

# Who and What is a Forensic Economist?

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**Abstract.** After many years of teaching economics, I often attempt to define the word *economics* to my undergraduate, and even graduate, students. Typically I offer definitions with the theme of: economics is the study of how decisions are made in the presence of scarcity. This article will further be a challenge in that it will offer a brief definition of *forensic economics* and will explain, in layman's terms, some basic functions and roles of Forensic Economists, some common problems they encounter as well as a brief outline on how Forensic Economists and vocational experts complement one another in the tort resolution process. After authoring many articles, this one has many particularly pleasurable aspects such as the inclusion of personal observation and opinion in some instances. One potential descriptor of this article is it attempts to explain the forensic economic profession as if the author were being queried by a student seeking career advice. Overall, the article is designed and intended to provide a general overview into the world of forensic economics, with the primary audience encompassing vocational experts, attorneys, students and other parties who wish to be more educated on the basics of this economic discipline.

*Keywords: forensic economics, economic methods, economic losses*

The National Association of Forensic Economics (National Association of Forensic Economics, 2014) proposes the following definition of the forensic field: Forensic economics represents a scientific discipline that applies economic theories in addition to identified methods to matters, particularly within a legal framework. My personal (hereinafter referring to myself as: your author) definition is similar with some modifications: A Forensic Economist applies a methodology, based on economic theories and models, to formulate written and oral opinions pertaining to economic damages incurred by individuals, while considering stipulations from court decisions pertaining to economic damages. Though rarer, Forensic Economists may estimate economic damages suffered by businesses particularly if the business is a sole proprietorship (i.e. the individual *is* the business). Generally the economic damage calculations provide a guideline for attorneys and courts to utilize in negotiating and awarding compensation.

Like Economists in other fields, the Forensic Economist (FE) must have impeccable analytical skills and pay very close attention to detail. Calculations must be checked and rechecked to insure accuracy. Also the FE, though not an attorney, has a duty to keep in-

formed on court decisions that affect his or her role in the litigation process.

In the sections that follow, your author will spell out some of the basic functions of FEs and highlight some salient pitfalls involved in the profession. Along the way, your author will point to specific instances where the roles of the FE and the vocational expert (VE) intertwine and therefore understanding of the roles of, and general communication between, the experts is paramount. The reader will notice a paucity of references in this article. The reason is simply the article's intent is to offer a general description of the functions of a FE and some attributes of the occupation. However, certain sections will be more descriptive and explanatory than others and your author will draw on personal experiences. Readers may refer to articles such as (Field, 2014) for a very lucid read on detailed issues faced by FEs (and VEs). Also, in limited instances, your author will offer some opinions with which other FEs may disagree. Those opinions will be stated as such. Some issues regarding terminology, and terms used interchangeably, in this article and the profession in general should be noted: economic *damages* are usually the same as economic *losses*. Lost wages, lost income and lost earnings are generally

synonymous yet should be distinguished from lost benefits.

Further, your author understands that noted Forensic Economist Thomas Climo is concurrently authoring an article dealing with forensic economic subject matter for this edition of *The Rehabilitation Professional*. While readers may obviously notice some commonalities in our articles, most assuredly the articles will be sufficiently different as to allow the audience to gain a basic grounding in the forensic economic profession, while understanding some specific issues, through perusing both articles. In any event, it will be pleasurable to have this work appear alongside that of Dr. Thomas Climo.

### Basic Functions of the Forensic Economist

The FE will employ data and methodologies to arrive at estimates of economic damages suffered by an injured party in a lawsuit. Economic damage estimates and opinions are offered in a legal environment where the FE may be recognized by a Court as an “expert” in economics. This raises the question: How does one become an economic expert? To explain *all* the myriad avenues by which one can be deemed an “expert” and the legal decisions surrounding such is beyond the scope of this article. However, the answer is essentially typified by education and training. Most Forensic Economists will hold a Bachelor’s degree in economics (sometimes finance) and typically will further their education in economics at the Masters and/ or Ph.D. levels. Usually a Forensic Economist will be retained by an attorney and said attorney will make a request that the Economist be recognized by the Court as an “expert.” Often, though your author hesitates to say always, holding a Ph.D. in economics will qualify one as an economic expert. Beyond that it is incumbent upon the retaining attorney to offer the Economist’s specialized knowledge, education, training and experience in economic analysis as the basis for a Court declaration of “expert.”

What exactly does the FE do? In a “quick and dirty” sense, the Forensic Economist will estimate economic losses resulting from an accident and/ or injury, in the form of: 1) lost labor market earnings and employer provided benefits; 2) lost household services (which include activities such as home, auto, and lawn maintenance that could have been performed but for the injury); 3) compensable medical expenses emanating from the accident/ injury. The FE may be called upon to offer opinions on economic losses to family members in wrongful death matters. Typically these losses will entail lost household services, funeral/ burial expenses and compensable medical expenses (Martin, 2013).

The FE may also need to estimate “case specific” economic damages. For example, injured oil rig workers in Louisiana that cannot return to work may suffer a loss in the form employer-provided meals that will no longer be enjoyed due to loss of this employment. Other damages such as lost use of a company car, lost employer provided child care or tuition assistance among others *may* need to be estimated on a case-by-case basis.

The FE will estimate losses using the discounted present value method, which has been prescribed by courts primarily since *Culver v. Slater Boat Co.* (1983). Among other tools needed to evaluate losses, the FE will employ life expectancy tables, worklife tables, return on the risk-free asset and Consumer Price Index (CPI) numbers.

The FE will prepare a written report which usually contains tables that describe economic losses and present the calculations of the losses as well as any assumptions, methodologies and references the FE utilized. Economic losses will typically include: 1) a past time period (past losses) which is usually from date of injury to a trial or reference date; and 2) a future time period (future losses) which is usually from the trial or reference date to some future period such as the end of the injured person’s worklife expectancy.

The report is a critical document. Its accuracy and completeness cannot be emphasized enough. It will be used by attorneys and courts as a guideline in awarding compensation for economic losses. And the FE may well be called on to defend the report in deposition and/ or trial proceedings.

### The Accuracy/ Explanation Conundrum

The FE must proceed on the presumption the case will go to trial and methods used to calculate losses will have to be potentially explained to a jury and defended under cross-examination. It is important the FE be a good “teacher” given he/she must be prepared to present and explain all aspects of the report to juries, judges and attorneys that may be unfamiliar with economic concepts. The conundrum lies in the presence of some methodologies that are clearer and more straightforward, but lack the degree of accuracy in calculating losses offered by other methods. To offer a hypothetical example involving the discount rate chosen by the FE, they may vacillate between using Treasury Inflation Protected Securities (TIPS) and a historical average of annual returns on 30 year Treasury Bonds as the discount rate. The historical average “method” may offer greater ease of explanation to laypeople while TIPS might deliver greater accuracy in economic loss estimates. Either method would be acceptable in the forensic economic profession (while FEs debate which method is more appropriate), so the

FE must be cognizant of the costs and benefits of both, then use his own clinical judgment. No one, at least in your author's experience, ever said being a FE would be easy.

### The Employment Conundrum

The FE, like most other expert witnesses, faces a strange employment situation. The FE and retaining attorney will sign a letter of engagement that stipulates items such as work to be performed, deadlines, and compensation. While the FE will be retained by an attorney, the attorney should not be considered the "boss" in that the FE must strive to maintain objectivity and independence. In your author's opinion, if demands of a retaining attorney entail violation of any ethical codes, the FE should disengage himself from the case. The FE must always remember his mission is to supply accurate, unbiased information to the trier of fact; not necessarily please his retaining attorney or assist in "winning" the case. When these conflict, the FE must, to protect credibility, gravitate toward the former.

### Other Pitfalls that Await Forensic Economists

In the course of a career, below are a few "problem areas" the FE will most likely encounter. The example problems that follow are, in your author's opinion, a few of the more salient ones.

Related to the employment conundrum above, sometimes the FE can be labeled a "hired gun" which, although a personal attack that may well be without merit, still may be used by opposing attorneys to undermine the Economist's reputation. This accusation is levied under the guise that the FE may be slanting economic loss calculations in favor to his retaining attorney's case (e.g., when retained by a defense attorney, the FE uses methods that deflate economic losses for the injured party or conversely when retained by the plaintiff attorney). In other words, the fact that the FE is being paid by either a plaintiff or defense attorney (or their respective firms) necessarily entails a loss of objectivity.

The Economist must be aware of this eventuality throughout his career in the forensic area. While a FE will be employed by a retaining attorney (either for the plaintiff or defendant), it is of utmost importance that the Economist remains objective. Never should an Economist do or say anything against conscious or principle even if required by the retaining attorney. At that point the Economist should "walk away" from the engagement. Failure to do so cannot only make an Economist appear like a "hired gun" but, more to the point, will harm the Economist's credibility with

judges and courts. Ultimately this could seriously jeopardize the Economist's career.

Unfortunately, sometimes attorneys and even courts can intermix roles of experts (e.g. forensic economics and forensic accounting). Usually FEs are schooled and trained in labor market and health care market issues that tie to personal economic losses; typically accountants (CPAs) do not have such training. Conversely, Economists tend to lack training in evaluating business losses, where, for instance, evaluating said losses would require a background in auditing to assess financial statements. There are potential exceptions: a FE may attend workshops, conferences and receive training credit and certifications to evaluate business damages. But further and more generally, if an Economist opines in an area outside his expertise, this invites a motion in limine for exclusion, more familiarly termed "a Daubert challenge" which, if successful, can seriously damage the Economist's career. Daubert challenges are legal proceedings instigated by opposing counsel to have the Court declare the Economist, or some other expert, as *not qualified* as an expert in the specific area in which the expert opines, or having part or all of their testimony excluded. In the challenge, the attorney may assert that the expert lacks the necessary credentials to offer said opinions and/ or has used specious methods to arrive at economic loss estimates. The technical issues involved in *Daubert* challenges are out of the scope of this article. Suffice it to repeat, a successful *Daubert* challenge remains permanent in court records and can be detrimental to the FEs career.

### Role of the Forensic Economist with the Vocational Rehabilitation Expert

Given your author is not a vocational expert, care is taken not to describe the functions of the vocational expert per se. Rather, what follows are some observations on how both experts complement one another in the tort resolution process; the observations are based on some knowledge your author does possess with regard to functions of VEs and personal experiences.

### We are One

The FE and the VE have essentially the exact same function: to provide unbiased, accurate information to the trier of fact. The forensic economic report and the vocational report (to an extent) *are* reports on economic losses (or potential losses). Both experts must also take special care to retain a reputation of honesty and integrity. In addition, the problem areas outlined in the preceding section may also be encountered by the VE.

### Who's on First?

Typically the vocational expert will "go first" and prepare a vocational rehabilitation report. The FE will later incorporate some information from the vocational report into the economic report. However, that needs to be qualified. Early in the litigation process, preferably as soon as they are retained, it is advantageous for the FE and VE to communicate often on the facts and status of the file. This communication enhances report quality as the VE and Economist can "check" each other's work as their respective reports develop and it helps ensure they are "on the same page" with regard to perhaps income calculations, factual statements on the case, etc. It should be noted that while it may not be absolutely necessary for both experts to communicate, or even meet one another, there are gains that could be experienced by said communication.

### What's on Second?

The FE will typically "go second" and prepare a report in which they often need, as stated above, information from the VE. Some examples include but are not limited to: job opportunity analysis, estimates of earning capacity if the injured person can return to work and compensable medical expenses. Usually from these numbers, the Economist will make projections of future losses using the discounted present value method. This is another example of why an accurate vocational report is critical: if wage calculations, medical cost data, etc. are not accurate in the vocational report that will, in turn, lead to inaccuracies in the economic report. Ultimately, economic loss estimated will be incorrect which would constitute an injustice to the injured party and weaken the retaining attorney's case and also harm the careers of both experts.

### I Don't Know is on Third: The FE Without the VE and Vice Versa

On occasion, maybe for either financial reasons or time constraints, attorneys will retain a FE or a VE; not both. This should make either expert retained very nervous as a crucial part of the process is being omitted. Both the FE and VE have important roles and one without the other cannot only weaken the retaining attorney's position, it could be dangerous to the career of whichever expert *is* retained. How? The retained expert (either FE or VE) might be called upon in either reports or depositions to perform the functions of both experts. The obvious implication is said expert would be offering opinion and analysis outside their area of expertise, which could invite a Daubert challenge, as discussed above. Further, the above stated advantages of employing both experts are forgone. This is not to say that an expert should never accept a case where only either a FE or VE is

employed, your author is simply noting this could create a very problematic situation for the employed expert and should give him or her pause. At a minimum, the FE or VE should question retaining counsel as to why both experts are not assigned to the case, then make a decision based on their own best judgment.

There are instance where both the FE and VE are one in the same person. Where this is not the case, caution as described above should be exercised.

### Concluding Observations and Remarks

Your author would like to offer some closing comments and suggestions for those interested in becoming FEs or those readers (e.g. vocational experts) who were simply interested in learning more about the forensic economic profession. While your author could think of many, the field has been narrowed to just a few. First, the FE should enjoy the career and the contribution he makes to the justice system and to society in general. Second, there is a "tricky" element to being a FE. They should strive to "keep it simple" for those who have not been fortunate enough to be schooled and trained in such a rich, interesting and time-honored field as economics, yet not sacrifice accuracy and thoroughness.

Too often, your author has witnessed Economists, including FEs, make the subject unduly complicated and cumbersome. This can be particularly relevant for the FE as he will at some interval be called upon to explain his work, or at least portions thereof, to jurors that are typically not educated in the discipline. And to be an effective expert witness, it is incumbent on the FE to explain complicated economic subject matter quickly and in an easily understood manner.

Third, and of utmost urgency, the FE must always maintain credibility and integrity. Even when tempted with the prospect of a big "pay day" for a case, the FE, as difficult as it may be, must remove him or herself from any engagement in which commitment to ethical principles must be sacrificed. Failure to do so may entail a short-term gain, but can have detrimental long-term effects on the FEs career.

Finally, a reading list is presented in the Appendix 1 of this article. It is proffered that those wishing to learn more about forensic economics may use the list as good "jumping off" point, though assuredly other quality publications (past, present and future) will also be explanatory.

### References

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- Martin, G. & Weinstein, M. (2013). *Determining economic damages*, Costa Mesa, CA: James Publishing.
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### Appendix 1: Essential Readings for Forensic Economists\*

- Albrecht, G., & Krueger, K. (2007). A review of economic foundations of earnings and discounting theories used in forensic economics. *The Earnings Analyst*, 9, 1-34.
- Brookshire, M. (2014). Foundations of forensic vocational rehabilitation. In R. Robinson (Ed.), *Issues in the handoff to a forensic economist* (pp. 429–441). New York, NY: Springer.
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### Author Notes

\*Membership in an organization such as The National Association of Forensic Economics, which also carries a subscription to *Journal of Forensic Economics*, should also be considered by those who wish to learn more about forensic economics and be exposed to more recent research in this field.

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