

1996 Developments in Ethics, Credentials, Standards and Disclosure

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During the 1993-95 period, there were three major developments involving the federal judiciary that brought issues of ethics, credentials, standards and disclosure to the forefront. The first was the 1993 United States Supreme Court decision in *Daubert vs. Merrell Dow Pharmaceuticals*, which announced a strong Supreme Court mandate to federal judges at all levels to become more active “gatekeepers” with respect to whether “expert testimony” is sufficiently “expert” to meet federal standards. The second was the adoption of new requirements within the Federal Rules of Evidence in December 1993 establishing that expert witnesses must disclose four year records of prior testimony, that reports issued by expert witnesses must adequately disclose the assumptions and factual bases of expert opinions, and establishing deadlines for reports that were sufficiently in advance of trial to allow checking of those assumptions and facts. The third was the January 1995 publication by the Federal Judicial Center of the *Reference Manual on Scientific Evidence*, containing, among other modules, one by Robert E. Hall and Victoria A. Lazear entitled, “Reference Guide on Estimation of Economic Losses in Damage Awards.”

These developments all point in a single direction. At the federal level, the ethics, standards and credentials of “expert witnesses” will be checked more closely and persons expecting to act as witnesses will be expected to disclose their backgrounds, assumptions and information sources earlier and more completely.¹ Under the initial guidance of Walter Johnson, NAFE previously adopted a Code of Ethics for economic experts in 1992. Building from that start, then NAFE President Michael Brookshire instituted work leading to the adoption by the NAFE membership of a “Disclosure Statement” in January, 1994. Brookshire also fostered the creation of an activated Ethics, Qualifications, Standards and Disclosure (ESQD) Committee with a charge to develop a NAFE response to the *Daubert* decision. Mike Brookshire’s charge to the committee was to try to develop a thoughtful alternative to a credentialing process.

The ESQD Committee developed a basic proposal built around the concept that the qualifications of reports prepared by proffered economic experts can be more easily considered than the qualifications of the experts preparing those reports. Less than six months after approval of this recommendation by the NAFE Board, the publication by the Federal Judicial Center of the *Reference Manual on Scientific Evidence* occurred in January of 1995. NAFE was already moving in the same direction. In the summer of 1995, the Judicial Guide Project was separated from the ESQD Committee and a Judicial Guide Committee composed of James D. Rodgers, Stephen Horner and Tom Ireland was empowered to continue developing a set of Judicial Guides, with each primary writer to serve officially as the “coordinator” for that module.

The Judicial Guide Committee is coordinating the development of four judicial

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¹ Fortunately, the National Association of Forensic Economics was already making decisions that put NAFE in a very good position to respond positively to these developments. See Ireland [1995].

guide modules: Personal Injury/Wrongful Death/Survival Action, coordinated by Thomas R. Ireland, Stephen M. Horner, and James D. Rogers; Business Valuation by Robert Trout; Employment Discrimination by Michael Piette; and Commercial Litigation by Patrick Gaughan. Each of these modules has been through at least one draft and the Judicial Guide Committee will present developed drafts of all four modules to the NAFE Board of Directors at its July 1996 board meeting. Issues such as how (and if) these modules will be published and distributed are unresolved, but will be considered at that time.

The goals of the Judicial Guide Committee are to produce module units that lay out the basic fundamentals of how analysis is done in the area of each module. In this discussion of fundamentals, the Committee's intent is that areas of controversy will be explained so that judges will have insight into the reasons for differences in the opinions of qualified economists. However, it is also the intent of the Committee that the modules will be strictly neutral in their presentations of those controversies. In addition to this strong focus on taking neutral positions with respect to controversial areas, the Committee is emphasizing the readability of the guides by persons not trained in economics, as will be the case with most federal judges and attorneys who will read the guides.

In this process, NAFE has had the strong support of its sister organization, the American Academy of Economic and Financial Experts (AAEFE). The closeness of the two organizations is indicated by the fact that two of the current members of the AAEFE Board of Directors are former or present members of the NAFE Board of Directors. At its annual meeting in March 1996, the AAEFE Board of Directors endorsed the NAFE Code of Ethics and will print the NAFE Code of Ethics in its *Journal of Legal Economics*. The AAEFE Board of Directors, however, decided to adopt a slightly different Disclosure Statement from the one adopted by NAFE in 1994. The NAFE Disclosure Statement reads: "NAFE encourages all of its members to be clear about sources of information and assumptions leading to all opinions they express in a litigative arena." The AAEFE Disclosure Statement reads: "AAEFE encourages its members to clearly state sources of information and material assumptions leading to their opinions. Such disclosure should be in sufficient detail to allow identification of specific sources relied upon and replication of the analytical conclusions by a competent economist with reasonable effort."

AAEFE is also supporting, in principle, the NAFE Judicial Guide Project. When the NAFE Board of Directors has determined that its Judicial Guides are ready for release, tentative plans call for the AAEFE Board of Directors to have an opportunity to consider endorsing the Guides, as it did with the NAFE Code of Ethics. This is based on the recommendation of Joe Cecil, of the Federal Judicial Center, that multiple organizational endorsement would strengthen the acceptance of the Guides being developed.

Reference

Ireland, Thomas R. "Recent Developments in Ethics, Credentials, Standards and Disclosure." This journal. 1995. 1(1): 95-96.