

The Sooner CPAs Assist During Financial Litigation, the Better

By James A. Andersen and William G. Essig



When litigation involves financial issues, most recognize that a qualified certified public accountant should be engaged to provide expert consulting and testifying services. Surprisingly, many CPA experts are hired too late in the process.

One would hope that lawyers would not wait until the latter stages of a trial to ask the CPA to testify. Yet, within the last year, we have had two such requests. In one instance, we turned down the attorney's request. This individual believed we could analyze financial data, prepare a damage model and provide expert testimony all within the span of three days.

In the other instance, the plaintiff's counsel requested that we testify, on two days' notice, on the net worth of a defendant as a basis for possible punitive damages. This testimony would be the last evidence presented to the jury. Under some circumstances, an expert might be able to provide such testimony. But in this instance, discovery relating to the defendant's net worth had not been handled properly, and there was no financial information on which an expert could base an opinion. Counsel attempted to convince the trial judge to reopen discovery so that the appropriate financial information could be produced for the expert's use, but the judge refused to do so. As a result, the plaintiff's counsel was precluded from pursuing his client's punitive-damages claim.

Had we been engaged before the discovery process started, we would have assisted the attorney in developing a discovery plan that would have yielded the information on which an opinion could be rendered.

Even if the financial expert is engaged before discovery is well under way, it may be too late for the expert to have sufficient time to analyze the relevant financial information.

In a recent matter, the plaintiff was claiming substantial economic damages, in the forms of lost earnings, extraordinary out-of-pocket costs and diminution in value of its business. The damages calculations were prepared by the entity's chief financial officer and were supported by numerous worksheets and analyses. As with most damages calculations, the assumptions on which the calculations were based were the most significant. To evaluate the assumptions and to determine their reasonableness was a task that required intensive research and analyses over a four- to five-month period.

Based on this work, we determined that a number of the plaintiff's assumptions were unfounded and that many were applied improperly. Had we not started our work in the early stages of this litigation, we would not have performed the research and analyses necessary to rebut the plaintiff's damage claims.

A few years ago, one of our clients prepared its own damage analysis and model. As the trial date neared, and before discovery closed, we were engaged to review the damages calculation. We found that the revenue and most of the cost and expense assumptions were reasonable but that the plaintiff was relying on a sole supplier for the key component of its product. We were told that this supplier was the only one in the United States capable of providing this component.

We contacted the supplier to verify its ability to provide components during the damages period. Based on the damages model, the business would need to sell 50 units a month to break even; it was forecasting that it would sell 200 to 250 units per month, giving rise to the plaintiff's substantial lost-earnings claim. We learned that the supplier could make, at most, 25 units a month — half the number of units necessary to meet the break-even point.

At this point, the plaintiff's action died, but many tens of thousands of dollars had been expended. These dollars would not have been spent had we been engaged on completion of the original damages model.

In another case, a number of plaintiffs sought damages for an environmental accident. Of the plaintiffs, only one had a history of successful business operations. All of the remaining plaintiffs' businesses had never shown a profit for three to five years. We pointed out this fact to the defendant's counsel, and the plaintiffs' claims were quickly dismissed.

Finally, we were once asked by a plaintiff's lawyer to prove a damage claim before the complaint was filed. The defendant's liability was very clear; however, how the plaintiff was damaged was not clear. Because the plaintiff's business continued its rapid growth and profitability, we concluded that the amount of the damages suffered was indeterminable, and the action wasn't filed. The plaintiff incurred less than \$5,000 in legal and expert fees, a huge savings from the fees that would have been incurred had a lawsuit been filed, discovery started, and the damages part of the case fallen apart.

The conclusion to be drawn from these situations is that the most successful and cost-effective cases are those in which the CPA expert is involved in the earliest stages of litigation and works with counsel as a partner in the process.

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Burdening Voters

By Robert F. Bauer

Some voters imagine that the flurry of election law reforms and proposals of recent years was meant for their protection. Certainly, these reforms are advanced and argued in their name. And perhaps, in some instances, this is the intent of some such activity, such as the billions spent under the Help America Vote Act to retire the clumsy, misfiring punch-card machinery, among other measures to improve election administration.

But another reform movement, the movement for Voter IDs, has surged. This is a movement in which the state, rather than answering for its dismal voting rights record, puts fresh burdens on voters, especially on those voters least able to bear them. And that, it turns out, is the very point of these reforms: to make voting harder for the voters straining hardest to be heard.

Last week, this movement celebrated a victory with a 7th U.S. Circuit Court of Appeals case upholding a voter ID law passed by the state of Indiana. *Crawford v. Marion County Election Board*, 06-2218, 06-2317 (7th Cir. Jan. 4, 2007). The court held that the law was a reasonable measure to combat voter fraud.

What fraud? Judge Richard Posner, writing for the majority, agreed that Indiana had not experienced any such fraud, having never prosecuted any such case, but he thought it entirely understandable that the state would worry about it. And this fear, however unsupported by fact, seemed to this judge and court well worth the burdens placed on the poor or the infirm or the elderly who might not have ID or the means or time or capacity to easily acquire it.

Indeed, Posner could not help mentioning his doubt that voting made all that much difference, anyway. In any realistic view of the world, he wrote, it is surprising that anyone bothers to vote at all, because no one vote could ever make much of a difference.

In the last year, other courts have been presented with ID requirements enacted in other states, and some, as in Missouri and Georgia, have refused to approve them. The Missouri Supreme Court, for example, found fatal the absence of any evidence of fraud. In Georgia, both federal and state courts were similarly unimpressed with the case for saddling voters, particularly those most vulnerable, with these identification requirements. Litigation in Ohio, which threatened to cause major confusion as the polls opened last year, concluded with a consent

decreed that provided reasonable protection for both absentee and in-person voters.

But the movement, as the 7th Circuit case demonstrates, has plenty of life left in it. It is an astonishing development, hardly what would have been expected of the national commitment to voter fraud protection forged after the 2000 presidential election. It is explained by several factors.

First, like many successful causes, this one has its prominent public advocate and pamphleteer: John Fund, a columnist for the Wall Street Journal and author of "Stealing Elections," first issued in 2004. With skill and perseverance, Fund has supplied spurious gravity to the alarms rung about "voter fraud." He is the supreme anecdotalist, able to turn out limpid prose in support of a shrewdly argued but pre-cooked ideological program.

Fund does not call for studies of the problem: He assumes its very existence, and he rests this assumption on claims and suspicions and the potential for fraud that he detects in the mismanaged and underfunded electoral "system" we now have. Fund's particular talent is directing frustration with the system away from those responsible for it — legislators and administrations — to those victimized by it, voters. And in the absence of any need for the anti-fraud measures he advocates, Fund has written, literally, the book on it, which can be cited to fill in the missing support for the ID requirement.

The second is the discriminatory but, to some, politically advantageous impact of this "reform" movement. The dissenting judge in the Indiana case perceived the politics with piercing clarity: "to discourage election-day turnout by certain folks believed to skew Democratic." Scholars, such as Spencer Overton at George Washington University, who have devoted attention to the bias in this movement have shown, with the numbers, how these politically fruitful burdens fall on the low income, the poor, the elderly.

Consider Georgia, where, by one estimate, 36 percent of the

residents older than 75 do not have a driver's license. Or consider Wisconsin, where, according to a 2005 study, African-Americans were half as likely as whites to have a driver's license. Reports from 2004 showed that voters in Native American counties in South Dakota were two to eight times more likely than whites to show up at the polls without IDs.

And the maladministration of ID requirements has, not surprisingly, haunted primarily the socially or economically disadvantaged and people of color. New York City, for example, has no ID requirement, but in the past Asian-Americans have been the targets of illegal demands that election officials have made for ID.

Yet a third reason for the steady progress of this movement has been the surprising willingness of experts and courts to accept a low threshold of justification for these requirements.

The Carter Baker Commission on Federal Election Reform recommended an ID requirement on the bald assertion that "there is no doubt" about the existence of fraud. The commission added that at least there was some public "perception" of fraud.

This was bad enough — here was nonpartisan cover for this insidious enterprise — but then last year the Supreme Court, in *Purcell v. Gonzalez*, signaled that it would accept this sloppy, empirically uninformed reasoning. Reinstating a voter ID requirement in Arizona, the court announced that "voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised," discouraging them from participating. This was all there was to it: just the court's judgment from gut, its sense of how voters feel about all this.

Finally, there is the anti-immigrant politics of the times, nourished by anxieties about national security. Worries about violation of our borders can be turned easily into dark warnings about violation of the purity of the vote. ID requirements aimed at proof of U.S. citizenship play on these concerns, as the House Republicans chose to do by promoting the Federal Election

Integrity Act of 2006, an ID requirement that passed in the fall on a party-line vote.

These are the potent forces propelling this movement, even as brave courts, like those in Georgia and Missouri, stand their ground. Some experts with impeccable records of advocating voting rights have suggested that a compromise might be possible. Professor Richard Hasen of Loyola Law School, for example, has suggested some reasonable ID requirement in exchange, for example, for government-funded universal registration. So far, the anti-fraud movement has not taken the challenge. Nor has it exhibited much interest in another challenge, voiced by Overton, that they support true study of the imagined problem rather "than a couple of unsubstantiated anecdotes and speculation about the potential for voter fraud."

The significance of the battle over ID is hardly less than the difference between reforms that hold government accountable to voters — for a better, more reliable, more democratic electoral process — and a program to insulate government from its responsibilities by suggesting that voter fault or incapacity or mischief is the chief threat to the integrity or successful operation of our elections.

In a recent article, professor Heather Gerken of Yale Law School has noted rightly that "self-interested politicians — not voters — are the main obstacle to reform" and that a Democracy Index might be created to measure our progress toward a system in which votes are accurately recorded, lines are not discouragingly long, and registration and turnout are socioeconomically balanced and robust.

Gerken proposes to prod election officials and politicians into action by exposing, by use of hard data, where we stand in what she calls, without exaggeration, an "election system ... in scandalous shape." The ID movement tries to change the topic and redefine the scandal, so that the voters, perversely, are answering to the government, not the other way around.

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Judges' Pay Must Keep Up With the Times

By Karen J. Mathis



On New Year's Day, U.S. Supreme Court Chief Justice John G. Roberts Jr. issued the court's annual report on the state of the judiciary. He considered one issue so urgent that he made it the sole topic of his remarks: the declining real pay of America's federal judges.

Since 1969, federal judges have been caught in a financial time warp that has seen inflation erode their real earnings by nearly 25 percent. Where U.S. district judges once earned more than law-school deans — a fitting reflection of their responsibility and professional standing — they now are sometimes out-earned by first-year associate lawyers.

Americans have mixed feelings about public service: We want the best and most conscientious people serving in our courts, but the willingness to pay can be grudging. Most high-level employees understand that a career in government means a pay cut, compared with what is available in the corporate world.

Even by that standard, though,

public disputes, making tough calls in controversial cases and deciding when laws fail to comply with the Constitution. They must command the respect of those who come before them and be willing to apply the law fairly and without fear.

We are at the point where the erosion in pay is discouraging the best private lawyers from entering the judiciary, and judges increasingly are leaving the bench at what should be the height of their public careers because of financial pressures.

"The dramatic erosion of judicial compensation will inevitably result in a decline in the quality of persons willing to accept a lifetime appointment as a federal judge," Roberts wrote. "Without fair judicial compensation, we cannot preserve the quality and independence of our judiciary, which is the model for the world."

Our nation's founders understood that financial security was essential to protect judges from manipulation. That is why, alone among government positions, judges were given lifetime tenure — and the founders insisted that their salaries not be lowered.

Unfortunately, because of defective pay policies, that mandate has been turned on its head. Federal judges are more exposed to financial uncertainty than those serving in practically every other government position.

Whereas most federal employees consider annual cost-of-living adjustments routine, judges receive them only if Congress approves them specifically. Many years, for electoral reasons, those adjustments are rejected.

I urge you to read Roberts' full remarks at www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf

Few Americans appreciate the need for a stable, properly supported judiciary as much as lawyers do. It is incumbent on the legal community to support the legitimate needs of federal judges and to educate all Americans, including lawmakers, on the importance of this issue.

We must protect the proper functioning of our courts so that our courts can protect us.

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