# Expert testimony by linguists in U.S. courts: An illustrative case of practices

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***Abstract.*** *This article describes procedures surrounding expert testimony in U.S. federal courts, exemplifying with details of an expert's experience in one case. The exemplar is a civil (not criminal) case brought for defamation, tried to a jury in a federal district court, and subsequently appealed to a higher court. The article discusses reasons for which attorneys retain expert linguists, why courts welcome experts when their testimony is deemed helpful in deciding a disputed fact but exclude them if they are not qualified or the proffered testimony is deemed insufficiently helpful or possibly prejudicial to a jury. The article concludes with observations about the pros and cons of serving as a linguistics expert in contested legal matters in an adversarial system.*

***Keywords:*** *Expert testimony, adversarial legal proceedings, U.S. courts, Daubert criteria, discovery process.*

***Resumo.*** *Este artigo descreve os procedimentos subjacentes ao testemunho nos tribunais federais dos EUA, usando como exemplo pormenores da experiência de um perito num caso num caso cível (não criminal) de difamação, julgado em tribunal de júri num tribunal federal de primeira instância, e posteriormente objeto de recurso para um tribunal superior. Este artigo discute os motivos pelos quais os advogados recorrem a peritos linguistas e por que razão os tribunais admitem peritos quando o seu testemunho é útil para decidir um facto contestado, mas excluem-nos se estes não possuírem qualificações ou quando o testemunho é considerado insuficientemente útil ou, possivelmente, prejudicial para avaliação pelo júri. O artigo termina com observações acerca dos prós e contras de desempenhar o papel de perito linguista em assuntos de natureza legal contestados num sistema adversarial.*

***Palavras-chave:*** *Testemunho pericial, processo jurídico adversarial, tribunais dos EUA, critérios de Daubert, processo de averiguação.*

## Introduction

Within the United States, policies and practices surrounding expert testimony in courts and within broader legal contexts vary somewhat from jurisdiction to jurisdiction. Besides the federal court systems, each of the 50 states has systems of its own, from Alabama at the head of the alphabet to Wyoming at the tail. Within a state there are statutes that apply statewide, as well as municipal and county codes that address local issues; any disputes over these latter would fall under the jurisdiction of local courts. Differences between practices surrounding criminal offenses (those that may entail possible incarceration) and civil litigation (disputes that do not involve criminal activity or possible incarceration) may also differ within a jurisdiction. The article focuses on one linguistics expert's experience in a defamation case tried in a federal court. The outcome of the trial was subsequently appealed to a higher court, which is also documented here, although the basis for the appeal was not related to the linguistics expert's testimony. Procedures in this case are identical to or have close parallels in other kinds of cases, particularly civil cases, and in other jurisdictions. The descriptions and analyses are thus generally applicable beyond the example case.

The article also discusses some of the reasons for which attorneys retain expert linguists, why courts welcome their expertise when it is judged helpful in establishing a disputed fact but may exclude their testimony if the expert is judged insufficiently qualified or the proffered testimony deemed prejudicial to the jury or insufficiently helpful in establishing matters of fact. The article concludes with observations about the pros and cons of serving as a linguistics expert in an adversarial legal system, including on the positive side an opportunity to play a role in the administration of justice and on the negative side the challenge of facing opposing counsel intent on undercutting the expert's opinion.

In discussing expert testimony in U.S. courts, it is crucial to recognize the adversarial nature of litigation in the system. Criminal cases are brought by government prosecutors against those accused of a crime, who thus become defendants. Civil cases (i.e. those not involving crimes) originate when an attorney files a complaint for an alleged offense on behalf of a plaintiff. Parties to both criminal charges and civil lawsuits are almost invariably represented by legal counsel if the charge is serious enough. The principal aim of the present article is to illustrate typical procedures for an expert linguist in a civil case tried in a federal court. The legal issues surrounding defamation are addressed only incidentally.

## Court systems in the United States

### Federal Courts

The federal trial courts in the U.S. are called district courts. There are 94 districts, each state having at least one district court and the larger ones having several – for example, the U.S. District Court for the Central District of California and the U.S. District Court for the Southern District of New York. Although Washington D.C. and Puerto Rico are not states, each has a district court, as do certain U.S. territories. By law there are 678 judges functioning in the district courts. An additional 551 magistrate judges assist the circuit courts by handling administrative issues like setting bail and reducing sentences, each magistrate judge operating usually for one circuit court judge.

Each district belongs to one of thirteen regional 'circuits', and the circuit courts serve as courts of appeal in their circuit. By law, there are 179 judges serving in the thirteen circuits; they hear cases that have been appealed from the district courts in that circuit. As an example, the Ninth Circuit is the largest and covers nine western states and two territories. Above the appellate courts of the circuits sits the U.S. Supreme Court, with nine justices; published decisions of the U.S. Supreme Court constitute law for the entire United States. Appellate courts rely principally on written submissions – records from the trial (or trials) below and appellate briefs submitted in the appeal process – and thus do not involve expert witnesses. Sometimes a district court case is appealed on the grounds that the judge wrongly admitted or excluded an expert. More generally, criteria for admitting expert testimony have been established by the U.S. Supreme Court's interpretation of federal legislation, as discussed below in connection with the 'Daubert criteria'.

At the federal level there are also specialized courts or enforcement jurisdictions. The United States Patent and Trademark Office and its Trademark Trial and Appeal Board is a frequent venue for forensic linguists rendering expert opinion. The USPTO and TTAB rely on administrative law judges, who act in an administrative capacity as both judge and finder of fact, never with a jury, and weigh and decide on patent and trademark applications and disputes arising from their decisions. There are appeal mechanisms within the USPTO, but dissatisfied applicants or opposers to an application may take the dispute to a federal district court.

**State Courts**

In the U.S., each state has its own court system, with trial courts and appellate courts. Depending on the size of its population, a state may have only a few appellate courts or an extensive system of them. Linguists serve as experts in those courts as well, and many states abide by the same criteria in admitting experts as does the federal court system (whose details I discuss below).

## Why attorneys retain experts

Three kinds of evidence that linguistics experts testify about in the U.S. – having to do with authorship identification (see Brooklyn Law School 2013; Sousa-Silva and Coulthard 2018), defamation (Tiersma 1987; Shuy 2010), and trademark (see Shuy 2002; Butters 2021) – are common. Phoneticians may serve in other capacities such as voice analysis (see, e.g., Labov 1988). In all such cases, language is at the heart of the dispute, and linguists are increasingly retained to testify in such cases in the U.S., although the same few seem to do most of the expert witnessing, perhaps because attorneys tend to rely on experienced experts or because attorneys ask one another for recommendations. (It might also be noted that some witnesses allowed to testify in linguistic matters lack linguistic expertise – see Butters 2009 – although judges seem to be increasingly perspicacious.)

Among the reasons that attorneys retain experts, common ones include an expert's ability to assemble evidence from sources unfamiliar to the parties and help explain subtle or complex matters of fact or interpretation to a court, especially technical matters, including a range of language facts. Experts can help identify and explain scientifically what attorneys may only intuit, and within their domains of expertise they are able to weigh the pros and cons of competing fact claims. Sometimes the effect of an expert's

preliminary report moves the retaining attorney to urge a client not to proceed with a case or to settle the dispute outside of court or, in a criminal case, seek a plea bargain. Effective experts are also helpful in explaining linguistic science to a lay jury in understandable terms.

An attorney may retain a linguist as a consultant, solely to help assess aspects of a claim or help guide the attorney in questioning an expert on the opposing side, or as a formally designated expert witness to help the trier of fact – the jury or judge – decide a matter of fact. Consulting roles need not be disclosed to opposing counsel or the court, but if a litigant intends to offer an expert's testimony at trial the expert must be designated as such, submit a report, and be subject to examination by opposing counsel in the process of discovery (a topic I return to below). In this respect, the practices in an adversarial legal system such as that in the U.S. may differ considerably from those in an inquisitorial system. In the U.S., experts are retained by attorneys on one side or the other of a dispute or criminal charge; experts are seldom retained by the court (except perhaps in family court). Although an expert's principal legal obligation is to the court, they function on one side of the litigation or the other, and as Lawrence Solan has written about experts in an adversarial system, 'One lawyer wants the expert witness to act as a good team player, while the other attempts to rip the expert to shreds' (Solan 2021: 350). In the same vein, Justice Peter Gray of the Federal Court of Australia has noted that '[j]udges in civil cases in common law courts need expert witnesses to resolve many issues, but distrust those experts. The distrust is partly due to [...] the perception that expert witnesses are beholden to their clients' (Gray 2010: 201); those words apply equally well to U.S. courts. (See also Clarke and Kredens 2018, whose analysis relies on reports of experienced forensic linguists.)

As the illustrative dispute in this article deals with defamation, a few words about that offense will be helpful. *Black's Law Dictionary* (Garner 2019) defines defamation as a 'false written or oral statement that damages another's reputation'. It is thus an act that damages the good reputation of the defamed person. While defamation is criminalized in some states, it is not a federal crime; it is, however, subject to civil suit, and when the plaintiff and defendant reside in different states the law permits the plaintiff to choose a federal court trial; it is for that reason that the Cohen trial, discussed below, was held in the U.S. District Court of Nevada.

An expert linguist is not retained to assess reputations, of course, nor the possible damage inflicted by an alleged defamation but generally to offer analysis and expert opinion as to what an ordinary speaker of a language would take a spoken or written text – in context – to be saying or implying about the person claiming to be defamed. For a linguist, a defamation analysis is essentially a discourse analysis, sometimes also involving interpretation of particular words (Tiersma 1987; Shuy 2010). Given that sophisticated defamers are careful not to express anything known to be false, their claims or implied accusations are often couched in language that is ambiguous or originates in the speech or writing of third parties. For example, a headline in a supermarket tabloid might read '[Name] Drinking Herself into the Grave', with words such as 'Friends say' in smaller print above the headline, easily overlooked, and with alleged friends of Name expressing their concern over her health in the article itself. A discourse analysis can be helpful in demonstrating how a reader infers meaning and intended meaning from

language, relying for example on speech act theory (Austin 1962) and the Cooperative Principle (Grice 1989).

## Admissibility of experts at trial

U.S. federal law specifies criteria for admission of expert testimony at trial in Article VI 'Witnesses' and Article VII 'Opinions and Expert Testimony' of the Federal Rules of Evidence (FRE 2021). It is nonetheless up to the trial judge to interpret the criteria in particular cases. In technical or scientific matters that a judge or jury may not be familiar with – DNA evidence, for example – judges are inclined to admit expert testimony. In language matters, however, if judges regard themselves as possessing expertise and deem jurors as having first-hand knowledge, they may exclude proffered expert testimony, especially if opposing counsel offers a compelling legal reason in a motion to exclude. In my experience, judges are more open to permitting an expert to testify about language in a bench trial (a trial without a jury), where the judge is the sole finder of fact and may feel better able than a jury to interpret testimony without being unduly biased by it. (For a report about a language issue where expert testimony was not permitted, see Finegan 2020a.) The testimony of any expert must be seen to have evidentiary value – ability to assist the trier of fact in deciding a factual matter. In an adversarial system, where proposed expert testimony must be disclosed in writing to opposing counsel, opposing counsel often moves to exclude linguistic testimony as irrelevant or prejudicial or failing to meet the Daubert criteria. The Federal Rules of Evidence permit court-appointed expert witnesses, but on linguistic matters they are, at most, infrequent. As gatekeepers, judges could decide on their own to exclude proffered expert testimony, but exclusion of an expert's testimony is virtually always a consequence of opposing counsel's convincingly moving to exclude it. Sometimes, too, a judge admits certain aspects of an expert's testimony but excludes other aspects – for example, by allowing a language analysis in an authorship case but not permitting the expert to express a conclusion based on the analysis.

Current standards for admissibility were established by Congress in 1975 (and subsequently amended), and they were interpreted in the 1993 U.S. Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals Inc.* (and a follow-up case); for that reason, the standards that now exist are commonly called the Daubert criteria (Daubert 1993). The Daubert decision modified the earlier 'Frye' standards (named after a 1923 federal case) and laid down these criteria to guide judges in their gatekeeping function: (1) whether the theory or technique in question can be, and has been, tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within the relevant scientific community. The criteria are interpreted by the trial court in a case, and not every criterion is applicable in each case. It is useful to bear in mind Justice Gray's observation, cited above: judges are eager to have whatever expert guidance can be helpful and, as gatekeepers, they permit what they deem will be helpful. (See also Cheng and Yoon 2005; Cheng 2013.)

## An illustrative case: Cohen v. Hansen

### The facts

Ross Hansen, a former commercial tenant of businessman Bradley S. Cohen, published two websites that compared Cohen to Bernie Madoff, an infamous American white-

collar fraudster. At the time of publication, Madoff was serving a 150-year sentence for carrying out a so-called Ponzi scheme that defrauded investors of $65 billion, a charge Madoff had pleaded guilty to in 2009. Cohen sued Hansen for internet defamation and related offenses in August of 2012. The facts of the case as relevant to a linguist will become clear as I describe the processes of serving as an expert witness in the case. The focus here is on the procedures principally as they relate to expert testimony, and I exemplify with this case chiefly because it involved both expert trial testimony and led to an appellate court decision, albeit one not related to the linguist's testimony.

**Discovery**

In the U.S. legal system, a crucial part of an expert's engagement occurs during the legally mandated 'discovery' process. As characterized by the American Bar Association (ABA 2019), discovery is 'the formal process of exchanging information between the parties about the witnesses and evidence they'll present at trial'; it 'enables the parties to know before the trial begins what evidence may be presented'; it is 'designed to prevent "trial by ambush," where one side does not learn of the other side's evidence or witnesses until the trial, when there's no time to obtain answering evidence'. In this respect, then, it differs from the fictional television trials in which surprise witnesses are called during trial and 'ambush' one side or the other.

In the Cohen case, I was retained on behalf of the plaintiff. My task was to analyze the websites with a view to what ordinary reasonable viewers would understand the sites to be communicating about Bradley S. Cohen. (The sites were earlier and later versions, nearly identical except that some significant material was omitted from the later version.) After becoming familiar with the facts of the case as relevant to linguistic expertise from the point of view of a discourse analyst, and after consultation between me and the retaining attorney about my assessment, I submitted a report in August of 2013. The 4,700-word report and its appendices described my task and relevant credentials, and laid out my professional assessment of the relevant facts and the bases for them, as required by the Federal Rules of Civil Procedure, which also require experts to disclose their publications from the preceding ten years, all cases in which they have given testimony in the preceding four years, and their fee arrangement; except when performing pro bono work, linguistic experts in the U.S. typically operate under an agreement with the retaining attorney's law firm that spells out various mechanical details of the engagement, including an hourly fee for time spent, irrespective of the outcome of the litigation; some agreements specify higher hourly fees for time spent in testimony than for time spent preparing a report. In compliance with the statutory requirements governing discovery, my report in Cohen was served to opposing counsel by the retaining attorney, and a month later I was issued an official 'notice to appear' for a deposition to be taken by opposing counsel, again in compliance with established federal rules. (It is useful to note that the federal rules have parallels in state courts.)

A deposition is sworn oral testimony given by a designated witness preceding a trial. Testifying in deposition or in court requires an oath or affirmation to testify truthfully and, according to the Federal Rules of Evidence, it 'must be in a form designed to impress that duty on the witness's conscience' (FRE 2021: Rule 603); it functions to inform the opposing side in litigation as to an expert's intended testimony – the conclusions and their bases, along with the other matters just identified. A deposition creates a structured opportunity for opposing counsel to question a designated expert about the contents of

their report and related matters such as when and by whom it was written and the expert's credentials. Arrangements for the deposition – time, place, other routine matters – are agreed by counsel. Depositions are not required, but counsel rarely forgoes an opportunity to depose an opposing expert. Among other reasons, counsel's not taking an expert's deposition may influence a judge to deny a motion to exclude the expert at trial. In my experience, a motion asking the court to exclude an expert's testimony frequently arises as a consequence of information disclosed during the deposition, although a motion to exclude could be made when an expert and the topic of testimony is first disclosed.

Depositions are tedious as well as challenging, in part because the deposing attorney would probably like to keep the expert from testifying; consequently, the questions posed, however neutrally phrased, may be intended to discredit the expert or undermine the basis for the proffered testimony. At a deposition no judge is present to resolve disputes arising between the attorneys and there is no jury to impress. Minimally present at a deposition is an attorney for each side, a court reporter, and the expert. Sometimes, there are several attorneys representing different interests related to the case, as with a representative of an insurance firm responsible for potential financial damages arising from a verdict. The retaining attorney 'defends' the deposition not on behalf of the expert (with whom they may have worked closely for weeks or months) but on behalf of the retaining attorney's client. Sometimes this legally important fact is explained to an expert deponent early in the deposition but more commonly it goes unsaid; I have read depositions at which experts express surprise when they are told, essentially, that they are on their own legally – that the retaining attorney is committed to doing the best for their client, not to protect the deponent from a possible ethical transgression. Opposing counsel – likewise present on behalf of their client – seeks to gain a fuller and clearer understanding of the expert's credentials and opinions on the matter at bar, opinions previously expressed in the expert's written report. A videographer may be present to videotape the entire on-the-record portion of the proceedings. Because depositions typically last for hours (usually not exceeding seven hours), participants may ask to take breaks, including for lunch, and sometimes attorneys wish to talk with one another about mechanical matters and go off the record to do so.

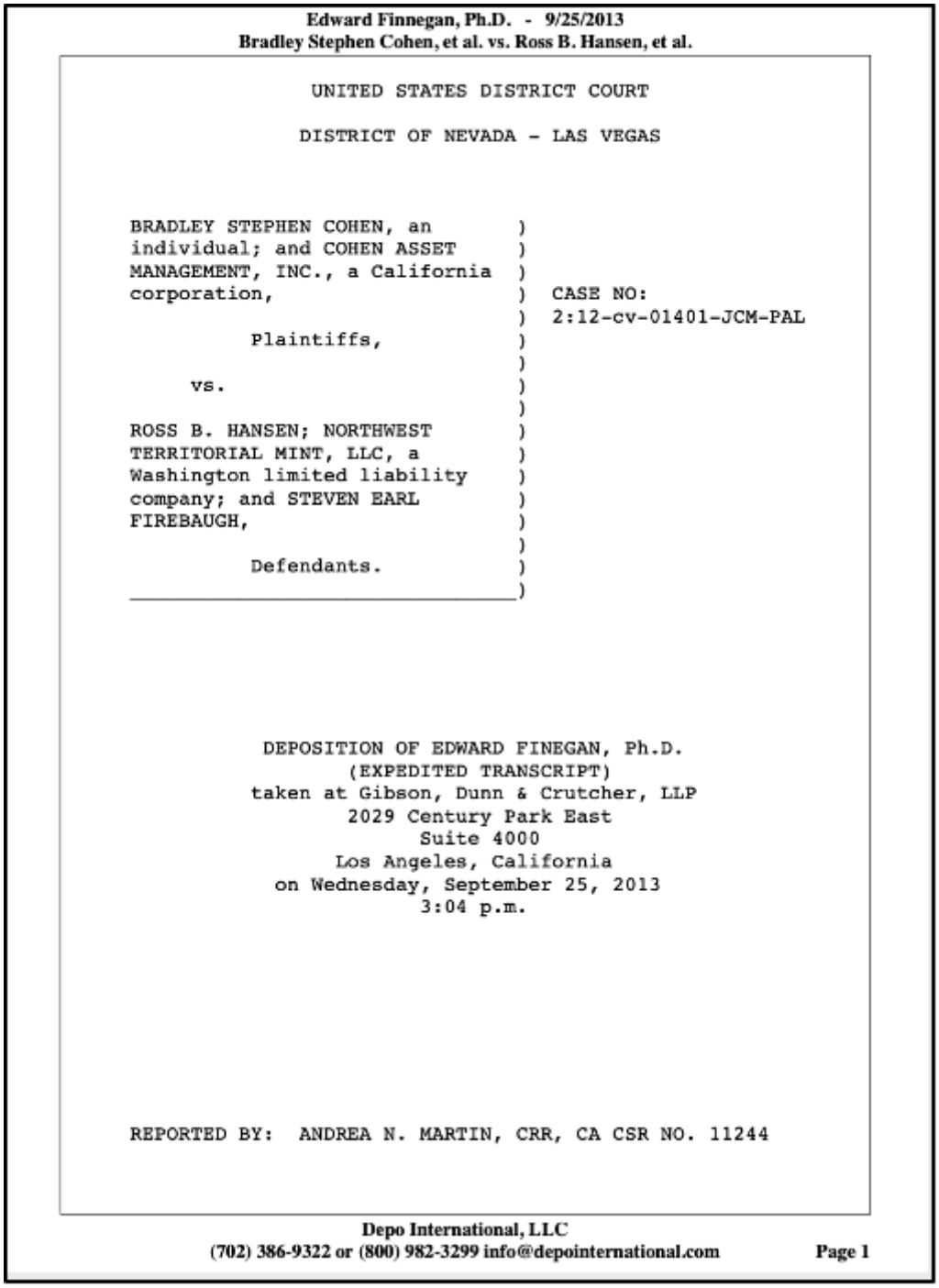
The deponent is sworn in by the court reporter, and the deposition testimony can be used at trial. In a report the expert gets to lay out their opinion; the questions asked at deposition are probing ones about the expert's opinions and their basis, as well as their credentials as an expert. Rules of engagement are spelled out in the Federal Rules of Civil Procedure, in particular Rule 30 (see FRCP 2019), although they are not generally known by expert deponents except as violations or putative violations make an appearance during the deposition and the expert's retaining attorney objects. Retaining attorneys may object frequently, sometimes on legal bases that may not be familiar to the expert. Sometimes an objection is entered for the record and left to be settled later by the judge if need be. At other times, in practice, objections are made chiefly to alert the expert to be cautious answering the question just asked. Experts are routinely advised by retaining attorneys to pause before answering a question, allowing opportunity for an objection whose intention may include alerting or warning the expert. Any disputes between attorneys occur on the record and may be referred to the trial judge to resolve if the case goes to trial and the issue remains unsettled. Deposition testimony can also be

cited in a motion to exclude an expert. Motions to exclude an expert take place among the attorneys and the court, often without the expert's knowledge unless the motion to exclude succeeds or limits their testimony. Additional information about the topics discussed here can be found at the website of the American Bar Association (ABA 2019) and, more technically, at FRCP (2019).

After testifying at deposition, the expert must review a transcript of the testimony to correct any errors of transcription and sign the record. Figure 1 shows the cover sheet for my deposition in the Cohen matter. Figure 2 shows the second and third pages of the deposition, which lay out the names of the attorneys for the plaintiff and defendant in the case and a table of contents, including reference to the exhibits the deposing attorney produced during the deposition, here just a few but sometimes numbering dozens. Note that one of the exhibits is an article I had written (Finegan 2009) that the deposing attorney quizzed me about during the deposition. I have occasionally faced a foot-high stack of my publications, with bookmarks protruding in my direction throughout the entire deposition, possibly intended as an implied threat that the attorney would ask questions about each of them and thereby catch me in a contradiction between what I'd written for publication and what I'd opined in my report in the case. (See also Gray 2010: 204.)

Figure 3 shows the opening question and answer sequence of the formal deposition. When not taking place via Zoom or other electronic means (as has occurred during the Covid-19 pandemic), depositions typically take place around a large conference table in the offices of a law firm. Beforehand, typically, the retaining attorney and the expert meet, sometimes for several hours, to prepare the expert for the structure of the deposition, go over anticipated questions the expert may be asked, perhaps report how the deposing attorney has behaved with other deponents in the case, and answer any questions the expert may have about the deposition process.

After depositions are taken on both sides, many cases, especially in civil matters, settle outside of court before the trial stage. I have chosen the Cohen trial as illustration precisely because it proceeded to trial and presents an opportunity to describe the process of trial preparation, trial testimony, and what may happen afterwards.



Edward Finnegan, Ph.D. - 9/25/2013
Bradley Stephen Cohen, et al. vs. Ross B. Hansen, et al.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA - LAS VEGAS

BRADLEY STEPHEN COHEN, an individual; and COHEN ASSET MANAGEMENT, INC., a California corporation,

Plaintiffs,

vs.

ROSS B. HANSEN; NORTHWEST TERRITORIAL MINT, LLC, a Washington limited liability company; and STEVEN EARL FIREBAUGH,

Defendants.

CASE NO:
2:12-cv-01401-JCM-PAL

DEPOSITION OF EDWARD FINEGAN, Ph.D.
(EXPEDITED TRANSCRIPT)
taken at Gibson, Dunn & Crutcher, LLP
2029 Century Park East
Suite 4000
Los Angeles, California
on Wednesday, September 25, 2013
3:04 p.m.

REPORTED BY: ANDREA N. MARTIN, CRR, CA CSR NO. 11244

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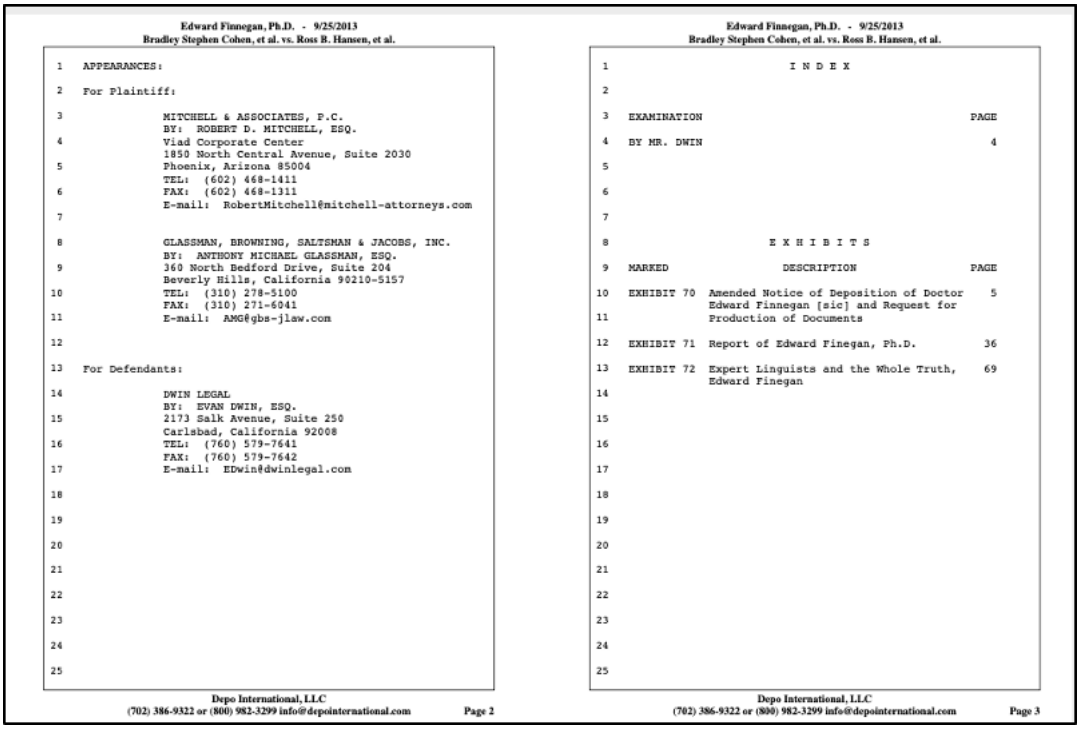
**Figure 1. Cover Page for Deposition Transcript in *Cohen v. Hansen.***



Edward Finnegan, Ph.D. - 9/25/2013
Bradley Stephen Cohen, et al. vs. Ross B. Hansen, et al.

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I N D E X

| EXAMINATION | | PAGE |
|---|---|---|
| BY MR. DWIN | | 4 |

E X H I B I T S

| MARKED | DESCRIPTION | PAGE |
|---|---|---|
| EXHIBIT 70 | Amended Notice of Deposition of Doctor Edward Finnegan [sic] and Request for Production of Documents | 5 |
| EXHIBIT 71 | Report of Edward Finegan, Ph.D. | 36 |
| EXHIBIT 72 | Expert Linguists and the Whole Truth, Edward Finegan | 69 |

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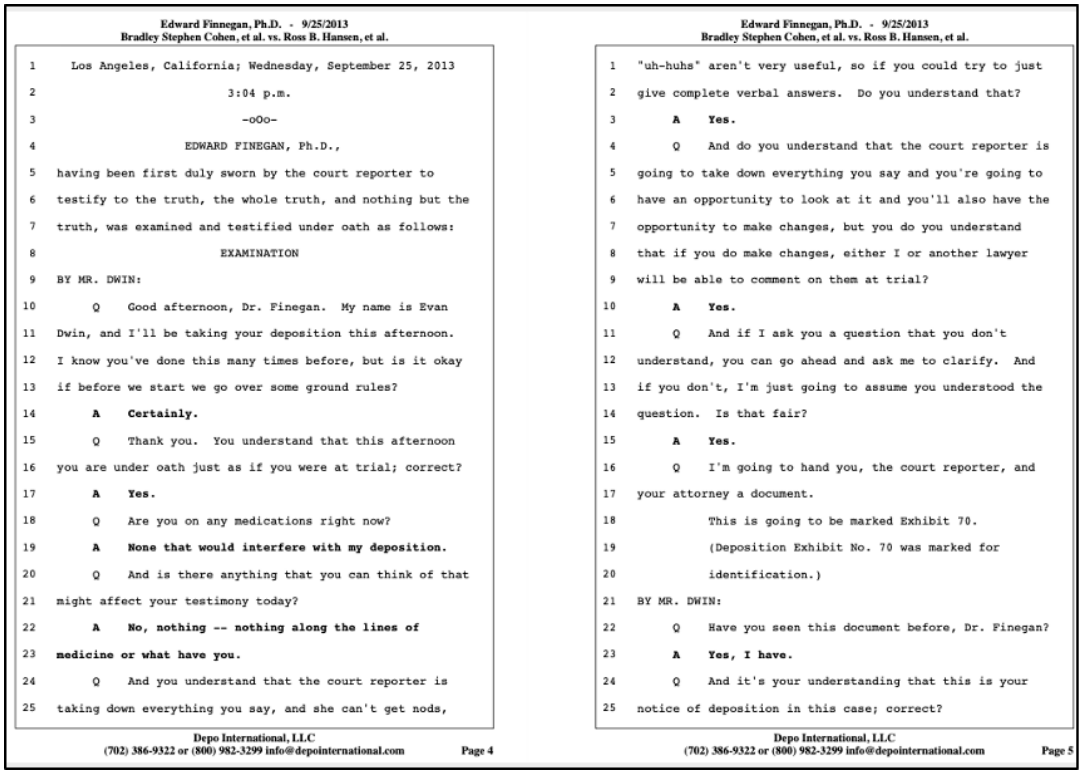
**Figure 2. Second and Third Pages of Deposition Transcript in *Cohen v. Hansen.***



Edward Finnegan, Ph.D. - 9/25/2013
Bradley Stephen Cohen, et al. vs. Ross B. Hansen, et al.

Los Angeles, California; Wednesday, September 25, 2013
3:04 p.m.
-oOo-
EDWARD FINEGAN, Ph.D.,
having been first duly sworn by the court reporter to testify to the truth, the whole truth, and nothing but the truth, was examined and testified under oath as follows:

EXAMINATION

BY MR. DWIN:

Q Good afternoon, Dr. Finegan. My name is Evan Dwin, and I'll be taking your deposition this afternoon. I know you've done this many times before, but is it okay if before we start we go over some ground rules?

**A Certainly.**

Q Thank you. You understand that this afternoon you are under oath just as if you were at trial; correct?

**A Yes.**

Q Are you on any medications right now?

**A None that would interfere with my deposition.**

Q And is there anything that you can think of that might affect your testimony today?

**A No, nothing -- nothing along the lines of medicine or what have you.**

Q And you understand that the court reporter is taking down everything you say, and she can't get nods,

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"uh-huhs" aren't very useful, so if you could try to just give complete verbal answers. Do you understand that?

**A Yes.**

Q And do you understand that the court reporter is going to take down everything you say and you're going to have an opportunity to look at it and you'll also have the opportunity to make changes, but you do you understand that if you do make changes, either I or another lawyer will be able to comment on them at trial?

**A Yes.**

Q And if I ask you a question that you don't understand, you can go ahead and ask me to clarify. And if you don't, I'm just going to assume you understood the question. Is that fair?

**A Yes.**

Q I'm going to hand you, the court reporter, and your attorney a document.

This is going to be marked Exhibit 70.

(Deposition Exhibit No. 70 was marked for identification.)

BY MR. DWIN:

Q Have you seen this document before, Dr. Finegan?

**A Yes, I have.**

Q And it's your understanding that this is your notice of deposition in this case; correct?

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**Figure 3. Fourth and Fifth Pages of Deposition Transcript in *Cohen v. Hansen.***

## Trial

Because pre-trial negotiations between litigants in civil cases can lead to a settlement at any time, it is sometimes uncertain until the last moment whether a scheduled trial will take place. In May 2021, for example, a trial at which the court agreed to permit me to testify (and for which I possessed airplane tickets to fly to the venue) settled one day before the trial was to begin (and just an hour before I was scheduled to board a plane headed to the court 1,500 miles away). Sometimes even after appearing at a trial venue, it remains uncertain that an expert will be permitted to testify. For example, in 1977, at the very first trial in my experience as an expert linguist, I waited outside the courtroom ready to testify to a jury, only to be thwarted by the court's decision not to permit my testimony in the presence of the jurors (see Finegan 2020a). In the Cohen case, the retaining attorneys had not received a decision about the court's willingness to allow me to testify before I needed to be at the trial venue in case the court permitted my testimony, so I flew from Los Angeles to Las Vegas and awaited the court's decision: in the end, the judge permitted me to be sworn in and testify. Before returning to the testimony itself, it is instructive to describe something of the preparation that preceded my appearance in a United States District Court before a federal judge in a jury trial.

In my written report, I had opined that visitors to the websites would have concluded that the website creators intended to persuade them that the answer to the prominently and repeatedly displayed question 'Is Bradley S. Cohen the Next Bernie Madoff?' was yes, and I explained how the website accomplished making that accusation without articulating it directly. Following my written report and deposition, as the possibility of my testifying in court approached, the retaining attorney and his staff, comprising other attorneys and technical assistants who worked up the slides I had prepared for presentation at trial, met with me on several occasions. Sometimes beforehand and sometimes afterwards, I received a list of questions that the attorney was planning to ask me on direct examination (i.e. the question-and-answer sequence on the witness stand in which the questions are asked by the attorney who has called the witness). Figure 4 shows a slide that Cohen's attorney planned to display and ask me to explain to the jury. On the slide are two questions I would be asked about it: 'Describe what this is / what you understand this to represent' and 'How does the repetition of the banner affect the average reader?' The first question allowed me to explain to the jury what the slide represented, while the second allowed me to begin discussing a discourse analysis in lay terms and to explain in part how the site conveyed its accusations. The slide depicts the six pages of the offending (second) website, the fifth page encompassing two columns on the slide. Across every page is a banner that asks, 'Is Bradley S. Cohen the Bernie Madoff of real estate?' and, in large font above photographs of both men side-by-side, 'Is Bradley S. Cohen the Next Bernie Madoff?'

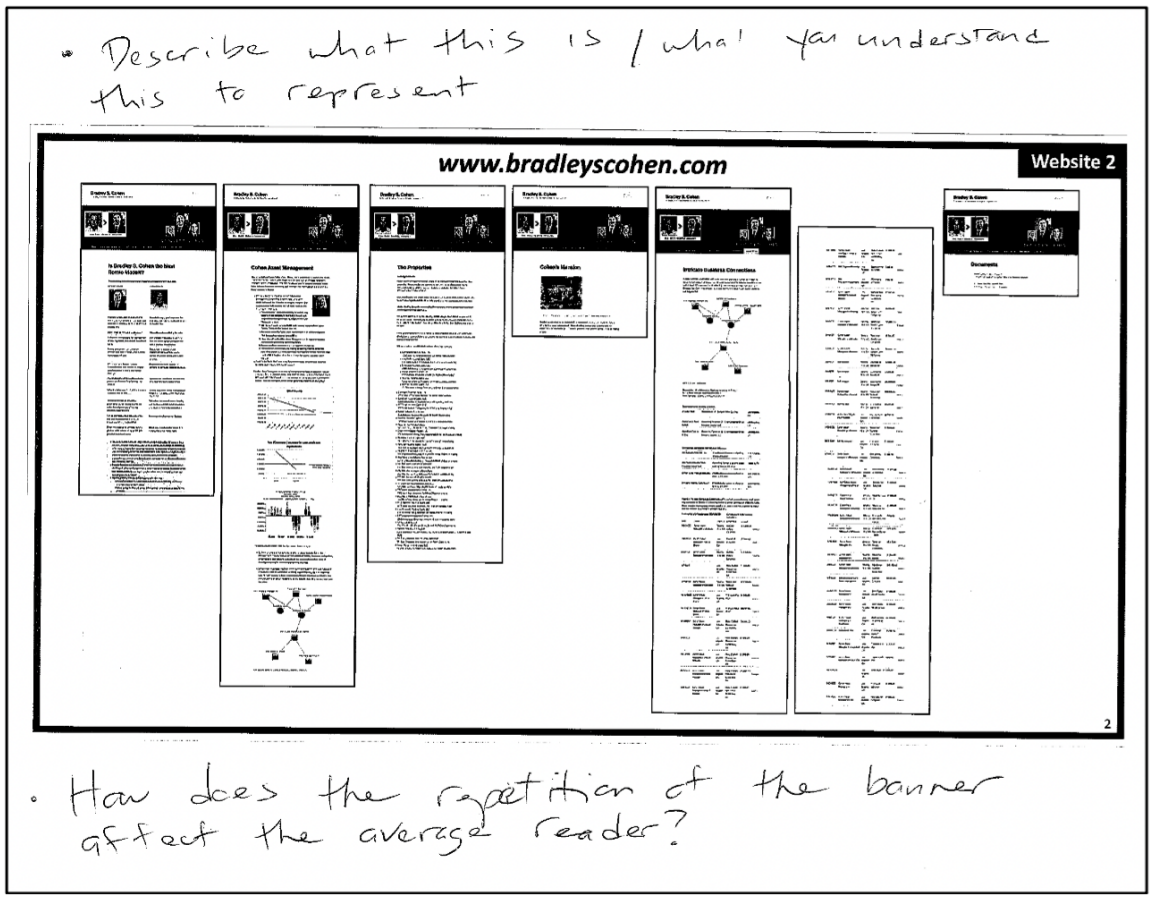


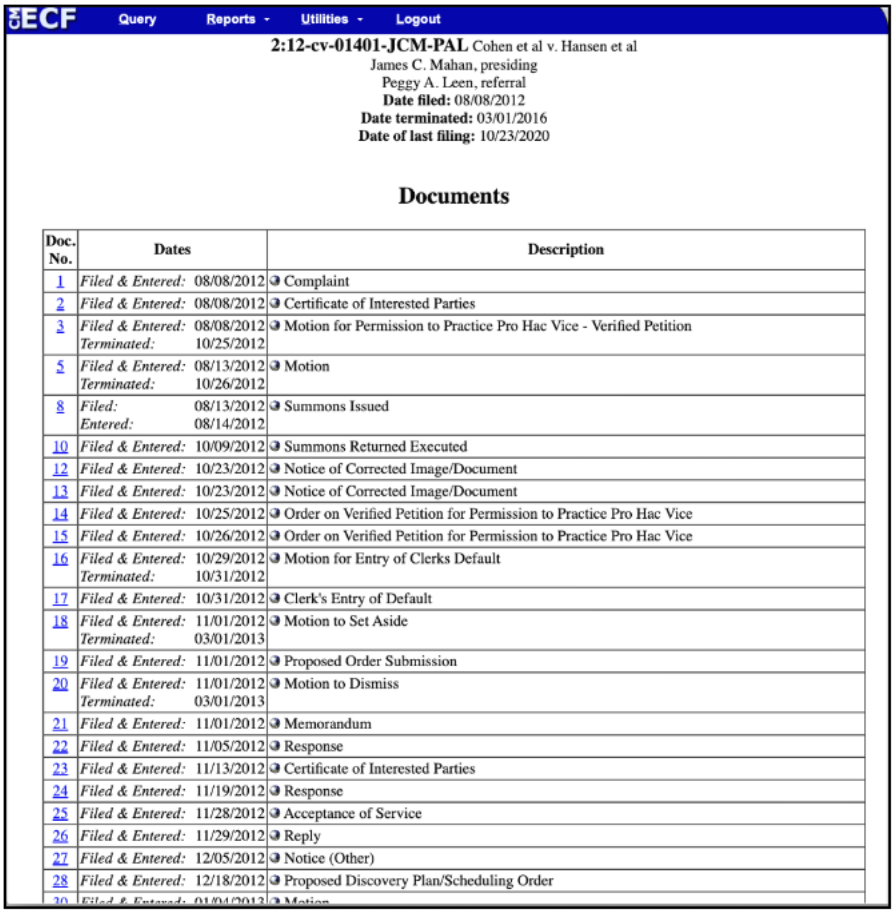

**Figure 4. Example Preparation Sheet for Trial Testimony in *Cohen v. Hansen.***

Figure 4, shown here to illustrate an expert's preparation for trial, serves also as an example of a slide that was shown to jurors during my testimony, though in court the handwritten questions were absent; following this overview of the website, slide by slide, I focused on several sections, appropriately highlighted to capture the jury's attention, until the major points in the analysis had been explained to the jury. The slides were shown to the jury as occasions to testify about the syntax, semantics, and pragmatics, for example, of the question 'Is Bradley S. Cohen the Next Bernie Madoff?' and a caption like 'The alarming similarities between these two investment firm founders'. Question by question, under direct examination (where leading questions are not permitted), the retaining attorney asked me to address various aspects of my testimony, calculating at each step the jury's reaction and deciding when he had gone far enough. Under questioning, I went through the slides explaining how the website containing the images and texts conveyed a particular understanding of Cohen. I did not address legal questions, of course, or the truth of the stated and implied information. My task was to explain how the website was crafted to create the impression that an ordinary speaker of English would experience in viewing the website and how that understanding included accusations of Bradley S. Cohen.

Following the direct examination, I was cross-examined by opposing counsel and was then excused from the witness stand, my engagement complete. At least one other expert testified, though not on language-related matters. Hansen had not engaged an

expert linguist to rebut my testimony. Had he done so, we would have testified independently of one another, and there would not have been an opportunity for us to meet and agree on certain matters and identify for the court those matters on which disagreement remained. While that situation may occur in jurisdictions outside the U.S. (see Gray 2010), I am not aware of such instances in the U.S. In the Cohen case, after its deliberations, the jury returned a verdict finding in favor of Cohen and awarding him damages of $38.3 million. It was thus a consequential trial for litigants and attorneys, and with such a steep penalty it is not surprising that Hansen appealed the verdict, a topic I return to in the following section.

Before doing that, it is helpful to examine the court docket in the Cohen case because experts may not recognize what a relatively limited part they play in a larger legal battle (however important their role may be). A court docket, the first page of which for the Cohen case shown in Figure 5, is simply a log of official court proceedings – motions and responses of the court, as well as other documents submitted by the parties and other official actions in the case; it is in effect the broad outline of the court proceedings from beginning to end. The first entry in a civil case is the 'Complaint', in the Cohen case dated August 8, 2012. The final entry (numbered 429 but not shown in Figure 5) is dated October 23, 2020 – eight years after the Complaint. It is easy for an expert witness not to appreciate the larger legal contest in which they play one role, sometimes not much more than a cameo appearance in a larger drama.



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**2:12-cv-01401-JCM-PAL** Cohen et al v. Hansen et al
James C. Mahan, presiding
Peggy A. Leen, referral
**Date filed:** 08/08/2012
**Date terminated:** 03/01/2016
**Date of last filing:** 10/23/2020

**Documents**

| Doc. No. | Dates | Description |
|---|---|---|
| 1 | *Filed & Entered:* 08/08/2012 | Complaint |
| 2 | *Filed & Entered:* 08/08/2012 | Certificate of Interested Parties |
| 3 | *Filed & Entered:* 08/08/2012<br>*Terminated:* 10/25/2012 | Motion for Permission to Practice Pro Hac Vice - Verified Petition |
| 5 | *Filed & Entered:* 08/13/2012<br>*Terminated:* 10/26/2012 | Motion |
| 8 | *Filed:* 08/13/2012<br>*Entered:* 08/14/2012 | Summons Issued |
| 10 | *Filed & Entered:* 10/09/2012 | Summons Returned Executed |
| 12 | *Filed & Entered:* 10/23/2012 | Notice of Corrected Image/Document |
| 13 | *Filed & Entered:* 10/23/2012 | Notice of Corrected Image/Document |
| 14 | *Filed & Entered:* 10/25/2012 | Order on Verified Petition for Permission to Practice Pro Hac Vice |
| 15 | *Filed & Entered:* 10/26/2012 | Order on Verified Petition for Permission to Practice Pro Hac Vice |
| 16 | *Filed & Entered:* 10/29/2012<br>*Terminated:* 10/31/2012 | Motion for Entry of Clerks Default |
| 17 | *Filed & Entered:* 10/31/2012 | Clerk's Entry of Default |
| 18 | *Filed & Entered:* 11/01/2012<br>*Terminated:* 03/01/2013 | Motion to Set Aside |
| 19 | *Filed & Entered:* 11/01/2012 | Proposed Order Submission |
| 20 | *Filed & Entered:* 11/01/2012<br>*Terminated:* 03/01/2013 | Motion to Dismiss |
| 21 | *Filed & Entered:* 11/01/2012 | Memorandum |
| 22 | *Filed & Entered:* 11/05/2012 | Response |
| 23 | *Filed & Entered:* 11/13/2012 | Certificate of Interested Parties |
| 24 | *Filed & Entered:* 11/19/2012 | Response |
| 25 | *Filed & Entered:* 11/28/2012 | Acceptance of Service |
| 26 | *Filed & Entered:* 11/29/2012 | Reply |
| 27 | *Filed & Entered:* 12/05/2012 | Notice (Other) |
| 28 | *Filed & Entered:* 12/18/2012 | Proposed Discovery Plan/Scheduling Order |

**Figure 5. The First 28 of 429 Docket Entries in *Cohen v. Hansen.***

An expert linguist would not be involved in any but a very few entries and ordinarily would not be aware of all the other court proceedings because they have nothing to do with the expert's role or testimony. Because the linguist's involvement is chiefly, if not solely, what the retaining attorney and the expert discuss, it may be tempting for an expert to imagine their involvement playing a larger or more central role in a litigation than is accurate. But the length of a docket and the extensive legal maneuvering that it represents is useful for experts to bear in mind, even though it does not involve them directly. To underscore the point, it is sobering to recognize that in the Cohen case, despite my involvement over several years, the judge could have decided just a short while before I was to testify that my testimony was not deemed sufficiently helpful to warrant admission. The case would have gone ahead in all its other complexity, and no one knows what the jury's verdict would have been under those circumstances. Not a few published reports by linguists discussing their experience as an expert witness seem to suggest that the linguistic issue was the only issue or at the very center of a case, and while that is sometimes accurate, it is far from true in many other cases.

## The appeal and the appellate court

After the jury returned a verdict and damages of more than $38 million, Hansen sought a retrial, citing certain pre-trial agreements among counsel and the court, but the court did not grant a retrial (see Mahan 2016). Hansen then appealed to the U.S. Court of Appeals for the Ninth Circuit, which has appellate jurisdiction for the District of Nevada. The Ninth Circuit has 29 judges sitting on it, and for most cases a panel of three judges is assigned to hear the appeal, as with Hansen's appeal here.

In appellate courts, including the U.S. Supreme Court, virtually all proceedings take place via written filings, including a transcription of the trial court(s) and appellate briefs filed by each side laying out their case for or against some or all of the underlying verdicts or decisions to be overturned. In addition to the written documentation, there is a surprisingly brief live interaction, where appellant and respondent are given equal time to address the panel and answer questions about the briefs filed in the appeal. The testimony of attorneys before the appellate court is usually available on the court's website in one form or another, sometimes including videos, as with Hansen's appeal. Figure 6 is a screen capture from the appearance of Cohen's attorney before the three-member appellate court panel. He addressed the panel after Hansen's appellate attorney addressed it. The inset may suggest the attorney is facing away from the three-judge panel, but of course that is misleading. The 15 minutes allotted to each side in this matter might be thought to belong entirely to the attorney, but a visit to the site demonstrates otherwise. Attorneys seldom get far into their presentation before an appellate court judge interrupts with a question to clarify some aspect of the briefings. For readers with half an hour to spend, a viewing of this hearing may be of interest; among other things, the differences between the attorneys' approaches is striking. (See Ninth Circuit 2020.) Oral arguments before the United States Supreme Court – in approximately 70–80 cases each year – are available online (see SCOTUS 2020); for an oral argument involving linguistic questions, *Facebook Inc. v. Duguid* (Facebook 2020) may be of interest.

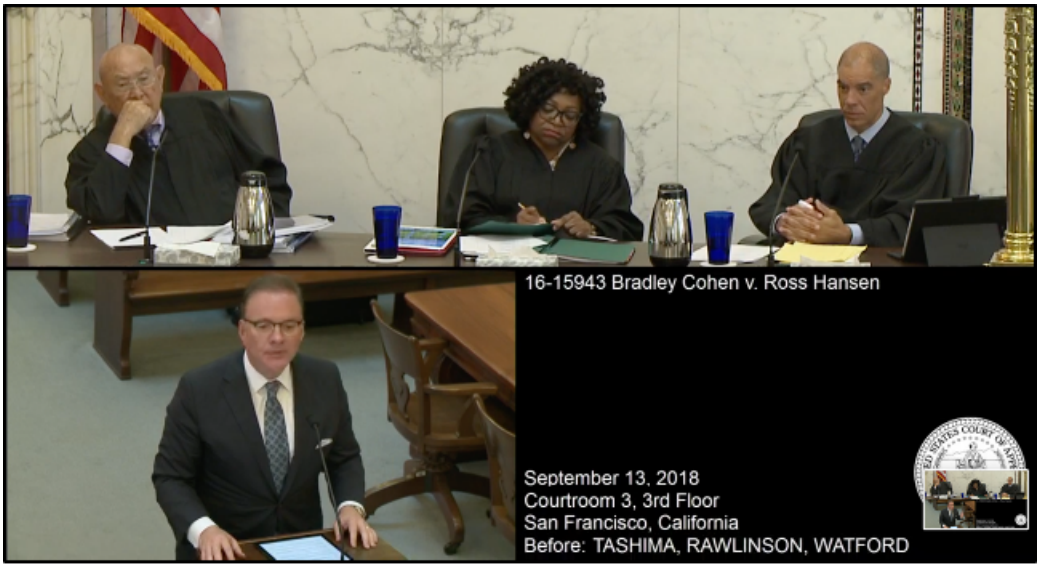
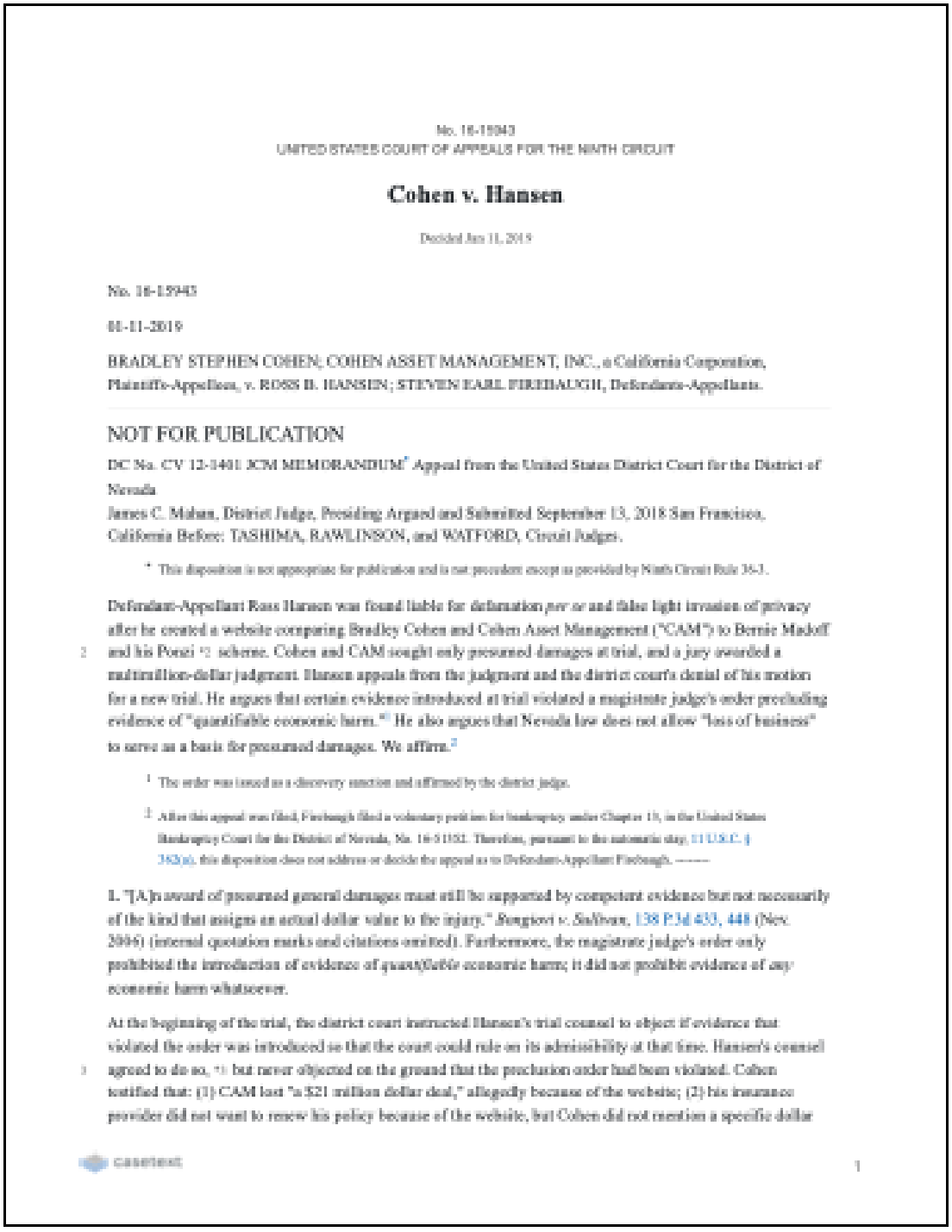



**Figure 6. Cohen Attorney Robert D. Mitchell Addressing Ninth Circuit Appellate Court.**

## Appellate court decision

Four months after attorneys for Cohen and Hansen testified before the three-judge Ninth Circuit panel, the court issued its decision, affirming the district court's judgment. The basis of the appeal made by Hansen was unrelated to the linguistic issues, as the Court of Appeals' decision explains. (See Figure 7.) It is worth calling attention to the notice NOT FOR PUBLICATION in all caps, which appears nine lines down in the decision document. Decisions that appellate courts designate 'not for publication' identify them as not constituting legal precedent and therefore not citable as precedential or authoritative in subsequent related or unrelated litigation. In other words, such decisions would not find their way into the law books that constitute case law. Note, too, that the final line of the court's decision, set off from all else, reads, "The judgment of the district court is AFFIRMED."



No. 18-15043
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**Cohen v. Hansen**

Decided Jan 11, 2019

No. 18-15943

01-11-2019

BRADLEY STEPHEN COHEN; COHEN ASSET MANAGEMENT, INC., a California Corporation, Plaintiffs-Appellees, v. ROSS B. HANSEN; STEVEN EARL FIREBAUGH, Defendants-Appellants.

NOT FOR PUBLICATION

DC No. CV 12-1401 JCM MEMORANDUM* Appeal from the United States District Court for the District of Nevada
James C. Mahan, District Judge, Presiding Argued and Submitted September 13, 2018 San Francisco, California Before: TASHIMA, RAWLINSON, and WATFORD, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

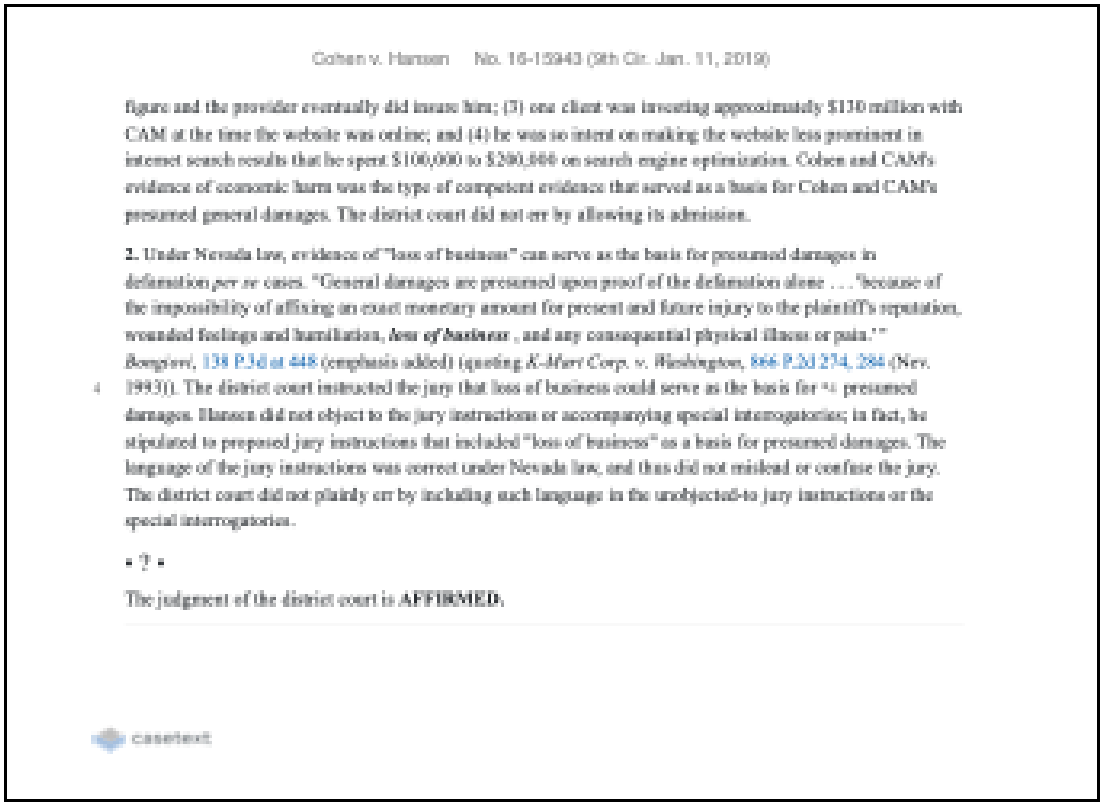
Defendant-Appellant Ross Hansen was found liable for defamation *per se* and false light invasion of privacy after he created a website comparing Bradley Cohen and Cohen Asset Management ("CAM") to Bernie Madoff and his Ponzi [2] scheme. Cohen and CAM sought only presumed damages at trial, and a jury awarded a multimillion-dollar judgment. Hansen appeals from the judgment and the district court's denial of his motion for a new trial. He argues that certain evidence introduced at trial violated a magistrate judge's order precluding evidence of "quantifiable economic harm." [1] He also argues that Nevada law does not allow "loss of business" to serve as a basis for presumed damages. We affirm.[2]

[1] The order was issued as a discovery sanction and affirmed by the district judge.

[2] After this appeal was filed, Firebaugh filed a voluntary petition for bankruptcy under Chapter 13, in the United States Bankruptcy Court for the District of Nevada, No. 18-51152. Therefore, pursuant to the automatic stay, 11 U.S.C. § 362(a), this disposition does not address or decide the appeal as to Defendant-Appellant Firebaugh. ———

I. "[A]n award of presumed general damages must still be supported by competent evidence but not necessarily of the kind that assigns an actual dollar value to the injury." *Rosgiovi v. Sullivan*, 138 P.3d 433, 448 (Nev. 2006) (internal quotation marks and citations omitted). Furthermore, the magistrate judge's order only prohibited the introduction of evidence of *quantifiable* economic harm; it did not prohibit evidence of *any* economic harm whatsoever.

At the beginning of the trial, the district court instructed Hansen's trial counsel to object if evidence that violated the order was introduced so that the court could rule on its admissibility at that time. Hansen's counsel agreed to do so, [3] but never objected on the ground that the preclusion order had been violated. Cohen testified that: (1) CAM lost "a $21 million dollar deal," allegedly because of the website; (2) his insurance provider did not want to renew his policy because of the website, but Cohen did not mention a specific dollar



Cohen v. Hansen No. 16-15943 (9th Cir. Jan. 11, 2019)

figure and the provider eventually did insure him; (3) one client was investing approximately $130 million with CAM at the time the website was online; and (4) he was so intent on making the website less prominent in internet search results that he spent $100,000 to $200,000 on search engine optimization. Cohen and CAM's evidence of economic harm was the type of competent evidence that served as a basis for Cohen and CAM's presumed general damages. The district court did not err by allowing its admission.

2. Under Nevada law, evidence of "loss of business" can serve as the basis for presumed damages in defamation *per se* cases. "General damages are presumed upon proof of the defamation alone . . . 'because of the impossibility of affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation, ***loss of business***, and any consequential physical illness or pain.'" *Bongiovi*, 138 P.3d at 448 (emphasis added) (quoting *K-Mart Corp. v. Washington*, 866 P.2d 274, 284 (Nev. 1993)). The district court instructed the jury that loss of business could serve as the basis for presumed damages. Hansen did not object to the jury instructions or accompanying special interrogatories; in fact, he stipulated to proposed jury instructions that included "loss of business" as a basis for presumed damages. The language of the jury instructions was correct under Nevada law, and thus did not mislead or confuse the jury. The district court did not plainly err by including such language in the unobjected-to jury instructions or the special interrogatories.

* 7 *

The judgment of the district court is **AFFIRMED**.

casetext

**Figure 7. Decision of the Ninth Circuit Appellate Court in *Cohen v. Hansen.***

## Pros and cons of serving as a linguistics expert in litigation

Especially early-career linguists and graduate students are sometimes keen to engage as forensic linguists and consult as experts in court cases. What appeals to them varies a good deal and may include the excitement of a court appearance or the lure of earning consulting wages or a commitment to social justice. By no means is the desire to consult limited to early-career linguists and graduate students. Linguists at all stages have inquired of me and others about how to get involved in forensic linguistics, how to be retained by a law firm in a case that requires their specialization. Sometimes at talks or presentations concerning forensic linguistic expert testimony, the first question asked is, 'How do I get to do it?' It is important that a younger generation take an interest in the work of forensic linguists because the contribution that linguists can make is significant, but much of the work currently in the record has been carried out by a generation of linguists who are now retired or retiring. (See Finegan 2020b and Finegan 2021b for a remembrance of a recent death, one among several.)

Here I describe what I view as some of the pros and cons of serving as an expert. So as to leave the pros as a final positive observation, I begin with the cons. In virtually all instances in the U.S., the initial request to serve as an expert comes from an attorney who represents one of the litigants in a case. The fact that a linguist has been approached as a potential expert witness indicates that the existing or anticipated litigation involves a contested linguistics issue. An expert linguist may already be retained on the opposing side. If opposing counsel has already retained a linguist (or goes on to do so), that linguist likely believes the facts of the case do not lead to the conclusions the attorney seeking one's expertise expects, indeed needs, one to arrive at if one is to be of assistance to the

attorney's client. In short, requests for expertise that arise in a contested situation are, almost by definition, weighted with pros and cons on both sides of the issue. While an expert's primary duty is to the court, in an adversarial system the expert is retained by one of the litigants and paid by the litigant in other than pro bono service.

As a second entry in the debit column, the process of providing testimony is unlike anything else a linguist experiences as a professional – in a classroom, laboratory, conference presentation, and so on – and it can prove challenging and has discouraged some linguists from giving testimony (see Gray 2010: 204–205, Fadden and Solan 2015: 223–225). In the U.S., the expert is nearly always required to sit for a deposition and be subjected to questions from opposing counsel whose duty extends beyond learning the expert's opinion and its bases to finding possible flaws in the methodology, analysis, or conclusions or identifying any other reason to discredit the expert or demonstrate that they should not be permitted to testify in the dispute at bar. Should the litigation not settle out of court but go to trial, the expert who has not been excluded by the court will take the witness stand and, under oath, be examined first by the retaining attorney and then cross-examined by opposing counsel with some of the same discrediting aims motivating the deposition. Sworn testimony, especially in answer to questions from opposing counsel, can be challenging in ways an academic linguist may be unaccustomed to. As Justice Gray has written, '[l]awyers try to discredit expert witnesses, which discourages experts from wanting to give evidence' (Gray 2010: 201).

Another way in which serving as an expert differs significantly from engagements as an educator or researcher, say, is that in either of those systems the linguist has a relatively tidy schedule: classes or meetings on certain days of the week at certain hours of the day; semester or trimesters or quarters tidily laid out months or years in advance for academics. Serving as an expert requires sometimes extraordinary adaptability in scheduling because court calendars can change and litigants themselves may delay for settlement talks or tactical reasons. Because civil and criminal cases are tried in the same courts, and because criminal court cases take precedence over civil cases, a judge may need to change a planned civil trial date to accommodate a criminal case. Sometimes, too, in the midst of a case, a legal dispute will arise between litigants that necessitates postponing the expert's planned courtroom appearance for an indeterminate amount of time. (For an example, see Finegan 2020a.) Expert testimony, then, requires adaptability, and senior academics and researchers may have greater control over their schedules than less senior ones.

In any case, litigation is characterized by stops and starts, often extending over months or even years. In the Cohen case, after weeks of analysis and discussion with counsel, I submitted my report to Cohen's counsel in August of 2013 and sat for deposition a month later, but my trial testimony was not given for another two and a half years. While the trial concluded my involvement in the case, the appellate court hearing did not take place until another two and a half years had passed. The appeal in the Cohen case did not involve my trial testimony, but in other cases the expert's testimony – particularly its inclusion or exclusion – could be the basis for appeal, as it was in Daubert, which was appealed to the Ninth Circuit (the same one that decided the appeal in the Cohen case) and then, beyond that, to the U.S. Supreme Court, whose opinion in the matter established the Daubert criteria discussed above.

Experts with sufficient experience become accustomed to the starts and stops of litigation and regard their involvement concluded only once they have testified at trial, for example, or been informed by the retaining attorney that the case has settled or their services are no longer required. In an earlier case in which no fewer than five linguistics experts had been retained, the attorney I worked most closely with informed me just before the trial date that the case had settled. That was the last substantive communication he and I had on the matter. I understood settled to mean, among other things, that there would be no trial and, thus, no linguistics testimony. In fact, I published an article reporting certain aspects of the case, including that it had settled and not gone to trial (Finegan 1990). A few years later, however, I and one of the experts in the earlier case were both engaged, again on opposing sides. At a hearing in the later case, I confirmed my understanding that the earlier case had not gone to trial, only to be confronted with evidence that it had and that the opposing expert had testified in it. As a further development, it happens that neither the other expert nor I was aware of significant developments in the earlier case because the attorneys had become involved in related financial disputes that did not directly involve us, and they simply did not take time to inform us that the case was being appealed. Ironically, upon appeal the linguist's trial testimony was vacated and, thus lacking validity, should not have been cited in the second case to undercut my report in the published article and my testimony in the later matter. (For further details about this turn of affairs, see Finegan 2021a.)

Returning to the pros and cons of serving as an expert linguist, on the positive side of the ledger, the pros outweigh the cons by far. One rewarding aspect is the opportunity to apply abstract or theoretical linguistic knowledge to real-world problems, appealing to many linguists who would not otherwise identify themselves as applied linguists. Further, participation as an expert witness provides an exceptional window on the legal world – an opportunity to gain knowledge not ordinarily part of a linguist's education or experience. Another window opened by serving as an expert is the opportunity to join professional and scholarly groups other than those in one's linguistic specialization. While the shared focus may be linguistics in the law, the range of linguistic topics is wider than in a typical linguist's immediate environment or, for that matter, the ordinary conferences attended. Forensic linguists represent a disparate group of subfields – phonetics, discourse, sociolinguistics, computational linguistics, syntax, semantics, and so on – and there is value in sharing a common focus across subdisciplines of linguistics in conferences of the International Association of Forensic Linguists, for example. Beyond the subfields themselves are the linguists, many of whom are exceptionally high minded and dedicated to issues of social justice. Further still, the personal interactions among colleagues around the world with an interest in applications to law is a window on diverse legal systems and an occasion to experience courtrooms in countries and systems one would otherwise miss out on.

Depending on the kind of case, serving as an expert permits a linguist to contribute to real-world dispute resolution, solve perplexing problems, and contribute to social justice issues. More generally, an expert linguist can take pride in contributing to the cause of justice broadly conceived. In so doing – in communicating what one knows to attorneys on both sides of a case, as well as to judges and jurors – serving as an expert offers an opportunity to enhance one's communication skills in ways that differ dramatically from scholarly exposition and argumentation directed to fellow experts. Another

positive is the supplemental income that serving as an expert affords, and – as a final positive note and on the other hand – to offer expertise pro bono to those in need. (See Nunberg 2009.)

## Acknowledgements

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