

**The Performance Review Podcast**  
**Episode 21**  
**Greenberg Traurig**

Speaker 1 ([00:00](#)):

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Speaker 2 ([00:19](#)):

Welcome to the Performance Review, Greenberg Traurig's California Labor and Employment Law Podcast, where we discuss and review important trends and topics for California employers with hosts Ryan Bykerk and Philip Person.

Philip Person ([00:31](#)):

Welcome back to the Performance Review. Last episode, we discussed when to retain an external investigator. Today, we're going to discuss when an employer should hire an expert witness in a wage and hour case.

[\(00:46\)](#):

Our guest today is the fabulous Joe Krock, managing director of Stout, a consulting firm that provides independent expert analysis. Joe, welcome to the Performance Review. You're going to have so much fun with us today. Tell the audience about yourself.

Joe Krock ([01:02](#)):

Thank you for having me, Philip and Ryan. Excited to be here today. This is my first podcast, so if I'm a little nervous, I apologize, but it's great to see you guys and be able to tell a little bit about my story. I've been engaged in wage and hour class action work since all the way back in 2000.

[\(01:17\)](#):

I worked for Farmers Insurance on the Bell v. Farmers case. I was the managing consultant in that case, running the whole backend of things and providing data and support to the law firm and to the expert in that case. So that's where I cut my teeth in this world and have continued to do it over the last 23, 24 years.

[\(01:37\)](#):

On a background side of things, I focused on economics most of my life, and I went to UCSB and I got a degree in economics mathematics, graduated there and then went directly to the University of Chicago where I got my PhD in economics along with a master's along the way there. So that was a way to get into this business of expert consulting, especially in the economic side of things.

[\(02:00\)](#):

I've been retained to testify in a large number of matters, both as a consulting expert and as a testifier. Again, a lot of it is in the wage and hour class action here in California as a big piece of that. Then another portion of our work and my work is in the antitrust space, consumer class action space, general damages, disputes, anywhere there's really data involved, that's where I get plugged into the issue.

[\(02:29\)](#):

On the wage and hour side of things and the labor and employment side of things, we do discrimination. We do the wage and hour class action. We do fair pay issues on the consulting side for clients, and we spend a lot of our time really counseling and strategizing with clients in the large wage and hour class action. That's the largest part of my practice.

[\(02:50\)](#):

The bottom line for anything that we do on a little sales pitchy side of things is its data. We do a lot of data analysis and that's what we're really good at, and we can apply it to a lot of different areas. So we've worked with millions of records of data, large employers, small employers, weird internet issues, where there's lots and lots of data and not a real easy story to tell. That's where my staff and I really come in and are able to put a cohesive story together through some really odd and large data.

Ryan Bykerk [\(03:20\)](#):

Awesome. Thank you, Joe, and you said it's your first podcast. You sound like a natural, so this is actually Philip and I's first podcast as well. I'm just kidding. Philip is not allowed to kick me off, so you do sound great, but don't push me off the podcast.

[\(03:36\)](#):

We will get into some depth talking about what an expert does through the life cycle of a case, but we thought we should really start with when an attorney is vetting an expert witness, what should they be looking for and really why are those things important?

Joe Krock [\(03:53\)](#):

I think the largest piece of this as an expert is communication. It's we're going to end up having to tell a story at some point and be able to communicate that directly, whether it's directly to the client, whether it's to the court, whether it's to a jury. That communication style and ability will really, I think, should be a driving aspect of who you're going to retain.

[\(04:16\)](#):

The quantitative skills are great, but if you can't get the story across, then all of that hard work and analysis is for naught. So really that's the number one thing I would say in practice is really the bottom line. Then it really comes down to that the analytical ability, the credentials, what specifically you're looking for for that person on a more quantitative basis or qualitative basis.

[\(04:44\)](#):

If you're looking at something like an HR dispute or you need an occupational therapist, what sort of credentials that person has there? If you're looking for somebody that's doing data analysis and wage and hour space, like what we do, looking for somebody that can handle large amounts of data and from disparate sources and piece all that together.

[\(05:00\)](#):

Then that next step is if you check these two boxes, that's great. The next question that always comes to us is how much are you going to cost, and this is where things may go a little bit astray. If you're looking for a bottom dollar, the cheapest possible expert, it's probably not going to be the best bang for your buck in that case.

[\(05:22\)](#):

I've worked on a number of cases where the client's already hired an expert and thought that they were going to be able to get the project done on the cheap, and all of a sudden a couple months later, as it's

really getting towards trial or some motion, we're having to come in and catch up and do it again and duplicate work that you normally wouldn't want to have to duplicate.

[\(05:45\)](#):

So I wouldn't get so hung up on rates, but I do know that there's a very large spread among the firms in our competition and even as you get in some of the other areas of expert work, there's a pretty wide range of those things. It's a bit of a balancing act on that part, but then it ends up becoming the client's final say.

Philip Person [\(06:06\)](#):

You mentioned rates and costs. I think I agree with you here is that you shouldn't be cheap with your attorneys and you shouldn't be cheap with your expert witness. You get what you pay for you. You're obviously a topnotch expert witness here, but tying into that rate and cost topic, can you talk to us about the process of hiring an expert witness and the factors that might cut in favor or against hiring an expert witness?

Joe Krock [\(06:34\)](#):

I mean I think the bottom line is how complex the issues that we're having to address are. As you look at a case and figuring out where you are in that case, so there's the timeline of the process of what's going on and then there's the actual issues that you're going to have to work on and resolve as you get through the case, making sure that the person that you're hiring has the right abilities to do it.

[\(07:03\)](#):

They're familiar with the issues, can offer suggestions to what's going on, because at early stages, sure, I made it up a little bit, but as you get in and you see a lot of the work over and over again, it becomes beneficial to the client that you can shortcut a bunch of things or you can approach things a little bit differently.

[\(07:23\)](#):

One of the things that we deal with often for our matters is talking about the stage that we're in and whether you need to do a particularly difficult task right away. Is it something we can put off? Is there some other techniques that we can use to stage things out so we're not incurring a bunch of costs right at the beginning when the case may settle quickly? We'd rather get it done and get kind of a quick and dirty answer to start with, or if that doesn't work out, we wait and then do some of the other heavier lifting down the road.

[\(07:53\)](#):

So having those sorts of things at the fingertips of your expert are going to be very important in that decision, and whether you're going to get things done correctly. I might not have the cheapest rate, but I can offer a solution that spreads things out and would avoid a lot of the costs if we're going to try to settle this out early.

[\(08:13\)](#):

Where we run into the biggest issues with regard to most of the cases if we get brought in really late or if you have not used an expert for a long time, and you're getting into the end of discovery or you're getting into a class cert issue. Or you're getting into even trial, a lot of times, is we get a phone call, saying, "I've got two weeks and trial's coming up and we didn't have an expert, but now we've got to respond to another expert. We've got to do all this discovery."

[\(08:40\)](#):

That's when the least efficient solution comes out of things is that we're now pressed to just go whole hog right away. It's expensive. There's a lot of people involved and there's a lot of risk involved in that, because with a lack of time, it's harder to make sure that the quality control and the quality of the product that comes out is difficult.

[\(09:00\)](#):

The longer we have, the easier it is to make sure that we're putting the right things together. We're able to check our work. We're able to make sure that we're not overdoing what we need to do, and so the balance becomes, it may take a little longer over time, but I think that the ultimate net cost and something like that is a lot lower if we can get involved a little bit earlier.

Ryan Bykerk [\(09:24\)](#):

Joe, we started by talking about the beginning of things, how does maybe an attorney reach out to you and get things started. But as you've been talking, it reminds me a little bit that a lot like of our listeners are in-house, maybe they're HR professionals, how should they be thinking about data and record keeping just as a matter of course, so that if there is a case, heaven forbid, they're well-prepared to defend themselves?

Joe Krock [\(09:53\)](#):

This is one of the things that we find and is another portion of making sure your expert is comfortable with. And part of that communication style is being able to talk to the client and being able to identify the data. Where we run into a lot of other issues is that, one, the employer doesn't have the right systems or the systems are not complete in terms of the data that they're recording.

[\(10:17\)](#):

Do you have all of those pieces for the potential issues that come up? In a wage and hour class action, are you recording time correctly? Are you making sure you have those records? Do you have your pay records available to you, and do you know how to get them? Have you identified the right resources within the company to make sure that if you had to find time records, who do I need to talk to get that information and brought forward?

[\(10:42\)](#):

That's a lot of times our first call is with the client and with the HR team to figure out who in IT do we need to talk to and what sorts of questions do we need to be asking and how to get it out and what sort of formats are used, and more user friendly for us because if it comes out in a nice electronic format, things are going to be a little bit easier on everybody and cheaper.

[\(11:08\)](#):

The data is the real important king for all of these cases, and we do run into scan paper copies of timecards. That sort of issue, it tends to be a little more expensive because now you're having to have somebody data enter a lot of this data. It's sometimes recorded in other systems that may be able to be identified.

[\(11:29\)](#):

Sometimes it's not, but knowing that in advance and/or then trying to employ or change your system so that it becomes an easier task down the road, I would highly recommend reviewing the pieces that you use to get your data together and making sure that that stuff becomes available at some point. Because once the case starts, it can get real painful real quick on pulling out that data.

Philip Person ([11:58](#)):

So it sounds like let's not hope for litigation but anticipate and expect it. The larger you get in California, the more you're going to see the risk of litigation. Let's say we find ourselves in a scenario where, dun, dun, dun, litigation is here and it's time to roll up our sleeves.

([12:21](#)):

An expert witness can play a role. They can assist with expert reports, obviously expert discovery and depositions, but not everyone may realize that an expert witness can also help guide non-expert discovery. Can you tell us about how an expert witness can help there?

Joe Krock ([12:39](#)):

I mean one of those is on the data side of things is trying to pull all that data together, working with the in-house counsel, working with IT, finding that stuff, but also the strategy and the structure of things that you're going to do even on a declarations issue or are you going to collect declarations? Are you going to take depositions of people? What strategies could you take in doing those things so that the information that you're getting out of that is more reliable?

([13:08](#)):

The court often will say that, "You get your declarations done," but they're not reliable because you just cherry-picked the top 10 people to take the depositions of or get a declaration from. So there's no reliability of those things. There are ways that you can try to approach it from a little more structured way that may give you a chance to advance those sorts of fact witness issues in there. And that sampling side of things is where can you take a sampling and can you use statistics then on that secondary depositions.

Ryan Bykerk ([13:47](#)):

So Phillip mentioned expert reports, and of course, that can be a really important part. Does a CBA change your analysis, a collective bargaining agreement, and that's just something that we run across in the employment space fairly regularly. What should employers keep in mind with respect to expert reports? And maybe could you walk us through to a little bit of the difference between federal cases and state cases because we know there are some different rules there.

Joe Krock ([14:16](#)):

I mean, a CBA, it will supersede the law. So in terms of what we have to analyze and what we do, we'll have to change from the typical rules. You'll see different factors in the CBA, and so it's going to be important for the expert to understand that and not apply the same California rules or Kentucky or whatever state you're going to be in. That's an important part of that and should be something that the experts familiar with and how they go about doing it.

([14:48](#)):

From the report side of things, it doesn't really change how we go about our work. It's just more of the facts that we get at. In terms of the report process, we have a little more control as experts on the front end side. If we're going to be providing it an affirmative report, we can structure and kind of know what it takes for us to do it and there's a lot less variability in how we approach and how we write our proactive reports.

([15:24](#)):

When you're getting into a rebuttal situation, it becomes a little more of a wild card because you never know what the other side's going to say. Then how do we approach the analysis? For us in data analysis, we really have to dig into everything. We've got to understand how they collected their data, what they did to their data between the beginning and when they did their analysis, and then what did they do in their analysis and did they make any mistakes along the way? Are they making any assumptions that are there? What happens if those assumptions are wrong?

[\(15:56\)](#):

So on the rebuttal side of things, things are a little more gray in terms of the cost. So that's one of the issues that we see in this. Venue has a big part of this, federal versus state. In most state courts, California, certainly, you do not need to present a formal report. So most of the time what we'll get is a table and some deposition testimony from the other expert, and the rebuttal to that will be similarly a table on my end and then some deposition testimony. So the state cases tend to be a little bit easier.

[\(16:38\)](#):

We do have situations where more formal reports are written in state cases, but they tend to be fewer and far between, and probably part of the other reason has to do with CAFA. We see a lot of our cases getting removed to federal court already, so they land in the federal court, which then means you've got to describe all your opinions in a written report.

[\(16:59\)](#):

So then all of a sudden we've now have to be at a higher standard of things. We've got to check a certain number of boxes in terms of the things we say and do, and we got to make sure that we're covering all of this topics that we really want to have an opinion on ,if and when we get to trial. So that's a much, much more stringent, much more structured process and tends to be a little bit higher.

Philip Person ([17:21](#)):

So earlier we talked about litigation and litigation's coming, you have to prepare for that, but let's talk about something that's a little bit more common for a lot of our listeners here is mediation. When should an expert help prepare for mediation, and what are some of the things to consider leading up to that mediation? What's the expert's role essentially there?

Joe Krock ([17:48](#)):

This is where we spend a big portion of our time is really in that mediation preparation side of things. Typically, the first round is a little bit more back of the envelope on people. You get two sides that are so far apart that mediation's probably not going to work.

[\(18:05\)](#):

Once the client and the attorneys commit to doing a little bit of scratching things to figure out what the issues are and what sort of exposure do we have, what's our exposure to the liability type issues, that's where we get involved typically. That's where we're going to assist pulling all the data from the client. We're going to do an analysis.

[\(18:28\)](#):

In a wage and hour context, we'll do a meal analysis and are people taking their meals on time? Are they taking them late? Are they short? Are they missing them all together? Are there different stratas, different segments of time to those issues pop up? So that's the background analysis that we do, and we can even do that on a very light basis at the mediation level.

[\(18:51\)](#):

Then it's a matter of preparing the client for the quantum of what they're looking at. That's where I've had more than a handful of times where I've received a call from either the CFO or the CEO of a company as they've floated my analysis and all of a sudden the absolutely worst case scenario damages are in the hundreds of millions of dollars.

[\(19:14\)](#):

It's an immediate phone call from them to say, "Hey, Joe, I can't afford this is. My company's gone if we have to pay for this." And it's like, "Well, no, that's not what we're... If everything goes really sideways and we end up in a bad place, this is where we're at." But that's really where we're working with the outside counsel and in-house legal counsel is really figuring out what the strategy is going forward and how do we want to approach the mediation.

[\(19:41\)](#):

Do we think we have room to settle this out and get out for a significant discount or do we really, really want to fight it? If the facts are in our favor, then maybe it's let's stick to our guns. Let's keep aiming low. We give everybody their meal breaks, so there's no reason to really settle out and the plaintiff's offer is exorbitant. Let's keep going, let's keep fighting this, because we can win it at a class cert.

[\(20:08\)](#):

So that's really the strategic part where we get involved in and are able to have and help frame the future of the case and the issues. So all of those pieces and how we look forward to trial, how we look forward to class cert, how we look forward to maybe some of the other motions that are out there, we can give advanced notice of where we stand on those issues.

Philip Person ([20:36](#)):

And you mentioned a strategic point with that and working with counsel there, because another situation is or question is whether the parties are going to exchange their preliminary reports at mediation. That depends on the facts, obviously, talking to counsel and everything else, but that's something that we always have that conversation come up.

Joe Krock ([21:00](#)):

It's interesting because we'll often get the mediation brief, and it'll have some numbers in there and sometimes on the plaintiff's side, it'll just be made up numbers that don't seem to attach to anything. But sometimes they do spend the money and effort on it, and so then we have to do a little bit more legwork to make sure that we're backing it up.

[\(21:20\)](#):

But if you are contemplating exchanging, it definitely, and I would say that it puts you in a little bit better position with the mediator in those cases where you can actually point to some analysis that's been done. It happens pretty regularly where we'll either be on the call or we'll be in the background at... Well, now everything's on Zoom for everything, but being at the mediation or being on call so that if the mediator has questions about how and what we did, we can answer those questions. It, I think, gives the mediator comfort that we're not just making stuff up.

Ryan Bykerk ([21:57](#)):

So let's assume we've been moving through the life cycle of the case. Let's assume we did expert discovery, we did depositions, we did maybe dispositive motions have been written and failed. We

maybe tried to mediate and maybe it didn't go. Now, we're headed into trial. How does the expert's role shift and transition as we move into trial?

Joe Krock ([22:20](#)):

We really describe the process when you're looking at going through the pre-lit stage to trial as what I call sharpening the pencil. So as you're looking at the process and you're starting off at the beginning, you want to do some high value, low cost work. You want to identify the low hanging fruit.

([22:41](#)):

You want to do what you can without having to spend a lot of money and the client's resources trying to identify stuff. So typically what we'll do is look for smaller samples of data and our results won't be as precise as you would expect, but they're going to be exactly what we want at that stage in the case without having to go too far. Really what we're doing at this point is creating an order of magnitude for the issue.

([23:09](#)):

That really gives us a chance to strategize with the client about how they want to move forward. And obviously, the attorneys are involved in this, and really pushing things forward as we head towards trial. The next phases where we get to the next level of data is going to be at the class certification stage and/or other sorts of motions that may come up, motions for summary judgment, other things.

([23:35](#)):

This is where we're going to need to dig a little bit deeper. We may need some more information than we typically would look for at the earlier stage. So that's where we would sharpen the pencil a little bit further. We would need to write a declaration. That means we need to get some more information.

([23:51](#)):

We need to have a real basis that gets us closer to a scientific answer for those things, and so we'll continue to dig that data up. As we head towards the trial, that's where we're going to need the highest level, the most specificity in the data and what we need to prove the case as we see it. We don't see these too often, so it's rare that we get there, but one of the aspects of having an expert and running through that whole process is that, if you do things correctly, the data will feed its way through this whole process and get us to an answer that is not having to duplicate or reinvent the wheel along the way.

([24:34](#)):

In terms of whether you want to retain an expert or the same expert across the entire process, that's really up to the attorneys and the client. We've done it a couple of different ways in terms of being just a purely consulting expert, and then we don't really have any part of the testifying side of things. We hand our work product off or we hand bits and pieces of things over.

([25:03](#)):

We also have done the other end of this, where we're the testifying expert and we get the other work product from another expert. Then we've also done the same work and I've done the same work, as we go from the testifying expert or from the consulting expert all the way through to be the testifier in the case. It all depends on how the attorneys want to see it.

([25:31](#)):

Typically, it all rests on what sort of information may come up and whether or not there's a risk about bad facts maybe coming up or the analysis or providing an answer that we might not like or we may

discover some things along the way. If that sort of stuff exists, then it might be worthwhile to shift horses along the way.

[\(25:53\)](#):

More times often than not, we don't run into that issue, but in an abundance of caution, the attorneys may want to change. Some of it also comes down to discovery and whether you're in federal court or state court, and so those sorts of issues pop up and create a reason for attorneys to kind of move.

[\(26:14\)](#):

But what you really want to keep in mind is that you don't want to duplicate the effort, and so finding and using experts who are used to sharing work product and being able to work together, maybe not closely, but at least within less than arm's reach process, that really is going to help the client and help them get out of that. But again, it was really left up to the attorneys and their taste for things.

Philip Person [\(26:42\)](#):

You said setting up the expert for trial, well, let's talk about that for a little bit. How can an employer help make sure that their expert is prepared for trial? And then what should an expert be used for at trial?

Joe Krock [\(26:57\)](#):

The first thing I would say about this is that trials for wage and hour matters are a pretty rare event. We don't see them often happening too often, but I was involved back in the day with the Bell v. Farmers trial, which was kind of a lifetime ago. But that was really one of the larger wage and hour class actions and really has shaped a lot of the work that we do nowadays in the wage and hour space.

[\(27:26\)](#):

But that again is on the rare side of things. Most of what we see in my work is that the cases settle fairly early. We may reach a deposition, it may be either before or after class cert, but we don't see those quite as often. What I have seen that's increased a little bit more is on the arbitration side of matters in that when with the enforcement of arbitration agreements, I've seen a couple of large mass arbitration processes getting started.

[\(27:56\)](#):

So it all works the same way as it would in a trial sense, but that's where we see it. When we're preparing for those, I would say that the best preparation is the defensive end of things of vetting your expert before, making sure that you find somebody who is experienced, who has been through the process before, who can really see the arc of the case from beginning to end is the best way to make sure that you're going to be prepared so that you really get the end product you know about. And you're working towards that end product from the beginning of your time that you're working in the case.

[\(28:38\)](#):

Usually, what we see and where our place is in most of these cases, every now and then there'll be a liability type issue, but we see a lot of damages and statistical evidence in the interpretation of that. So those are really the areas that we're really looking for across that process. Really through experience, the deposition process is much more difficult than trial, because in a deposition, the attorneys can really ask any questions, and there's a lot of ground to cover.

[\(29:09\)](#):

They can cover off-topic ideas and it's more train of thought or however they want to run their... The other side's agenda is what's at play. When we're in trial, we have the ability to orchestrate things a little

bit better and make sure that we really are keeping on point and on message. So I would really highly recommend that in working with an expert that either you take the time to prepare and to run through the testimony in advance to really know where we're going.

[\(29:45\)](#):

If you have a chance, have somebody else on the trial team take the devil's advocate role and run some mock cross on the testimony. That's really from a functional standpoint, the best way to prepare in there, and it's really not the time to fly by the seat of your pants and just know that you have a couple of high points and let's see how we roll that.

[\(30:06\)](#):

That can be a little sketchy, especially if you're not used to or you don't know your expert very well. I would really recommend taking the time to prepare in advance and practice ahead of time. What we really risk in that preparation and knowing your witnesses is really the gotcha moments are the things that you really want to protect against, making sure that there's no prior testimony, that the expert hasn't been doubt burdened before.

[\(30:38\)](#):

There are other issues that may pop up and those can be problematic, obviously, for your case if there's something that discredits or witness, then you really are in a world of hurt. So trying to avoid those or know in advance of those things or doing any sort of diligence that you have to do on vetting your expert, it's important. I haven't had to face any of those at this point.

[\(31:05\)](#):

I have heard stories of other experts who may have embellished their CV or other less savory ways to present themselves, and that's what you really need to know and check out in advance. But when I get down to it, I think that the important thing in the testifying side of things and when you're at trial or even in deposition is that you really need to make sure that, to keep the expert on point, is really focus them in on those keys.

[\(31:40\)](#):

I'm sure you as attorneys know this as well as anybody that you really want to make sure that your expert listens to the question, thinks about the answer for that question, and thinks about it in not just a cursory way. And to think through the words and to really understand what the point of the question is and then take time to answer that question and only the question. Don't elaborate.

[\(32:06\)](#):

It's not the time, especially in a deposition, it's not the time to be professorial. If that's something you want out of your trial testimony, then make sure that's clear that you want them to elaborate on a certain point. But the reality of things is that the more you talk, the more fodder the other side has. So staying on point and staying brief and on topic is really, I think, one of the more key ways to make sure that your experts prepared and that you're going to get your message across in a clear and concise way.

Ryan Bykerk ([32:40](#)):

That would be a bad day. That would be a bad day. Well, Joe, thank you. I mean, this has been really a stem to stern primer on how to interact with and understand how an expert can help your case. So really thank you so much for taking us through that. But as you know, one of our favorite parts of any episode is to make sure that we get from our guests a crazy employment story. And we're confident that as an expert, you of course have come across some of those. So we would just love if you could share a wild employment story with us.

Joe Krock (33:19):

Well, I do have quite a doozy of a story. This goes back a number of years, but we were working on a case up in the Eastern District of California. It was a class of agricultural workers, and it was an off the clock, missed meal break kind of claim. The court had ordered both sides to agree on a sampling plan and submit a joint plan to go through and execute.

(33:49):

We were not able to reach an agreement on what an appropriate sampling plan was and what the appropriate survey methodology was. So we just stapled together our two options. Ours was a very complex multi-strata, tiered deposition plan, where we were looking at ultimately probably on the order of a thousand depositions necessary to get what testimony we needed.

(34:16):

But really, having been through this a few times, we recognized that this was really going to prove out our point is that there were going to be a lot of different answers across the board, so we really didn't have an expectation that we'd reached the end. I think we knew that we were going to, and eventually, we did find that the sorts of answers that we were getting in the depositions were not pointing in any particular direction as far as an answer that would create any sort of statistically reliable evidence of liability or damages.

(34:49):

Whereas the plaintiffs, they had a plan initially to do a mail survey, and they wanted to send it to a hundred of these agricultural workers up in the Central Valley. They sent it off and received three responses and so that obviously wasn't going to work for them. So they went back out and went to the court and asked for relief to go execute another sort of survey.

(35:14):

And so in that case, they wanted to survey, do in-person interviews and do a sample of about 300 people. So they went out and I think it took them a month or two. All of a sudden, we got a expert report from their expert saying that they finished their survey, and they had an 80% response rate, which in this sort of matter and in almost any one of our matters, but certainly on the agricultural side of things, a response rate of 80% is exceptionally high.

(35:46):

We typically see them probably at 30% or lower from when we've had to do these sorts of surveys. So this was a first red flag seeing that in there. So as we started to dig into things and kind of understand the process, their main expert had hired a survey company to execute the survey, and he had helped develop the questions and the form of the survey, worked with them to program into a handheld.

(36:19):

And then that survey company went on to hire a subcontractor to actually perform those surveys. So we started digging through the data as we're looking at things, and the software that they used recorded the GPS coordinates of the surveys. So every survey was associated with a location, and so we started plugging in the locations into mapping software and checked out where they were.

(36:51):

Oddly enough, one of the outcomes was a fast food restaurant in Bakersfield. So we kept plugging in different addresses, and these survey results were coming into parking lots of big box retailers, elementary schools, fast food restaurants, places that were not expected for where you would... And they would be clustered together, so there was a group of them.

[\(37:13\)](#):

So it really was an odd thing to see these. And so we started to, as we're communicating with our attorneys, looking at these places, they went out and started subpoenaing people in the process for their expert's survey work. And lo and behold, the attorneys for the plaintiffs in that case started to realize where the questions were coming from, and immediately then tried to backtrack and wanted to pull their expert's report.

[\(37:49\)](#):

There's a whole kerfuffle with the attorneys and the survey firm, but ultimately, the court did not allow them to use any of their survey work or provide any representative testimony from the plaintiffs and really limited the individual claims of the named plaintiffs. So it was a very unceremonious end to their case, and it was really shocking to have seen this sort of work happen.

[\(38:24\)](#):

The bottom line of what ultimately caused that is that their expert did not go through the process that he had claimed that he would go through and vet the results of the survey, go back, check, make sure that the people who were answering the questions were answering the questions. He just accepted all the work product at face value and didn't vet that work on the back end of things.

[\(38:47\)](#):

If you're not going to complete your job in that way, then you really open yourself up to some pretty big challenges as you get into the trial end or into that expert work product. So that was a pretty crazy one, so I haven't seen it since, but it really keeps you on your toes for when you're trying to get things done and make sure that you're doing good work and not bad.

Ryan Bykerk ([39:12](#)):

Oh man, that violates one of the main rules here on the Performance Review Podcast, which is don't be bad, don't be bad.

Philip Person ([39:20](#)):

Don't be bad, and GPS can get you every time, every time. Well, Joe, thank you for this story and thank you for joining us on the Performance Review.

Joe Krock ([39:33](#)):

Thank you, guys. I really appreciate being on your show and had a great time.

Philip Person ([39:38](#)):

And thank you for our listeners for tuning in. We will catch you on the next episode. And if you have any questions in the meantime, please email us at [performancereview@gtlaw.com](mailto:performancereview@gtlaw.com). See you on the next episode.