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**CONSULTING SERVICES
PRACTICE AID 96-3**

AICPA

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Technical Consulting

***Communicating
in Litigation Services:
Reports***

A Nonauthoritative Guide

Management Consulting Services Team

NOTICE TO READERS

This practice aid is designed as educational and reference material for Institute members and others who provide consulting services as defined in the Statement on Standards for Consulting Services (SSCS) issued by the AICPA. It does not establish standards or preferred practices. Other approaches, methodologies, procedures, and presentations may be appropriate because of the widely varying nature of management consulting services as well as specific or unique facts about the client and engagement.

Various members of the 1995–1996 AICPA Litigation and Dispute Resolution Services Subcommittee provided information for this practice aid and advised the authors and staff. The subcommittee members are listed below.

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PREFACE

This practice aid is one of a series intended to assist practitioners in applying their knowledge of organizational functions and technical disciplines in the course of providing consulting services. Although these practice aids often deal with aspects of consulting services knowledge in the context of a consulting engagement, they are also intended to be useful to practitioners who provide advice on the same subjects in the form of a consultation. Consulting services engagements and consultations are defined in the Statement on Standards for Consulting Services (SSCS), *Consulting Services: Definitions and Standards*, issued by the AICPA.

This series of technical consulting practice aids should be particularly helpful to practitioners who use the expertise of others while remaining responsible for the work performed. It may also prove useful to members in industry and government in providing advice and assistance to management.

Technical consulting practice aids do not purport to include everything a practitioner needs to know or do to undertake a specific type of service. Furthermore, engagement circumstances differ and therefore the practitioner's professional judgment may cause him or her to conclude that an approach described in a particular practice aid is inappropriate.

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COMMUNICATING IN LITIGATION SERVICES: REPORTS

74/105 INTRODUCTION

.01 Litigation and dispute resolution services are rendered by a CPA using accounting and consulting skills to assist a client in a matter that involves a pending or potential formal legal or regulatory proceeding before a “trier of fact” (for example, a judge, jury, arbitrator, mediator, or special master) in connection with the resolution of a dispute between two or more parties.¹ Litigation services may be provided by a CPA acting as a consultant only, usually to an attorney, or as an expert witness.² The services provided may include fact-finding (such as assistance in the discovery and analysis of data), damage calculations, document management, preparation of demonstrative evidence, expert testimony, and other professional services. Litigation services also include services associated with bankruptcy, reorganization, insolvency, and fraud investigations, among many other services.

.02 Litigation services are classified as transaction services in the Statement on Standards for Consulting Services (SSCS) No. 1,³ and are subject to the SSCS, as well as to the professional standards embodied in the AICPA Code of Professional Conduct. The communication standards promulgated by the AICPA that apply to litigation services are limited to the general requirement of communication with client in SSCS No. 1. The SSCS states:

Communication with client. Inform the client of (a) conflicts of interest that may occur pursuant to interpretations of rule 102 of the Code of Professional Conduct,⁴ (b) significant reservations concerning the scope or benefits of the engagement, and (c) significant engagement findings or events.

¹ See the definition of litigation services in the Interpretation of Statement on Standards for Attestation Engagements, “Attestation Standards: Attestation Engagements Interpretations of Section 100” (AICPA, *Codification of Statements on Standards for Attestation Engagements*, AT sec. 9100.48).

² The practice discipline of litigation services includes actual and potential disputes that may or may not proceed to formal litigation. Throughout this practice aid the term *litigation services* includes litigation and dispute resolution services, unless otherwise indicated.

³ SSCS No. 1, effective January 1, 1992, states that litigation services as part of the full definition of consulting services are subject to the following standards: professional competence, due professional care, planning and supervision, sufficient relevant data, client interest, understanding with client, and communication with client. See SSCS No. 1 (AICPA, *Professional Standards*, CS sections 100.06 and 100.07) for further explanation.

⁴ Educational information on the topic of conflicts of interest is contained in Consulting Services Special Report 93-2, *Conflicts of Interest in Litigation Services Engagements* (New York: AICPA, 1993).

.03 The communication requirement in the SSCS No. 1 is relatively broad and does not provide specific guidance to the CPA for satisfying this requirement. Practitioners may communicate concerns about conflicts of interest, serious reservations, or significant engagement findings and events to the client either orally or in writing. This practice aid identifies several typical oral and written communication forms used by practitioners, but its primary emphasis is on the written expert report signed by the CPA.

74/110 SCOPE OF THIS PRACTICE AID

.01 The SSCS No. 1 standard for communication with the client can be satisfied either orally or in writing, whether the CPA is serving as a consultant or testifying expert. Although this practice aid identifies typical examples of oral communications by either consultants or expert witnesses, its primary focus is the written report signed by a CPA expert witness that is intended to assist the trier of fact. Except as required by the Federal Rules of Civil Procedures (Federal Rules) or local court jurisdiction, written reports are not mandatory. However, written reports may still be requested by the trier of fact or client.

.02 This practice aid sets no standards. The CPA and attorney-client should discuss the required report components, if any, or other elements to be included in the report for presentation to the trier of fact. This practice aid offers nonauthoritative guidance on communications in litigation services engagements, specifically, the content, format, and style of written reports by expert witnesses. The content, form, or style of these written reports cannot be standardized because engagement requirements and local dispute resolution rules vary.⁵ In practice, expert reports prepared by CPAs can vary significantly in their appearance and other characteristics, but satisfy the CPA's professional obligations, the client's needs and interests, and any applicable legal requirements. Therefore, the CPA is not constrained by the examples presented in this practice aid.

.03 While the applicable professional standards neither require a written report nor specify the nature of the contents when one is prepared for litigation services, the CPA may be subject to other requirements, such as the Federal Rules. The Federal Rules dictate that the written report contain at least certain elements addressed in the section titled "The Federal Rules of Civil Procedure and Written Reports by Experts." Other potential report elements are described in the section entitled "Elements of an Expert's Written Report." The CPA and attorney-client might discuss whether any federal, state, local, or other jurisdictional rules apply to the format and content of the expert's written report. In any event, the CPA and attorney-client should discuss the required report components, if any, or other elements to be included.

.04 The above-mentioned sections of this practice aid provide a list of possible, but not necessarily all, report elements for the CPA to consider. The examples in the appendixes are for illustrative purposes only. The practitioner can choose any approach that is appropriate to the client's needs and any applicable legal or dispute resolution requirements.

⁵ Under certain circumstances, an attest report may be submitted in conjunction with a litigation services engagement. If so, the applicable attestation standards apply. This practice aid discusses the expert witness report provided by the CPA as a non-attest or consulting service.

.05 In short, a written report by an expert witness generally describes such matters as the CPA's qualifications, the assignment, data or documents reviewed or analyzed, procedures performed, and the findings, recommendations, or conclusions. An expert witness's written report can take a variety of forms including a substantive narrative report, letter, memorandum, declaration, affidavit, or a combination of these forms. Appendix A contains a sample written report for a defendant in a wrongful termination case, and Appendix B contains a sample written report on damages for a plaintiff in a litigation matter. Both are prepared for presentation in Federal Court where the Federal Rules apply. Appendix C presents an example of a shorter, less detailed report that may be acceptable in some dispute resolution situations not subject to the Federal Rules. Again, the CPA should confer with the attorney-client prior to report preparation about any applicable requirements and the client's needs. Except for a few specific suggestions, this practice aid does not discuss the form, content, or styles of engagement letters, file memorandums, correspondence, working papers, preliminary presentations, demonstrative evidence, billings, or other engagement documents.

74/115 SUMMARY OF AUTHORITATIVE AND NONAUTHORITATIVE GUIDANCE

.01 Since the SSCS does not require a written form of communication with a client, this practice aid provides nonauthoritative information that may be useful to CPAs who prepare a written report in a litigation services engagement. It does not in any way mandate a report, nor does it prescribe the content or form of any written report. Such requirements, if any, emanate from sources outside the AICPA.

.02 While this practice aid addresses communications in litigation services engagements, other AICPA practice aids and special reports also provide nonauthoritative guidance to the CPA in this practice area. The following AICPA publications provide fuller discussions of the applicable professional standards, conflicts of interest, the general nature of litigation services, the differences between attest and consulting services, general communication considerations for consulting engagements, and engagement letters:

.03 Authoritative.

AICPA Code of Professional Conduct

Statement on Standards for Consulting Services No. 1, "Consulting Services: Definitions and Standards" (New York: AICPA, 1991)

.04 Nonauthoritative.

Consulting Services Special Report 93-1, *Application of AICPA Professional Standards in the Performance of Litigation Services* (New York: AICPA, 1993)

Consulting Services Special Report 93-2, *Conflicts of Interest in Litigation Services Engagements* (New York: AICPA, 1993)

Consulting Services Special Report 93-3, *Comparing Attest and Consulting Services: A Guide for the Practitioner* (New York: AICPA, 1993)

Consulting Services Practice Aid 93-4, *Providing Litigation Services* (New York: AICPA, 1993)

Consulting Services Practice Aid 95-2, *Communicating Understandings in Litigation Services: Engagement Letters* (New York: AICPA, 1995)

Management Advisory Services Practice Administration Aid No. 3, *Written Communication of Results in MAS Engagements* (New York: AICPA, 1987)

.05 Terms such as *opinion* or *report* have unique meanings to the accounting profession and may mean something different to triers of fact, attorneys, litigants, and other parties related to the dispute. An expert opinion or expert report provided as a litigation consulting service is different from an opinion or report issued as part of an audit of financial statements or another attestation engagement. These distinctions, as well as the amendments to the Federal Rules of Civil Procedure in December 1993 which require written reports signed by experts in Federal Court,⁶ make it necessary to examine the communication issues in litigation services more closely.

74/120 COMMUNICATION WITH THE CLIENT IN LITIGATION SERVICES

.01 As the litigation process proceeds, the CPA may issue a written report to the client before it is presented to, or required by, the trier of fact. The CPA may view such a document as an expert witness's written report when he or she expects that the trier of fact may consider the report as the basis for a decision. For example, the CPA might submit a written report to the attorney, who in turn may provide a copy of the report to opposing counsel and parties. The CPA may be deposed on the contents of the report and, then, the dispute could be settled before a formal trial or other legal proceeding. Even though the report ultimately was not presented to, and evaluated by, a trier of fact, the CPA expert witness might have considered the writing as an expert witness's written report based upon its potential use and discoverability.

.02 Since communications for litigation consulting services can be either oral or written, CPAs should not presume that every litigation services assignment will require a written report. Requirements vary from jurisdiction to jurisdiction, so CPAs should consider deferring to the attorney-client or appropriate legal counsel to determine whether a written report is mandatory. If it is not required, CPAs nevertheless may want to discuss the advantages and disadvantages of each potential oral or written communication form with the attorney-client. The discussions may assist the attorney or other client in deciding whether a written report will be needed, or useful, in the dispute resolution

⁶ U.S. District Court implementation of the changes can vary by district.

process.⁷ Even if CPAs believe they are knowledgeable about the rules of evidence and related legal requirements, they should rely on the attorney's opinion about the form for communicating their findings. CPAs may discuss the general merits and possible limitations of various communication forms but counsel's opinion should determine whether a written report is needed and, if so, what report form is appropriate.

.03 The CPA may want to identify the client for the purposes of complying with the standard of communication with client required in the SSCS. The client could be one of the many parties who may be involved in the litigation process, (for example, outside counsel, in-house counsel, plaintiffs or co-defendants and their counsel, company employees, individuals, and insurance carriers).⁸

.04 The CPA could have more than one client for different purposes. For example, the CPA could view an attorney as the client for purposes of receiving direction in engagement performance, discussing work accomplished, and presenting initial findings. On the other hand, the CPA could consider the attorney's client (for example, a company, insurer, individual, or other entity) as the client for purposes of paying the CPA's fees and expenses and receiving the ultimate benefit of the CPA's work. As a result, the CPA may consider these distinctions in evaluating to whom any oral or written report is directed. Under certain conditions, the CPA would not view the ultimate beneficiary of the CPA's work as the client for purposes of the communications requirement in SSCS No. 1. The reason is that a premature discussion of significant engagement findings or reservations with that party could undermine the attorney work product privilege. Usually, the CPA meets the communications standard by talking with or reporting to the attorney. If appropriate, the engagement letter may address these distinctions and the differing roles or expectations of the various parties.

.05 Written reports by consultants (not testifying experts) engaged by an attorney typically are presented to the attorney and are not distributed to opposing or other interested parties. Expert witness reports are almost always more widely circulated.⁹ Besides the CPA's attorney-client, other potential recipients may include the attorney's client and related parties, other experts, opposing counsel, opposing experts, opposing parties to the litigation, and the trier of fact. In any

⁷ On some occasions, the CPA may be engaged to perform litigation services by someone other than an attorney. For example, the CPA may be engaged by a non-attorney client for a matter that may evolve into a formal legal dispute (for example, a company may ask the CPA to assist in documenting a loss covered by an insurance policy, and the insurance claim could evolve into a formal legal dispute if it is not paid by the insurer in the normal course of business under the terms of the insurance policy). The CPA should recognize, in such circumstances, that related written reports and the underlying work papers may be subject to discovery whether or not counsel was eventually engaged and whether or not the CPA is ultimately designated as an expert witness in the matter.

⁸ The AICPA Code of Professional Conduct, ET sec. 92.01 defines a client as any person or entity, other than the member's employer, that engages a member or a member's firm to perform professional services or a person or entity with respect to which professional services are performed.

⁹ The distribution of an expert's report, for example, might not occur if the case were settled shortly after the report was prepared and submitted to the client.

adversarial proceeding, an opposing party has the right and responsibility to examine and refute, if appropriate, the expert's report.¹⁰

.06 Suggestions are provided in this practice aid to help the CPA comply with the AICPA Code of Professional Conduct, by exercising due professional care in preparing a report.

74/125 COMMUNICATION FORMS IN LITIGATION SERVICES

.01 Communications in litigation services can have a variety of oral and written forms. The CPA should appreciate that many forms of communication or documentation, such as the substance of oral meetings or the CPA's handwritten notes, may be subject to discovery. The following list of examples is presented to alert the CPA to the fact that litigation parties at times may have a broad definition of communications and may think a written report is required in some instances and an oral report in others. Although this practice aid deals largely with written reports, the practitioner should be aware of the circumstances that give rise to oral reports whether or not a written report is prepared.

.02 Examples Involving Oral Communications.

- *Oral testimony before a trier of fact*, such as a judge, jury, arbitrator, mediator, or special master. Oral testimony may or may not be accompanied by demonstrative evidence (for example, exhibits, graphs, or schedules) or formal written reports. Typically, oral testimony is presented through direct testimony and is subject to detailed cross-examination and challenge by the opposing counsel. In some dispute resolution situations, the trier of fact may interject his or her own questions to the testifying expert.
- *Oral representations made in the presence of opposing parties as part of settlement conferences, mediations, or other negotiations.* The CPA may be asked to present his or her work product and findings to assist the parties in reaching a settlement. The opposing parties may waive their right to refute the CPA's representations in deciding whether to resolve the dispute or proceed to litigation.
- *Deposition taken of the expert witness.* Depositions are usually conducted orally and transcribed into writing by a court reporter, then reviewed, edited, and signed by the CPA. In addition, videotaping of depositions is becoming more frequent. Depositions are normally conducted after the CPA has performed substantive work and formulated his or her litigation opinions. In some circumstances, the depositions may be accomplished after the trial has begun but prior to the expert testifying before the trier of fact.

¹⁰ This characteristic is different than in typical attest services performed outside the litigation arena since third parties may receive the CPA's written attest report but may not have the opportunity to cross-examine or otherwise question the report preparer.

.03 Examples Involving Written Communications.

- *A written report submitted to the trier of fact.* The report may be offered prior to formal proceedings or in conjunction with oral testimony.
- *Exhibits that explain the CPA's testimony.* While exhibits alone may not be viewed by many as a written report, they are in certain instances the only written material presented to the trier of fact by the testifying expert to explain his or her oral testimony. As such, the CPA should exercise appropriate caution to ensure that such exhibits are clear and present the CPA's findings objectively.
- *A written report prepared by the CPA and submitted to the client.* This report may be released by the CPA's client to opposing counsel, or other parties, for a variety of reasons, including discussion of potential settlement or compliance with judicial rules. Under certain circumstances, the written report may help form a basis for settling the dispute prior to formal proceedings before a trier of fact and prior to opposing counsel's exercising any right to depose or cross-examine the CPA about the report.
- *A declaration or affidavit presented to the trier of fact or others in the place of live testimony by the CPA.* A declaration commonly refers to a written statement of a witness that is not made under oath. An affidavit is a sworn statement in writing made under oath or an affirmation before an authorized magistrate or officer of the court.
- *Damage models, working papers, and supporting documents submitted to others through the legal discovery process.* While such documents alone do not constitute an expert's report, they are a form of CPA communications for litigation services. Opposing parties may review such documents in detail as the basis for deposition questions or a potential settlement.

74/130 GENERAL CONSIDERATIONS FOR WRITTEN COMMUNICATIONS

.01 As previously mentioned, the reporting standards for litigation services promulgated by the AICPA are limited to the general communications requirement stated in the SSCS No. 1. Further, no specific or standard elements are required for expert witness written reports in litigation services engagements except as may be required by the rules of federal, state, bankruptcy, or local courts. Often, the form and content are influenced by the applicable dispute resolution forum, as well as the particular needs of the client retaining the CPA. Because of this variety of matters, unique issues, and situations encountered by the CPA in litigation services, adherence to a uniform format for expert witness reports is impractical. To help the CPA practice effectively in the litigation or dispute resolution environment, a few practical considerations are addressed in the following paragraphs.

Limiting the Use of Documents

.02 Schedules, charts, graphs, and written narratives, whether contained in a formal written report or presented in support of oral statements, should clearly indicate that they were prepared solely for use in the subject dispute or litigation. This identification can be accomplished by many means, such

as including the case name or restrictive disclaimers. Many CPA experts, however, are reluctant to use disclaimer language because it may be exploited by opposing counsel to undermine the sufficiency of the CPA's work. As an alternative, the CPA may consider annotating the document (for example, using a header, footer, title, footnote, or narrative comment) to clearly communicate that the document was prepared solely in conjunction with the CPA's performance of the litigation engagement.

.03 The CPA can also communicate that a document was prepared for a specific litigation services engagement by including a descriptive title that conveys the nature of the document (for example, *Computation of Extended Home Office Overhead Resulting from Construction Delays*) and the name of the case or dispute (for example, *Plumbing Subcontractor v. Construction Contractor, Inc.*). The CPA may also include additional descriptive information, such as the court name and case number. These elements might appear on each page of the report and any related documents prepared by the CPA, even if a separate cover letter accompanies the CPA's report. Clear titling and inclusion of case-descriptive information will mitigate the risk that the CPA-prepared documents may be improperly distributed and used outside of the engagement.

Indicating Document Status

.04 CPAs may use additional document annotations to communicate the status of and basis for the work product. Often, CPAs not yet confident that all work has been completed may label the work product as *Draft*, *Tentative and Preliminary*, or *Subject to Change*. CPAs often follow a policy of discarding superseded drafts until they are required to retain the drafts, such as by receipt of a valid and enforceable subpoena to appear as an expert witness. The expert's report, schedules, graphs, or other work product may be so marked for use at the expert's deposition (although opposing counsel may object), since the expert might perform additional work or receive more information prior to the trial and amend the findings before final presentation. Of course, the expert should expect to be questioned about any changes. Naturally, such labels remaining on written reports submitted to the trier of fact or others may detract from the usefulness of the expert witness report. Therefore, consider removing *Draft* or a similar label at least by this point in the engagement. Also consider annotating the work product with the date of preparation. This additional information may help to explain what data was available and was considered as of the date the document was created, as well as to keep track of work product revisions.

.05 CPAs may label their working papers as *Privileged and Confidential — Prepared for litigation under the attorney work product privilege* when they are working in a consulting role or before being designated an expert witness. CPAs should discuss the use of the label with the attorney to ascertain that it is appropriate (For example, they are not already designated and disclosed as expert witnesses). Such labels may be useful in protecting work papers from release through the discovery process when CPAs remain in a purely consulting role.¹¹

.06 Some CPAs, however, leave such labels on all or most working papers even after being designated an expert, at least for certain issues. If they do so, they may undermine the legal basis for

¹¹ On occasion, a judge may still order production of the documents if they contain information that is needed by the adversary when the adversary cannot reasonably obtain the information through any other source or means.

protecting from discovery working papers unrelated to the expert testimony. That is, opposing counsel may argue that, since all or most working papers contain the same label, those supporting the expert's opinions cannot be readily distinguished from any others, and, therefore, all must be produced. This may be an important consideration when a CPA firm has separate assignments, as well as distinct professional teams, to provide expert testimony rather than consulting services only to legal counsel. If both teams' work product is so labeled, then the CPA's written documents may not be differentiated by the trier of fact and all written documents may have to be produced.

Maintaining Confidentiality of Documents

.07 Rule 301 of the AICPA Code of Professional Conduct, "Confidential Client Information," which applies to litigation services, states "A member in public practice shall not disclose any confidential client information without the specific consent of the client" unless the requirement is superseded by a validly issued and enforceable summons or subpoena. But information exchanged through discovery is often reviewed by many individuals besides CPAs who may not be subject to a professional standard requiring confidentiality. On some engagements, protective orders exist to guard against the unauthorized dissemination of confidential information. A typical protective order may require an individual to agree in writing to maintain the confidentiality of the opposing party's information received and reviewed and not to disclose it outside of the litigation process. Sometimes, a protective order will be even more specific. For example, it may specify that the vice president of marketing may not receive, review, or be informed about the opposing party's (a competitor) strategic or marketing plans as reflected in documents or other information provided through discovery.

.08 Both CPA consultants and expert witnesses may be required to sign confidentiality and nondisclosure agreements before being granted access to some or all of a litigant's data and documents. To prevent unauthorized use or disclosure, the CPA might earmark or segregate copies of protected documents, as well as CPA-prepared documents containing such information and data. For example, the CPA who prepares a schedule that contains information extracted from documents subject to the protective order may consider using schedule labels or annotations such as *Subject to Protective Order*, *Contains Proprietary Data*, *Controlled Information*, or *Confidential*.

Using Documents in Settlement Discussions

.09 Many legal disputes are subject to settlement conferences between opposing parties before the matter is heard or resolved by a trier of fact. The CPA may prepare analyses for use only in the settlement discussions and label such documents as, for example, *Prepared for Settlement Purposes Only*. If the case is not settled, the controlling legal jurisdiction usually precludes the opposing parties and their counsel from seeking the documents through discovery or referring to the CPA's analyses before the trier of fact. Similarly, the particulars of the settlement offers made orally are usually protected.

Distributing Expert Witness Reports

.10 The CPA may plan with the client the timing for distributing the expert witness's written report to the client and others, including opposing parties or the trier of fact. Before distribution, the

CPA can review the report with the client. In some circumstances, there may be advantages to providing interested parties with the written report before the expert gives oral testimony. One possible benefit of doing this is to inform the opposing parties about the strengths of the client's case or the weaknesses of the opposing arguments, so that a settlement may result. Another possible benefit is to educate the trier of fact about the expert's views as a foundation for understanding the oral testimony to follow. The expert witness's written report is also helpful to the trier of fact as a reference document to accompany expert testimony and is sometimes accepted by the trier of fact in place of an oral presentation by the expert. Often in an alternative dispute resolution proceeding (for example, arbitration or mediation), the trier of fact will permit the expert to present direct testimony with few, if any, leading or clarifying questions by the client-attorney. In this case, the written report may serve as a presentation outline and provide supporting detail for opinions. At appropriate points in the testimony, the expert witness may refer the trier of fact to relevant report elements, such as schedules, charts, graphs, or other supporting documents, including those prepared by others.

74/135 THE FEDERAL RULES OF CIVIL PROCEDURE AND WRITTEN REPORTS BY EXPERTS

.01 The *Federal Rules of Civil Procedure*¹² were amended on December 1, 1993 to include a prerequisite that experts provide written reports before giving opinion testimony at trial. This major change in the way many federal courts operate is intended to allow early, complete discovery of planned expert testimony thereby improving the litigation process¹³ and diminishing surprises to the opposing party during trial.

.02 In the past, the expert often did not submit a written report before testifying at trial but presented his or her opinion orally, frequently with the aid of demonstrative exhibits. If the CPA's expert opinion was related to a quantitative issue such as the value of a company or the amount of damages suffered by the plaintiff, the schedules supporting these calculations were often marked as exhibits and entered into evidence. Although the expert may have produced written documents, he or she usually did not prepare a formal report.

.03 Federal Rule of Civil Procedure 26(a)(2)(B) now requires that the expert prepare a written report unless the federal district court issues a local rule that modifies or eliminates the requirement. Such local rules are set through General Orders issued by the courts. The CPA may want to check with the attorney-client to determine the written report requirements for the applicable federal district court and the subject lawsuit. For general information, the CPA can confer with the applicable clerk of the federal court.¹⁴

¹² Copies of the *Federal Rules of Civil Procedure* can be obtained from law libraries and legal publishers.

¹³ Any potential overall economic savings may be difficult to project (for example, increased settlements and fewer trials by improved knowledge of opposing positions), but it appears that written reports will increase many clients' costs for experts.

¹⁴ For all courts, the local rules can be requested from the clerk of the applicable court.

.04 Under Federal Rule of Civil Procedure 26(a)(2)(B), the following elements are required in the written report of an expert witness:¹⁵

- a. A complete statement of all opinions to be expressed.
- b. An explanation of the bases and reasons for the opinions.
- c. The data or other information considered by the witness in forming the opinions.
- d. Any exhibits to be used as a summary of or support for the opinions.
- e. Qualifications of the witness, including a list of all publications authored by the witness in the preceding ten years.
- f. A listing of any other cases in the preceding four years in which the witness has testified as an expert at trial or by deposition.
- g. Compensation to be paid for the study and testimony.
- h. Signature of the witness.

These required elements are discussed further in the following paragraphs.

.05 A Complete Statement of All Opinions. The key concept in this requirement is that *all* opinions must be stated in the written report. If the expert is offering six opinions at trial, all six opinions must be disclosed in the written report or the witness may not be permitted to offer the previously undisclosed opinions at trial. The objective of this requirement is to allow for full discovery of the expert's opinions before they will be permitted to be given at trial. It is also possible that certain judges, particularly in bench trials, may replace the expert's direct testimony with the written report. The only examination of the expert on the stand will be cross-examination, re-direct and re-cross. Therefore, it is always advisable that the opinions be stated clearly in the report.

.06 Explanation of the Bases and Reasons for the Opinions. Not only must the opinions of the expert be disclosed, but also the bases and reasons for these opinions must be explained. Often an expert will have several reasons for his or her opinion. If the expert desires to give these explanations at trial, they must be presented in the written report. For example, an expert develops a report to rebut a study of lost profits damages. The report presents analyses and supporting data which indicate that no market opportunity exists to sell additional products, but does not address plant capacity. At trial, however, the expert attempts to introduce findings that additional products could not have been manufactured anyway because of inadequate plant capacity. An expert who offers such an additional explanation at trial that was not previously disclosed in the report may have the testimony precluded or stricken from the record because of an objection from the opposing attorney.

¹⁵ Written reports by a CPA engaged as a consultant only are not subject to the requirements of the Federal Rules. However, in some situations, based on client needs, the reporting elements in the Federal Rules may be appropriate in a consultant's report.

.07 Data and Other Information Considered by the Expert. The Federal Rules require the expert to include in the written report all data or information “considered” by the expert. This is a very broad concept. The rules do not define the word *considered* and its meaning may be broader than the phrase *relied upon*. Everything the expert looked at in arriving at an opinion may meet the definition of *considered*. The expert should be aware of these requirements and might consider consulting with the attorney or his or her own counsel, in the matter, before returning or discarding any data or information. In addition, the Committee Notes of the drafters of these Federal Rules make it clear that any document given to the testifying expert by the attorney or client is discoverable and no work product privilege or attorney client privilege can be asserted.¹⁶ Therefore, the expert witness may need to be familiar with all documents received and be prepared to explain whether or not they were relevant to his or her analysis and findings. In the written report, the CPA can facilitate the disclosure of all documents received from the attorney or collected independently by maintaining a list of documents during the engagement. However, the CPA may only need to disclose the documents he or she considered in forming opinions.

.08 Exhibits That Summarize or Support the Expert’s Opinions. Any exhibits that help explain the expert’s opinions or reasons for the opinions must be included in the written report. Exhibits might include those that quantify the opinion (for example, a computer-generated damage model), explain particular assumptions, show how the expert’s calculations work, or teach financial concepts like present value of future cash flows. The pictures, graphs, and charts, including those intended to be used in court, must be included in the written report, unless the parties agree otherwise.

.09 Qualifications of the Expert. The Federal Rules require that the expert’s report disclose the reasons why the expert is qualified to render an opinion. For example, if the expert’s education, work experience, professional licenses, professional affiliations and positions, or awards are to be used as reasons the person should be qualified as an expert, these credentials must be disclosed in the report. A list of all publications written by the expert in the last ten years must also be disclosed. Copies of the publications need not be included but complete citations should be provided so the opposing party can obtain copies. An opposing attorney may review the expert’s prior writings or testimony transcripts and search for past expert positions that are inconsistent with the expert’s opinions in the current case.

.10 Prior Expert Testimony. The expert must disclose prior testimony or publications, regardless of whether he or she plans on using them as credentials. The expert must list in the written report all testimony given in the last four years. This includes all testimony given at trial or deposition. The CPA’s prior testimony disclosure may include the names of the parties to the litigation, the case number, and the court. There is no obligation to produce transcripts of the testimony. The expert can maintain lists of all case testimony during the last four years and publications written in the last ten years for inclusion in an expert report when needed.

.11 Compensation. The Federal Rules also require the written report to disclose the compensation of the expert. It is unclear whether the rule requires only the billing rate of the testifying expert or the amount of money charged by the expert and assistants to prepare the report and the estimated total

¹⁶ Further, any working papers, drafts of written reports, or other CPA writings in the CPA’s possession when a valid subpoena is received will be subject to discovery unless extraordinary circumstances exist.

charges through testimony. In practice, the latter alternative is less likely to be questioned by opposing counsel. The expert can discuss the disclosure requirement with the attorney-client.

.12 Signature of the Witness. The individual who will express the opinions stated in the report must sign the report. A firm cannot sign the expert report since only an individual can testify and be cross-examined under oath. Therefore, even if the expert is a partner in a CPA firm and many assistants worked on the engagement, the expert must sign his or her own name, not the name of the CPA firm.

.13 Other Considerations. The Federal Rules do not prescribe an exact date during the discovery period of a lawsuit for producing the written report to the opposing side. Instead, the Federal Rules leave it up to the trial judge to determine the times and in what sequence the expert reports will be produced. If a trial judge does not decide on a different schedule, the Rules state that the parties may agree to a schedule. Finally, absent a court order or stipulation, expert reports are due ninety days before trial.

.14 An expert who is retained only to rebut the testimony of an expert retained by the opposing party has thirty days after disclosure of the opposing expert's report to submit a rebuttal report. An expert retained to offer both affirmative opinions and rebuttal opinions may have two reports. The report containing the affirmative opinions will be disclosed first and, then, the rebuttal report will be disclosed within thirty days of the disclosure of the opposing expert's affirmative report.

.15 Federal Rule of Civil Procedure 26(e)(1) requires experts to supplement their written reports if "in some material respect the information disclosed is incomplete or incorrect" or "if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Since, under the Federal Rules, the opposing party has no right to take the deposition of the expert until after the written report is disclosed, the deposition may be an opportunity for an expert to expand upon the written report. If the expert forms additional opinions after disclosing the written report, the expert may communicate these opinions at the deposition. The expert may also explain any additional data or analyses supporting the opinions.

.16 The expert should disclose to the attorney or other client any corrections or additional information that may affect the opinions or the reasons for the opinions, as appropriate. The Rules envision that the parties will agree to a schedule to supplement the written reports of experts. Without agreement of the parties, however, the Federal Rules state that these supplemental disclosures will occur at least thirty days before trial.

.17 Each state and locality sets its own rules of civil procedure that govern the conduct of civil trials. Some states or local jurisdictions have rules that differ significantly from the *Federal Rules of Civil Procedure*, but most either follow the Federal Rules or pattern their own rules on them. Therefore, over time, it is possible that the requirement for written expert reports may become common in state and local courts, as well as federal courts.

74/140 ELEMENTS OF AN EXPERT'S WRITTEN REPORT

.01 A written report that is easy to read, well organized, and carefully referenced is important to the expert in litigation. But, there is no single report format or structure that is appropriate for all litigation services engagements. Dispute resolution procedures and the related expert testimony vary too much in circumstances and facts to allow for a standard report format.

.02 The elements specified by Federal Rule of Civil Procedure 26(a)(2)(B) to be included in an expert's written report may also be included in a written report not subject to the Federal Rules. The expert may consider these elements when collecting the information, so it can be incorporated easily into the report.¹⁷

.03 The practitioner should also consider including the following report elements not required by the *Federal Rules of Civil Procedure*.

.04 Table of Contents. The triers of fact are very important readers of the expert report, but they have little time to search for the information they need in the expert's report. A Table of Contents may assist these individuals to find the parts of the report of most interest to them, as they try to reach their decision.

.05 Executive Summary. An executive summary also helps the trier of fact to use time efficiently. A concise statement of only the most important conclusions and reasons may expedite his or her review of the expert's report.

.06 Introduction and Background. Whether the written report accompanies oral testimony or replaces the direct examination of the expert witness, an introduction and background description may help the reader understand the expert's opinions by placing them in the proper context. It may be important that the trier of fact understand how the expert's opinions relate to the rest of the case and the other oral or written testimony. The CPA might discuss with the attorney-client the level of detail to be included, as well as whether the section should refer to specific pleadings or merely state the positions of the parties in general terms, state the facts assumed by the expert, and describe whether disputed facts do or do not relate to the CPA's analyses and findings. The CPA and attorney-client may agree whether these topics are or are not appropriate.

.07 Objectives of the Engagement. The trier of fact may be assisted in understanding the opinions of the expert by knowing the purpose of the expert's engagement. The reasons why the expert was retained are part of the foundation for the opinions the expert ultimately reaches. The expert can make his or her qualifications, assumptions, description of work performed, and findings more relevant to the reader of the report by stating the overall purpose, or general objectives, of the engagement.

¹⁷ These elements relate to expert reports but in some situations may be appropriate in a consultant's report based on client needs.

.08 Scope of the Engagement. The work performed by the expert is also an important basis for the expert's opinions. To properly weigh the expert's opinions against the case of the opposing party, the trier of fact may need to know the nature and extent of the CPA's work.

.09 To avoid confusion, it may be appropriate to state in the report the assumptions adopted or issues not addressed by the expert. For example, the defendant's damages expert commonly assumes that liability is established for the purpose of independently estimating damages. This expert may want to state that he or she has not studied the issue of liability and has no opinion on whether the defendant is liable to the plaintiff. However, the expert assumes that the plaintiff will prove the case against the defendant for the purpose of completing his or her work. The purpose of the disclosures is to give the trier of fact and the opposing parties an understanding of the assumptions in the written report, and to ensure that they are not misled about what the expert did or did not do. As a result, the cross-examination on these issues may have less impact and may reduce surprise to the trier of fact, because they were previously disclosed and explained by the expert.

.10 The expert may explain the major work steps or tasks performed. The actual work done by the expert is an important part of the foundation for the opinions reached. The quality and quantity of work are factors the trier of fact may consider in deciding how much weight to give the expert's opinions. Descriptions of major tasks may include such efforts as gathering data, reading depositions, interviewing fact witnesses, visiting sites, developing computer models, and performing other analyses.

.11 If the client or other parties participated in the CPA's engagement, the expert may want to explain their role. The expert may also have consulted with or relied upon the client, or other people or organizations, in reaching opinions. If the expert relied upon others for any information or assumptions used as a basis for an opinion, he or she may want to disclose this reliance on their contributions in the written report.

.12 Citing References to Source Documents. It may be appropriate to cite references to the source documents from which the expert obtained information about assumptions and facts. When available, the CPA might refer to the identification number stamped on the document for purposes of the litigation. This makes it easier for the report reader to find the specific source data used by the expert to reach the opinions. Readers often prefer reports that provide the conclusions first, then intermediate analyses or calculations, and then citations or referenced copies of the source documents used for the facts and assumptions. This report structure may also make it easier for the expert to locate the sources for the facts and assumptions while under cross-examination. The expert who quickly finds the data used for a particular calculation or identifies an underlying assumption may be a more convincing witness to the trier of fact.

.13 Similarly, electronic spreadsheet models used as a basis to quantify damages or to value a business may flow logically from the summary schedules in the front of the model to the intermediate calculations and, then, to the source data used in the calculations. Cross-referencing numbers can help the reader understand the logic of the model. The expert also might consider making as much of the model logic visible to and simple for the reader as possible. The expert can do this by either footnoting the logic in a particular cell or column or breaking the logic up into more discrete pieces such as using more cells or columns to make the calculation more understandable. There are many good reasons to expose the computer model's logic. The expert should be able to explain the

logic to others. Even with the oral explanation, the trier of fact may not understand unless the logic is explained in writing on the face of the model's printed pages. Further, the expert may have difficulty remembering the logic of the model if a long period of time passes between creating the model and testifying about it at trial.

.14 Authentication of Source Documents. The admissibility of documents used by the CPA may be an issue. Although an expert can rely on evidence that may be inadmissible in other circumstances, if the report is moved into evidence, the judge may not allow the otherwise inadmissible evidence to remain in an expert's report, unless a proper foundation is laid. For example, the CPA may prepare an analysis of financial statements identified to a company, but someone else may have to establish how and when the subject documents were prepared. Therefore, the expert might consider or seek legal assistance about what written report information is admissible or requires authentication. It may be necessary for the expert to explain and discuss the source of the data and the documents relied upon in the report.

74/145 SUMMARY

.01 This practice aid discusses the communications standard, presents typical examples of oral and written communications, and summarizes key issues and considerations for written communications by CPAs whether serving as consultants or expert witnesses. The emphasis is on non-attest or consulting reports written by expert witnesses, including those required of experts subject to the *Federal Rules of Civil Procedure*. Generally, testifying experts sign written reports and are expected to explain and support their opinions for the trier of fact. While CPAs may take primary responsibility for the expert opinions, they may want to discuss all, or most, reporting factors and issues with the client before issuing a final report.

.02 The CPA's work on any litigation services consulting assignment is covered by the AICPA Code of Professional Conduct and SSCS No. 1, with its standard for communication with client. The practitioner should also review other available practice aids related to litigation services engagements.

APPENDIX A

SAMPLE WRITTEN REPORT FOR A DEFENDANT IN A WRONGFUL TERMINATION CASE

United States District Court
Northern District of Other State
Case No. C92-3753 EH
Bill White v. Classic Sand & Gravel Co., Inc.

Expert Witness Report of
P.F. Jones
Related To Bill White's Economic Loss
December 31, 1995

I. Introduction

Bill White was terminated at Classic Sand & Gravel Co. (Classic) after thirty-six years of service on September 20, 1988. He was within two weeks of his sixty-first birthday. Mr. White was the vice president-general manager of the Northern Division of Classic. He alleges that he was unlawfully terminated and has filed this lawsuit to collect damages resulting from the termination.

II. Assignment

I was retained by the law firm of Smith, Smith, & Light, counsel for Classic. I was asked to assume that Bill White will prevail on his legal theories in this case. Accordingly, I have not undertaken any work to analyze or reach an opinion on the liability issues in this case. I was asked to review the calculation of economic loss as a result of the termination of Bill White and to determine whether the calculation and assumptions are reasonable.

III. Expert Opinions

The estimate of Bill White's economic loss of \$1,472,729 is overstated and based on unrealistic assumptions (see exhibit A-1). The estimate disregards any mitigation. If the evidence establishes that Mr. White was healthy, truly desired to continue working, and could have found another job, the alleged damages would be further reduced. Furthermore, there is no consideration of his earlier receipt of retirement income or social security income. Also, I have not found any support for many of the key assumptions such as that Mr. White would work until he reached age seventy and that his earnings would increase at a national average even though he was already sixty-one years old when he was terminated.

Based upon the information reviewed and my analysis, better assumptions are that he would have retired by age sixty-five and his salary increase would have matched the budgeted merit increases at Classic. One must also consider the money Mr. White has received from his retirement plan, which he would not have received if he had continued to work. Based on these assumptions, the estimate of Mr. White's economic loss is \$340,060 (see exhibit A-2). This estimate of damages does not take into consideration the possibility that Mr. White could have found another job and continued working until his normal retirement age of sixty-five. If he had done this, his economic loss would be less than I have calculated.

IV. Work Performed

I reviewed the expert witness report of the plaintiff's economist (see exhibit A-1) and various documents related to Mr. White's employment history, medical records, and retirement benefits. I identified the significant assumptions made by the plaintiff's economist. These assumptions are (1) that Mr. White would work until age 70, (2) that his salary would have increased in the future at the average increase for workers in the United States, (3) that there is no duty to mitigate damages, and (4) that since Mr. White has not worked since termination, there is no deduction

for alternative employment. Differences in pension benefits are ignored. Lost earnings after trial are discounted back to the estimated date of judgment.

I replicated the logic in the plaintiff's damage model (see exhibit A-1). I then used this model to prepare an alternative calculation of Mr. White's economic loss based on more reasonable assumptions (see exhibit A-2). The documents supplied to me are listed in exhibit B [exhibit B is not included in this sample report].

V. Bases for Expert Opinions

A. *Consideration Must Be Given To Receipt Of Pension Benefit.*

Bill White has been receiving pension benefits equaling \$4,421.17 per month since April 1, 1992 and a supplemental payment of \$969 per month until he reaches age sixty-five. (See letter dated March 9, 1992 at exhibit C [not included in this example].) If Mr. White had continued to work, he would not have received this \$5,390.17 per month.

In addition, as stated in the letter in exhibit C, Mr. White was paid the \$4,421.17 per month retroactive to March 1, 1990 and the \$969 per month retroactive to October 1, 1991. This equals \$116,343.25 (25 months times \$4,421.17 plus 6 months times \$969). This payment would not have been made to Mr. White if he had continued to be employed.

However, if Mr. White had worked until he turned sixty-five, his pension benefit payment would have been higher. This benefit would have been \$5,782.29 instead of \$4,421.17 (see the letter from the pension consultant at Towers Perrin to Betty Johnson, Pension Manager at Classic dated March 13, 1995 in exhibit D [not included in this example]). Therefore, between November 1, 1992 and Mr. White's death, he would have earned an additional \$1,261.12 per month if he had continued to work at Classic until he reached age sixty-five.

The net present value benefit of retiring early on the total pension benefits to be received by Mr. White was estimated by Towers Perrin (see the letter in exhibit D [not included in this example]). This calculation shows that Mr. White is better off by \$65,364.76 (present value of pension benefits with actual retirement of \$634,050.67 less present value of pension benefits with retirement at age sixty-five of \$568,685.91).

B. *A More Reasonable Retirement Age Is Age Sixty-five.*

The normal retirement age at Classic is sixty-five years (see page 6 of Classic's pension plan in exhibit E [not included in this example]). Classic made it very attractive for employees like Mr. White to retire early. Paragraph 6.3 on page 31 of the plan states that employees with twenty-five or more years of vesting can retire anytime after reaching age sixty-two and get full benefits as if they remained until age sixty-five.

Furthermore, I understand that Mr. White had health problems in his last couple of years of work. He had coronary artery disease and he underwent coronary angiography in 1987. He was hospitalized at Capital City Memorial Hospital from January 3, 1990 through January 9, 1990 for a complete

L4-L5 decompressive laminectomy. It is possible that one of his medical conditions would have prevented him from continuing to work after age 65.

C. A More Reasonable Assumption Is That Mr. White's Income Would Have Increased At The Rate Salaries Actually Increased At Classic.

I received from Classic a comparison of what Mr. White's income was in relation to other Classic executives and what the actual merit increases were at Classic. This information is contained in exhibit F [not included in this example report]. It is more likely that these are the types of increases Bill White would have received if he had continued to work at Classic. The average increases used by the plaintiff's economic expert include all ages and all different types of workers in the United States. This is not a good yardstick for a sixty-one-year-old executive. Many executives who stay employed past age sixty actually have declining incomes.

VI. Qualifications

I am a Managing Director of P.F. Jones, Inc., an accounting firm specializing in litigation and dispute resolution services. Previously, I was a partner at a Big Six accounting firm for ten years, including the last five years as partner in charge of the litigation services practice in Other State. I am a Certified Public Accountant, licensed to practice in Other State. I also hold CPA licenses in Neighboring State and Any State. I have devoted the last twenty years of my professional life to the analysis of complex business issues in commercial litigation. A copy of my Curriculum Vitae (CV), including my current and past employment and professional affiliations, is provided in exhibit A-3.

I write and speak frequently on the issue of commercial damages. A complete list of my publications and a partial list of speeches I have given are provided in my CV.

The cases in which I provided trial and deposition testimony are listed in my CV.

My firm has not billed any fees or expenses to date in this engagement. Fees and expenses incurred to date and not yet billed are approximately \$1,600. [Note: Some experts only disclose their billing rate as evidence of their compensation.] Additional fees and expenses may be billed between now and the trial if additional work is requested by counsel for the defendant.

The only work contemplated, but not yet completed, is attendance at deposition, if requested by plaintiff's counsel, preparation of possible demonstrative exhibits, preparation to testify, and attendance at trial.

P.F. Jones

December 31, 1995

Exhibit A-1

**Bill White v. Classic Sand & Gravel Co., Inc.
Economic Loss Alleged by Plaintiff**

	Date of birth: 10/4/27	Date of hire: 9/1/52	Date of termination: 9/20/88	<u>Earnings Without Termination</u>			<u>Earnings With Termination</u>			<u>Difference</u>	<u>Present Value</u>
				<u>Wages</u>	<u>Fringe Benefits</u>	<u>Total</u>	<u>Wages</u>	<u>Fringe Benefits</u>	<u>Total</u>		
Past:	1988			\$161,870	\$2,790	\$164,660	\$204,570	\$2,790	\$207,360	(\$42,700)	(\$42,700)
	1989			170,464	2,976	173,440	210,030	2,976	213,006	(39,566)	(39,566)
	1990			179,839	3,181	183,020	43,016	2,667	45,683	137,337	137,337
	1991			188,822	3,311	192,133	—	—	—	192,133	192,133
	1992			198,429	3,441	201,870	—	—	—	201,870	201,870
	1993			204,047	3,571	207,618	—	—	—	207,618	207,618
	1994			210,168	3,757	213,925	—	—	—	213,925	213,925
	1995	2		23,344	1,447	24,791	—	—	—	24,791	24,791
Future:	1995	10		193,094	2,347	195,441	—	—	—	194,441	191,928
	1996			216,437	3,794	220,231	—	—	—	220,231	211,618
	1997	10		180,364	3,794	184,158	—	—	—	184,158	173,775
				Present Economic Loss			895,408				
				Future Economic Loss (PV)			577,321				
				Total Economic Loss (PV)			1,472,729				

Bill White v. Classic Sand & Gravel Co., Inc.

Adjusted Economic Loss

Date of termination: 9/20/88

Date of hire: 9/1/52

Date of birth: 10/4/27

	Year	Month	Earnings Without Termination			Earnings With Termination			Present Value
			Wages	Fringe Benefits	Total	Wages	Fringe Benefits	Total	
Past:	1988		\$161,870	\$2,790	\$164,660	\$204,570	\$2,790	\$207,360	(\$42,700)
	1989		171,582 ¹⁸	2,976	174,558	210,030	2,976	213,006	(38,448)
	1990		181,877 ¹⁹	3,181	185,058	43,016	2,667	45,683	139,375
	1991		181,877 ²⁰	3,311	185,188				185,188
	1992	10	159,142 ²¹	2,868	162,010	65,365 ²²		65,365	96,645
Future:	1993								
	1994								
	1995								
	1996								
	1997								
						Pure Economic Loss		\$340,060	
						Future Economic Loss (PV)		—	
						Total Economic Loss (PV)		\$340,060	

¹⁸ 6% growth based on Merit Budget for the year (see Tab F).

¹⁹ 4% growth based on Merit Budget for the year (see Tab F).

²⁰ 0% growth based on no merit increase; salaries were frozen (see Tab F).

²¹ 5% growth based on Merit Budget for the year (see Tab F).

²² Present value of benefit of retiring early.

**Curriculum Vitae
P.F. Jones**

POSITION	Managing Director, P.F. Jones, Inc.
EDUCATION	B.S., Accounting, Other State University (1971)
PROFESSIONAL AFFILIATIONS (current)	Member, American Institute of Certified Public Accountants Litigation Services Committee (1993–present) Member, Any State Society of CPAs Certified Public Accountant, Any State, Other State, Neighboring State
PROFESSIONAL AFFILIATIONS (past)	AICPA MAS Practice Standards and Administration Subcommittee (1988–1990) Member, Any State Society of Certified Public Accountants Litigation Services Committee (1985–1990) Certified Management Consultant
RANGE OF EXPERIENCE	Experience includes extensive consulting work and testimony in the accounting, financial, economic, and business issues of commercial litigation.
PROFESSIONAL AND BUSINESS HISTORY	P.F. Jones, Inc.: Managing Director, January 1993–Present Big Six Accounting Firm: Partner, January 1983–December 1992 Senior Manager, January 1980–December 1982 Manager, January 1977–December 1979 Senior, January 1974–December 1976 Staff Accountant, January 1972–December 1973
PUBLICATIONS	“The Implications of Changes in The Federal Rules of Civil Procedure for CPA-Expert Witnesses,” <i>The CPA Management Consultant</i> , Spring 1994. “How You Compute Damages,” <i>Journal of Any State’s Accounting Society</i> , Volume 5, Spring 1993. “Calculating Commercial Damages,” <i>Law Journal of Any State Bar Association</i> , Volume II, March 1991.
SELECTED SPEECHES	“Calculating Damages,” 1995 Business Appraisers Conference on Appraising Closely Held Businesses, January 31, 1995, Vacation City, Any State. “The Revised Federal Rules of Civil Procedure That Apply to Expert Witnesses,” 1994 National CPA Organization, National Advanced Litigation Services Conference, October 1, 1994 at Big City, Big State. “Damages in Employment Litigation,” Employment And Labor Law

In Any State, Lorman Education Services, April 29, 1994, Capital City, Any State.

“Damages, Time Value of Money” and panel participant on “Practical Problems of Federal Rule of Civil Procedure No. 26,” 1994 Litigation Advanced Forum, Other State Society of CPAs, April 25, 1994, Resort City, Other State.

**CASES IN WHICH
TRIAL TESTIMONY
WAS GIVEN**

Jones v. Jones, C-19365, Any State Superior Court (1995)
Smith v. Smith, C-18999, Any State Superior Court (1994)
All American Company v. Foreign National Company, AL-301,
U.S. District Court (1994)
Jupiter v. All Waste, Inc., Civil No. 3567, Other State County Court
(1993)
Karl v. Employment Co., BV-1935, U.S. District Court (1991)

**CASES IN WHICH
DEPOSITION
TESTIMONY WAS
GIVEN**

Client v. Lawyer, C-12957, Any State Superior Court (1995)
Big Brother v. Friend, KS-3975, U.S. District Court (1993)
Johnson v. Ever Right, No. 2345, Neighboring State Supreme Court (1989)

APPENDIX B

SAMPLE WRITTEN REPORT ON DAMAGES FOR A PLAINTIFF IN A FEDERAL COURT

United States District Court

District of Any State

Case No. 95-1999 MW

Auto Truck Plaza, Inc.

v.

Major Oil Company

Expert Witness Report of

J.W. Smith

December 1, 1995

I. Introduction

The plaintiff in this litigation has been operating an auto-truck stop along Interstate A for the past fifteen years. The plaintiff entered into a contract to purchase motor fuel from Major Oil Company. The initial contract term was three years and the contract has been automatically renewed every three years over the last fifteen years. The plaintiff's auto-truck stop needed renovation and upgrading as of 1989. The defendant, Major Oil Company, refused to perform the necessary renovation and upgrading of the plaintiff's facilities. Deterioration of the facility reduced the plaintiff's ability to compete effectively. Following discussions between the plaintiff and the defendant regarding the facility upgrade, the defendant terminated the motor fuel purchase agreement effective January 1, 1995. The termination of the contract resulted in the loss of favorable purchase terms to the plaintiff that continues today.

II. Assignment

I was retained by the law firm of Jones, Jones & Blank. I was asked to assume that Auto Truck Plaza, Inc. will prevail on its legal theories in this case and to compute the damages to Auto Truck Plaza resulting from the allegations in the Second Amended Complaint as generally described above.

III. Expert Opinions

In my expert opinion, Auto Truck Plaza has suffered about \$3.1 million in damages through December 31, 1994 as a result of Major Oil Company's not upgrading and renovating the facility operated by Auto Truck Plaza. In addition, Auto Truck Plaza was permanently damaged by the wrongful termination of its franchise agreement with Major Oil Company in the amount of approximately \$2.1 million.

Summary

Lost profits through December 31, 1994	\$3,077,839
Lost future profits	<u>2,096,857</u>
Total	<u>\$5,174,696</u>

IV. Work Performed

I reviewed the Second Amended Complaint to understand the context of the issues I was asked to analyze. I read several documents that provide additional information on the operation of the auto-truck plaza by Auto Truck Plaza. I collected information on the market for gasoline and diesel sales in Any State. In addition, I collected general information on the auto-truck stop industry. A list of

the documents that I or my staff considered in this case is provided in exhibit A of this report [exhibit A is not included in this example report].

I met with Mr. Clark, owner of Auto Truck Plaza, Inc., and Mrs. Brown, controller at Auto Truck Plaza, to discuss the operations of the auto-truck stop and to understand the accounting information available to estimate plaintiff's damages. I toured the facility to understand the various segments of the business carried out at the auto-truck stop and to view the condition of the facility.

I prepared a computer model to estimate the additional profits that should have been earned by Auto Truck Plaza if the facility had been renovated and upgraded as planned. A copy of the results of the computer model is provided in exhibit B-1 of this report. This report also consists of twenty-five sub-exhibits [not included] that include all the schedules and source documents supporting the calculation. [The only pages included in this example are the sixteen exhibits from the computer model, not the supporting source documents.]

V. Bases for Opinions

I was told to assume that the lack of renovation and upgrading had an impact on the operations of Auto Truck Plaza beginning in 1989. [Note: Often, the CPA will be asked to render an opinion on causation; in other cases, the CPA will be asked to assume that the alleged legal violations caused the loss computed.] I used calendar years 1989 through 1994 as the accounting periods to estimate past damages.

I estimated the damages to Auto Truck Plaza by first determining the additional sales Auto Truck Plaza would have earned if it had a renovated and upgraded facility. With an upgraded facility, the plaintiff could have effectively competed with other auto-truck stops in the Neighboring State, Any State, and Other State (the relevant market area). I then estimated the additional variable costs that Auto Truck Plaza would have incurred to generate these sales.

To estimate these lost sales, I used a commonly accepted approach known as the "before and after" approach. I determined the average relationship between the sales of gasoline and diesel in gallons at Auto Truck Plaza and in Any State for the years 1986 through 1988. Because the majority of Auto Truck Plaza's sales were in Any State, I did not break down information from Neighboring State and Other State by the partial areas that Auto Truck Plaza competed in these states. I then determined the decrease in this relationship beginning in 1989 and through 1994 (see exhibit B-1.13). I used this decrease to estimate the additional sales for Auto Truck Plaza if it had stayed as competitive as it had been in this earlier period.

In conversations with Mr. Clark and Mrs. Brown, I was told that there were no new auto-truck stops built during the damage period in the relevant market area that would have taken business away from Auto Truck Plaza. Several competitors did improve their facilities and make themselves more attractive, thus causing Auto Truck Plaza to lose business. If Auto Truck Plaza had been able to make its facility as attractive as its competition, it would not have lost this business.

To compute lost sales in dollars, I used the actual average price per gallon charged by Auto Truck Plaza in each year from 1989 through 1994 (see exhibit B-1.3). I then multiplied the lost gallons by the average price per gallon to arrive at the lost sales in dollars.

Auto Truck Plaza sold other items besides gasoline and diesel, including oil, accessories, mechanics services, and scales. They also had a restaurant and a store. I used the actual relation that these sales had to diesel gallonage in each year of the damage period to estimate the lost sales in these related areas (see exhibits B-1.2 and B-1.4).

For the lost product and service sales, I calculated the incremental cost of goods sold, using the average actual cost of goods sold for Auto Truck Plaza in each year of the damage period. I have assumed that Auto Truck Plaza would not have received any quantity discounts on these additional inventory purchases (see exhibits B-1.5 through B-1.10).

To calculate the additional selling, general, and administrative expenses, I analyzed the statistical relationship between these expenses and net sales from December 1987 through July 1993. Using linear regression analysis, I have concluded that for every additional sale, Auto Truck Plaza incurred an additional eleven cents of selling, general, and administrative expenses (see exhibit B-1.14).

Having calculated the incremental sales that would have been received by Auto Truck Plaza if it had an upgraded and renovated facility, I then subtracted the additional cost of goods sold and of selling, general, and administrative expenses to arrive at the lost profits of Auto Truck Plaza (see exhibit B-1.1).

I estimated the lost future value of Auto Truck Plaza by capitalizing the "but-for" pre-tax for 1994, using a 25 percent capitalization rate. I used Schilt's Risk Premium Table to estimate the capitalization rate. No future income is anticipated because Auto Truck Plaza has lost its franchise agreement to operate.

VI. Expert Qualifications

I am a Managing Director of J.W. Smith, Inc. (JWS), an accounting firm specializing in litigation and dispute resolution services engagements. Previously, I was a partner at a Big Six accounting firm for ten years, including the last five years as partner in charge of their litigation services practice in Any State. I am a Certified Public Accountant, licensed to practice in Any State. I also hold CPA licenses in Neighboring State and Other State. I devoted the last twenty years of my professional life to the analysis of complex business issues in commercial litigation. A copy of my current Curriculum Vitae (CV) including my current and past employment and professional affiliations is provided in exhibit B-2.

I write and speak frequently on the issue of commercial damages. A complete list of my publications and a partial list of speeches I have given are provided in my CV.

Cases in which I provided trial and deposition testimony are listed on page two of my CV.

My firm has billed about \$10,000 to date in this engagement. Fees and expenses incurred to date and not yet billed are approximately \$2,000. Therefore, total fees and expenses incurred on this project to date are approximately \$12,000. [Note: Some experts only disclose their billing rate as evidence of their compensation.] Additional fees and expenses may be billed between now and trial if additional work is requested by counsel for Auto Truck Plaza. My compensation is not contingent on the outcome of this litigation.

The only work contemplated, but not yet completed, is the analysis of Major Oil Company's expert opinions, preparation of possible demonstrative exhibits, preparation to testify, and attendance at depositions and trial.

J. W. Smith

December 1, 1995

Computer Model of Lost Profits of Auto Truck Plaza, Inc.

Auto Truck Plaza, Inc. v. Major Oil Company
Calculation of Incremental Lost Sales

	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>Total</u>
"But-For" diesel gallonage ^a	6,704,278	7,201,713	7,167,548	7,077,291	7,160,239	7,160,239	42,471,308
"Actual" diesel gallonage ^b	6,345,629	6,190,347	5,801,245	5,532,379	5,110,211	5,107,141	34,086,952
"Lost" diesel gallonage ^c	358,649	1,011,366	1,366,303	1,544,912	2,050,028	2,053,098	8,384,356
Average Price per Gallon ^d	\$0.80	\$0.89	\$0.80	\$0.78	\$0.82	\$0.72	\$0.79 ^{Lost}
Lost diesel sales	<u>\$286,920</u>	<u>\$900,116</u>	<u>\$1,093,042</u>	<u>\$1,205,031</u>	<u>\$1,681,023</u>	<u>\$1,478,231</u>	<u>\$6,644,362</u>
"But-For" gasoline gallonage ^a	926,329	926,518	932,406	935,620	969,830	969,830	5,660,533
"Actual" gasoline gallonage ^b	885,004	931,111	875,632	887,587	848,676	1,087,705	5,515,715
"Lost" gasoline gallonage ^c	41,325	0	56,774	48,033	121,154	0	144,818
Average price per gallon ^d	\$1.11	\$1.15	\$1.17	\$1.26	\$1.25	\$1.23	\$2.24 ^{Lost}
Lost gasoline sales	<u>\$45,871</u>	<u>\$0</u>	<u>\$66,426</u>	<u>\$60,522</u>	<u>\$151,442</u>	<u>\$0</u>	<u>\$324,260</u>
<u>Allied sales</u>							
Restaurant /1,000 diesel gallonage	\$210.08	\$238.93	\$258.64	\$273.28	\$276.38	\$293.55	\$2,261,829
Lost restaurant sales ^e	\$75,345	\$241,648	\$353,386	\$422,186	\$566,581	\$602,683	
Store /1,000 diesel gallonage	\$137.06	\$137.42	\$151.13	\$167.72	\$175.78	\$197.62	\$1,419,827
Lost store sales ^e	\$49,157	\$138,982	\$206,493	\$259,110	\$360,356	\$405,730	
Oil /1,000 diesel gallonage	\$22.39	\$21.78	\$25.37	\$24.35	\$23.69	\$28.30	\$209,004
Lost oil sales ^e	\$8,032	\$22,026	\$34,657	\$37,624	\$48,555	\$58,110	
Accessories/Parts /1,000 diesel gallonage	\$76.39	\$88.05	\$86.85	\$79.44	\$70.41	\$95.98	\$699,246
Lost accessories/parts sales ^e	\$27,396	\$89,050	\$118,665	\$122,727	\$144,346	\$197,062	
Labor /1,000 diesel gallonage	\$35.51	\$39.86	\$39.97	\$40.51	\$37.01	\$40.76	\$329,801
Lost labor sales ^e	\$12,736	\$40,310	\$54,608	\$62,592	\$75,867	\$83,688	
Scales /1,000 diesel gallonage	\$11.58	\$13.93	\$15.86	\$17.35	\$18.56	\$19.55	\$144,910
Lost scales sales ^e	\$4,154	\$14,092	\$21,664	\$26,802	\$38,050	\$40,148	
Total lost allied sales \$\$	<u>\$176,820</u>	<u>\$546,108</u>	<u>\$789,473</u>	<u>\$931,041</u>	<u>\$1,233,755</u>	<u>\$1,387,421</u>	<u>\$5,064,617</u>
Lost incremental sales	<u>\$509,611</u>	<u>\$1,446,224</u>	<u>\$1,948,941</u>	<u>\$2,196,594</u>	<u>\$3,066,220</u>	<u>\$2,865,652</u>	<u>\$12,033,239</u>

Notes:

(a) Computed as line (b), "Actual" diesel gallonage plus line (c) "Lost" diesel gallonage.

(b) Based on monthly sales statistics (exhibit B-1.4).

(c) See calculation of Auto Truck Plaza's lost sales in gallons (exhibit B-1.13); no negative damages are computed.

(d) Based on actual average annual price per gallon (exhibit B-1.3).

(e) Based on actual annual relationship from exhibit B-1.4. Source: Auto/Truckstop Monthly Sales Report.

Exhibit B-1.3

Auto Truck Plaza, Inc. v. Major Oil Company
Calculation of Auto Truck Plaza's Actual Price Per Gallon

	<u>Period</u>	<u>Diesel</u>	<u>Gasoline</u>
1994 Price per gallon			
Sales	Dec. 94	\$328,697	\$99,285
Sales	12/93-11/94	\$3,624,418	\$1,336,624
Sales	Dec. 93	<u>(\$294,676)</u>	<u>(\$97,656)</u>
Sales	1/94-12/94	\$3,658,439	\$1,338,253
Gallons	1/94-12/94	5,107,141	1,087,705
Price per gallon	1/94-12/94	\$0.72	\$1.23
1993 Price per gallon			
Sales	Dec. 93	\$294,676	\$97,656
Sales	12/92-11/93	\$4,206,552	\$1,051,666
Sales	Dec. 92	<u>(\$328,572)</u>	<u>(\$84,987)</u>
Sales	1/93-12/93	\$4,172,656	\$1,064,335
Gallons	1/93-12/93	5,110,211	848,676
Price per gallon	1/93-12/93	\$0.82	\$1.25
1992 Price per gallon			
Sales	Dec. 92	\$328,572	\$84,987
Sales	12/91-11/92	\$4,310,680	\$1,110,515
Sales	Dec. 91	<u>(\$333,833)</u>	<u>(\$79,761)</u>
Sales	1/92-12/92	\$4,305,419	\$1,115,741
Gallons	1/92-12/92	5,532,379	887,587
Price per gallon	1/92-12/92	\$0.78	\$1.26
1991 Price per gallon			
Sales	Dec. 91	\$333,833	\$79,761
Sales	12/90-11/91	\$4,748,156	\$1,030,758
Sales	Dec. 90	<u>(\$425,292)</u>	<u>(\$89,494)</u>
Sales	1/91-12/91	\$4,656,697	\$1,021,025
Gallons	1/91-12/91	5,801,245	875,632
Price per gallon	1/91-12/91	\$0.80	\$1.17

(Continued)

Auto Truck Plaza, Inc. v. Major Oil Company
Calculation of Auto Truck Plaza's Actual Price Per Gallon

	<u>Period</u>	<u>Diesel</u>	<u>Gasoline</u>
1990 Price per gallon			
Sales	Dec. 90	\$425,292	\$89,494
Sales	12/89-11/90	\$5,469,464	\$1,052,354
Sales	Dec. 89	(\$370,721)	(\$72,695)
Sales	1/90-12/90	<u>\$5,524,035</u>	<u>\$1,069,153</u>
Gallons	1/90-12/90	6,190,347	931,111
Price per gallon	1/90-12/90	\$0.89	\$1.15
1989 Price per gallon			
Sales	Dec. 89	\$370,721	\$72,695
Sales	12/88-11/89	\$5,065,576	\$983,518
Sales	Dec. 88	(\$353,293)	(\$74,131)
Sales	1/89-12/89	<u>\$5,083,004</u>	<u>\$982,082</u>
Gallons	1/89-12/89	6,345,629	885,004
Price per gallon	1/89-12/89	\$0.80	\$1.11

**Auto Truck Plaza, Inc. v. Major Oil Company
Auto/Truckstop Monthly Sales Report
January 1987 Through December 1994**

	Gallons										Sales																
	Gasoline	Diesel	Total	Restaurant	General Store	Motel	Motor Oil	Tires & Tubes	Batteries	Truck Parts	Garage Labor	Truck Washing	Scale	Total	Gasoline	Diesel	Total	Restaurant	General Store	Motel	Motor Oil	Tires & Tubes	Batteries	Truck Parts	Garage Labor	Truck Washing	Scale
Jan. 87	56,667	355,018	411,685	\$ 84,087	\$48,392	\$1,762	\$10,030	\$9,640	\$ 439	\$12,624	\$10,707		\$3,095	\$180,776													
Feb. 87	46,055	336,691	382,746	81,244	49,495	1,453	8,906	9,832	337	10,600	10,088		2,988	174,943													
Mar. 87	54,475	408,591	463,066	95,476	60,071	1,546	9,712	7,162	421	12,221	10,341		3,188	200,138													
Apr. 87	52,616	455,524	508,140	89,947	58,941	1,336	10,189	10,290	612	10,910	10,137		3,210	195,572													
May 87	59,423	507,697	567,120	99,487	60,895	1,213	9,736	12,291	367	10,940	10,410		2,933	208,272													
Jun. 87	81,385	571,367	652,752	104,124	61,719	1,254	11,659	13,458	397	10,900	11,048		3,016	217,575													
Jul. 87	95,636	568,350	663,986	109,399	64,626	1,483	10,716	15,598	580	11,093	12,074		3,176	228,745													
Aug. 87	84,709	532,299	617,008	110,481	69,355	1,899	10,532	15,380	608	13,194	11,017		3,192	235,658													
Sep. 87	70,848	509,816	580,664	106,256	63,784	1,539	12,713	18,924	512	15,853	12,557		3,483	235,621													
Oct. 87	62,376	541,910	604,286	100,895	64,638	1,964	12,944	12,411	480	14,778	13,115		4,958	226,183													
Nov. 87	65,867	507,290	573,157	95,833	61,065	1,595	10,525	8,329	489	15,888	11,454		4,501	209,679													
Dec. 87	68,291	515,080	583,371	92,626	54,730	2,217	12,123	11,340	630	16,633	14,110		2,217	206,626													
Jan. 88	61,346	518,577	579,923	89,315	52,693	1,496	10,795	8,218	406	14,401	12,135		5,418	194,877													
Feb. 88	56,527	508,030	564,557	104,127	66,505	1,506	10,968	16,131	572	16,910	16,114		5,731	238,564													
Mar. 88	73,186	548,919	622,105	99,632	61,693	1,643	9,927	15,071	414	14,200	14,479		4,721	221,780													
Apr. 88	73,517	523,238	596,755	107,147	65,646	1,662	11,782	17,438	782	16,611	15,741		4,492	241,301													
May 88	78,450	585,322	663,772	114,839	71,031	1,969	11,484	15,772	439	15,940	15,772		4,279	251,525													
Jun. 88	82,080	625,930	708,010	120,473	74,867	1,631	12,240	17,205	1,149	17,390	16,067	\$3,464	4,969	269,455													
Jul. 88	86,844	671,378	758,222	120,925	77,721	1,846	12,210	22,818	636	16,220	17,080		5,938	277,369													
Aug. 88	103,413	666,181	769,594	108,368	71,926	1,429	11,317	21,278	715	17,201	17,320		4,798	255,737													
Sep. 88	80,892	634,832	715,724	106,026	67,271	1,521	12,471	12,696	682	16,913	14,174		6,938	240,177													
Oct. 88	80,020	610,020	690,040	100,329	68,122	1,711	12,124	12,045	700	25,440	15,434	45	5,791	241,741													
Nov. 88	80,344	576,855	657,199	96,997	70,394	1,647	10,532	12,022	684	21,840	13,113		5,162	232,391													
Dec. 88	76,321	525,715	602,036	111,049	74,411	1,647	10,532	12,022	684	21,840	13,113		5,162	232,391													
Jan. 94	71,889	363,742	435,631	111,049	74,411	1,647	10,532	12,022	684	21,840	13,113		5,162	232,391													
Feb. 94	70,580	385,088	455,668	106,606	77,600	1,496	9,938	16,420	462	19,412	14,799		7,959	253,196													
Mar. 94	80,912	466,300	547,212	125,972	83,638	1,506	12,981	22,705	338	20,201	18,903		9,738	294,476													
Apr. 94	81,437	432,174	513,611	123,300	83,555	1,336	10,825	23,274	357	15,360	16,191		8,466	280,971													
May 94	94,437	454,818	549,248	132,056	82,450	1,213	12,463	20,304	407	17,840	16,963		8,231	290,714													
Jun. 94	107,833	445,918	553,751	132,456	86,160	1,254	12,670	22,827	400	19,466	17,088		8,022	299,089													
Jul. 94	112,634	432,550	545,184	138,041	86,342	1,483	13,940	25,093	243	21,682	19,671		8,227	313,239													
Aug. 94	113,117	444,711	557,828	140,206	96,696	1,539	12,919	25,373	433	18,873	18,752		7,145	320,397													
Sep. 94	97,054	381,275	478,329	125,453	83,187	1,506	11,823	18,770	487	18,065	16,953		8,346	283,084													
Oct. 94	92,913	382,009	474,922	122,497	81,205	1,521	12,589	19,741	480	20,130	16,210		8,061	280,913													
Nov. 94	84,737	474,654	559,391	121,355	83,829	1,964	12,055	14,992	390	32,453	17,867		8,781	291,722													
Dec. 94	79,096	442,659	521,755	120,201	90,191	1,647	12,348	13,044	460	32,909	21,012		8,262	298,427													
Total	5,562,103	38,277,691	43,839,794	\$8,751,686	\$5,362,111	\$41,324	\$867,813	\$1,234,488	\$41,673	\$1,520,405	\$1,315,424	\$23,711	\$485,390	\$19,644,025													

[Data for 1989 through 1993 are deleted to make the presentation more concise.]

Source: Auto/Truckstop Monthly Sales Reports (source documents not included)

Exhibit B-1.6

Auto Truck Plaza, Inc. v. Major Oil Company
Calculation of Cost of Goods Sold — 1993

	Period	Diesel	Ref	Gasoline	Ref	Restaurant	Ref	General Store	Ref	Motor Oil	Ref	Accessories, Tires & Parts	Ref	Total
1993 Cost of Goods Sold														
Beginning inventory		\$ 10,480	xx	\$ 23,536	xx	\$ 17,560	xx	\$ 91,004	xx	\$ 31,413	xx	\$ 147,696	xx	\$ 321,689
Plus: Purchases	Dec. 93	230,332	xx	88,603	xx	45,102	xx	36,096	xx	4,068	xx	9,800	xx	414,001
	12/92-11/93	3,409,308	xx	921,345	xx	513,942	xx	442,824	xx	77,036	xx	247,712	xx	5,612,167
	Dec. 92	(253,628)	xx	(51,146)	xx	(41,081)	xx	(39,407)	xx	(5,295)	xx	(28,864)	xx	(419,421)
	1/93-12/93	3,386,012		958,802		517,963		439,513		75,809		228,648		5,606,747
Less: refunded assessments		(8,580)	xx	(910)	xx		xx		xx		xx			(9,490)
Less: ending inventory		(11,055)	xx	(20,113)	xx	(16,949)	xx	(84,685)	xx	(15,172)	xx	(109,845)	xx	(257,819)
1993 Cost of goods sold		<u>3,376,857</u>		<u>961,315</u>		<u>518,574</u>		<u>445,832</u>		<u>92,050</u>		<u>266,499</u>		<u>5,661,127</u>
Actual sales		4,165,131	xx	1,024,969	xx	1,524,696	xx	968,223	xx	131,813	xx	611,977	xx	8,426,809
Cost of goods sold		<u>3,376,857</u>		<u>961,315</u>		<u>518,574</u>		<u>445,832</u>		<u>92,050</u>		<u>266,499</u>		<u>5,661,127</u>
Gross profit on sales		<u>\$ 788,274</u>		<u>\$ 63,654</u>		<u>\$ 1,006,122</u>		<u>\$ 522,391</u>		<u>\$ 39,763</u>		<u>\$ 345,478</u>		<u>\$ 2,765,682</u>
Gross cost of goods %		81.07%		93.79%		34.01%		46.05%		69.83%		43.55%		67.18%

Exhibit B-1.7

**Auto Truck Plaza, Inc. v. Major Oil Company
Calculation of Cost of Goods Sold — 1992**

Period	Diesel	Ref	Gasoline	Ref	Restaurant	Ref	General Store	Ref	Motor Oil	Ref	Accessories, Tires & Parts	Ref	Total
1992 Cost of Goods Sold													
Beginning inventory	\$ 20,245	xx	\$ 19,183	xx	\$ 17,906	xx	\$ 104,188	xx	\$ 21,229	xx	\$ 170,806	xx	\$ 353,557
Plus: purchases													
Dec. 92	253,628	xx	51,146	xx	41,081	xx	39,407	xx	5,295	xx	28,864	xx	419,421
12/91-11/92	3,455,053	xx	990,102	xx	506,447	xx	466,188	xx	98,454	xx	313,088	xx	5,829,332
Dec. 91	(263,962)	xx	(64,499)	xx	(42,715)	xx	(40,466)	xx	(3,671)	xx	(20,587)	xx	(435,900)
1/92-12/92	3,444,719		976,749		504,813		465,129		100,078		321,365		5,812,853
Less: refunded assessments	(41,570)	xx	(6,175)	xx		xx		xx		xx		xx	(47,745)
Less: ending inventory	(10,490)	xx	(23,536)	xx	(17,560)	xx	(91,004)	xx	(31,413)	xx	(147,696)	xx	(321,699)
1992 Cost of goods sold	<u>3,412,904</u>		<u>966,221</u>		<u>505,159</u>		<u>478,313</u>		<u>89,894</u>		<u>344,475</u>		<u>5,796,966</u>
Actual sales	4,305,420	xx	1,115,739	xx	1,511,875	xx	927,478	xx	135,213	xx	657,603	xx	8,653,328
Cost of goods sold	<u>3,412,904</u>		<u>966,221</u>		<u>505,159</u>		<u>478,313</u>		<u>89,894</u>		<u>344,475</u>		<u>5,796,966</u>
Gross profit on sales	<u>\$ 892,516</u>		<u>\$ 149,518</u>		<u>\$ 1,006,716</u>		<u>\$ 449,165</u>		<u>\$ 45,319</u>		<u>\$ 313,128</u>		<u>\$ 2,856,362</u>
Gross cost of goods %	79.27%		86.60%		33.41%		51.57%		66.48%		52.38%		66.99%

Exhibit B-1.8

**Auto Truck Plaza, Inc. v. Major Oil Company
Calculation of Cost of Goods Sold — 1991**

	Period	Diesel	Ref	Gasoline	Ref	Restaurant	Ref	General Store	Ref	Motor Oil	Ref	Accessories, Tires & Parts	Ref	Total
1991 Cost of Goods Sold														
Beginning inventory		\$ 18,142	xx	\$ 25,123	xx	\$ 13,778	xx	\$ 102,821	xx	\$ 21,969	xx	\$ 169,308	xx	\$ 351,141
Plus: purchases	Dec. 91	\$ 263,962	xx	\$ 64,499	xx	\$ 42,715	xx	\$ 40,467	xx	\$ 3,671	xx	\$ 20,587	xx	435,901
	12/90-11/91	3,745,336	xx	932,954	xx	476,713	xx	481,989	xx	99,582	xx	\$ 365,967	xx	6,102,541
	Dec. 90	(\$ 338,497)	xx	(93,237)	xx	(38,364)	xx	(33,847)	xx	(3,068)	xx	(\$ 31,988)	xx	(539,001)
	1/91-12/91	3,670,801		904,216		481,064		\$ 488,609		100,185		\$ 354,566		5,999,441
Less: refunded assessments				(\$ 2,196)										(\$ 2,196)
Less: ending inventory		(\$ 20,245)	xx	(19,183)	xx	(17,906)	xx	(104,188)	xx	(21,229)	xx	(\$ 170,806)	xx	(353,557)
1991 Cost of goods sold		<u>3,668,698</u>		<u>907,960</u>		<u>476,936</u>		<u>487,242</u>		<u>100,925</u>		<u>\$ 353,068</u>		<u>5,994,829</u>
Actual sales		4,656,696	xx	1,021,025	xx	1,498,051	xx	867,927	xx	146,377	xx	\$ 727,965	xx	8,918,041
Cost of goods sold		<u>3,668,698</u>		<u>907,960</u>		<u>476,936</u>		<u>487,242</u>		<u>100,925</u>		<u>353,068</u>		<u>5,994,829</u>
Gross profit on sales		<u>\$ 987,998</u>		<u>\$ 113,065</u>		<u>\$ 1,021,115</u>		<u>\$ 380,685</u>		<u>\$ 45,452</u>		<u>\$ 374,897</u>		<u>\$ 2,923,212</u>
Gross cost of goods %		78.78%		88.93%		31.84%		56.14%		68.95%		48.50%		67.22%

Exhibit B-1.9

**Auto Truck Plaza, Inc. v. Major Oil Company
Calculation of Cost of Goods Sold — 1990**

Period	Diesel	Ref	Gasoline	Ref	Restaurant	Ref	General Store	Ref	Motor Oil	Ref	Accessories, Tires & Parts	Ref	Total
1990 Cost of Goods Sold													
Beginning inventory	\$21,569	xx	\$23,786	xx	\$13,787	xx	\$101,775	xx	\$27,203	xx	\$150,338	xx	\$338,458
Plus: purchases	338,497	xx	93,237	xx	38,364	xx	33,847	xx	3,068	xx	31,988	xx	539,001
12/89—11/90	4,357,617	xx	995,852	xx	497,442	xx	499,642	xx	74,701	xx	434,648	xx	6,859,902
Dec. 89	(295,769)	xx	(65,623)	xx	(37,885)	xx	(35,263)	xx	(2,877)	xx	(31,767)	xx	(469,184)
1/90—12/90	4,400,345		1,023,466		497,921		498,226		74,892		434,869		6,929,719
Less: ending inventory	(18,142)	xx	(25,123)	xx	(13,778)	xx	(102,821)	xx	(21,969)	xx	(169,308)	xx	(351,141)
1990 Cost of goods sold	4,403,772		1,022,129		497,930		497,180		80,126		415,899		6,917,036
Actual sales	5,524,036	xx	1,069,153	xx	1,473,421	xx	851,830	xx	135,897	xx	807,926	xx	9,862,263
Cost of goods sold	4,403,772		1,022,129		497,930		497,180		80,126		415,899		6,917,036
Gross profit on sales	\$1,120,264		\$47,024		\$975,491		\$354,650		\$55,771		\$392,027		\$2,945,227
Gross cost of goods %	79.72%		95.60%		33.79%		58.37%		58.96%		51.48%		70.14%

Exhibit B-1.10

Auto Truck Plaza, Inc. v. Major Oil Company
Calculation of Cost of Goods Sold — 1989

Period	Diesel	Ref	Gasoline	Ref	Restaurant	Ref	General Store	Ref	Motor Oil	Ref	Accessories, Tires & Parts	Ref	Total
1989 Cost of Goods Sold													
Beginning inventory	\$10,859	xx	\$23,026	xx	\$14,362	xx	\$98,527	xx	\$34,934	xx	\$110,218	xx	\$291,926
Plus: purchases	295,769	xx	65,623	xx	37,885	xx	35,263	xx	2,877	xx	31,767	xx	469,184
12/88-11/89	3,827,047	xx	869,020	xx	427,496	xx	498,151	xx	78,913	xx	379,012	xx	6,079,639
Dec. 88	(238,394)	xx	(66,686)	xx	(34,570)	xx	(32,671)	xx	(2,665)	xx	(22,949)	xx	(397,935)
1/89-12/89	3,884,422		867,957		430,811		500,743		79,125		387,830		6,150,888
Less: ending inventory	(21,569)	xx	(23,786)	xx	(13,787)	xx	(101,775)	xx	(27,203)	xx	(150,338)	xx	(338,458)
1989 Cost of goods sold	<u>3,873,712</u>		<u>867,197</u>		<u>431,386</u>		<u>497,495</u>		<u>86,856</u>		<u>347,710</u>		<u>6,104,356</u>
Actual sales	5,083,005	xx	982,582	xx	1,326,774	xx	871,681	xx	142,706	xx	709,982	xx	9,116,730
Cost of goods sold	<u>3,873,712</u>		<u>867,197</u>		<u>431,386</u>		<u>497,495</u>		<u>86,856</u>		<u>347,710</u>		<u>6,104,356</u>
Gross profit on sales	<u>\$1,209,293</u>		<u>\$115,385</u>		<u>\$895,388</u>		<u>\$374,186</u>		<u>\$55,850</u>		<u>\$362,272</u>		<u>\$3,012,374</u>
Gross cost of goods %	76.21%		88.26%		32.51%		57.07%		60.86%		48.97%		66.96%

Auto Truck Plaza, Inc. v. Major Oil Company
Computation of Incremental Cost of Goods Sold

	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>Total</u>
Lost diesel sales ¹	\$286,920	\$900,116	\$1,093,042	\$1,205,031	\$1,681,023	\$1,478,231	\$6,644,362
Gross cost % ²	<u>76.21%</u>	<u>79.72%</u>	<u>78.78%</u>	<u>79.27%</u>	<u>81.07%</u>	<u>84.57%</u>	<u>80.75%</u>
Incremental cost of diesel sales	\$218,661	\$717,572	\$861,099	\$955,228	\$1,362,805	\$1,250,140	\$5,365,506
Lost gasoline sales ¹	\$45,871	\$0	\$66,426	\$60,522	\$151,442	\$0	\$324,260
Gross cost % ²	<u>88.26%</u>	<u>95.60%</u>	<u>88.93%</u>	<u>86.60%</u>	<u>93.79%</u>	<u>90.56%</u>	<u>90.67%</u>
Incremental cost of gasoline sales	\$40,486	\$0	\$59,072	\$52,412	\$142,037	\$0	\$294,007
Lost restaurant sales ¹	\$75,345	\$241,648	\$353,386	\$422,186	\$566,581	\$602,683	\$2,261,829
Gross cost % ²	<u>32.51%</u>	<u>33.79%</u>	<u>31.84%</u>	<u>33.41%</u>	<u>34.01%</u>	<u>33.55%</u>	<u>33.36%</u>
Incremental cost of restaurant sales	\$24,495	\$81,653	\$112,518	\$141,052	\$192,694	\$202,200	\$754,612
Lost store sales ¹	\$49,157	\$138,982	\$206,493	\$259,110	\$360,356	\$405,730	\$1,419,827
Gross cost % ²	<u>57.07%</u>	<u>58.37%</u>	<u>56.14%</u>	<u>51.57%</u>	<u>46.05%</u>	<u>49.23%</u>	<u>51.02%</u>
Incremental cost of store sales	\$28,054	\$81,124	\$115,925	\$133,623	\$165,944	\$199,741	\$724,410
Lost motor oil sales ¹	\$8,032	\$22,026	\$34,657	\$37,624	\$48,555	\$58,110	\$209,004
Gross cost % ²	<u>60.86%</u>	<u>58.96%</u>	<u>68.95%</u>	<u>66.48%</u>	<u>69.83%</u>	<u>55.71%</u>	<u>63.66%</u>
Incremental cost of motor oil sales	\$4,888	\$12,987	\$23,896	\$25,012	\$33,906	\$32,373	\$133,062
Lost accessories and parts sales ¹	\$27,396	\$89,050	\$118,665	\$122,727	\$144,346	\$197,062	\$699,246
Gross cost % ²	<u>48.97%</u>	<u>51.48%</u>	<u>48.50%</u>	<u>52.38%</u>	<u>43.55%</u>	<u>58.96%</u>	<u>51.50%</u>
Incremental cost of accessories and parts sales	\$13,416	\$45,843	\$57,552	\$64,285	\$62,863	\$116,188	\$360,146
Total cost of lost sales	<u>\$330,000</u>	<u>\$939,179</u>	<u>\$1,230,062</u>	<u>\$1,371,612</u>	<u>\$1,960,249</u>	<u>\$1,800,642</u>	<u>\$7,631,743</u>

Notes:¹ See exhibit B-1.2.² See exhibits B-1.5 through B-1.10.

Auto Truck Plaza, Inc. v. Major Oil Company
Monthly Detail of Auto Truck Plaza's Diesel, Gasoline and Net Sales

<u>Month</u>	<u>Net Sales</u>	<u>Diesel Sales</u>	<u>Gasoline Sales</u>
Dec. 87	\$662,606	\$420,874	\$66,233
Jan. 88	642,349	418,577	59,441
Feb. 88	617,915	409,912	54,928
Mar. 88	709,648	460,291	68,639
Apr. 88	644,166	401,112	69,288
May 88	717,010	453,334	75,102
Jun. 88	747,424	462,656	77,741
Jul. 88	756,196	457,998	84,981
Aug. 88	770,954	450,636	99,089
Sep. 88	731,731	442,742	79,441
Oct. 88	676,612	417,311	76,693
Nov. 88	642,057	381,679	76,673
Dec. 88	612,985	353,293	74,131

Data for 1989 through 1993 are deleted to make the presentation more concise.

Jan. 94	541,494	240,141	86,731
Feb. 94	586,734	275,039	84,515
Mar. 94	696,381	325,621	95,131
Apr. 94	672,199	308,119	97,533
May 94	709,941	322,514	111,677
Jun. 94	721,538	309,080	128,583
Jul. 94	733,087	295,678	139,438
Aug. 94	751,659	307,783	143,324
Sep. 94	675,793	285,743	124,502
Oct. 94	695,175	303,459	119,173
Nov. 94	750,157	356,565	108,361
Dec. 94	696,919	328,697	99,285

Source: Monthly general ledger (source documents not included). Note that net sales do not tie to total sales on exhibit B-1.5 because different source documents were used.

Auto Truck Plaza, Inc. v. Major Oil Company
Calculation of Auto Truck Plaza's Lost Sales in Gallons

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)
Year	Auto Truck Plaza		State of Any State		Auto Truck Plaza Market Share		Percentage of Lost Gallonage Sales		Lost Gallonage Sales	
	Gasoline ¹	Diesel ¹	Gasoline ²	Diesel ²	Gasoline	Diesel	Gasoline	Diesel	Gasoline	Diesel
Base Period	Annual Gallonage				b/d	c/e	base ave-f	base ave-g	d × h	e × i
1985	1,010,116	6,376,352	1,254,669,000		0.0805%					
1986	795,840	4,890,681	1,294,515,000	249,852,000	0.0615	1.9574				
1987	798,348	5,809,633	1,312,919,000	272,388,000	0.0608	2.1329				
1988	932,940	6,994,997	1,364,831,000	306,276,000	0.0684	2.2839				
Average Any State Market Share During Base Period					0.0678%	2.1247%				
Damage Period										
1989	885,004	6,345,629	1,366,267,000	315,540,000	0.0648%	2.0110%	0.0030%	0.1137%	40,988	358,769
1990	931,111	6,190,347	1,366,546,000	338,952,000	0.0681	1.8263		0.2984		1,011,433
1991	875,632	5,801,245	1,375,230,000	337,344,000	0.0637	1.7197	0.0041	0.4050	56,384	1,366,243
1992	887,587	5,532,379	1,379,971,000	333,096,000	0.0643	1.6609	0.0035	0.4638	48,299	1,544,899
1993	848,676	5,110,211	1,430,427,000	337,000,000	0.0593	1.5164	0.0085	0.6083	121,586	2,049,971
1994	1,087,705	5,107,141	1,430,427,000	337,000,000	0.0760	1.5155		0.6092		2,053,004

Notes:

¹ Source: Auto Truck Plaza's Summary of Diesel and Gasoline Gallonage (source documents not included).

² Source: Annual Excerpts from *National Petroleum News Factbook Issue* (source documents not included).

**Auto Truck Plaza, Inc. v. Major Oil Company
Total Department Expenses vs. Net Sales
Department Expenses Include Personnel, Occupancy, and Other
December 1987-July 1993**

Regression Statistics

Multiple R	0.557976766
R square	0.311338071
Adjusted R square	0.3009038
Standard error	12572.75728
Observations	68

Analysis of Variance

	<u>Sum of Squares</u>	<u>Mean Square</u>	<u>F</u>	<u>Significance F</u>
Regression	4716622895	4716622895	29.83802627	7.67275E-07
Residual	10432898886	158074225.5		
Total	15149521781			

	<u>Coefficients</u>	<u>Standard Error</u>	<u>t Statistic</u>	<u>P-value</u>	<u>Lower 95%</u>	<u>Upper 95%</u>
Intercept	106789.5007	15243.89926	7.005392711	1.48149E-09	76354.08489	137224.9166
x1	\$0.11	0.02081942	5.462419452	7.42551E-07	0.072157105	0.1552917

Monthly financial information used to generate regression equation is not included.

**Auto Truck Plaza, Inc. v. Major Oil Company
Gallonge Data for Auto Truck Plaza, Inc. and Any State**

Month	Auto Truck Plaza Gallonge ¹		State of Any State Gallonge ²		Indexed From 1/87	
	Gasoline	Diesel	Total	Gasoline	Diesel	Total
Jan. 85	80,071	572,356	652,427	104,555,750		104,555,750
Feb. 85	69,053	510,384	579,437	104,555,750		104,555,750
Mar. 85	84,756	538,555	623,311	104,555,750		104,555,750
Apr. 85	82,773	502,035	584,808	104,555,750		104,555,750
May 85	88,622	516,304	604,926	104,555,750		104,555,750
Jun. 85	96,545	516,324	612,869	104,555,750		104,555,750
Jul. 85	102,701	554,096	656,797	104,555,750		104,555,750
Aug. 85	96,041	603,432	699,473	104,555,750		104,555,750
Sep. 85	87,990	566,328	654,318	104,555,750		104,555,750
Oct. 85	79,730	562,664	642,394	104,555,750		104,555,750
Nov. 85	66,884	484,110	550,994	104,555,750		104,555,750
Dec. 85	74,950	449,764	524,714	104,555,750		104,555,750
Jan. 86	59,461	444,854	504,315	107,876,250	20,821,000	128,697,250
Feb. 86	52,705	431,617	484,322	107,876,250	20,821,000	128,697,250
Mar. 86	57,566	477,688	535,254	107,876,250	20,821,000	128,697,250
Apr. 86	57,015	420,721	477,736	107,876,250	20,821,000	128,697,250
May 86	63,404	386,547	449,951	107,876,250	20,821,000	128,697,250
Jun. 86	72,465	416,653	489,118	107,876,250	20,821,000	128,697,250
Jul. 86	80,506	430,327	510,833	107,876,250	20,821,000	128,697,250
Aug. 86	83,395	388,181	471,576	107,876,250	20,821,000	128,697,250
Sep. 86	75,509	366,192	441,701	107,876,250	20,821,000	128,697,250
Oct. 86	66,287	397,285	463,572	107,876,250	20,821,000	128,697,250
Nov. 86	62,296	368,132	430,428	107,876,250	20,821,000	128,697,250
Dec. 86	65,231	362,484	427,715	107,876,250	20,821,000	128,697,250
Jan. 87	56,667	355,018	411,685	38,005,000	22,699,000	60,704,000
Feb. 87	46,055	336,691	382,746	148,830,000	22,699,000	171,529,000
Mar. 87	54,475	408,591	463,066	98,922,000	22,699,000	121,621,000
Apr. 87	52,616	455,524	508,140	109,606,000	22,699,000	132,305,000
May 87	59,423	507,697	567,120	114,984,000	22,699,000	137,683,000
Jun. 87	81,385	571,367	652,752	117,825,000	22,699,000	140,524,000
Jul. 87	95,636	568,350	663,986	79,944,000	22,699,000	102,643,000
Aug. 87	84,709	532,299	617,008	169,600,000	22,699,000	192,299,000
Sep. 87	70,848	509,816	580,664	110,518,000	22,699,000	133,217,000
Oct. 87	62,376	541,910	604,286	88,364,000	22,699,000	111,063,000
Nov. 87	65,867	507,290	573,157	126,946,000	22,699,000	149,645,000
Dec. 87	68,291	515,080	583,371	109,375,000	22,699,000	132,074,000
					100	100
					95	100
					115	260
					128	288
					143	303
					161	310
					169	210
					149	446
					125	100
					110	233
					116	334
					121	288

Data for 1988 through 1992 are deleted to make the presentation more concise.

Jan. 93	59,680	424,864	484,544	53,407,000	28,083,333	81,490,333	105	120	141	124
Feb. 93	54,363	358,274	412,637	157,551,000	28,083,333	185,634,333	96	101	415	124
Mar. 93	62,455	430,139	492,594	116,275,000	28,083,333	144,358,333	110	121	306	124
Apr. 93	74,988	410,647	485,635	99,981,000	28,083,333	128,064,333	132	116	263	124
May 93	82,606	428,306	510,912	130,595,000	28,083,333	158,678,333	146	121	344	124
Jun. 93	71,977	453,025	525,002	126,311,000	28,083,333	154,394,333	127	128	332	124
Jul. 93	76,684	462,839	539,523	134,067,000	28,083,333	162,150,333	135	130	353	124
Aug. 93	76,193	466,770	542,963	132,720,000	28,083,333	160,803,333	134	131	349	124
Sep. 93	63,696	415,725	479,421	127,796,000	28,083,333	155,879,333	112	117	336	124
Oct. 93	73,804	412,367	486,171	121,682,000	28,083,333	149,765,333	130	116	320	124
Nov. 93	73,185	439,319	512,504	115,021,000	28,083,333	143,104,333	129	124	303	124
Dec. 93	79,045	407,936	486,981	115,021,000	28,083,333	143,104,333	139	115	303	124
Jan. 94	71,889	363,737	435,626				127	102		
Feb. 94	70,580	385,088	455,668				125	108		
Mar. 94	80,912	466,300	547,212				143	131		
Apr. 94	82,490	433,306	515,796				146	122		
May 94	94,430	454,818	549,248				167	128		
Jun. 94	107,853	445,918	553,771				190	126		
Jul. 94	112,634	432,550	545,184				199	122		
Aug. 94	113,117	444,711	557,828				200	125		
Sep. 94	97,054	381,391	478,445				171	107		
Oct. 94	92,913	382,009	474,922				164	108		
Nov. 94	84,737	474,654	559,391				150	134		
Dec. 94	79,096	442,659	521,755				140	125		
Total from 1/87	7,247,003	46,891,582	54,138,585	9,596,191,000	2,240,596,000	11,836,787,000				

¹ Source: Auto Truck Plaza's Summary of Diesel and Gasoline Gallonage (source documents not included).

² Source: Annual Excerpts from *National Petroleum News Facebook Issue* (source documents not included).

Exhibit B-1.16

Auto Truck Plaza, Inc. v. Major Oil Company
Lost Profits by Product Line

	<u>Lost Sales¹</u>	<u>Incremental Cost of Goods Sold²</u>	<u>Gross Margin³</u>	<u>Incremental SG&A Expense⁴</u>	<u>Lost Profits⁵</u>
Diesel	\$6,633,818	\$5,370,945	\$1,262,873	\$729,720	\$ 533,153
Gasoline	323,536	294,493	27,043	35,589	(8,546)
Restaurant	2,261,950	767,842	494,107	248,814	1,245,293
Store	1,419,902	793,337	626,565	156,189	470,376
Motor oil	209,015	146,552	62,463	22,992	39,471
Accessories and parts	699,285	415,465	283,820	76,921	206,899
Labor	329,819		329,819	36,280	293,539
Scales	144,917		144,917	15,941	128,976
	<u>\$12,022,242</u>	<u>\$7,790,634</u>	<u>\$4,231,607</u>	<u>\$1,322,447</u>	<u>\$2,909,161</u>

Notes:

- ¹ Data from Calculation of Incremental Lost Sales (see exhibit B-1.2).
- ² Data from Computation of Incremental Cost of Goods Sold (see exhibit B-1.11).
- ³ Gross margin = lost sales – incremental cost of goods sold.
- ⁴ Assumption that incremental variable costs are 11% of sales (see exhibit B-1.14).
- ⁵ Lost profits = gross margin – incremental SG&A expense.

**Curriculum Vitae
J.W. Smith**

POSITION	Managing Director, J.W. Smith, Inc.
EDUCATION	B.S., Accounting, Any State University (1971)
PROFESSIONAL AFFILIATIONS (current)	Member, American Institute of Certified Public Accountants Litigation Services Committee (1993–present) Member, Any State Society of CPAs Certified Public Accountant, Any State, Other State, Neighboring State
PROFESSIONAL AFFILIATIONS (past)	AICPA MAS Practice Standards and Administration Subcommittee (1988–1990) Member, Any State Society of Certified Public Accountants Litigation Services Committee (1985–1990) Certified Management Consultant
RANGE OF EXPERIENCE	Experience includes extensive consulting work and testimony in the accounting, financial, economic, and business issues of commercial litigation.
PROFESSIONAL AND BUSINESS HISTORY	J.W. Smith, Inc.: Managing Director, January 1993–Present Big Six Accounting Firm: Partner, January 1983–December 1992 Senior Manager, January 1980–December 1982 Manager, January 1977–December 1979 Senior, January 1974–December 1976 Staff Accountant, January 1972–December 1973
PUBLICATIONS	“The Implications of Changes in The Federal Rules of Civil Procedure for CPA—Expert Witnesses,” <i>The CPA Management Consultant</i> , Spring 1994 “How You Compute Damages,” <i>Journal of Any State’s Accounting Society</i> , Volume 5, Spring 1993 “Calculating Commercial Damages,” <i>Law Journal of Any State Bar Association</i> , Volume II, March 1991
SELECTED SPEECHES	“Calculating Damages,” 1995 Business Appraisers Conference on Appraising Closely Held Businesses, January 31, 1995, Big City, Big State. “The Revised Federal Rules of Civil Procedure That Apply to Expert

Witnesses," 1994 National CPA Organization, National Advanced Litigation Services Conference, October 1, 1994 at Vacation City, Any State.

"Damages In Employment Litigation," Employment And Labor Law In Any State, Lorman Education Services, April 29, 1994, Capital City, Any State.

"Damages, Time Value of Money" and panel participant on "Practical Problems of Federal Rule of Civil Procedure No. 26," 1994 Litigation Advanced Forum, Other State Society of CPAs, April 25, 1994, Resort City, Other State.

**CASES IN WHICH
TRIAL TESTIMONY
WAS GIVEN**

Jones v. Jones, C-19365, Any State Superior Court (1995)
Smith v. Smith, C-18999, Any State Superior Court (1994)
All American Company v. Foreign National Company, AL-301,
U.S. District Court (1994)
Jupiter v. All Waste, Inc., Civil No. 3567, Other State County Court
(1993)
Karl v. Employment Co., BV-1935, U.S. District Court (1991)

**CASES IN WHICH
DEPOSITION
TESTIMONY
GIVEN**

Client v. Lawyer, C-12957, Any State Superior Court (1995)
Big Brother v. Friend, KS-3975, U.S. District Court (1993)
Johnson v. Ever Right, No. 2345, Neighboring State Supreme Court (1989)

APPENDIX C

**SAMPLE WRITTEN REPORT NOT SUBJECT TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

Gerald A. Brown, CPA
Anytown, U.S.A

February 13, 19xx

Ann Smith, Esq.
500 Allstreet
Anytown, U.S.A.

Re: Jones v. Jones

Dear Ms. Smith

In accordance with your request, I have prepared this Summary Report in the above entitled litigation. The scope of my assignment was to review the documents submitted relating to Jones Men's Wear, interview appropriate parties, and undertake the research necessary to arrive at my conclusion. Prior to this engagement, I did not know either party to the litigation. The valuation conclusion presented herein is limited only by the scope of the assignment and is my personal, unbiased, professional opinion. My compensation is determined based on an hourly rate for services performed and is not contingent on any action or event resulting from the conclusions or use of this report.

Purpose and Function of Appraisal

The purpose of the appraisal is to estimate the fair market value, on a cash basis, of John Jones' 100 shares of common stock representing the one hundred percent (100%) equity interest in Jones Men's Wear as of the date of commencement of matrimonial litigation, July 24, 1993. The information in this appraisal will be used by John Jones in a pending matrimonial litigation matter between Mary Jones, Plaintiff, and John Jones, Defendant, and is invalid if used for any other purpose.

Definition of Values Estimated

The value estimated for this purpose is "Fair Market Value." The Internal Revenue Service, in Revenue Ruling 59-60, defines fair market value as "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts. . . the hypothetical buyer and seller are assumed to be able, as well as willing, to trade and to be well informed about the property and concerning the market for such property." Other definitions frequently add that the property would be exchanged at arm's length, and on a cash or cash equivalent basis.

Effective Date of Valuation

The effective date of valuation is July 24, 1993, the date of commencement of matrimonial litigation. For appraisal purposes, the financial information utilized is as of July 31, 1993, the corporation's normal fiscal year end nearest the appraisal date.

General Valuation Considerations

Valuation of closely held securities requires the consideration of all factors that influence the value of the securities. These factors, which are widely recognized and utilized in gift and estate tax cases, by the tax courts, the IRS, and professional investors, are outlined and described in Revenue Ruling 59-60, which has served as a general guideline for the valuation of closely held securities since 1959 and has served as

a guideline in the preparation of the valuation conclusions in this matter.

Limiting Conditions

This valuation is valid only for the date and purpose specified and no part of this report may be published without the written consent of the appraiser. Possession of this report does not carry with it the right of publication without prior approval of the appraiser.

Valuation Conclusion

The fair market value, on a cash basis, of John Jones' 100 shares of common stock representing the one hundred percent (100%) equity interest in Jones Men's Wear as of the date of commencement of matrimonial litigation, July 24, 1993, is \$1,247,000.

Sincerely,

Gerald A. Brown, CPA

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Thank you for your assistance.

1. How familiar were you with this subject before you read this practice aid?

0 1 2 3 4 5
Unfamiliar Somewhat familiar My area of expertise

2. How useful is the practice aid to your practice?

0 1 2 3 4 5
Not useful at all Extremely useful

3. Is there additional information that you think should have been included or information that should be modified in this practice aid? Yes _____ No _____

If yes, please explain _____

4. Do you think that an advanced level practice aid on this subject should be available?

Yes _____ No _____

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