earnings from being offset by any disability insurance proceeds that an injured plaintiff has received.

Economists working in public policy arenas must work within the constraints of multitudinous municipal and state codes, administrative law, and regulations requiring public notice. They must understand the roles of the public, interested parties, the agency staff, and the elected/appointed decisionmakers. It is the arena, not the analysis, that makes the work unique. Paul Silvern, Partner at Hamilton, Rabinovitz & Alschuler, Inc. in Los Angeles, explains: "In our work we use the same tools as other analysts: regression, econometric, and I/O analysis. What we do differently is that we go to great lengths to try to make that analysis understood, particularly by people who are not familiar with the methods and thus may be skeptical of them."

Unlike the more private nature of corporate consulting—and even of forensic consulting, much of which takes place in private offices and not in courtrooms—public policy consulting is indeed quite public. This means that it faces a different type of scrutiny, and factors that affect the decisionmaking are not like those that one finds in a corporate boardroom. The range of interests (including homeowners, small businesses, environmentalists, and political groups) that can become involved in a project are difficult to predict but must not be ignored. Ultimately, the quality and success of the work is decided not by other economists, or even businesspeople, but by juries and judges, elected and appointed policymakers, and members of the general public.

Constraints of Data, Time, and Budget

These constraints are all too familiar to consulting economists in all fields. Forensic economists can find themselves being brought into a project on the eve of trial, when the universe of data has been predetermined simply by the expiration of various filing deadlines. Public policy assignments often concern issues with pressing time horizons and budgets that may not permit customized data collection. According to Paul Silvern, "We have to adapt research for the reality of the situation. These projects don't lend themselves to longitudinal studies where you collect ten years of data. Sometimes there is virtually no historical data, almost no budget, and you need an answer in three days."

Not surprisingly, experience pays off in these situations. Practitioners learn to design the analytical framework early and carefully, to stay in frequent contact with the client and any other consultants working on overlapping portions of the analysis, to be conscious of the process, to know the procedural deadlines, and to plan and price the project in discrete stages whenever possible.

A Good "Fit" for Economists

Economists are particularly well suited to forensic and policy work. The very nature of economics is to contemplate "what if" questions, to design and agree to be limited by assumptions, and to hold some factors constant. Economists, particularly those with social science training, can bring a multidisciplinary approach to bear on complex issues. For example, consider the case of a husband who undergoes a vasectomy. Three years later he and his wife, unwillingly, become parents. (In the forensic economics literature, this is termed "wrongful pregnancy.") The economist is asked to assume that the husband is indeed the biological father, that the vasectomy was performed improperly, and that terminating the pregnancy was not an option. The consulting assignment is to determine and measure the elements of economic loss. Most obvious will be the cost of raising the child—but how does that cost vary with family income, and should it reasonably include a college education? Will the mother or father face a reduction in lifetime earnings due to the necessity of caring for the child? Does the law consider the positive attributes of love and comfort that an additional child can bring to a family? Will the child be able

to contribute to her aged parents' support one day? For this assignment, the economist will need to suspend his or her own beliefs and experiences with family life, apply the relevant legal standards, and find reliable, objective ways to conceptualize and measure the loss and/or benefit derived.

These two fields tend to be natural ones for professors of economics, who can apply their classroom-tested explanatory skills to a jury or public hearing situation. Indeed, within the forensic economics field many practitioners maintain their full-time academic careers, while working only occasionally as consultants. In public policy work, where the consulting assignments are likely to be more comprehensive and longer term, full-time consulting work is the norm. Both types of consulting are particularly appropriate for those who enjoy the intellectual challenges offered by legal and policy analysis but who do not desire to be lawyers or policymakers themselves. And they offer an opportunity to work with other disciplines, including law, accounting, medicine, vocational rehabilitation, asset appraisal, social work, and urban planning.

These are also fine fields to make a meaningful contribution to some final product. Society is faced with numerous questions of rights, equity, distribution, and accountability. The mechanisms that we use to address these issues, i.e., the courts and the political system, are imperfect. However, economists can make these processes more efficient and effective. In litigation, economists can provide the parties with accurate appraisals of many elements of damages, thus helping them come to an earlier, more objective resolution and reduce court costs. In public policy work, economists can provide a more objective basis for decisionmakers and help them reach policy goals more reliably.

The Hard Part

But these are not professions for the faint of heart. An economist testifying in court may face cross-examination focused not only on the accuracy of his methodology, but also on his personal business practices and even on his own character. Trial attorneys are trained specifically to argue and advocate at a level well beyond what an economist may have faced at his dissertation defense. He will be asked to recall and to divulge all of his data sources, the name of every person with whom he discussed the project,

the content of all discussions with his clients, his hourly billing rate and total charges, and the names of other clients and projects. For a public policy economist presenting his analysis at a public hearing, he may find that all of his good work is viewed through the lenses of opposing political factions. Public policy discussions are often emotionally charged, because they deal with core human issues, such as education, housing, and personal welfare. Policy consultants have had to walk through lines of sign-bearing demonstrators in order to enter a city council's chambers, and they will in all cases need to be comfortable in dealing with the media.

One of the reasons that I like consulting is the continuous variety of assignments. In a given week, I may be grappling with how a commercial builder has been damaged because a lender refused his funding, trying to measure a mother's economic value to her family, and conducting industry analysis in waterbeds or weight control. I will also be advising lawyers on how to use the tools available to them (i.e., depositions, interrogatories, document requests, and third-party discovery) to get the information that will eventually help me to conduct my analysis. Forensic economics and public policy consulting are interesting and varied fields, where economists can apply their skills in practical contexts and build satisfying careers. ■

To Find Out More

Forensic economists are a web-savvy bunch, so there are a number of resources available on-line. An excellent Internet site, maintained by Will Yancey, an economist and CPA in Texas is <http://www.willyancey.com>. It contains links to most of the associations and journals relevant in this field. It includes a link to the 700-member National Association for Forensic Economics (NAFE), the largest professional association in the field. In addition to publishing two peer-reviewed journals, NAFE sponsors the NAFE-L Internet discussion list, a model for such vehicles. Public policy work is a wider field, incorporating numerous and disparate disciplines. For a good overview of the variety of think tanks, associations, and journals, go to <http://www.policy.com/community> and http://our-world.compuserve.com/homepages/sm_nz/guide.htm.

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COMMENTS AND GUEST AUTHORS

We hope in these columns to devote regular space to questions and answers, complaints, current issues or other commentary by economic consultants among the readership. Correspondence can be directed to my attention via e-mail. The address is McCoy.Scott.Co@IBM.net. We are also happy to hand the pen to our readership from time to time. If you have an idea for an article that addresses the issues we discuss in the Consultants' Corner and feel it would be useful to others, please contact me at the e-mail address given above or by telephone at (312) 444-2942.