

**EXCERPT**

Nancy J. Fannon | Jonathan M. Dunitz

# The Comprehensive Guide to Economic Damages



Fifth Edition

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What It's Worth



FIFTH EDITION

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# The Comprehensive Guide to Economic Damages

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VOLUME ONE

Nancy Fannon  
and  
Jonathan M. Dunitz  
Editors



**What It's Worth**

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## **What It's Worth**

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*In memory of my biggest cheerleader and the most powerful  
influence in my life...my dad.*

*NJF, 2018*

*To my parents, for their decades of support.*

*JMD, 2018*



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Please note:

Participation in this guide does not mean that individual contributors, reviewers, or editors agree with everything that has been included in it, including the writings and opinions of other contributors. While we have attempted to present clear guidance on the various topics wherever possible, damages and their proper calculation will always be subject to the facts of the particular matter, the opinion of the expert, the case law, and the law that governs the particular jurisdiction, as well as the trier of fact's ultimate findings.

The information contained in this guide is provided for informational or educational purposes only. It is not intended and shall not be deemed to constitute legal advice.

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## Author Bios

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**Jeffrey L. Baliban, CPA/ABV, CDBV**, is an economist, a certified public accountant, and business valuation appraiser. In his professional practice, Baliban has, for the last four decades, focused on resolving complex commercial disputes by providing independent evaluation studies of economic impact on businesses and individuals involved. His clients have come to include a diverse group of corporations and their counsel who retain him to value businesses and/or provide an independent measure of expectation, reliance, restitution, statutory, and/or punitive damages. He has, on numerous occasions, provided testimony as an expert witness in accounting, economics, valuation, business interruption, and other finance matters in various federal and state jurisdictions as well as in arbitration. During his career, Baliban has been a managing director at Alvarez & Marsal, a senior vice president at NERA Economic Consulting, and a senior partner in KPMG LLP's Dispute Advisory Services Practice. He is currently an adjunct professor of statistical measurements, analysis and research at the New York University School for Professional Studies and a senior advisor to Capital Forensics Inc. Baliban holds degrees in accounting (B.S., 1977) and economics (M.A., 1995) and has been a CPA since 1981. He holds the ABV and CDBV accreditations in business valuation and completed FINRA Series 63 and Series 79 licenses. Over the years, Baliban has written and spoken widely on fraudulent transfer as well as other complex commercial damages matters and business valuation issues.

**Doug Bania, CLP**, has 15 years' experience as an intellectual property (IP) and brand licensing strategist and IP valuation professional. Bania is an accomplished writer, speaker, and is part of the International Trademark Association's (INTA) Internet Committee and the ICANN Compliance and Domain Name Industry Subcommittee. He is a Certified Licensing Professional (CLP) and is a founding principal of Nevium Intellectual Property Solutions and a managing director of Brand Finance USA. Bania is also a branding, licensing and IP damages expert and has been named in approximately 50 cases, has been deposed 10 times, and has provided trial testimony five times, including testimony as the damages and apportionment expert in the *Blurred Lines* case. Bania has managed hundreds of projects related to brands, intellectual property, and the related intangible assets. He has assisted clients in intellectual property matters related to acquisitions, litigation, bankruptcy, tax, estate, and licensing. He holds an M.A. in television, film, and new media with an emphasis on marketing from San Diego State University and a B.A. in cinema from San Francisco State University. His writings have appeared in peer-reviewed journals such as the *Journal of Intellectual Property Law* and other publications such as *The World Trademark Review* and panel presentations for the Licensing Executive Society (LES) and the SXSW music festival.

**Neil J. Beaton, CPA/ABV/CFE, CFA, ASA**, is a managing director in Alvarez & Marsal's Valuation Services Practice. Prior to joining A&M, Neil was the global lead in charge of complex valuation at Grant Thornton LLP's Valuation Services Group. He has over 25 years of experience analyzing both closely and publicly held companies. Beaton has appeared as an expert witness across the country and in international tribunals, is an instructor for the AICPA's business valuation courses, and speaks nationally on business valuation with a special emphasis on early-stage and high-technology companies. He has published two books, contributed chapters to a number of other books, and written many articles on early-stage company valuations as well. He has served on the AICPA's National Accreditation Commission and the Financial Accounting Standards Board Valuation Resource Group. Beaton has a Bachelor of Arts degree in economics from Stanford University and a MBA in finance from National University. In addition to his formal education, Beaton is a Certified Public Accountant, Accredited in Business Valuation and Certified in Financial Forensics, a Chartered Financial Analyst, and an Accredited Senior Appraiser in business valuation from the American Society of Appraisers.

**Richard F. Bero, CPA/ABV/CVA**, is the managing director of The BERO Group. The BERO Group specializes in litigation and valuation services. Bero is a Certified Public Accountant, accredited in business valuation, and a Certified Valuation Analyst. Bero received his BBA in accounting and finance from the University of Wisconsin—Madison. He has provided accounting and financial consulting services and expert testimony pertaining to valuation and economic damages issues for more than 28 years. Bero has served as an expert witness in commercial and intellectual property litigations concerning a wide range of industries and technologies including medical imaging, medical devices, financial services, electronics, software, industrial equipment, construction and heavy equipment, automotive, pharmaceutical, consumer products, and many others. Bero has testified as an expert more than 130 times in trials, depositions, arbitrations, and other hearings in federal and state courts across the country. Bero has presented, instructed, and written articles on topics including intangible assets, intellectual property damages, commercial damages, and various accounting issues. He is the lead instructor of the intellectual property damages course for the National Association of Certified Valuation Analysts. Bero has also been a member of the damages committee of the Intellectual Property Owners Association since 2004. Prior to founding The BERO Group, Bero was the Wisconsin Practice Leader for Coopers & Lybrand’s National Litigation & Claims Services practice and an executive consultant with Peterson Consulting.

**Jared Bourgeois, CPA/ABV, CFE, CAMS**, is a manager in a large professional services firm in the financial forensics practice and is based in Chicago. Bourgeois has significant professional experience advising clients in commercial disputes, post-merger and acquisition disputes, bankruptcy-related litigation, and forensic accounting investigations. He has performed valuation, solvency, and economic damages analyses in various matters, including breach of contract disputes, earnout disputes, fraudulent conveyance investigations, benefit-of-the-bargain and material adverse change cases, and marital dissolutions. He has served as a consulting expert on various matters involving complex damages, valuation, and accounting issues, including the interpretation of generally accepted accounting principles. He has also conducted a variety of forensic accounting and other internal investigations, including fraud, FCPA, anti-money laundering, auditor malpractice, successor liability, and breach of fiduciary duty investigations.

**Brian Buss, CFA**, is a founding principal of Nevium Intellectual Property Solutions, a San Diego-based intellectual property (IP) consulting firm specializing in valuing, monetizing, and managing IP. Buss has over 20 years of experience in valuations, financial analysis, and corporate finance both in the U.S. and overseas. He provides strategic advice for intellectual property portfolios and transactions; product pricing and resource allocation strategies for executive teams and corporate boards; and performs valuations of trademarks, patents, copyrights, brand assets, trade secrets, technology assets, marketing strategies, and other intangible assets. Buss has provided expert testimony and opinions regarding the value of intellectual property assets and the contribution of IP to economic profits in bankruptcies, tax court, federal court, and arbitration. He has spoken and wrote papers on topics including damages in internet and social media infringement, IP valuation, and the economic impact of brand disparagement. Buss graduated from Claremont McKenna College with a degree in biology and economics and earned an MBA from San Diego State University. During his career, Buss has developed financial models and forecasts for acquisitions, business valuations, class action litigation, reorganizations and privatization transactions, licensing transactions, and new business ventures. His entrepreneurial experience includes serving as co-founder of a technology startup. Prior to founding Nevium, Buss worked at San Diego-based consulting firms Westpac Institutional Bank and Deloitte & Touche’s Financial Advisory Services group in New Zealand and the United States.

**David B. Chaffin, Esq.**, is the managing partner of the Boston office of White and Williams LLP. Chaffin has been a commercial litigator and trial lawyer for over 30 years. He handles complex litigation in the areas of, among others, real estate, intellectual property, employer/employee relations, corporate governance, and insurance coverage. Chaffin is a member of the bars of the Commonwealth of Massachusetts and the State of New York, as well as the bars of several United States District Courts and the Courts of Appeals for the 1st and 2nd Circuits. He graduated in 1983 from Duke Law School, where he was an editor of the *Duke Law Journal*. Chaffin graduated cum laude from Amherst College in 1979.

**Larry Chiagouris, Ph.D.**, possesses a unique combination of having served as both an executive with *Fortune* 500 companies and also as an accomplished academician. He currently is a tenured full professor of marketing at the Lubin School of Business at Pace University in New York City where he teaches marketing and survey research methods. In addition to his academic work, he is also a principal in the consulting firm BrandMarketing Services. He has been conducting marketing and research assignments for more than 30 years on behalf of *Fortune* 500 companies, startups, and major law firms. He is past chairman of the Advertising Research Foundation and currently serves on the editorial review board of the *Journal of Advertising Research*.

**Adrian M. Cowan** is co-founder of Analytic Focus LLC and former associate professor in finance in the Business School at St. Mary's University. Dr. Cowan has over 20 years of experience in research and design applied to issues in banking risk. She specializes in the study of derivatives and other forms of investment, as well as operations in financial institutions. Dr. Adrian Cowan has worked in the federal government, academia, and in financial institutions. Her diverse work encompasses: creation of prototypes of term structure and interest rate derivatives models for the OTS risk management model; valuation of bonds and fixed income derivatives; and evaluation of asset and liability policies and procedures and installation of risk measurement software using stochastic term structure models, simulations, binomial models, and option valuation models. Dr. Cowan taught financial risk management, investments and derivatives, money and capital markets, and financial institutions; she also directed the Student Investment Portfolio for the Business School at St. Mary's. She is the author of many articles on credit and interest rate risk, commercial lending, and pricing models.

**Charles D. Cowan** is managing partner of Analytic Focus LLC. Dr. Cowan has 40 years of experience in statistical research and design. He consults for numerous public- and private-sector entities on the design, implementation, and evaluation of research and the synthesis of statistical and sampling techniques for measurement. Dr. Cowan has designed some of the largest and most complex research programs the federal government has conducted. He has provided expert advice to corporations and government agencies on the incorporation of complex research designs in demographic and economic measurement problems. Dr. Cowan teaches graduate and undergraduate courses in survey methods, statistics, and computer methods for analysis. He is the co-author of two books, one on evaluation of survey and census methods and one on econometric measures related to the welfare of the U.S. economy. He has written numerous articles on statistical methods, sampling, rare and elusive population research, and optimization techniques. Dr. Cowan is also professor of biostatistics at the University of Alabama—Birmingham in the School of Public Health.

**Dr. Michael A. Crain, DBA, CPA/ABV, CFA, CFE**, is on the faculty at Florida Atlantic University and the director of FAU's Center for Forensic Accounting. He is also senior advisor at Miami-based accounting firm Kaufman Rossin in forensic accounting and valuation. He has over 30 years of experience as a practicing certified public accountant (CPA). Dr. Crain has been a licensed CPA in Florida since 1984 and has the certification Accredited in Business Valuation (American Institute of CPAs); he also has the Chartered Financial Analyst designation (CFA Institute) and is a Certified Fraud Examiner (Association of Certified Fraud Examiners). He has B.A. (accounting) and an MBA from Bellarmine University and a Doctor of Business Administration (finance) degree

from Manchester Business School in England at the University of Manchester. He has previously been approved as an arbitrator for the American Arbitration Association's Commercial Panel. In addition to his academic role, Dr. Crain consults with clients largely in the areas of business/economic damages measurement, valuation of businesses and financial assets, and forensic accounting. He has served as a consulting and testifying expert in many commercial cases in state and federal courts and has also served as an arbitrator in commercial damages and minority shareholder cases and as a court-appointed accountant. Dr. Crain has previously worked in the auditing and consulting areas in public accounting firms, including senior manager at an international firm. He is a past chairman of the AICPA's Business Valuation Committee and has been inducted into the AICPA's Business Valuation Hall of Fame. Dr. Crain's publications include contributing author of *Litigation Services Handbook: The Role of the Financial Expert*, 4th edition, co-author of *Financial Valuation: Applications and Models*, 1st and 2nd editions, contributing author of *The Portable MBA in Finance and Accounting*, 3rd and 4th editions, and articles in the *Journal of Accountancy*. He received AICPA's Lawler Award for best article of the year in *Journal of Accountancy* and AICPA's Sustained Contribution Award.

**Mark O. Dietrich** is a summa cum laude, Beta Gamma Sigma graduate of Boston University where he also earned an MBA with high honors; he holds a Master in Taxation degree from Bentley College as well. A prolific writer, Mark is editor and contributing author to the *Business Valuation Resources/American Health Lawyers' Association Guide to Healthcare Finance and Valuation*, 4th edition; editor and principal author of *Business Valuation Resources' Guide to Physician Practice Valuation*, 3rd edition; co-editor and contributing author to the *American Business Valuation Resources/Health Lawyers' Association Guide to Valuing Physician Compensation and Healthcare Service Arrangements*, 2nd edition; and co-author with Gregory Anderson, CPA/ABV, of *The Financial Professional's Guide to Healthcare Reform*. Dietrich is also author of the *Medical Practice Valuation Guidebook* and co-author of *Thomsen-PPC's Guide to Healthcare Consulting*, along with more than 100 articles on valuation, taxation, managed care, and the healthcare regulatory environment. His career experience includes serving as partner-in-charge of the annual audit of an 80-physician tax-exempt faculty group practice affiliated with a major teaching hospital, representation of tax-exempt and taxable entities in Internal Revenue Service field audits, participation in the development of a 250-physician network and negotiation of managed care and Medicare Advantage contracts, and more than 450 valuation and litigation support engagements in the healthcare industry. Dietrich has an in-depth knowledge of the healthcare payment and regulatory environment, including such arcane matters as physician billing codes and the impact of local-market provider payment rates on fair market value compensation. A regular speaker at state and national conferences on healthcare reform, valuation, and other topics, he also lectured in the United Kingdom in 2009, 2011, 2012, and 2014 on managed care, healthcare valuation, and valuation of medical practices to Her Majesty's Revenue and Customs. He served as chairperson of the American Institute of CPAs (AICPA) National Healthcare Industry Conference for 2012 and 2013, chaired the AICPA Virtual Conference on the Affordable Care Act in January 2014, and the National Healthcare Industry Conference Affordable Care Act section in 2014. AICPA acknowledged his career achievements at the 2016 National Healthcare Industry Conference.

**Rachel J. Eisenhaure, Esq.**, is an associate at the Boston office of White and Williams LLP. Eisenhaure handles a variety of complex commercial litigation matters in areas such as insurance coverage, environmental, and contract/business-tort matters. She has extensive appellate experience. Eisenhaure is a member of the bars of the Commonwealth of Massachusetts, the United States District Court for the District of Massachusetts, and the Courts of Appeals for the 1st Circuit. She graduated in 2005 from Georgetown University Law Center and from Harvard College in 2002.

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**John V. Garaffa, Esq.**, is partner in the Tampa, Fla., office of Butler Weihmuller Katz Craig LLP. He practices in the firm's construction, coverage defense, and cyber losses departments. Prior to joining the firm, Garaffa served on active duty for 21 years as a member of the Judge Advocate Generals Corp, United States Navy, retiring as a captain. Garaffa is admitted to practice law before the state courts of Minnesota and Florida, the United States District Courts for the Northern, Middle, and Southern Districts of Florida, and the United States Courts of Appeals for the 11th Circuit. He has written and spoken widely on property coverage issues, first party bad faith, punitive damages, discovery disputes, and on the application of state-valued policy laws. He is the co-author of Chapter 42 of *New Appleman on Insurance*, concerning legal issues underlying coverage determinations in commercial property insurance. Garaffa received his J.D. from the University of Minnesota, cum laude, in 1982 and a Master of Laws degree, with distinction, from Georgetown University in 1991.

**Joseph D. Garrison, Esq.**, is the senior partner at Garrison, Levin-Epstein, Fitzgerald & Pirrotti PC in New Haven, Conn., where he practices employment law on behalf of employees. Garrison is an elected member of the American College of Trial Lawyers and the American Board of Trial Advocates. He served for three years as president of the National Employment Lawyers Association (NELA) and was a Charter Fellow in the board of governors of the College of Labor and Employment Lawyers, later serving as its national president. As an elected member of the American Law Institute (ALI), he has been substantially involved in drafting the highly influential Restatement (Third) of Employment Law, which was published in 2014. He increasingly focuses his practice on mediation and arbitration and has served since 2009 as a member of the board of directors of the American Arbitration Association (AAA).

**Daniel K. Gelb, Esq.**, a partner at Gelb & Gelb LLP, is a member of the bars of the Commonwealth of Massachusetts and State of New York, the United States District Court for the District of Massachusetts, and the United States Court of Appeals for the 1st Circuit. He graduated from Tufts University (B.A. in English, 1999), Boston College Law School (J.D., 2003), and Boston College Carroll Graduate School of Management (MBA, 2003). Prior to joining Gelb & Gelb LLP, Gelb was an assistant district attorney with the Norfolk County District Attorney's Office in Massachusetts. Gelb practices at the state and federal levels in the areas of general and white-collar criminal defense, complex civil litigation, arbitration, regulatory proceedings, and academic discipline and student misconduct defense. He is a member of various professional organizations including The Sedona Conference® Working Group on Electronic Document Retention & Production, American Bar Association, Litigation Counsel of America, Massachusetts Bar Association, Boston Bar Association, and the Massachusetts Academy of Trial Attorneys. Gelb is also a member of the Frank J. Murray American Inn of Court, National Association of Criminal Defense Lawyers' (NACDL) White Collar Crime Committee, as well as NACDL's Amicus Committee for which he is a vice chair for the 1st Circuit. For the past several years, Gelb has been a volunteer faculty member for Harvard Law School's *Trial Advocacy Workshop*. Gelb has achieved the AV Preeminent® peer review rating by Martindale-Hubbell® and is included in *Martindale-Hubbell Bar Registrar of Preeminent Lawyers*. He is a Louis D. Brandeis Fellow of the *Massachusetts Bar Foundation* and has been recognized by various legal industry publications such as *Massachusetts Super Lawyers*, *New England Super Lawyers*, *The National Trial Lawyers*, and *National Association of Distinguished Counsel*.

**Richard M. Gelb, Esq.**, a partner and co-founder of Gelb & Gelb LLP, is a member of the bars of the Commonwealth of Massachusetts, State of New York, District of Columbia, United States District Courts for the Districts of Massachusetts, the Southern and Eastern Districts of New York and the District of Connecticut, United States Courts of Appeals for the 1st, 2<sup>nd</sup>, and 11th Circuits and the United States Supreme Court. He is a graduate of New York University (B.A., 1969) and Boston College Law School (J.D., 1973). He is experienced in trying jury and nonjury business and securities cases in federal and state courts and in arbitration and regulatory proceedings, including those before the United States Securities and Exchange Commission, FINRA, and the Massachusetts Division of Securities and Division of Insurance, and represents clients before the Certified Financial Planner Board of Standards Inc. and the Massachusetts Board of Accountancy. Gelb was a member of the board of trustees and is a member of the Leadership Council of the American Inns of Court Foundation, and the state liaison for Massachusetts. On the local level, he was a founder and co-president of the Suffolk University Law School Litigation American Inn of Court and is the past president of the Boston Inn of Court. At Boston College Law School, he was vice president, communications, of the Boston College Law School Alumni Council and co-chair of the Leadership Gifts Committee. Gelb received the Reverend James B. Malley, S.J. Award for service and commitment to the law school and was a recipient of the 75th BC Law Anniversary Awards. Gelb was a member of the Massachusetts Bar Association's Civil Litigation Section Council, a member of the Committee on Ethics, chair of the Business Litigation Committee, and a member of the State Bench-Bar Forum Committee. At the Boston Bar Association, he was co-chair of the Securities Law Committee Broker-Dealer Subcommittee, the Fee Disputes Committee, and a member of the Task Force on Civility in the Legal Profession. Gelb was co-chair of the Trade Secrets Committee of the Boston Patent Law Association. Gelb is included in the *Martindale-Hubbell Law Directory* ("AV" rating), *Martindale-Hubbell Bar Registrar of Preeminent Lawyers*, *The Best Lawyers in America* (for over 15 years), *New England Super Lawyers*, *Massachusetts Super Lawyers*, and *Who's Who in the World*. He is a life member of the Massachusetts Bar Foundation, Fellow of the American Bar Foundation, and Fellow of the Litigation Counsel.

**Mark Glick, Ph.D., J.D.**, has over 20 years of experience as an economist, lawyer, and expert witness. He is a professor of economics at the University of Utah. He also co-wrote *Intellectual Property Damages: Guidelines and Analysis*.

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**Joseph S. Goode** is the managing partner of Laffey, Leitner & Goode LLC. He approaches client problems with passion and intensity as if those problems were his own. The day he graduated from Syracuse University College of Law, Goode received the George and Evelyn Marcus Award for being the graduate who best demonstrated the qualities of good judgment, ambition, understanding, compassion, and an appreciation of learning. In the more than two storied decades since, those exact qualities have become synonymous with Goode. They've not only contributed to his countless successes as an attorney both inside and outside of the courtroom, but also to the standards by which he sets professionally for those he works with at LLG. As the last of five children, he honed his advocacy skills early in life and became very good at letting people know where he stands. He's a tireless leader who is intense and demanding (mostly of himself). He maintains the exacting eye of an old-school newsroom editor. Joe's joie de vivre is infectious to everyone around him, and his passion for people is routinely used to speak for those who require his advocacy.

**Dave Herzer, Esq.**, is a trial attorney with substantive litigation experience in general insurance defense litigation, insurance coverage issues, product liability defense, lead poisoning claims, construction disputes, employment law, and medical malpractice claims since 1992 representing a variety of clients in trial courts throughout Maine, both state and federal, and in appeals to the Maine Law Court, the 1st Circuit Court of Appeals, and the U.S. Supreme Court. Herzer also practices before the Maine Public Utilities Commission as counsel for trade organizations. He received his undergraduate degree from the University of Pennsylvania and is a cum laude graduate of the University of Maine School of Law, where his Moot Court team was a national champion. An active member of local, state, national, and international bar associations or attorney organizations, Herzer has held leadership positions in the Defense Research Institute and the Northern New England Defense Counsel Association (now known as The Tri-State Defense Lawyers Association). Since 2010, he has been a member of the Advisory Committee for the Maine Rules of Civil Procedure that develops rules of civil court, and he chairs the Maine Professional Ethics Commission that advises attorneys on issues of ethics for 2017. Herzer has been a featured speaker at seminars conducted for hospitals, risk managers, private medical practices, insurance companies, attorneys, and the construction industry on matters of insurance, ethics, risk management, claim investigation, professional liability, and civil litigation. Herzer has achieved Martindale Hubbell's highest peer review rating (AV® Preeminent™), has been recognized as a New England Super Lawyer, and has received special mention as a "Future Star" in the firm's listing as one of five "Highly Recommended Firms in Maine" by Benchmark Litigation. His peers nominated him for The Best Lawyers in America® in the fields of defendant's personal injury litigation, insurance law, and defendant's professional malpractice law. The Best Lawyers in America® named him "Lawyer of the Year" in the field of insurance law in 2014 and again in 2017 for defendant's professional malpractice law.

**Richard Hoffman, CPA/ABV**, has nearly 20 years of experience in performing damage calculations, business valuations, and other forensic accounting projects for several international consulting firms. He is a frequent instructor on the proper methods of measuring damages resulting from intellectual property disputes. He co-wrote *Intellectual Property Damages: Guidelines and Analysis* and has taught many courses for NACVA. He has testified in state and federal courts, including bankruptcy courts, on many occasions. He has also acted as the Special Master in a number of matters. He is a co-founding partner of Lone Peak Valuation Group in Salt Lake City, Utah.

**Clifton T. Hutchinson, Esq.** is a litigation partner in the Dallas office of K&L Gates LLP, where he focuses on disputes involving complex technical and scientific issues and evidence. Hutchinson has tried cases in state and federal courts around the U.S. and has argued before state and federal appellate courts, including the United States Supreme Court. He has written and edited several books and book chapters on the subject of expert witnesses and is a frequent speaker on experts and related topics. He is an adjunct professor of law at Southern Methodist University School of Law, teaching expert evidence. Hutchinson received an undergraduate degree in industrial engineering from the Georgia Institute of Technology in 1969 and his J.D. from Southern Methodist University School of Law, cum laude, in 1980, where he was Texas survey editor of the *Southwestern Law Journal*. He is admitted to the State Bars of Texas and California and to practice before the United States Patent and Trademark Office.

**Daniel E. Johnson, Esq.**, is an attorney and partner in the international law firm of Covington & Burling LLP, practicing in its Washington, D.C., office. He has over 30 years of experience litigating lost profits claims arising from government contracts, commercial disputes, and business torts. He represents parties in lost profits litigation at the trial and appellate levels and appears before administrative agencies and arbitration panels. Johnson graduated magna cum laude from Virginia Polytechnic Institute and State University and received a J.D. from the University of Virginia.

**Leon B. Kaplan, Ph.D.**, is the president and CEO of the Princeton Research & Consulting Center LLC (PRCC), a firm he founded in 1979. PRCC is a social-science research company specializing in marketing research, advertising research, and intellectual property research. Prior to founding PRCC, Dr. Kaplan worked at The DuPont Co. and Opinion Research Corp. (ORC). Dr. Kaplan has been involved in over 200 IP research projects spanning over 25 years. He has designed and implemented his own IP research, implemented research for other testifying experts, consulted on IP research projects, and evaluated the work of others. He has conducted research on likelihood of confusion, secondary meaning, genericness, fame, dilution, claim substantiation, design patents, and damages estimation. He is a past president of the Society for Consumer Psychology of the American Psychological Association.

**Michael Kaplan, CPA/ABV/CFF, CVA, CFFA**, is the principal of Kaplan Forensics, Forensic Valuation Consultants (Woodland Hills, Calif.). He has provided services in numerous litigation matters, including business litigation, professional malpractice matters, fraud, embezzlement, intellectual property, marital dissolution, loss of earnings, employment matters, and partner and shareholder disputes. Kaplan has qualified to testify in court as an expert witness in approximately 250 matters and has served as a court-appointed expert and accounting referee. Kaplan has served on the faculty of the Marshall School of Business and Leventhal School of Accounting (University of Southern California) and the National Judicial College. He has written numerous publications on business valuation and litigation practice marketing. Kaplan is a managing member of Courtroom Boot Camp LLC and a principal member of the training development team for the National Association of Certified Valuators and Analysts (NACVA). He is the recipient of NACVA's Magna Cum Laude Award and NACVA's 1997 Circle of Light Award (the highest distinction awarded to NACVA instructors). Kaplan received his B.S. in business administration and MBA degree from the University of Southern California.

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**Mark M. Leitner, Esq.**, has been successfully trying and arguing cases in Wisconsin and throughout the United States for three decades. Inspired to attend journalism school by Woodward and Bernstein's relentless Watergate reporting, his training armed him with the investigative and fact-finding skills needed to shine as a trial lawyer. Earning his J.D. (cum laude) from the University of Wisconsin, Leitner combines blue-collar street smarts with an outstanding academic background to create a persuasion style that gets through to judges and juries alike. Now a seasoned veteran, he has taken dozens of cases to verdict at trial and has handled countless injunction matters and other summary proceedings. His appellate work includes several precedent-setting cases in Wisconsin, and he is one of the very few lawyers nationwide to have won both a jury verdict and a settlement of more than nine figures. Along with his colleague, Joseph S. Goode, Leitner is a founding member of Laffey, Leitner & Goode LLC, a Milwaukee-based trial boutique.

**Jeff Litvak, CPA/CFF/ABV, ASA**, is a senior managing director in FTI's Forensic and Litigation Consulting practice and is based in Chicago. Litvak is a Certified Public Accountant, Accredited in Business Valuation (ABV), an Accredited Senior Appraiser (ASA) in business valuation, and is Certified in Financial Forensics (CFF). Litvak specializes in forensic accounting investigations and valuation matters, assessment of economic damages, analysis of lost profits, and unity of interest/separateness matters. Litvak is FTI's national product leader in merger and acquisition disputes. Recently, he was designated as co-chair of the AICPA task force on merger and acquisition disputes. Litvak received the 2009 AICPA Award for Volunteer of the Year for his achievements regarding the efforts of the AICPA's Task Force on Mergers and Acquisition Disputes. Litvak has experience in a cross-section of industries: real estate, manufacturing, wholesaling, construction, high-tech, automotive, and pharmaceutical. His extensive experience in accounting and auditing, market penetration analysis, and corporate finance provide a strong background for analyzing damages in many types of business litigation. He has worked on significant matters for the United States Department of Justice and Internal Revenue Service on valuation and other corporate finance matters.

**Professor Robert M. Lloyd** is Professor Emeritus at The University of Tennessee College of Law, where he taught courses in contracts, commercial law, and finance. His primary research interest is damages for lost profits. Professor Lloyd has three times been honored the Harold C. Warner Outstanding Teacher Award and once with the Student Bar Association Outstanding Teaching Award. In 1996, he received the University of Tennessee National Alumni Outstanding Teacher Award. Professor Lloyd is a Fellow of the American College of Commercial Finance Lawyers. He received a Bachelor of Science degree in aerospace and mechanical engineering from Princeton University and a law degree from the University of Michigan. Prior to his teaching career in Tennessee, he practiced law with a large firm in Los Angeles.

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## Foreword

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*“It costs us nothing to be just.”<sup>1</sup>*

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

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

This fifth edition includes materials on a variety of damages measures, including lost profits or value, unjust enrichment, intellectual property damages, other commercial damages, and an expanded chapter on personal injury and wrongful termination. There is also comprehensive and expanded analysis of motions to exclude experts and an in-depth review of the concept of reasonable certainty, the result of significant research on the topic.

Much of the text’s material has been substantially enhanced for this edition, and we thank the continuing efforts of the panel of contributing authors for their efforts. Additionally, many case digests have been added.

In addition to these expanded materials, new topics have been added to this edition, including theft of trade secrets, apportionment, and damages in cases involving rights of publicity and for franchises.

Finally, this edition also includes new digests of many of the damages cases found throughout the book.

Once again, Business Valuation Resources LLP has provided extraordinary support, and, in particular, we thank Sarah Andersen, publisher at BVR, whose assistance has been irreplaceable, as well as Sylvia Golden for her valuable assistance with case digests.

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

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

Nancy J. Fannon and Jonathan M. Dunitz  
2018

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<sup>1</sup> Henry David Thoreau, “A Plea for Captain John Brown” (1859).



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**Part VIII.**  
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