Excerpt from

The Comprehensive Guide
to Lost Profits and Other
Commercial Damages

Third Edition

Nancy J. Fannon
Jonathan M. Dunitz

BVR
What It’s Worth
Excerpt from

The Comprehensive Guide to Lost Profits and Other Commercial Damages

VOLUME ONE

Nancy Fannon
and
Jonathan M. Dunitz, Esq.
Editors
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Foreword

“It costs us nothing to be just.”¹

This book is about financial evidence: how to gather it, interpret it, and tell its story in a lawsuit or litigation setting. This is the task that the attorney typically retains the financial expert to accomplish. In this comprehensive Guide, we bring together the financial expert’s knowledge of accepted methods and procedures with the attorney’s knowledge of legal issues and insights. This includes a summary of the applicable rules of civil procedure and of evidence, as well as the rich and continually expanding case law that interprets what courts have accepted as evidence for lost profits claims—and what the courts have rejected and why. This Guide contains representational analyses as well as excerpts and abstracts of case law on lost profits damages. However, like any guidance, it is a tool and not a substitute for the professional’s knowledge of a particular case, the potential impact of local rules regarding discovery, and the jurisdictional nuances that may affect the damage calculations.

The attorneys and financial experts who have participated in putting together this text are among the best in the country in their respective areas of expertise. Our heartfelt thanks go out to all of them for their generous and substantial contributions. Each of their chapters served to make this a better, more comprehensive work covering a range of never-before-addressed topics—including extensive analysis of concepts and case law lawyers and experts have to grapple with when faced with a damage analysis.

This third edition includes materials on standards for experts, methodology, discount rates, evidentiary matters, lost profits for specific industries, and intellectual property damages. In addition, you’ll find extensive analysis of concepts that are important for lost profit and financial damage calculations. These materials include comprehensive analysis of motions to exclude experts in lost profits damages cases by issue, with materials contributed by Professor Robert M. Lloyd. Professor Lloyd also provides an in-depth review of the concept of reasonable certainty, the result of his significant research on the topic.

Much of the text’s material has been substantially enhanced for this edition. The chapter on spoliation has been significantly expanded by David Chaffin, Esq., and Rachel Eisenhaure, Esq., as has the chapter on lost profits versus lost business, thanks to the efforts of Neil Beaton and Tyler Farmer, Esq. Cliff Hutchinson, Esq., added his wisdom

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¹ Henry David Thoreau, “A Plea for Captain John Brown” (1859).
to the chapter on the U.S. court system, and the chapter on benefit-of-the-bargain damages by Jeff Litvak, Ken Mathieu, and Kevin Shannon, Esq., has been updated with the help of Jared Bourgeois. Trademark and copyright damages have also been updated with the addition of Mark Glick, Ph.D., J.D., and Milan Politi, J.D. And our cornerstone chapter on lost profits methods and procedures by Robert Gray and James O’Brien has been enhanced by the work of Bob and James, as well as the additional materials provided by Greg Stillman, Esq.

In addition to these expanded materials, new topics have been added and include an insightful, comprehensive look at the unjust enrichment remedy, by George P. Roach. Substantive new materials have been added on forensic accounting by Peter Resnick and Greg Naviloff and on business interruption by John Garaffa, Esq. Insightful new chapters on expert depositions, by David Herzer, Esq., as well as a new chapter on lost profits in the restaurant industry by Ron Seigneur, have also been added.

Finally, this edition also includes new, updated, and enhanced abstracts of many of the lost profit and damage cases found throughout the book.

Once again, BVR has provided extraordinary support, and in particular, we thank Sarah Anderson, publisher at BVResources LLP, whose assistance has been invaluable, as well as Sylvia Golden for her valuable assistance with case abstracts.

To all our new contributors to the Guide, a warm welcome, and to all who participated in this edition, a heartfelt thank you.

We hope you find this text to be a rich resource for your practice and welcome your suggestions and input for our continuing updates and for new topic areas that would benefit your work as an attorney or expert.

Nancy J. Fannon and Jonathan M. Dunitz, Esq.
2014
Part I
Context of Damages Calculations
Chapter 1.
Professional Standards for Experts

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Chapter 1.
Professional Standards for Experts

By Michael A. Crain, CPA/ABV, ASA, CFA, CFE

Financial experts may be subject to standards of professional practice from a number of sources when they measure lost profits damages and give related expert testimony. The sources can include governmental regulators as well as professional membership organizations and societies. In addition, a technical community may establish professional standards of practice in other ways. This chapter will review some of the standards commonly associated with financial experts.

1.0 Certified Public Accountants

Accountants are one group of financial experts who are frequently retained by parties in business litigation to measure lost profits damages. Most of these accountants are licensed as a Certified Public Accountant (CPA). Since state governments license CPAs in the U.S., the rules and regulations of a government entity or authority (usually a state’s board of accountancy) will regulate the professional conduct of a CPA in public practice. In addition, if a CPA has joined a professional member organization such as the American Institute of Certified Public Accountants (AICPA) or a state CPA society, he or she voluntarily submits to that organization’s ethical rules and standards of professional practice.

Most of the state boards of accountancy have adopted the majority of concepts in the AICPA professional standards into their rules and regulations. Accordingly, the discussion below will focus on the relevant AICPA standards for a Certified Public

---

1 This chapter does not discuss judicial rules that apply to expert witnesses; see Chapters 2-7 for a discussion of the applicable rules of procedure and evidence.
Accountant who provides services of measuring lost profits damages and testifies as an expert witness.

The AICPA has published professional standards for members who provide consulting services, including litigation services, in its *Statement on Standards for Consulting Services, No. 1* (SSCS No. 1).\(^2\) CPAs who make lost profits damages measurements are performing a consulting service described in SSCS No. 1.\(^3\)

SSCS No. 1 states that a CPA who performs consulting services should:

- Have professional competence;
- Exercise due professional care;
- Adequately plan and supervise the services;
- Obtain sufficient relevant data for the conclusions;
- Serve the client interest by seeking to accomplish the engagement objectives while maintaining integrity and objectivity;
- Establish an understanding with the client on matters such as the scope of work; and
- Communicate with the client on findings, reservations, and conflicts of interest.

SSCS No. 1 provides an explanation for each of these items. In addition, the AICPA's Consulting Services Special Report 03-1\(^4\) offers nonauthoritative advice on how SSCS No. 1 and other AICPA standards apply to litigation services.

The AICPA can only obligate its members to follow its standards such as SSCS No. 1. Further, to the best of the author’s knowledge, most, if not all, of the state regulators of CPAs in the U.S. have rules or regulations that incorporate the concepts of these consulting standards (and other AICPA standards) into their accountancy standards. Accordingly, the obligation for licensed CPAs to follow SSCS No. 1 arises from their membership in AICPA, if applicable, and from the rules and regulations of the state’s regulator.

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\(^3\) Ibid., CS sec.100.05.

In addition to SSCS No. 1, CPAs are also expected to follow the AICPA Code of Professional Conduct and any other applicable AICPA standards if the AICPA has issued technical standards for a specific area. For instance, the AICPA has issued technical standards for performing business valuations. It has not, however, issued any specific technical standards for developing lost profits damages measurements.

The portions of the AICPA Code of Professional Conduct that could be relevant to CPAs performing lost profits damages measurements (and other litigation services) are the following:

- Rule 102, Integrity and Objectivity;
- Rule 201, General Standards;
- Rule 202, Compliance With Standards;
- Rule 301, Confidential Client Information;
- Rule 302, Contingent Fees; and

In addition, if a CPA is performing lost profits damages measurements or giving expert testimony for an existing attest client, Rule 101, Independence, of the Code of Professional Conduct also applies to the CPA. This rule and the AICPA’s related interpretations of the rule discuss, in part, whether certain services and activities of a CPA will impair his or her independence, such that it might prevent him or her from providing attest services. (Litigation services are not attest services.) “Independence” has a specific meaning for the accounting profession and is required for a CPA to provide attest services, such as auditing and reviewing financial statements. As a term of art in the accounting profession, independence is not required for nonattest services. Instead, a CPA is required to have integrity and objectivity when providing nonattest services under Rule 102.

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6 AICPA, AICPA Professional Standards, ET Section.
7 Attest services as defined by AICPA Code of Professional Conduct. See AICPA Professional Standards, ET sec. 92.01.
8 AICPA Professional Standards, ET sec. 101.01.
9 In addition to complying with AICPA independence rules, CPA firms that audit U.S. public companies may be obligated to follow stricter independence standards under rules of the Public Company Accounting Oversight Board (PCAOB) and the U.S. Securities and Exchange Commission (SEC).
10 AICPA Professional Standards, ET sec. 101.05.
11 See, for example, AICPA, AICPA Professional Standards, ET sec. 92.01 and Rule 101 of the Code of Professional Conduct. The references for independence requirements for specific services are in the respective AICPA technical standards. See, e.g., AICPA, AICPA Professional Standards, AU sec. 220 and AR sec. 100.A.48 for auditing and reviewing financial statements, respectively.
In addition to Rule 101, Interpretation 101-3 of the Code of Professional Conduct may be applicable. Interpretation 101-3 is an authoritative interpretation of the independence rule. It covers consulting services and other nonattest services that a CPA provides to an existing attest client.

Finally, Rule 203, Accounting Principles, of the Code of Professional Conduct might apply in some litigation matters. Essentially, this rule requires the CPA to apply the proper accounting principles, if applicable.

These AICPA standards relate to the conduct of the CPA. No existing AICPA standards specify detailed reporting requirements for litigation services. Accordingly, there is no professional standard in the accounting profession on the technical content and form for reports on lost profits damages measurements.

As a tool to help CPAs understand how AICPA professional standards apply to litigation services, the Institute published a nonauthoritative practice aid in 2003. An appendix to that practice aid provides a decision tree that shows the general relation of AICPA standards to litigation services and is reproduced in Appendix C of this guide. Since the AICPA published the practice aid, it has issued professional standards on valuation services. Further, the practice aid compares AICPA professional standards with the version of Federal Rule of Evidence 702 that was in effect at that time. (That section is also reproduced in Appendix E of this guide.) Finally, in 2008, the AICPA published another nonauthoritative practice aid that discusses certain aspects of the AICPA Code of Professional Conduct to services in a litigation environment—Independence, integrity, and objectivity.

2.0 Economists and Other Financial Experts (Non-CPAs)
Unlike their oversight of CPAs, government regulators do not license and oversee economists and other financial experts if these professionals measure lost profits damages or provide related expert testimony. To the author’s knowledge, no federal or state regulators issue rules and regulations governing the conduct of economists and financial experts (who are not CPAs) on lost profits damages measurements. However, like CPAs, if these individuals belong to a professional organization that requires its

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12 AICPA, AICPA Professional Standards, ET sec. 101.05.
14 AICPA, AICPA Professional Standards, Valuation Services section.
15 AICPA, Independence and Integrity and Objectivity in Performing Forensic and Valuation Services, Special Report 08-1 American Institute of Certified Public Accountants, 2008.
members to follow ethical rules and other standards, then they have obliged themselves to follow those guidelines.

For instance, the National Association of Forensic Economics, a member organization consisting primarily of economists, has a Statement of Ethical Principles and Principles of Professional Practice.\textsuperscript{16} That document covers its members when providing an expert opinion for use as evidence by a trier of fact. Section 3 of the document states:

\textit{Diligence}

Practitioners of forensic economics should employ generally accepted and/or theoretically sound economic methodologies based on reliable economic data. Practitioners of forensic economics should attempt to provide accurate, fair and reasonable expert opinions, recognizing that it is not the responsibility of the practitioner to verify the accuracy or completeness of the case-specific information that has been provided.

Section 4 states:

\textit{Disclosure}

Practitioners of forensic economics should stand ready to provide sufficient detail to allow replication of all numerical calculations, with reasonable effort, by other competent forensic economics experts, and be prepared to provide sufficient disclosure of sources of information and assumptions underpinning their opinions to make them understandable to others.

Other examples of member organizations whose professionals are hired as testifying experts are the National Association of Certified Valuation Analysts (NACVA), the Institute of Business Appraisers (IBA), the American Society of Appraisers (ASA), the CFA Institute, and the Association of Certified Fraud Examiners. (Appendix A to this guide provides links to the ethical guidelines for each of these groups, as well as the National Association of Forensic Economists. Further, a link to the certification requirements of each group is also in Appendix B.)

In addition, unlicensed experts who have an academic background frequently rely on the practices of academia to establish standards of practice and proper conduct. A key practice in academia is reliance on published research that has been generally accepted in a scientific or technical community. In academe, proof of general acceptance

\textsuperscript{16} Available at nafe.net/about-nafe/nafes-ethics-statement.html.
is generally based on publication in a quality academic journal. The publication criteria in these types of journals usually focus on whether the research has passed anonymous peer reviews by a panel of experts.

Financial experts may also recognize the methods that their applicable professional literature describes as standards of practice. However, one should consider the quality of the journal and evaluate whether an article represents only one person’s opinion or a practice that has been peer-reviewed by a panel of experts.

3.0 Conclusion
The opinions of a testifying expert and the credibility of the individual may be judged by a trier of fact based on whether the work that went into the expert’s opinions met the professional standards of practice in the relevant technical community. These standards may be on technical matters or rules for ethical conduct. Further, professional organizations and associations may establish standards of practice. These groups might be government regulators or industry groups. In addition, standards of practice might arise from practices described in a profession’s literature. Beyond professional standards of practice in a technical community, judicial rules may also apply to the opinions of experts and their related disclosures.¹⁷

¹⁷ These rules are discussed in Chapters 2-7. Certain legal principles may also apply to a testifying expert’s opinion (e.g., the principle of reasonable certainty, discussed in Chapter 11, and the evidentiary requirements of relevance and reliability, discussed in Chapters 9-10).
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