

Expert Report on El Paso Corporation Cash Balance Conversion:

ERISA Summary Plan Description, Section 204(h) Notices,
and Precursor Documents

in

Tomlinson, et. al. v. El Paso Corporation and El Paso Pension Plan,

CV-04-2686 (WDM)

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I. Introduction

I have been asked by Stephen R. Bruce Law Offices to address the following questions in connection with Tomlinson, et. al. v. El Paso Corporation and El Paso Pension Plan, CV-04-2686.

A) Do El Paso’s Summary Plan Description (SPD) or Section 204(h) notices disclose that, as a result of El Paso’s conversion to a cash balance plan, the rate of pension benefit accrual will be significantly lower than the prior benefit accrual rate under the old plan?

B) Do El Paso’s Summary Plan Description (SPD) or Section 204(h) notices disclose that, as a result of El Paso’s conversion to a cash balance plan, many El Paso participants will experience long “wear away” periods during which they will earn no benefit accruals at all?

A. Summary of My Opinion. Upon inspecting these documents carefully, my conclusion is that El Paso’s SPD and Section 204(h) notices fail to disclose to the average plan participant the losses in benefits resulting from the new cash balance plan. There is no language in these documents making clear the circumstances under which the move to the new cash balance formula results in significant benefit losses—losses which the company identified and detailed in a number of its internal documents. Specifically:

1) Participants are not informed that the rate of benefit accrual under the cash balance plan is significantly lower than the prior benefit accrual rate under the old plan. Indeed, the different rates of benefit accrual under the old and new plan are nowhere compared in these documents. The documents contain *no* illustrative examples showing participants who would suffer substantial reductions as a result of the conversion. These reductions resulted in benefits decreasing in the range of 35% to 50% in comparison to the benefits that participants would have accrued under the former plan. Instead, the documents *only* contain examples that show participants who are “winners” and do not suffer any reduction in benefits as a result of the transition.

2) Participants are not informed that many will experience long “wear away” periods during which no benefit accruals from their new CBP Select plan will be paid. Nor are participants informed that these wear away periods largely result from the difference between the opening account balances and the value of the transition benefit five years later. The only possible hint that CBP Select plan credits might not be paid occurs in the three documents apparently intended as ERISA Section 204(h) notices. But these notices at most indicate that any suspension of benefits is connected to early retirement eligibility

with no indication that the suspension of benefits could last up to 14 years. El Paso's Section 204(h) notices, SPD, and precursor documents consistently and misleadingly suggest that participants' benefits under the new CBP Select will *only* continue to grow. The documents contain *no* illustrative examples of participants who suffer lengthy wear away periods after the five-year transition benefit ends. Instead, they only contain examples that show participants who are "winners" and do not suffer any reduction in benefits from wear away periods as a result of the transition.

B. Professional Qualifications. I am a tenured Associate Professor of Communication at the University of Colorado--Denver, where for the last 12 years I was the Director of the Communication Department's graduate and undergraduate programs in Technical Communication. I received a Ph.D. in Rhetoric from Carnegie Mellon University (Pittsburgh, PA) in 1988, with a focus on scientific methods for testing the usability and understandability of written communication in legal, business, and technical fields. I am currently an active, funded researcher publishing empirical studies of both legally trained and ordinary readers' comprehension of legal documents and legal argumentation (see attached Vita). With respect to ERISA related research, in 1988 I published an empirical study of readers' understanding of contract disclaimer language contained in a Summary Plan Document, in connection with Bower v. Bunker Hill, 725 F.2d 1221 (9th Cir. 1984).¹ This research has been cited in Alexander v. Primerica Holdings, Inc., 967 F.2d 90, 93 (3rd Cir. 1992), and in Chiles v. Ceridian Corp., 95 F.3d. 1505, 1518-19 (10th Cir. 1996). Regarding cash balance plans specifically, I have provided expert testimony in Amara et. al. v. CIGNA Corporation and CIGNA Pension Plan, C.A. 01-2361. Additionally, in 2003-04, I provided an expert report and a deposition on cash balance plan disclosures in Engers et al. v. AT&T and AT&T Management Pension Plan, CV-98-3660 (SRC). Otherwise, I have from time to time privately consulted for attorneys on issues of language clarity and reader understanding in various types of insurance contract litigation. In the present case I am working as a paid consultant and receive \$325 per hour plus travel and related expenses. A list of the documents I reviewed is on page ii of this report.

C. Preparation and Scope of Review. As part of my preparation for this investigation, I reviewed potentially applicable ERISA provisions concerning clear disclosure in SPDs. I was already familiar with these provisions in connection with the previous published research noted above. These provisions state that SPDs must "be written in a manner calculated to be understood by the average plan participant" and must "clearly [identify] circumstances which may result in . . . denial, loss, forfeiture or suspension of benefits

¹ Stratman, J. (1988). Contract Disclaimers In ERISA Summary Plans: A Deceptive Practice? *Industrial Relations Law Journal* 10, No. 3, 350 - 380.

that a participant or beneficiary might . . . reasonably expect the plan to provide” These regulations also provide that “any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure, or otherwise made to appear unimportant. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations.” Cross-references are required to descriptions of restrictive plan provisions if they are not disclosed “in close conjunction with the description or summary” of benefits.² Likewise, when changes are made to a plan, a summary of material modification(s) must be issued within 210 days of the change. This summary must also describe any benefit reduction in a manner that satisfies ERISA’s plan language provisions cited above. Specifically, the summary must be “written in a manner calculated to be understood by the average plan participant.”³

Additionally, I have also reviewed both the earlier and more recent versions of ERISA Section 204(h).⁴ The earlier version was passed as part of the Consolidated Omnibus Budget Reconciliation Act of 1985.⁵ This earlier version states that a pension plan “may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date . . . to each participant in the plan.” The version currently in effect was passed as part of Economic Growth and Tax Relief Reconciliation Act (EGTRRA) in 2002. This version states that “[a] pension plan may not be amended so as to provide for a significant reduction in the rate of future benefit accrual unless the plan administrator provides [a] notice . . . to each applicable individual . . . [This] notice . . . shall be written in a manner calculated to be understood by the average plan participant and . . . shall provide sufficient information . . . to allow applicable individuals to understand the effect of the plan amendment.”

I also carefully reviewed two GAO reports investigating communication and disclosure problems associated with conversions of traditional defined pension benefit plans to cash

² 29 U.S.C. §1022(a)(1) & (2); §2520.102-3(j) (1) and §2520.102-2(b). *Burke v. Kodak Retirement Income Plan*, 336 F.3d. 103, 110-11 (2d Cir. 2003).

³ 29 C.F.R. 2520.104b-3(a).

⁴ 29 U.S.C. 1054(h).

⁵ Consolidated Omnibus Budget Reconciliation Act of 1985, Title XI, § 11006, 100 Stat. 82 (1986).

balance plans.⁶ Both of these reports underscore the necessity of explaining the “hypothetical” nature of cash balance accounts, and the fact that pay and interest credits said to be “earned” in these accounts are not always paid to participants. Further, I have also reviewed discussions of actuaries’ obligations not to provide misleading hypothetical retiree examples and information about the effects of cash balance pension plan conversions to their clients.⁷ These discussions appear relevant to the issues addressed in this report because they were contemporaneous with the issuance of El Paso’s SPD and their Section 204(h) notices.

My investigation is framed by the fact that I am a written technical communication expert. I am not a pension actuary or a legal expert on benefits. Therefore, in performing my review, I assumed that the class can establish some facts to be true. My review was to determine whether, assuming those facts, El Paso’s SPD, precursor documents, and Section 204(h) notices have, or have not, adequately described the new cash balance benefit program. As per the actuarial declaration of Mr. Claude Poulin (April 15, 2008), the facts that I assumed to be true are as follows:

1) The rate of benefit accrual under the cash balance plan is significantly lower than the prior benefit accrual rate. In 1996 El Paso’s consultants (Mercer) also computed comparison ratios for each active employee showing 35-50% reductions in retirement benefits if they worked to age 60. Tab H.

2) Many participants experience long “wear away” periods during which accruals or pay credits under the cash balance plan are not paid from the participant’s cash balance account. As a result, many participants were never paid the credits they earned in a “hypothetical” cash balance account. Mr. Poulin calculates that those periods could extend for as many as 14 years.

D. Preview of Supporting Discussion and Methodology. I begin my discussion by focusing upon El Paso’s SPD and then discuss its ERISA Section 204(h) notices. I also provide analysis of precursor documents that El Paso distributed to employees starting in October, 1996. I do so in part because there is well developed communication theory and robust experimental research showing that order of presentation of information and

⁶ Private Pensions: Implications of Conversions to Cash Balance Plans. GAO/HEHS-00-185 (September 2000); Cash Balance Plans: Implications for Retirement Income. GAO/HEHS-00-207 (September 2000).

⁷ Amoroso, V. et. al. (2001). Pension professionalism. *Enrolled Actuaries Report* 26 (3), 4-6. Amoroso, V. et. al. (2002). ABCD cash balance letter: rephrasing the question. *Enrolled Actuaries Report* 27 (3), 1, 4-7.

repetition of statements has a powerful persuasive effect on listeners and readers alike.⁸ The more often readers read something, the more they believe it. That El Paso employees may have read some or all of the El Paso precursor documents *before* receiving and reading the SPD and Section 204(h) notices that the company later distributed must be appreciated. These precursor documents potentially shape the employee's expectations when they later read the SPD and Section 204(h) notices, and thus the way they interpret information presented in them. If these later, more official documents present statements that are different from or that contradict statements in the precursor documents, good communication practice requires the later documents to call readers' attention explicitly to these differences, so that readers are not confused by inconsistencies between documents or simply fail to perceive them. At the same time, many experimental studies in the decision science and communication literatures attest to the ways that prior communications can shape or interfere with the perception and interpretation of subsequent communications. Specifically, a consistently positive message about their pension benefits in the earlier El Paso documents would potentially "inoculate" plan participants against perceiving a negative message in later documents or reduce their diligence in seeking or perceiving negative information.⁹

To address the two issues indicated above (see pp. 1-2), I combined two methods of contemporary discourse analysis. One method is derived from Information Manipulation Theory (IMT) which distinguishes between texts which mislead readers by omission

⁸ O'Keefe, D. (2002). *Persuasion: Theory & Research* (Thousand Oaks, CA: Sage Publications); Hasher, L. & Chromiak, W. (1977). The processing of frequency information: an automatic mechanism? *Journal of Verbal Learning & Verbal Behavior* 16, 173-184; Hasher, L. Goldstein, D. & Toppino, T. (1977). Frequency and the conference of referential validity. *Journal of Verbal Learning & Verbal Behavior* 16, 107-112; Petty, R. & Cacioppo, J. (1979). Issue involvement can increase or decrease persuasion by enhancing message relevant cognitive responses. *Journal of Personality and Social Psychology* 37, 1915-1926.

⁹ McGuire, W. (1964). Inducing resistance to persuasion. In L. Berkowitz, Ed. *Experimental Social Psychology, Volume I* (New York: Academic Press); Eagly, A., & Chaiken, S. (1993). *The Psychology of Attitudes* (Fort Worth, TX: Harcourt Brace Jovanovich); Haugtvedt, C. & Wegener, D. (1994). Message order effects in persuasion: An attitude strength perspective. *Journal of Consumer Research*, 21, 205-218; Kahneman, D. & Tversky, A. (1984). Choices, values and frames. *American Psychologist* 39, 341-350; Shah, D., Domke, D., & Wackman, D. (1996). "To thine own self be true": Values, framing, and voter decision-making strategies. *Communication Research* 23, 509-560; Wang, X. (1996). Framing effects: Dynamics and task domains. *Organizational Behavior and Human Decision Processes* 68, 145-157.

versus commission.¹⁰ The other method is known as “topic analysis” which involves assessing the extent to which statements about the same topic are consistent or inconsistent with each other. This method also involves examining the extent to which terms and phrases are used consistently in relation to specific topics. Together, these methods required that I search El Paso documents for any statement directly or indirectly referencing the topics of reductions or differences in benefits obtainable under the old versus the new cash balance plan, including any descriptions, warnings, or assurances about such reductions or differences. Importantly, I did not simply examine relevant statements in isolation, but also analyzed how these statements would be understood by average plan participants given the particular temporal and spatial contexts in which the statements appear.

II. Discussion of El Paso’s Precursor Communications

The precursor documents fall into three groups, depending upon the employees whom they address. These documents appear in tabs A through C in their original chronological sequence.

Precursor Communications to El Paso Employees (tab A):

- Introducing CBP Select (October 1996) (P 0053-0056)
- Program Highlights: Pension Benefits from El Paso Corporation (P 0015-0026)

Precursor Communication to Former Sonat Employees (tab B):

- CPB Select Highlights for Sonat Employees (1999) (EPTO 0000953-970)

Precursor Communication to Former Coastal Employees (tab C):

- CPB Select Highlights for Coastal Employees (2000) (P 0197-0209)

¹⁰ Shuy, R. (1993). *Language Crimes: The Use and Abuse of Language Evidence in the Courtroom* (Cambridge, MA: Blackwell Publishers, Inc.); Shuy, R. (1998). *Bureaucratic Language in Government and Business*. (Washington, DC: Georgetown University Press); Solan, L. (1999). Can the legal system use experts on meaning? *Tennessee Law Review* 66, 1167-1199.

Precursor Communications to El Paso Employees

The precursor document titled “Introducing CBP Select” (tab A) that El Paso distributed in 1996 only offered unqualified, and therefore misleading assurances to participants about the continuous growth of CBP Select benefits:

You can’t lose. Your account will be credited with interest quarterly, so your account can only go up, never down (P 0055, highlight added).

You have your own personal account. It’s easy to watch your account grow; you’ll always know how much your account is at any time (P 0055; boldface type appears in the original; highlight added).

Consistent with these assurances, *no examples* in the precursor documents show how a participant’s accrual rate could be reduced. Instead, *all* of the examples show “winners” or else participants who would not lose any benefits relative to the benefits they would have received under the old plan. Notably, this practice of presenting only “positive” examples to average plan participants was judged in 2002 to violate the ethical code of actuaries by the Actuarial Board for Counseling and Discipline.¹¹ The absence of *any* negative examples, plus the company’s reassuring statements about the continuous growth of participants’ cash balance accounts (shown above), would in context prevent average plan participants from seeing or even suspecting that their overall benefit accrual rate was being reduced.

Participants’ belief that CBP Select credits would *continuously* grow, and that no wear away period could occur, is further reinforced by the graphic displayed on page 3 (P0017) of this document. This graphic shows that the curve for CBP benefit growth is *unbroken* and that participants’ CBP benefits ultimately catch up with their old plan benefits. A more accurate graphic for participants affected by a wear away would show both (1) a definite break in the CBP curve (to indicate the complete suspension of benefits), and (2) how long it might take for CBP benefits to catch up with old plan transition benefits.

El Paso may contend that average plan participants were warned about the existence of wear away periods in the example of “Sam” (p. 7, P0021). Close examination of the example shows that it illustrates a participant who retired *before* his benefits

¹¹ See Amoroso, V. et. al. (2001). Pension professionalism. *Enrolled Actuaries Report* 26 (3), 4-6. Amoroso, V. et. al. (2002). ABCD cash balance letter: rephrasing the question. *Enrolled Actuaries Report* 27 (3), 1, 4-7.

could have been harmed by such a period. The example purports to show an employee whose El Paso transition benefit (i.e., his old plan benefit) is greater than his cash account benefit at the point when he chooses to retire, in this case, precisely at the point his five year transition benefit ends. However, there is nothing in the example or on the page where the example is presented to suggest that, had Sam (or any employee) continued working *after* the five year transition benefit, CBP Select pay and interest credits could cease. On the contrary, the segment to the left of the example states *without qualification* that after the five year transition period ends “the employee earns pension benefits *only under CBP Select*” (p. 7, P0021, italics added). Indeed, the implication that participants are encouraged to draw from both this unqualified statement and the example itself is that there never would be a period during which CBP Select credits would not be paid. Sam’s example reassuringly shows that he is paid his higher transition benefit and that he has not lost any benefits as a result of the plan conversion. And, otherwise, there are no other examples in any of El Paso’s documents showing the occurrence of wear away periods.

It is true that the company offers a general disclaimer about all of the illustrative examples in this document. This disclaimer states, “Of course, your personal situation and calculations may be different [than the examples shown]” (p. 5) (P 0019). But neither this general disclaimer nor any other part of the precursor documents distributed to El Paso employees mentions that, contrary to what *all* of the examples in this document show or imply, many participants will be “losers” and suffer a significant reduction in their benefit accrual rate as a result of the transition. At the same time, no cross reference is provided with the disclaimer to pages where examples or explanations indicate a reduction in the rate of benefit accrual.

Precursor Communication to Former Sonat Employees

The most important difference between the plans indicated in Mr. Claude Poulin’s analysis (April 15, 2008) is the fact that many participants would lose 35 to 50% of the value of their final average pay plan benefits. As with regular El Paso employees, however, this outcome was also *never* explained or disclosed to former Sonat employees. On the contrary, in the Sonat precursor document titled “CBP Select Program Highlights for Sonat Employees” (tab B), El Paso made repeated, *unqualified* assurances that from the date of the transition to the new plan, participants could expect to *continuously* earn benefits under the new CBP Select plan, leading participants to believe that no disruption or reduction in benefits would occur. Three statements in this precursor document are pertinent here, as follows:

You have an account balance in the plan that will grow over time. (p. 3, EPTO 955)

Your *CBP Select* cash account steadily grows throughout your entire career with El Paso. (p. 3, EPTO 955)

CBP Select provides a steadily growing and competitive pension benefit throughout your career . . . (p. 4, EPTO 956)

Despite these assurances, the company may contend that it clearly informed longer service employees about reductions to their benefit accrual rate on p. 5 of this precursor, where the company states the following:

The two most frequent criticisms are that cash balance plans provide smaller early retirement benefits to longer-service employees than the traditional plans they replace and employers who implement them try to hide this fact from employees. Let's be clear: *CBP Select* may provide a smaller benefit to longer service employees who choose to retire early than a traditional pension plan may have. (EPTO 0000957)(highlight and italics added)

“While *CBP Select* provides a smaller benefit to longer service employees than a traditional pension plan, *CBP Select* also has positive features that may better fit the needs of employees and the company. (EPTO 0000957) (highlight and italics added).

Average plan participants with longer service are not likely to understand from these statements that a reduction in *their* existing benefit accrual rate—either at normal or early retirement--will occur as a result of transition to the new cash balance plan. As the following analysis will show, the language used in these statements is vague, evasive, and ambiguous. As a result, it will not be comprehensible to average plan participants.

First, the language is ambiguous because instead of comparing participants' benefits under their old final average pay plan with benefits provided under the new cash balance plan, both excerpts above compare El Paso's cash balance plan to “a traditional plan” (italics added). Whether or not this reference to “a traditional plan” is meant to include *the Sonat* traditional plan is not clarified by the company. Second, the language in the first highlighted text above is vague and evasive because the modal verb “may” implies the existence of conditions. Except to suggest misleadingly that only individuals electing early retirement *might* be affected, El Paso nowhere states what the conditions are, for example, what the age and years of service of the affected early-retirement employees may be. El Paso documents provided by plaintiffs' counsel suggest that the company clearly knew what groups of employees

would suffer reductions in their rate of benefit accrual (see tab H, “El Paso Energy Corporation, Pension Committee Meeting, August 14, 1996.”).

El Paso may also contend that the Sonat precursor documents warned employees in the following statement:

It should be noted, however, due to the transition benefit feature it may take several years before the cash account exceeds the transition formula for longer service employees. (“Cash Balance Plan Program Highlights for Sonat Employees” p. 3, EPTO 955)

I disagree that average plan participants could understand from this statement that they might suffer lengthy wear away periods during which they would accrue no additional pension benefits from either the old or new plan. This statement does not imply or suggest that CBP credits *might not actually be paid to participants*. Participants are not told that, after the five year transition ends, they may work for a number of years during which *they will be earning no additional benefits at all*, from *either* plan. Average plan participants without specialized professional knowledge of cash balance plan conversions could not conclude from this statement that they would not actually be earning *any* benefits. In fact, given the unqualified assurances of “steady” benefit growth under the new CBP Select plan that precede and follow this statement (see pages 8-9 of this report), the statement above could easily mislead employees into thinking that their CBP Select benefit, even if it lagged for a while compared to their old benefit, would equal their old benefit *by the time the five year transition ends*.

This particular understanding is made likely by three features, two semantic, and one contextual. First, the ordinary connotation of the phrase “several years” is “three to four years.” Certainly the term “several” does not suggest the possibility of wear away periods lasting as many as 14 years *after* the five year transition period ends, as per Mr. Poulin’s report (April 15, 2008). Second, the modal verb “may” implies the existence of conditions, but El Paso nowhere explains exactly how or why “it may take several years” for the cash balance benefit to catch up. Also as per Mr. Poulin’s report, El Paso clearly knew that it might take *many more than* “several years” because the company set participants’ new opening account balances at a value lower than the value of participants’ existing benefits, and the difference in this value would continue to increase during the five year transition. Additionally, the modal verb “may” obscures *which groups* of employees might be affected, specific information which the company clearly had available and could have provided to participants to help them understand (see tab H, “El Paso Energy Corporation, Pension Committee Meeting, August 14, 1996.”).

Finally, in context, participants' belief that the lag or "catch up" period referred to in the statements above is harmless is made more likely given the example of "Gail"—an example which is offered in the Sonat precursor documents (see tab B at EPTO 959). Like the "Sam" example discussed above (see p. 8), this example also shows a hypothetical participant who retires at the end of the five year transition period. Unlike "Sam," Gail's CBP Select benefit is greater than (and thus overtakes) her transition benefit *before* her five year transition benefit expires. Nevertheless, like "Sam," Gail does not work beyond the five year transition period and she is therefore an employee who does *not* suffer any loss of future benefits from a wear away period. Moreover, just as was the case with regular El Paso employees, *no* example is provided to former Sonat employees that shows the existence of wear away periods much less the negative effect from wear away periods that many of these employees would endure.

Precursor Communication to Former Coastal Employees

The precursor communication titled "Cash Balance Plan Program Highlights for Former Coastal Corporation Employees" (tab C) consistently leads participants to expect that from the date of their transition to the new El Paso plan they would *continuously* earn CBP Select benefits. Specifically, this precursor offers participants the following unqualified, and therefore misleading, assurances:

[Your] opening account balance **will continue to grow** under the cash account benefit formula of CBP Select (p. 2, P 0199).

Your CBP Select cash account **steadily grows** throughout your entire career with El Paso (p. 4, P 0201).

El Paso may contend that the Coastal precursor documents warned employees in the following statement:

Please note that if you are a longer service employee, it may take several years before your cash account exceeds the value of the Coastal Transition Benefit ("Cash Balance Plan Program Highlights for Coastal Employees" p. 4, P 0201).

This Coastal statement is very similar to the ostensible warning statement occurring in the Sonat precursor document (see p. 10, above). I therefore disagree that average plan participants could understand from this statement that they might suffer lengthy wear away periods during which CBP credits *might not actually be paid to*

participants. Coastal participants are not told that, after the five year transition ends, they may work for a number of years during which *they will be earning no additional benefits at all*, from *either* plan. Average plan participants without specialized professional knowledge of cash balance plan conversions could not conclude from this statement that they would not actually be earning *any* benefits. In fact, given the unqualified assurances of benefit growth under the new CBP Select plan that precede and follow the statement (see above), this statement could easily mislead employees into thinking that their CBP Select benefit, even if it lagged for a while compared to their old benefit, would equal their old benefit *by the time the five year transition ends*.

This particular understanding is made likely by the same three linguistic features analyzed in the Sonat statement. First, the ordinary connotation of the phrase “several years” is “three to four years.” Certainly the term “several” does not suggest the possibility of wear away periods lasting as many as 14 years *after* the five year transition period ends, as per Mr. Poulin’s report. Second, the modal verb “may” creates some uncertainty about who may be affected and under what conditions. However, El Paso nowhere explains *how or why* “it may take several years” for the cash balance benefit to catch up. Also as per Mr. Poulin’s report, El Paso clearly knew that it might take *many more* than “several years” because the company set participants’ new opening account balances at a value lower than the value of participants’ existing benefits, and the difference in this value would continue to increase during the five year transition. The modal verb “may” also obscures *which groups* of employees might be affected, that is, depending upon employees’ age and years of service. It appears from the company documents in tab H, for instance, that the company clearly had such information available. The company could have easily provided this kind of information to participants to help them understand whether a wear away period might affect them and how long it might last, at least on an age/years of service basis.

Finally, as was the case for Sonat participants, Coastal participants’ belief that the lag or “catch up” period referred to in the statements above is harmless is made more likely given the example of “Gail”—the same example offered to Sonat participants (see tab C at P 0206). Again, this example shows a hypothetical participant who retires at the end of her five year transition period. At that point, her CBP Select benefit is greater than (and has exceeded) her transition benefit. Because she does not work beyond the five year transition, she is therefore an employee who does *not* suffer any loss of future benefits from a wear away period. Just as was the case with El Paso and Sonat employees, *no* example is provided to former Coastal employees that shows the negative effect from wear away periods that many of these employees would endure.

III. Discussion of El Paso's SPD

1) Does El Paso's Summary Plan Description (SPD) disclose that as a result of El Paso's conversion to a cash balance plan, the rate of pension benefit accrual will be significantly lower than the prior benefit accrual rate under the old plan?

Just as there were no statements, illustrative examples, or warnings in the precursor communications indicating that many participants would suffer a reduced rate of benefit accrual under the new cash balance plan, so also in El Paso's SPD (tab D) there are no statements, illustrative examples, or warnings indicating this reduction. Instead, all three groups of participants are only reassured that "The value of your El Paso Cash Account Benefit will continue to grow as long as you maintain a balance in your *CBP Select* Account" (p. 8, P0106). Even more strikingly, the putative "hint" concerning a possible loss of future benefits that is contained in the Sonat and Coastal precursor documents does not appear within El Paso's SPD.

El Paso may nevertheless contend that average plan participants should be able to use the formulae shown in the SPD to perform the mathematical calculations which would reveal the overall reduction in their rate of benefit accrual under the new cash balance plan. I disagree with this contention. The separate sections that purport to show the formulae used to calculate the early retirement and age 65 retirement benefit for each group of employees (a) would not be understandable to average plan participants, and (b) would not permit them to calculate their monthly benefit payments at retirement. These sections involve terminology and definitions only understandable to actuarial and pension benefit professionals. Some examples of such terms include the following: "reduced for early commencement" (p. 18, P 0116); "reduced actuarially" (p. 25, P 0123); and "prorata reduction for fractional years" (p. 22, P 0120). At the same time, no section of this document permits participants to compare directly, in "side by side" fashion, the benefit they would earn under the old plan (had it continued) and the benefit provided under the new cash balance plan. Instead, to use the different plans' formulae in their own future benefit computations, participants must laboriously integrate distinct, complex definitions and conditions that are separated across many sections and pages of the SPD. The document design places prohibitively heavy cognitive demands on average plan participants' comprehension as well as their computational processes. It is a highly detailed and technical document that appears aimed at professional actuaries or other benefit professionals who would be able to supplement the limited explanations and interpret the technical terminology with specific accounting knowledge.

2) Does El Paso’s Summary Plan Description disclose that as a result of El Paso’s conversion to a cash balance plan, many El Paso participants will experience long “wear away” periods during which they will earn no future benefit accruals at all?

Just as El Paso’s precursor communications contained no understandable warning about or explanation of the circumstances under which cash balance plan credits might not be paid to employees, i.e, during a “wear away” period, the El Paso SPD also does not warn about or explain such circumstances for *any* of the employee groups. The SPD contains no warning or illustration that wear away periods will occur, but instead only offers *unqualified assurances* of the continuous growth of CBP Select benefits—the same unqualified assurances that participants were offered in El Paso’s precursor documents. Following are the pertinent SPD excerpts:

Your El Paso Cash Account Benefit from ***CBP Select*** is based on the value of a hypothetical ‘account’ that is established in your name when you become a participant in the Plan. **Your account increases in value over time by being credited with quarterly pay credits . . . In addition, your account will receive quarterly interest credits. The value of your El Paso Cash Account Benefit will continue to grow as long as you maintain a balance in your *CBP Select Account*.**” (p. 8, P0106, highlight added)

“**After December 31, 2001, your Minimum Benefit will be frozen, and you will earn benefits only under your El Paso Cash Account Benefit.**” (p. 17, P 0115, highlight added)

In the first two highlighted portions above, the El Paso SPD, like the precursor documents already examined, states that employees’ benefits continue to grow in their CBP Select Account. The only qualification the company identifies in the SPD which would prevent these benefits from increasing is if the employee fails to “maintain a balance” in the account, e.g., by taking a distribution of benefits. Further, average plan participants will only be confused by the simultaneous reference to CBP Select accounts as both “hypothetical” accounts and “Cash” accounts. As seen in the above excerpts, the meaning of the term “hypothetical” is not explained; nor is it explained anywhere else in the SPD or in any of El Paso’s precursor documents. Thus, as noted in the GAO reports cited earlier, average plan participants would not understand what “hypothetical” means; they might easily think that a “cash” account simply contains “Cash,” i.e., actual dollars that are their’s, as in a bank checking or

pass book savings account.¹² Moreover, why the term ‘account’ is placed within quotation marks is not explained and does not constitute any sort of signal that average plan participants would understand.

The second excerpt above again states *without qualification* that after the five year transition period ends, participants will earn pension “benefits only under [their] El Paso Cash Account Benefit.” This second excerpt is essentially repeated in the sections of the SPD targeting former Sonat and former Coastal employees, as well. There is no suggestion in these sections that there ever would be a wear away period *during which no CBP Select benefits would be paid and that such a period could last many years*. On the contrary, participants’ belief that CBP Select credits would be continuously earned from the time their CBP account opens is reinforced by the repeated and unqualified assurances of continuous growth that employees encountered previously in the precursor documents and again in the SPD itself.

In summary, then, El Paso’s SPD does not provide disclosure of any of the benefit reductions resulting from the transition to its cash balance plans. Notably, even the ostensible warnings that were embedded in the Sonat and Coastal precursor documents are *not* re-presented within the SPD (see pp. 10-11, above). If El Paso intended the precursor documents to serve the same statutory function as served by an SPD, there is no indication of that intention within any of the precursor documents or within the SPD. Thus, average plan participants who read *all* of the documents about the plan conversion that El Paso provided would reasonably assume that the SPD is the only “official,” and therefore reliable, ERISA disclosure document. Close examination of the SPD indicates that participants would find nothing within it to suggest that their benefits under the new CBP Select plan would be significantly less than those in their existing final average pay plans—with overall benefit reductions ranging from 35 to 50% of their old plan benefits. Participants are also not informed that, because of the reductions to their new opening account balances and the imposition of the five year transition period, they could suffer a wear away periods lasting as many as 14 years during which they would earn *no* further benefits from *either* their existing plan *or* from the new CBP Select plan. Instead, they are misleadingly reassured that CBP Select benefits would be paid continuously following the five year transition period.

¹² Private Pensions: Implications of Conversions to Cash Balance Plans. GAO/HEHS-00-185 (September 2000); Cash Balance Plans: Implications for Retirement Income. GAO/HEHS-00-207 (September 2000).

IV. Discussion of El Paso's Section 204(h) Notices

El Paso distributed ERISA Section 204(h) notices to three groups of employees: El Paso employees (in December, 2001); former Sonat employees (in December, 1999); and former Coastal employees (in March 2001). With respect to the two factual questions I have been asked to address, my specific findings concerning these notices follow.

1) Do El Paso's Section 204(h) notices disclose that as a result of El Paso's conversion to a cash balance plan, the rate of pension benefit accrual will be significantly lower than the prior benefit accrual rate under the old plan?

None of the notices provides any statements indicating that, as a result of the transition to the new CBP Select plan, participants' future rate of benefit accrual would be significantly lower than the benefit accrual rate provided by participants' existing final average pay plan. Indeed, the notices provide *no* indication that many participants would see benefit reductions ranging from 35 to 50% when compared with their old plan benefits.

El Paso may wish to contend that the 204(h) notices disclose to average plan participants the possibility of benefit reductions. The company may specifically argue that each of these notices contains a "hint" sufficient to inform participants about such a reduction. Alternatively, the company may contend that its 204(h) notices, when *combined with* statements in its previously distributed precursor documents, indicate that participants will suffer future benefit reductions.

I must disagree with these contentions. I contend instead that a reduction in the rate of benefit accrual and overall reduction in benefits is *not* communicated in a manner calculated to be understood by average plan participants. As explained below, the "hint" contained in the notices is so vaguely and ambiguously expressed that participants would be very unlikely to notice it--let alone comprehend it. Even assuming for the sake of argument that participants could comprehend that it signaled *some* kind of benefit reduction for *some* participants, they could not begin to comprehend the size and extent of the benefit reductions involved given the complete lack of explanation accompanying this "hint." The language of this "hint" is nearly identical in all three 204(h) notices. Nevertheless, below I analyze each 204(h) notice separately because, first, the text surrounding the "hint" in each notice differs, and second, the different employee groups would have read somewhat different precursor documents prior to reading the putative Section 204(h) notices.

The El Paso Corporation Pension Plan: Notice of Plan Changes

Average plan participants are not likely to understand that they will suffer significant benefit reductions from this Notice (tab E). And even if they do understand that some type of reduction might be involved, they could not begin to understand the extent and impact of the reductions, with some participants losing nearly half of the benefits they would have earned under their previous plan's final average pay formula. The following analysis will elucidate why El Paso employees reading this notice will likely not understand it.

First, in the initial paragraph (second sentence) participants are told that this notice "is simply a reminder of how the plan was changed." This statement may well lead participants to read no further, believing they already "know" what the transition involves from El Paso's precursor communications. However, in contrast with what the phrase "simply a reminder" would suggest, neither El Paso's Section 204(h) notice nor any of the precursor documents inform participants that the conversion will result in a significant reduction in their accrual rate and a significant overall loss in pension benefits.

Calling this notice "simply a reminder" (first paragraph) and stating that it "*again summarizes* how your benefits will be affected" (italics added, second paragraph) may not only deter participants from reading further, it is also deceptive. As shown above, El Paso participants were *not* previously warned in any precursor documents about significant benefit reductions. On the contrary, they were repeatedly assured about continuous growth and not shown any illustrative examples of participants who stand to suffer benefit reductions.

Assuming participants do read beyond these stipulations that the notice contains no new information, they will be only be confronted with vagueness and evasion in its third, fourth, and fifth paragraphs. In the third paragraph employees are told (as they were in the precursor documents) that they will cease earning benefits *from their old plan* when the transition period ends. The paragraph states that "credited service and earnings that occur after the date the minimum benefit stops accruing [i.e., December 31, 2001] will be disregarded when the minimum benefit is calculated." However, in the fourth paragraph participants are then told *without qualification* that their "cash account balance *grows* with pay credits and interest credits." Participants are not told in this sentence that, in addition to earning no further benefits from their old plan, *they will in fact see a significant reduction in the rate of benefit accrual and suffer a large reduction in monthly retirement benefits compared with the old plan.*

The repetition of this unqualified assurance about continuous growth in their cash

balance accounts will work to inoculate employees from recognizing the putative “hint” about reductions which occurs in the fifth paragraph, shown here:

2. After December 31, 2001, for a participant whose minimum benefit is greater than the cash account benefit, accruals under the Plan *may effectively* cease until the participant’s cash account benefit exceeds the minimum benefit earned as of December 31, 2001. This period of non-accrual will be more likely to affect individuals who elect early retirement (*italics added*).

The first of these two sentences is both evasive and ambiguous. It is evasive because the modal verb “may” together with the qualifier “effectively” implies the existence of conditions. However, participants would be unable to understand these conditions, because no further description of them is provided. Except to vaguely hint that individuals electing early retirement “will be more likely” to be affected, El Paso does not explain which groups of participants seeking early retirement might be affected, why or how these groups are at greater risk, or to what degree. The company clearly had much more specific information available about age and service groups who would suffer large reductions in their benefits but does not communicate any of that information here (tab H).

In addition to being evasive, the first sentence is also ambiguous, in two distinct ways. First, it is *referentially ambiguous*. When participants read that “accruals under the Plan may effectively cease,” they will not understand that the term “accruals” refers to or includes the pay and interest credits provided by the cash balance plan. Participants will not understand this reference because in the precursor documents the terms “accruals” and “accrue” are used *only* in reference to participants’ traditional defined benefits under their old plan. For instance, in the “Sam” example provided on p. 7 (P0021) of the “Program Highlights” precursor document, participants would have read that:

The employee’s benefits under the old plan formula will **continue to accrue** from January 1, 1997 until December 31, 2001 (*highlight added*).

The same restricted use of the term “accruals” to refer to participants’ old plan minimum benefits also occurs at the start of the notice itself, in its very first sentence:

Effective December 31st, all participants described below in item 1 will cease accruing a minimum benefit under the El Paso Corporation Pension Plan (the “Plan”).

Thus, participants will not grasp that “accruals” refers to benefits accumulated in

their “cash account.” Instead, they will likely think the statement in the notice simply refers to the cessation of their old plan benefits, which they had been told about repeatedly before.

Also referentially ambiguous in the fifth paragraph is the use of the term “Plan.” Participants may reasonably think that the term “Plan” is still referring *only to their existing plan*, because the very first sentence in the notice stipulates that the term “Plan” refers *only* to the “minimum benefit,” which is also the five year transition benefit. And otherwise, the notice nowhere states that the term “Plan” includes the new cash balance plan.

It is cognitively onerous for average plan participants to have to refer back to the start of the notice to retrieve a definition needed to interpret a statement made in its fifth paragraph. Yet, even participants who go to this effort may reasonably think that the phrase “accruals under the Plan” only means accruals under the *existing plan*, especially since (a) El Paso precursor documents have repeatedly stated that accruals under the existing plan will cease at the end of the five year transition period, and (b) the terms “accrual” and “accrue” have never been used before in reference to the growth of benefits under the cash balance plan (i.e., in El Paso’s precursor documents).

The first sentence in the fifth paragraph is also *contextually ambiguous* because it contradicts previous, repeated, and unqualified assurances in the precursor documents that CBP Select accounts would *only continue to grow*. In the context of this previous stream of assurances, average plan participants might easily fail to notice this ambiguous “hint.” Instead, for the reasons given above, participants may reasonably think this statement simply reminds them about the “freezing” of their existing “minimum” transition benefit, especially given that the notice is misleadingly downplayed at the outset as being only a “reminder.” Effective as well as ethical communication practice for ordinary readers requires that when official disclosure documents present statements that contradict statements made in documents previously distributed, the later documents—in this case the 204(h) notice—should *explicitly* call readers’ attention to these differences, so that they are sure to catch them. In contrast with such “reader-friendly” practice, the way this entire notice is framed works to inoculate participants against understanding or even noticing the ambiguous “hint” that is buried in the fifth paragraph. Indeed, these hypotheses are consistent with and illustrated by the deposition response (at tab I) of Mr. Muckelroy (plaintiff) to Mr. Nadel’s (defense counsel) question concerning the term “accruals” as used specifically in the putative hint:

14:14:01 (5-7) **Q. (Mr. Nadel)** Okay. Do you know what it means for accruals

under the plan to effectively cease?

14:14:23 (8-10) A. (Mr. Muckelroy) I would assume that it means accruals under the old plan may effectively cease? Yeah, they could cease. (Highlight added).

Similarly, the depositions of Ms. Ballesteros (plaintiff) and Mr. Tomlinson (plaintiff) (also at tab I) show that they cannot understand what the entire phrase, “accruals under the plan may effectively cease,” means:

13:40: 33 (7, 22) A. (Ms. Ballesteros) Well, the phrase “. . . accruals under the plan” is a little confusing because they don’t specify which plan . . . I didn’t understand what they mean by accruals would cease.”

10:11:28 (5-8) A. (Mr. Tomlinson) I’m confused as to what plan we’re talking about, cash balance plan or defined benefit plan. So the entire sentence doesn’t make sense.

The reactions of all three of these plaintiffs (which I did not see until my report was completed), is exactly what my linguistic analysis above predicts would be likely to occur when participants attempt to comprehend the language used in the “hint.”

Sonat Inc. Retirement Plan: Notice of Plan Changes

As with the El Paso notice, the notice sent to Sonat participants (tab F) encourages them to believe that it is simply a reminder of what they learned about the transition to the cash balance plan from precursor documents. In the second paragraph, the Sonat notice states:

You have received summaries that explain how you will accrue benefits under the El Paso Plan and how your benefits differ from the benefit you earned under the Sonat Plan. To comply with the Employment Retirement Income Security Act of 1974, as amended, the following *again summarizes* how you will be affected (p. 1, italics and highlight added).

As with the notice for El Paso employees, here the phrase “again summarizes” may lead Sonat participants to read no further, thinking they already know what the transition involves. Thus, former Sonat employees would have little or no incentive to read further. Worse still, they would have little understanding that the legal purpose of this notice is to clearly indicate that a reduction in their pension benefits *will* occur.

This lack of participant understanding is made more likely because the precursor document sent to former Sonat employees did not inform them that they might suffer significant reductions in their benefit accrual rate and thus large reductions in their future benefits compared with what their old plan would have provided. When El Paso states that “You have received summaries that explain . . . how your benefits differ from the benefit you earned under the Sonat Plan,” it is making a great exaggeration, if not simply a false statement. Reductions to their plan benefits would be a “difference” of obvious importance to plan participants. Yet as the preceding analysis of precursor documents shows, this crucial difference was never disclosed, let alone explained.

As was the case with the El Paso 204(h) notice discussed above, assuming that Sonat participants read as far as the fourth paragraph (numbered “2.”), they would be unlikely to comprehend the language used there, and for some of the same reasons. Just as in the El Paso 204(h) notice, Sonat participants are again reassured that their “cash account balance *will grow* with pay credits and interest credits” (third paragraph, italics added). The repetition of this unqualified assurance *in the notice itself*, together with the fact that employees also read *nothing* about the possibility of benefit reductions in El Paso’s precursor documents will work to inoculate them from recognizing the subsequent “hint.” Instead, they may reasonably think this statement is only a “reminder” about the cessation of their old plan benefit accruals. The likelihood of this understanding is increased by vague and evasive language within the “hint” itself:

After December 31, 2004, for a participant whose Sonat Transition Benefit is greater than the cash account benefit, accruals under the El Paso Plan *may effectively cease* until the participant’s cash account benefit exceeds the Sonat Transition Benefit earned at the end of 2004 (p. 1, italics added).

The phrase “accruals under the El Paso Plan” may confuse Sonat participants for two reasons. First, participants may not know or understand that the term “El Paso Plan” apparently means the new cash balance plan. It is true the first paragraph indicates that “the Sonat Plan will be merged into the El Paso Energy Corporation Pension Plan (the ‘El Paso Plan’).” But the notice otherwise never explicitly indicates that the “El Paso Plan” is simply the new cash balance plan. Second, as with the El Paso notices discussed previously, Sonat participants similarly will not understand that the term “accruals” refers to or includes the pay and interest credits provided by the cash balance plan. Participants will not understand this reference because in the Sonat precursor documents the terms “accruals” and “accrue” are consistently used *only* in reference to participants’ traditional defined benefits under their old plan. For instance, on page 7 (EPTO 959) of the “CBP Select Program Highlights for Sonat

Employees,” participants would have read that:

Over the next five years (until December 31, 2004 or termination if earlier), you will **continue to accrue** a benefit under the Sonat Inc. Retirement Plan final average pay formula (the Sonat transition benefit). (highlight added)

Given this earlier language in the precursor document they were sent, Sonat participants will not grasp that the term “accruals” in the notice refers to (or includes) benefits accumulated in their “cash account.” Participants will likely think instead that the statement in the notice simply refers to the cessation of their old plan benefits, which they had been told about before.

Second, the “hint” is also evasive, due to the use of the unexplained modal qualifier, “may effectively.” Even if participants could guess that “El Paso Plan” refers to the credits accumulated in their cash accounts, they cannot begin to tell from the phrase “may effectively” whether they are affected or not. Again, the company clearly had much more specific information available about age and service groups who would suffer large benefit reductions. The company could have easily communicated that information here.

Pension Plan for Employees of the Coastal Corporation: Notice of Plan Changes

Like El Paso and Sonat participants, Coastal participants are also not likely to understand from the same ostensible “hint” embedded in the Coastal notice (see tab G, page 2, second paragraph) that they would suffer significant benefit reductions.

Even though the Coastal notice does not mislead participants at the outset (as the Sonat and El Paso notices do) that it is simply a “reminder” of what they were previously told, participants would still not have an incentive to read further because they are not told what is the purpose of a Section 204(h) notice. Instead, they are only evasively told that “To comply with Employee Retirement Security Income Act of 1974, as amended, the following summarizes how your benefit *will be affected*” (P 0217, italics added). Participants are *not* told that the purpose of the 204(h) notice is to indicate whether their future pension benefits are being reduced.

Further, when reading this notice in light of El Paso’s precursor communication about the plan transition, average plan participants would likely be inoculated against noticing and comprehending the same embedded “hint,” and for the same linguistic reasons presented above.

First, as with the El Paso and Sonat notices, Coastal participants will not understand

that the term “accruals” refers to or includes the pay and interest credits provided by the cash balance plan. Participants will not understand this reference because in the precursor document that Coastal participants received the terms “accruals” and “accrue” are used *only* in connection with participants’ traditional defined benefits under their old plan. For instance, on pages 2 (P 0199) and 9 (P 0206) respectively of the “CBP Select Program Highlights for Former Coastal Corporation Employees,” participants would have read that

If you were an active participant in the Pension Plan for Employees of the Coastal Corporation (“Coastal Pension Plan”) on March 31, 2001, you will also continue to accrue benefits under the Coastal Pension Plan formula until March 31, 2006 (or termination of employment, if earlier) for purposes of calculating your Coastal Transition Benefit.

[and]

Over the next five years (until March 31, 2006 or termination of employment if earlier), you will continue to accrue a benefit under the Coastal Pension Plan formula (the Coastal Transition Benefit) (highlights added).

Given this consistent usage of the term “accrue” in the precursor document, Coastal participants will not grasp that the term “accruals” in the notice refers to benefits accumulated in their “cash account.” Instead, they will likely think that this putative “hint” in the notice (page 2, second paragraph) simply refers to the cessation of their old plan benefits, which they had been told about repeatedly before.

Second, the same precursor document consistently leads participants to expect that they would continuously earn CBP Select benefits. Adding to the effect of this previous inoculation, Coastal participants are reassured without qualification *in the notice itself* that their “cash account balance *will grow* with pay credits and interest credits” (fourth paragraph, italics added). Thus, if participants are able to understand anything from the putative “hint” at all, they may reasonably think that the clause, “accruals under the El Paso plan may effectively cease” (fourth paragraph, numbered “2.”) only refers to the cessation of their old pension plan benefits at the end of the five year transition.

Third, and finally, even if Coastal participants could guess that the terms “El Paso Plan” and “accruals” refer to the credits accumulated in their cash accounts, they could not begin to tell whether they are affected or not. As in the El Paso and Sonat notices examined above, the phrase “may effectively” implies certain conditions will determine whether an individual’s “accruals” will cease or not. But El Paso does not

mention or describe what these conditions may be. Moreover, participants would have no way of calculating or even estimating when these “accruals” would cease. Again, the company clearly had much more specific information available about age and service groups who would suffer large benefit reductions (see tab H). The company could have communicated that information here or else referred participants to sources where they could reduce the uncertainty provoked by such a vague qualification as “may effectively cease.”

2) Do El Paso’s Section 204(h) notices disclose that as a result of El Paso’s conversion to a cash balance plan, many El Paso participants will experience long “wear away” periods during which they will earn no future benefit accruals at all?

El Paso’s Section 204(h) notices also fail to inform participants that the cause of the significant reduction to their benefits is the fact that many will suffer lengthy wear away periods—in some case as long as 14 years--during which they will not earn *any* additional benefits from either the new cash balance plan or the old plan. El Paso may object that the company did disclose such wear away periods in its notices, specifically in the putative “hint” analyzed above. But for the reasons already explained in the preceding sections, average plan participants would be very unlikely to comprehend this “hint” or its import. Just as the statements in precursor documents discussed above would work to inoculate participants from understanding that the notices indicated a significant reduction to their overall pension benefits, the same statements in the precursor documents would also inoculate them from comprehending that the notices were warning them specifically about long wear away periods.

Nevertheless, El Paso may contend that certain statements or hypothetical examples in their precursor documents for each group of employees did inform participants that wear away periods causing significant loss of future benefits would occur. In the following two sections, I explain why I must disagree with this contention.

The El Paso Corporation Notice of Plan Changes

As discussed above, El Paso may contend that it notified participants about the existence of wear away periods in the following paragraph of its section 204(h) notice (tab E):

2. After December 31, 2001, for a participant whose minimum benefit is greater than the cash account benefit, accruals under the Plan *may effectively* cease until the participant’s cash account benefit exceeds the minimum benefit earned as of

December 31, 2001. This period of non-accrual will be more likely to affect individuals who elect early retirement (*italics added*).

The company may contend that average plan participants would construe this paragraph to indicate the existence of wear away periods because they had already been warned about the existence of wear away periods in a precursor, specifically in the example of “Sam” (p. 7, P0021, in tab A). However, an argument that average plan participants should be able to somehow combine the above paragraph in El Paso’s putative 204(h) notice with this previously presented hypothetical example and in that manner learn about wear away periods is highly implausible. As ordinary adult readers with no specialized knowledge of cash balance plan conversions, average plan participants would simply be unable to make such a connection. Certainly the paragraph above does not provide any sort of reference to the “Sam” example. But even if it did, as previously shown, the example *itself* does *not* show a participant who suffers a wear away period; nor does it imply the possibility of wear away periods (see p. 8, above). On the contrary, as previously shown, the example shows a participant who retires before his benefits could have been harmed by such a period.

The Sonat and Coastal Notices of Plan Changes

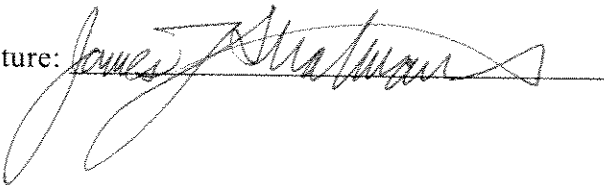
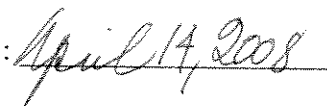
El Paso may also contend that average plan participants would construe the “hints” in the Sonat and Coastal Notices (tabs F and G) to indicate the existence of wear away periods because they had already been warned about such periods in the Sonat and Coastal precursor documents previously distributed to them. In particular, the company may contend that the example of “Gail” used in both precursor documents somehow discloses the existence of wear away periods. However, as with El Paso’s 204(h) notice, an argument that average plan participants should be able to somehow combine the “hints” in the putative Sonat and Coastal 204(h) notices with this previously presented hypothetical example, and in that manner learn about wear away periods, is highly implausible. Average plan participants would simply be unable to make such a connection. Certainly the putative Sonat and Coastal hints do not provide any reference to the “Gail” example. But even if they did, as previously shown (see p. 11, above), the example *itself* does *not* show a participant who suffers a wear away period; nor does it imply the possibility of wear away periods. On the contrary, the example shows a participant whose CBP Select Account overtakes her old plan benefit before the five year transition benefit ends.

To summarize, the foregoing analysis of El Paso’s purported Section 204(h) notices indicates the following:

First, none of the notices provides any statements adequately indicating that, as

a result of the transition to the new CBP Select plan, average plan participants' future rate of benefit accrual would be significantly lower than the benefit accrual rate provided by participants' existing final average pay plan. Moreover, these notices provide participants with virtually no indication regarding just how large their future loss of pension benefits might be, with some reductions as large as 50%. Nor do they offer any understandable explanation as to which participant groups would be affected.

Second, the existence of lengthy wear away periods is *not* communicated in a manner calculated to be understood by an average plan participant. Instead, the only "hints" that are provided concerning such wear away periods are rendered unintelligible by the ambiguous contextual and linguistic cues analyzed above. Average plan participants without much prior or technical knowledge of cash balance plans would be very ill-equipped to untangle these "hints," especially since all of the hypothetical examples and earlier statements they previously received about the plan conversion misleadingly encouraged them to believe that their cash balance benefits would continue to grow and would never be suspended.

Signature:  _____ Date:  _____

VITA

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DISSERTATION

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TEACHING INTERESTS

Legal writing, legal rhetoric, and legal argumentation; technical writing and editing; health risk communication; empirical research methods (behavioral and cognitive) in document design; usability testing; functional text analysis.

RESEARCH INTERESTS

Comprehension processes in technical, legal, and health-risk communication; cognitive, rhetorical, and forensic linguistic methodologies for understanding, designing, and improving scientific, health risk, technical, and legal documentation.

GRANTS AND FUNDED RESEARCH

2005-06 Law School Admissions Council (LSAC) (Newton, PA) (\$40,000), Research Grant. Law Students' Critical Case Reading and Reasoning Ability: Follow Up Study in Developing an Assessment Tool, Phase 2B. (Co-PI). With Professor Dorothy Evensen, School of Education, Penn State University (Co-PI), and Laurel Oates, University of Seattle Law School (Co-PI).

2005 (Summer Award). Law School Admissions Council (LSAC) (Newton, PA) (\$20,000), Research Grant. Law Students' Critical Case Reading and Reasoning Ability: Follow Up Study in Developing an Assessment Tool, Phase 2A. (Co-PI). With Professor Dorothy Evensen, School of Education, Penn State University (Co-PI), and Laurel Oates, University of Seattle Law School (Co-PI).

2004-2006 Colorado Institute of Technology (CIT) (Broomfield, Colorado). Teaching and Equipment Grant (\$46,581). With co-coordinators Filip Sapienza and John Killoran (University of Colorado at Denver). The grant provides CU Denver faculty in the Technical Communication program with training support, course release time, and software/hardware to boost the capability of the program's usability testing facility and to attract more sponsored projects from external clients needing such testing.

2003-04 Law School Admissions Council (LSAC) (Newton, PA) (\$52,450). Research Grant, To Develop an Assessment of First Year Law Students' Critical Case Reading and Reasoning Ability (PI). With Professor Dorothy Evensen, School of Education, Penn State University, and Laurel Oates, University of Seattle Law School.

1997-98 New Urban University (NUU) Research Grant, University of Colorado at Denver (\$1800, half-year). "Readers' Perception and Comprehension of Colorado Ballot Booklets." Additional support for experimental study to investigate booklet text and format design alternatives, and the possible impact(s) of these alternatives on voters' comprehension of ballot issues and their perception of booklet impartiality.

1996-97 Legislative Council of the Colorado Legislative Assembly. (\$500, Matching Grant With CU-Denver). "Readers' Perception and Comprehension of Colorado Ballot Booklets." Experimental study to investigate booklet text and format design alternatives, and the possible impact(s) of these alternatives on voters' comprehension of ballot issues and their perception of booklet impartiality.

1996-97 The Spencer Foundation, Small Grants Program. (\$11,995, One Year). "Analyzing Legal Cases: Exploring Relationships Between Task-Context And Students' Performance." Empirical study to investigate the possible relationships between different purposes for reading legal cases and students' reading and legal problem-solving strategies.

1996-97 Course Developer and Instructor, Global Change and Environmental Quality Program, University of Colorado. (\$5,924). "Distance Education Outreach To Colorado Citizen, County and State Environmental Organizations." To support a graduate-level, problem-based learning (PBL) course in health risk communication within a virtual, completely

on-line environment, targeting environmental health risk managers in government and non-profit sectors.

1995-97 Project Manager, Global Change And Environmental Quality Program, University of Colorado. (\$3170). "Cross Disciplinary Outreach To Citizen, State and Federal Environmental Organizations: Linking Technical Communication and Environmental Science." Funds used to support creation of collaborative, professional internships linking Masters degree students in technical communication and environmental science.

1991 Principal Investigator, Aisenberg & Kaplan, Attorneys At Law, Denver, CO. (\$600). Retained to investigate experimentally the comprehensibility or ambiguity of coverage exclusions concerning organ transplants described in health insurance policy.

1987 Project Manager, Grant From Robert N. Hackett Associates, Attorneys At Law, Pittsburgh, PA: "Simplifying Commercial Loan Contracts." (\$4,000). Awarded contract to study how readers use and comprehend commercial loan agreements and to redesign law firm's existing commercial loan agreement (approximately 300 pages); trained and supervised graduate students in management to develop a "plain language" commercial loan agreement for use by banks, real estate developers and attorneys; supervised research assistants' use of think-aloud reader protocols and interviews to discover different bank employees' needs for documentation design; reduced overall length of loan form by nearly one-third while meeting law firm's goals for coverage and client protection.

1984-85 Principal Investigator, American Bar Foundation: "Decision-Making In The Appellate Brief And Opinion Composing Process." (\$19,000). Awarded contract to study the decision-making of lawyers and judges as they compose legal arguments in real cases; created a taxonomy of appellate reading and composing problems and cognitive models of solution processes; collected extensive think-aloud writing protocols from attorneys representing opposing sides in the same case (i.e., appellant v. appellee); collected extensive think-aloud reading protocols from court clerks deciding the case under natural conditions; supervised three research assistants in the collection, transcription, and coding of interview and protocol data; research provided the basis for the dissertation and for three refereed publications to date.

1984-85 Principal Investigator, United Steelworkers Of America (USW). Contract Disclaimers In ERISA Summary Plan Documents. (\$4,000). Awarded contract from USW to study empirically readers' understanding of contract disclaimers in benefit plan documents; investigated what employees might infer from the language used in such disclaimers, and how readers' understanding of disclaimer affected their beliefs about their retirement benefits; published study findings in Industrial Relations Law Journal.

1982-84 Research Assistant, National Science Foundation Grant. "Cognitive Processes in Revision" (Linda Flower and John R. Hayes, Grant Directors). Assisted in the design of revision process experiments and experimental task directions; collected think-aloud protocols from professional writers, analyzed and coded the transcribed results; reviewed research literature pertinent to cognitive processes in writing and revision; set directions for theory development; provided improvements in working project manuscripts and helped compose research papers.

AWARDS

Faculty Research Summer Stipend (1997), University of Colorado at Denver (\$2750). To continue empirical research investigating the case reading and reasoning processes of first-year law students, begun under a Spencer Foundation Small Grant award in 1996.

Seed Money Award (1996-97), Research and Creative Activities Committee, University of Colorado at Denver (\$500). To pilot experimental study of voters' understanding of Colorado ballot booklets. An additional \$500 (matching) for this research is provided by the Legislative Council of the Colorado General Assembly.

National Council of Teachers of English (NCTE), Award for Excellence in Technical and Scientific Communication, 1995. Best Article Reporting Historical Research or Textual Study. "Transmuting Common Substances: The Cold Fusion Controversy and the Rhetoric of Science" *Journal of Business and Technical Communication* 9, (1995): 389-424. With Brad Thacker, National Renewable Energy Labs (NREL).

Seed Money Award (1994-95), Research and Creative Activities Committee, University of Colorado at Denver (\$600). To continue pilot experimental study of expert/novice differences in legal case reading skill and to prepare research proposals for external funding.

Teaching Excellence Award (1994), College of Liberal Arts and Sciences, University of Colorado at Denver. (\$500).

Seed Money Award (1993), Research and Creative Activities Committee, University of Colorado at Denver (\$300). To continue pilot experimental study of expert/novice differences in legal case reading skill and to prepare research proposals for external funding.

Nominated for Teaching Excellence Award (1992) College of Liberal Arts and Sciences, University of Colorado at Denver.

Faculty Fellowship Award (1993), University of Colorado at Denver. Awarded one semester release from teaching to further book, "Reading Legal Rhetoric: Cognitive Processes in Appellate Court Decision Making."

Junior Faculty Development Award (1992), University of Colorado at Denver, Research & Creative Activities Committee. Awarded funding (\$2000) for research pilot study, "Reactivity In Think-Aloud Editing Protocols," to support grant application to National Science Foundation.

Richard Braddock Memorial Award, Conference on College Composition and Communication (1987), with Linda Flower, John R. Hayes, Karen Schriver and Linda Carey, for research article, "Detection, Diagnosis and the Strategies of Revision," *College Composition and Communication*, 37, No. 1, February, 1986, 16 - 55.

EXPERIENCE

2008 - Present

UNIVERSITY OF COLORADO AT DENVER

Chair
Department of Communication

1996 - 2007

UNIVERSITY OF COLORADO AT DENVER

Director, Technical Communication Program
Department of Communication

1995 - 1996

Associate Professor (Tenured)
Technical, Legal Communication

1990 - 1995

UNIVERSITY OF COLORADO AT DENVER

Director, Graduate Studies
Department of English
Assistant Professor of English
Technical, Legal Communication

1981 - 1990

CARNEGIE MELLON UNIVERSITY

Adjunct Assistant Professor,
Management Communication
Graduate School of Industrial Administration

Instructor,
Legal Reasoning and Writing,
Advanced Composition and Argument

1984-85

UNIVERSITY OF PITTSBURGH, SCHOOL OF LAW

Senior Research Associate

1978-80

**NORTHERN KENTUCKY UNIVERSITY
LITERATURE AND LANGUAGE DEPARTMENT**

Instructor In Composition,
Literature and English Teacher Training

1974-78

**UNIVERSITY OF CINCINNATI
DEPARTMENT OF ENGLISH**

Teaching Assistant In Composition,
Literature & ESL

**TECHNICAL COMMUNICATION COURSES DEVELOPED AND TAUGHT
UNIVERSITY OF COLORADO AT DENVER (1990 - 1999)**

- (TC 5681/4681) Communication Issues in the Trial Court Process
- (TC 5510/4510) Usability Testing (graduate and undergraduate)
- (TC 5750/4750) Legal Reasoning and Writing (graduate and undergraduate)
- (TC 6620) Health Risk Communication: Theory, Research, Practice (graduate)
- (TC 5405) Technical Communication: Writing (graduate)
- (TC 3154) Technical Writing (undergraduate)
- (TC 5505) Technical Editing (graduate)
- (TC 5605) Rhetorical Theory for Technical Communication (graduate)
- (TC 6205) Research Methods in Technical Communication (graduate)

PAST ADMINISTRATIVE RESPONSIBILITIES

**Director, Technical Communication Program
University of Colorado at Denver**

Personnel Management

-- Recruit, manage Part-Time and Adjunct Faculty in technical communication for the following courses:

- TC 3120 Technical Communication
- TC 4120/5120 Technical Report Writing
- TC 4410/5410 Science Writing

TC 4750/5750 Legal Reasoning & Writing
TC 4300/5300 Multimedia Authoring
TC 4310/5310 Advanced Multimedia Authoring
TC 4290/52 90 Web Design

-- Manage course scheduling for the undergraduate Minor in Technical Communication, for two Graduate Certificates in Technical Communication, and for the M.S. in Technical Communication degree program.

-- Monitor the book ordering process, in concert with Department Administrative Assistant, for the above courses.

Student Recruitment, Advising, Supervision, and Career Development

-- Coordinate the process of screening, evaluating, and accepting/rejecting all student applications to the M.S. and Graduate Certificate Programs in Technical Communication in concert with other TC faculty. In 1998-99, the MSTC Program had approximately 35 students in progress toward the degree.

-- Advise graduate and undergraduate students about degree, minor, and graduate certificate program completion alternatives and requirements, from program entry to graduation.

-- Coordinate the screening of applicants for annually awarded Program Tuition Scholarships, and draft the announcements when awards are made.

-- Answer all telephone, email, hard copy, and face-to-face queries from prospective students concerning the Minors in Technical Communication, the Graduate Certificates in Technical Communication, and the M.S. program admission qualifications and degree completion requirements.

-- Review/draft letters on behalf of students requesting course credit transfers from other institutions.

-- Supervise the course re-validation process for graduate students who return to complete their degrees after an extended leave of absence.

-- Post notices of positions available worldwide for technical communication professionals on the MSTC Program's CU Virtual Conference site. (This information is obtained from list-servers/Internet databases dedicated to technical communication and related professionals).

Technical Communication Curriculum Development & Oversight

1) Plan new graduate and undergraduate courses in technical communication:

a) assess changes in technology, theory, and research relevant to the technical communication field;

b) monitor students' changing interests and demographic trends;

c) scout opportunities for course collaboration with other disciplines, colleges, and departments;

d) prepare all technical communication curriculum change requests (additions, deletions, content, and title changes) for the CLAS Curriculum Review Committee.

2) Coordinate the M.S. Comprehensive Examination and Capstone Processes, including the following:

a) draft the exam (with both faculty and student input);

b) schedule the oral and written portions (e.g., in Fall 1998, 13 students took this examination);

c) grade the oral and written portions;

d) respond to student queries about the examination, before and after the process;

e) serve upon all of the examination committees;

f) supervise Cooperative Education courses and Internships of graduate and undergraduate students in technical communication;

g) direct Master's Degree Theses and Capstone Projects In Technical Communication.

3) Develop an outcomes assessment plan (for North Central Accreditation) for the Technical Communication Program that accommodates both program goals and resources.

4) Annually provide curriculum change and quality information to the Western Interstate Commission on Higher Education (WICHE) concerning the M.S. Program's eligibility for out-of-state students' tuition relief.

Manage Program Communications & Advertising

-- Annually review/edit UCD Course Schedule & Catalogue narrative and course entries.

-- Annually review/edit MSTC Program Brochure for content and attractiveness.

-- Annually review requirements for the Minor in Technical Communication and make sure the Advising Sheet is current and accurate.

-- Manage the MSTC website, in concert with other TC faculty, for current information about the program (e.g., course/instructor changes, paperwork/procedure changes relevant to students, etc).

--Review/edit the Internet Web Site for the Technical Communication Program, for content accuracy, usability, and attractiveness.

Community Outreach Activities for the Technical Communication Program

-- Interact with employers and professional organizations, such as the Society for Technical Communication (STC), regarding both educational needs of professionals and Internship/Cooperative Education opportunities for graduate and undergraduate students.

-- Interact with UCD's Cooperative Education and Internship Office to find educationally relevant learning opportunities for students in the programs.

-- Look for external funding opportunities for research and courses associated with the program.

REFEREED ARTICLES

Research Papers, Monographs Published

"How Legal Analysts Negotiate Indeterminacy of Meaning In Common Law Rules: Toward a Synthesis of Linguistic and Cognitive Approaches to Investigation." *Language & Communication* 24, No. 1, 2004, 23-57.

"When Law Students Read Cases: Exploring Relationships Between Professional Legal Reasoning Roles and Problem Detection." *Discourse Processes* 34, No. 1, 2002, 57-90.

"Readers' Perception of Bias in Public Education Documents: The Case of Ballot Booklets" *Written Communication* 17 (4), 2000, 520 - 578.

"Readers' Comprehension of Temporary Restraining Orders in Domestic Violence Cases: A Missing Link In Abuse Prevention ?" *Forensic Linguistics* 3, (2), 1996, 211-231. (With Patricia Dahl as second author, Graduate School of Public Administration, Criminal Justice Program, University of Colorado at Denver).

"Transmuting Common Substances: The Cold Fusion Controversy and the Rhetoric of Science." Second author. With Brad Thacker (National Renewable Energy Laboratory, Golden, CO). *Journal of Business and Technical Communication* 9, No. 4, 1995, 389 - 424.

* Winner, 1995 NCTE Award for Excellence in Technical and Scientific Communication, for "Best Article Reporting Historical Research or Textual Study."

"Risk Communication, Meta-Communication and Rhetorical Stases in the Aspen-EPA Superfund Controversy." *Journal of Business and Technical Communication* 9, No. 1, 1995, 5 - 41. First author. With Carolyn Boykin, Marti C. Holmes, M. Jane Laufer and Marion Breen. * This paper has been retrospectively honored in the 20th anniversary issue of *JBTC* (2006) as an as one

of the top six articles published in *JBTC* during that period, in a commemorative written by former *JBTC* editor, Professor Charles Kostelnick, of Iowa State University.

"Investigating Persuasive Processes In Legal Discourse In Real-Time: Cognitive Biases And Rhetorical Choices In Briefs." *Discourse Processes* 17, No. 1, 1994, 1 - 57.

"Teaching Lawyers to Revise Legal Documents: A Role For Reader Protocols." *Legal Writing* 1, No. 1, 1992, 35 - 78.

"The Emergence of Legal Composition as a Field Of Inquiry: Evaluating The Prospects." *Review of Educational Research* 60, No. 2, Summer, 1990, 153 - 235.

"Contract Disclaimers In ERISA Summary Plans: A Deceptive Practice ?" *Industrial Relations Law Journal*, (10) No. 3, 1988, 350 - 380. Since publication, this research has been cited by two Federal circuit court decisions: Alexander v. Primerica Holdings, Inc., 967 F.2d 90, 93 (3rd Cir. 1992), and in Chiles v. Ceridian Corp., 95 F.3d. 1505, 1518-19 (10th Cir. 1996).

"Detection, Diagnosis and the Strategies Of Revision." *College Composition And Communication* 37 February, 1986, 16 - 55. With Linda Flower, John R. Hayes, Linda Carey and Karen Schriver. * Winner, 1987, Braddock Memorial Award from the Conference on College Composition.

"Teaching Written Argument: The Significance of Toulmin's Layout for Sentence-Combining," *College English* 44 No. 7, November, 1982, 718 - 733.

REFEREED BOOK CHAPTERS & ENCYCLOPEDIA ENTRIES

"Legal Rhetoric." In Theresa Enos, General Ed. *Encyclopedia Of Rhetoric and Composition: Communication From Ancient Times To The Information Age*. New York, NY: Garland Publishing, Inc., 1996, 383-385.

"Reactivity In Concurrent Think-Aloud Protocols: Issues For Research." In P. Smagorinsky, Ed. *Speaking About Writing: Reflections On Research Methodology*. Newbury Park, CA: Sage Publications, 1993, 89 - 112. First author, with Liz Hamp-Lyons as second author.

"Adversarial and Scholarly Theories Of The Appellate Court Brief: Implications For Appeal Court Judges And Their Staff Attorneys As Audiences." In D. Roen and G. Kirsch, Eds. *A Sense of Audience In Written Communication*. Beverly Hills, CA: Sage Publications, 1990, 115 - 139.

"Cognitive Processes In Revision." In S. Rosenberg, Ed. *Advances In Applied Linguistics, Volume II: Reading, Writing And Language Processing*. Cambridge University Press, 1987, 176 - 240. With John R. Hayes, Linda Flower, Karen Schriver, and Linda Carey.

"Sentence-Combining And Argument Skill: Toward A Pedagogy." In A. Kerek, M. Morenberg and D. Daiker, Eds. *Sentence Combining: A Rhetorical Perspective*. Carbondale, Ill: Southern Illinois University Press, 1985, 265 - 302.

EDITED JOURNAL VOLUMES

With Thomas M. Duffy, solicited, reviewed, and edited four articles for the May, 1990 issue of *Management Communication Quarterly*, devoted to written management communication.

REFEREED CONFERENCE PROCEEDINGS

"Staying Out of Court By Making Coverage Exclusions Clear: Insights From Empirical Research For Medical Plan Insurance Writers." *Conference Record, International Professional Communication Conference*, 1992.

NON-REFEREED ARTICLES

"A Reflection on 'Risk Communication, Metacommunication, and Rhetorical Stases in the Aspen-EPA Superfund Controversy.'" *Journal of Business and Technical Communication* 21, No. 1, 2007, 23-26.

"Developing an assessment of 1st year law students' critical case reading and reasoning ability (Phase 2)." Final Research Report for the funding agency, *Law School Admissions Council*, 2007. With Professor Dorothy Evensen, Penn State University, and Professor Laurel Oates, Seattle University School of Law. (104 pages).

"Developing an assessment of 1st year law students' critical case reading and reasoning ability (Phase 1)." Final Research Report for the funding agency, *Law School Admissions Council*, 2005. With Professor Dorothy Evensen, Penn State University, and Professor Laurel Oates, Seattle University School of Law. (93 pages).

"Explorations Into Law School Literacy," *Professions Education Researcher Quarterly* (15) No. 4, 1994, 2 - 8. With Dorothy Deegan, Pennsylvania State University, and Chris Rideout, University of Puget Sound, School of Law.

"Reply To Hagge and Kostelnick." *Management Communication Quarterly*, (4), No. 3, February, 1991, 381 - 386.

"Conceptualizing Research On Written Management Communication: Looking Through A Glass Onion." *Management Communication Quarterly*, (3), May, 1990, 429 - 451. With Thomas M. Duffy as second author. This article appeared as the lead article in the Edited Volume of the Quarterly shown above.

"Where Do Theories Of Instruction in Legal Writing Come From ? An Exploration." *American Association of Law Schools Newsletter, Section On Legal Writing, Reasoning And Research*, October, 1986, 17 - 37.

"Studying The Appellate Brief and Opinion Composing Process: A Window On Legal Thinking." *Juris*, (19) Nos. 1 and 2, Fall and Winter (Two Parts) Duquesne University Law School, 1985.

"Teaching Written Argument: Response to Professor Gross." *College English*, (46) No. 3, March, 1984, 314 - 319.

RESEARCH IN PROGRESS OR IN REVIEW

Research funding proposal submitted to the *National Science Foundation, Law & Social Sciences Program*. "Weighing confusability: Judicial rulings and ordinary readers' comprehension of employers' reservation of rights clauses in health benefit Summary Plan Documents under ERISA." (\$783,511). With Dr. Carole Chaski (Institute for Linguistic Evidence), Dr. Karen Kafadar (University of Indiana), and Mr. Matt Epstein (American Judicature Society). (August, 2007).

"Developing an assessment of first-year law students' critical case reading and reasoning ability." With co-authors Professor Dorothy H. Evensen (Penn State University, School of Education) and Professor Laurel C. Oates (University of Seattle School of Law).

INVITED SCHOLARLY PRESENTATIONS (1990 to Present)

Presentation, "An Empirical Assessment of 1st Year Law Students' Critical Case Reading and Reasoning Ability: Transition Points Needing Focused Instructional Intervention." *Biennial Conference of the Legal Writing Institute*. Mercer University School of Law, Atlanta, GA, June, 2006. With Professor Dorothy Evensen, School of Education, Pennsylvania State University.

Presentation, "Assessing Law School Literacy: Results from the Law School Admissions Council Field Test of Critical Case Reading and Reasoning." *National Reading Conference*. Miami, FL. December 2005 (forthcoming). With Professor Dorothy Evensen, School of Education, Pennsylvania State University.

Presentation, "Assessing 1st Year Law Students' Critical Case Reading and Reasoning Ability." *Biennial Conference of the Legal Writing Institute*. University of Seattle, July 23, 2004. With Professor Dorothy Evensen, School of Education, Pennsylvania State University.

Day Long Workshop, "Reading research methodologies: Modes for inquiry in legal interpretation and in the law classroom." *Notre Dame Law School Colloquium on Legal Discourse*, University of Notre Dame Law School, June 12, 2003.

Paper, "Reading the law: learning how students do it and teaching them how lawyers do it." *Biennial Conference of the Legal Writing Institute*. University of Tennessee, College of Law, Knoxville, TN, June 1, 2002.

Speaker, "Legal Communication in Technical Communication Programs: Worth Thinking About?" *Council for Programs in Technical and Scientific Communication (CPTSC) Annual Conference*, Pittsburgh, PA, October 12, 2001.

Speaker, "Improving Usability Testing: Recent Dutch Research and Its Implications." *Software Quality Association in Denver (SQuAD)*, Denver, Colorado, January 11, 2000.

Panelist, "Academic/Industry Collaborations in Usability Testing: An Opportunity for Theory-Building or Burial Ground?" *Council for Programs in Technical and Scientific Communication (CPTSC) Annual Conference*, Santa Fe, New Mexico, October 15, 1999.

Paper, "Voter Comprehension and Perception of State-Mandated Ballot Information: An Experimental and Linguistic Analysis." *Law and Society Association (LSA) Annual Conference*, Snowmass, Colorado, June 5, 1998.

Panelist, "Online Distance Education: A Boon or Bane to Higher Education?" *Colorado Speech Communication Association Annual Convention*, Denver, Colorado, April 24, 1998.

Workshop, "When Readers Study Themselves Reading: Using Think-Alouds To Improve Law Students' Case Reading And Analysis Skills." *Conference Of The Legal Writing Institute*, Seattle University School of Law. July 18, 1996.

Paper, "Readers' Comprehension of Temporary Restraining Orders in Domestic Violence Cases: A Missing Link In Abuse Prevention?" *International Association of Forensic Linguists (IAFL)*, Annual Conference. University of New England, Armidale, Australia. July 9, 1995. With Patricia Dahl, Graduate School of Public Affairs, University of Colorado at Denver.

Panelist, "Is The First Year Too Early To Teach Critical Reading Skills? What Recent Think-Aloud Studies Might Tell Us" *Conference Of The Legal Writing Institute*, Illinois Institute of Technology, Kent College of Law, Chicago, July 28 - 31, 1994. With Professor Dorothy Deegan of Pennsylvania State University.

Paper, "The Technical Communication Researcher As Expert Witness: Linkages Between Evidentiary, Methodological And Ethical Issues." *Michigan Technological University, Rhetoric and Technical Communication Program*, Houghton, MI. April 22, 1994.

Paper, "Exploring the Role of Rhetorical Task in Expert and Novice Case Reading and Analysis Processes," *American Educational Research Association (AERA)*, Annual Meeting, New Orleans, LA, April 5, 1994.

Roundtable Presenter, "Methods for Conducting Language, Reading and Literacy Research: Updates and New Approaches," *American Educational Research Association (AERA)*, Annual Meeting, New Orleans, LA, April 6, 1994. With John R. Hayes.

Plenary Address, "Composition Theory And Legal Education: Issues For Research." *American Association of Law Schools (AALS) Summer Workshop*, Washington, D.C. July 29 - 31, 1993.

Speaker, "How To Avoid Speaking At Cross-Purposes In Disputes Over Risk: A Look At The Aspen-EPA Lead Contamination Controversy." *U.S. Bureau of Mines*, Denver, CO April 28, 1993.

Discussant/Reviewer, "Academic Writing: Connecting Text, Context and Intertext." *American Educational Research Association (AERA)*, Annual Meeting. Atlanta, GA April 12, 1993.

Paper, "Reading The Common Law In Preparation For Argument: Expert-Novice Differences In Identifying Relevant Features Of Favorable And Unfavorable Precedent." *American Educational Research Association (AERA)*, Annual Meeting. Atlanta, GA April 12, 1993.

Speaker, "Framing Effects In The Reading Processes Of Appellate Court Clerks." *Holland and Hart, Attorneys At Law, Appellate Practice Group*, Denver, Colorado, November 24, 1992.

Paper, "Staying Out Of Court By Making Coverage Exclusions Clear: Insights For Medical Insurance Plan Writers." *International Professional Communication Conference*, Santa Fe, New Mexico, October 1st, 1992.

Paper, "Developing Cases For Legal Drafting: Using Readers' Experiences With Insurance Policies." *Conference Of The Legal Writing Institute*, University of Puget Sound, School of Law, Tacoma, WA. August 1st, 1992.

Roundtable Presenter, "Reactivity In Concurrent Think-Aloud Editing Protocols," *American Educational Research Association (AERA)*, Annual Meeting. San Francisco, CA April 20 - 25, 1992. With Professor Liz Hamp-Lyons.

Speaker, "Balancing Scholarly And Adversarial Techniques In Appellate Briefs: How To Avoid Cognitive Bias." *Holme Roberts and Owen, Attorneys At Law, Environmental Practice Group*, Denver, Colorado, August 6th, 1991.

Workshop, "Legal Writing: Research On Plain English," University of Puget Sound, School of Law, Tacoma., Washington, January 12th, 1991.

"Reading Legal Rhetoric: How Court Clerks Respond To Opposing Appeal Briefs." *American Educational Research Association (AERA)*, Annual Meeting. Boston, MA, April 16 - 18, 1990.

"Levels of Inquiry in Research in Written Management Communication" *Management Communication Association (MCA)* Annual Conference, University of Michigan, School of Business Administration, Executive Residence, Ann Arbor, MI, April 18 - 20, 1990.

SERVICE AS CONFERENCE SESSION CHAIR/DISCUSSANT (1990 to Present)

"Comprehensibility of Legal Language and Decision Logics," *Law and Society Association (LSA)* Annual Conference, Snowmass, Colorado, June 7, 1998.

"Placing Writing And Reading In Context," *American Educational Research Association (AERA)*, Annual Meeting, San Francisco, CA April 20 - 25, 1992.

"Evaluation of Writing: Issues for Production and Revision." *American Educational Research Association (AERA)*, Annual Meeting, Chicago, ILL April 4 - 5, 1991.

INVITED SCHOLARLY PRESENTATIONS (Prior to 1990)

Panel Discussion Leader, "Cognition and Negotiation," *Working Conference On Managerial Thought And Cognition*. August 10 - 12, 1989, Washington, D.C.

"How Novice Managers Understand Labor Contract Negotiations: Evidence From Initial Segments Of Negotiation Session Transcripts." *Management Communication Association (MCA)*, Rutgers University, New Brunswick, NJ, April 28 - 29, 1989.

"The Emergence of Legal Composition As A Field Of Inquiry: Evaluating The Prospects." *Conference Of The Legal Writing Institute*, University of Puget Sound, School of Law, Tacoma, WA August 5th, 1988.

"Designing Reader-Based Commercial Contracts." Guest Lecture, *University of Pittsburgh, School of Law*, October 27, 1987.

"Helping Management Students Improve Their Communication During Corporate Board Meetings: A Role For Modified Interaction Process Analysis." *Management Communication Association (MCA)*, New York University, April 11, 1987.

"The Rhetorical Dynamics Of Appellate Persuasion," *American Educational Research Association (AERA)*, Annual Meeting. Washington, D.C. April 20, 1987.

"Overcoming Obstacles To Research On Legal Writing Skill," *College Conference On Composition And Communication*. Atlanta, Georgia, March 20, 1987.

Plenary Address, "Teaching Legal Writing: The Role Of Theory And Research." *Conference of the Legal Writing Institute*, University of Puget Sound Law School, Tacoma, WA, July 17, 1986.

"Analyzing Communication Performance During A Board Of Directors Meeting: Points Of Departure For The Use Of Video In Research And Teaching." *Management Communication Association (MCA)*. Duke University, Fuqua School Of Business, April 4, 1986.

"Anatomy Of A Failed Appeal: Lessons From Reading And Writing Protocols For Teachers Of Legal Argument," *College Conference On Composition And Communication*, New Orleans, Louisiana, March 13, 1986.

"Teaching Managers To Revise Technical And Functional Documents." *American Business Communication Association Annual Conference*, Chicago, Illinois, October 31, 1985.

"Getting Inside The Legal Mind: Process-Tracing Methods For Exploring The Making And Understanding Of Legal Texts." *Conference On Language In The Judicial Process*, Georgetown University, Washington, D.C., July 27, 1985.

"How Judges Read Appeal Briefs And Write Opinions: Insights From Protocols." *Conference On College Composition And Communication*, Minneapolis, MN, March 22, 1985.

"Using Reader Protocols To Teach Revision Of Legal Texts." *Teaching Legal Writing Conference, National Endowment For The Humanities*, University Of Puget Sound, Norton Clapp Law Center, Tacoma, Washington, August 15 - 16, 1984.

"Defining The Task Of Revision: A Study Of Expert-Novice Differences." *American Educational Research Association (AERA)*, New Orleans, LA, April 25, 1984.

"Preparing Executives For Video-Interaction With The Press." *Management Communication Association (MCA)*, Colgate-Darden School of Business, Charlottesville, VA, April 14, 1984.

"Conflicts And Decision-Making In The Composing Process Of Legal Brief Writers." *Conference On College Composition And Communication*, New York City, March 31, 1984.

"Teaching Argument Skill Through Sentence-Combining: Toward A Pedagogy." *Conference On Sentence Combining And The Teaching Of Writing*, Miami University, Oxford, Ohio, October 21, 1983.

"Rhetorical Theory And Composing Process Paradigms In The Legal Textbook Tradition: Some Needed Research On Brief Writing." *The Penn State Conference On Rhetoric And Composition*, State College, Pennsylvania. July 5 - 8, 1983.

"Toward A Cognitive Process Theory of Legal Argument and Brief Writing." *Fifth International Conference On Culture And Communication*, Temple University, Philadelphia, Pa., March 25, 1983.

"Legal Writing As Problem-Solving: Changing the Product by Changing the Process." Address at the *Pittsburgh Legal Administrators Association*, Pittsburgh Press Club, September 17, 1982.

"Interviews and Invention: Eliciting Students' Tacit Heuristic Procedures." *College Conference on Composition and Communication*, Dallas, Texas, March, 1981.

"Student-Created Heuristic Models." *College Conference on Composition and Communication*, Washington, D.C., March, 1980.

PROFESSIONAL PAID CONSULTING

Expert Testimony in U.S. District Court of Connecticut: Provided a rhetorical and linguistic analysis of potentially misleading language in employee pension plan documents for the plaintiffs in a federal class action civil lawsuit arising under ERISA and EEOC, Amara et al v. CIGNA (Sept. 11-13, 2006). For Stephen R. Bruce, Attorney (Washington, D.C.).

Expert Testimony/Deposition: Provided a rhetorical and linguistic analysis of potentially misleading language in employee pension plan documents for the plaintiffs in a federal class

action civil lawsuit arising under ERISA and EEOC, Engers et al v. AT&T (September 2003-September 2006). For Stephen R. Bruce, Attorney (Washington, D.C.).

Usability Testing: Methods for Procedural and Non-Procedural Documents (May 23, 2001). Provided for The Society for Technical Communication, Rocky Mountain Chapter. Denver, Colorado. One day workshop. Trained documentation professionals how to (1) make decisions about user testing based upon text-analysis heuristics, and (2) to use think-aloud data to build and design heuristic models for document quality assessment.

Training Consultant, For Legislative Council of the Colorado General Assembly. Provided training in technical writing, technical editing and quantitative graphic design for Legislative Council Staff. Training focused improving Staff Memoranda to legislators, State Fiscal Notes, Issue Briefs, ballot booklets (for voters), and periodic white papers reporting on public policy issues (October 16, 23, 30, 1996).

Consultant, Disabled American Veterans (DAV), National Service Officers Training Program. Assisted in developing a course for DAV personnel in legal and professional writing, on behalf of the *International Training Academy, University of Colorado at Denver*. (1994).

Book Reviewer For Sage Publications, Inc. Provided written review of Nicole Caesarez, *Corporate Speech And First Amendment Rights* (1992).

Training Seminar, Martin Marietta Corporation, 1991: "Reporting Technical Information To Management."

Book Reviewer For Sage Publications, Inc. Provided written review of E. Rogers and D. Gibson, *Synergy On Trial: Texas High Tech And The MCC* (1991).

Educational And Communication Consultant to Davis, Graham and Stubbs, Attorneys at Law, Denver, Colorado (1990 - Present).

Media Interview Training, Senior Executive Program (SES), School of Urban and Public Affairs, Carnegie Mellon University, 1989-90. Designed and taught a television interviewing course, specifically for participants from the U.S. Office Of Personnel Management's Candidate Development Program.

Information Consultant for McGraw-Hill, New York, NY, 1988. Prepared written discussion of legal writing skill for Tom Goldstein and Jethro K. Lieberman's book, *The Lawyer's Guide To Writing Well*.

Book Reviewer for Scott-Foresman & Company, Glenview, Illinois, April, 1987. Prepared a written review of Joseph M. Williams, *Style: Ten Lessons In Clarity And Grace*.

Media Training for Gerald C. Meyers Associates, Inc., Crisis Management Consultants, November, 1986. Personal media interview training for Mr. Meyers prior to national television speaking tour.

Pennsylvania Governor's Senior Management Development Program - IV. February 11 - 14, 1986. Designed and taught a course in press interviewing skills, using videotape and television.

National Endowment for the Humanities, Lehigh University, Writing Across The Curriculum Project, Bethlehem, PA, May 24 - 25, 1984. "Applications Of Cognitive Research To The Teaching Of Writing." Retained by NEH grant directors at Lehigh to present two day seminar. The seminar reported recent research developments concerning cognitive processes in writing, and demonstrated classroom applications of this research for teachers in different academic disciplines.

The Martha Holden Jennings Foundation Writing Project, "Teaching the Composing Process: A Developmental Perspective" (For Primary, Middle and Secondary School Teachers of Writing) Cleveland State University, Cleveland, Ohio, October, 1982 - 84. Workshop series introduced teachers to pedagogical applications of developmental research in composition. The workshop explained the cognitive process differences between speaking and writing, and elaborated a composition pedagogy using the "procedural facilitation" techniques for teaching writing developed by Carl Bereiter and Marlene Scardamalia of the Ontario Institute.

University of Pittsburgh, Informal Education Program, "Writing Effective Training Materials for the Workplace," 1 Day Workshop, Pittsburgh, Pa., March 5, 1983. This workshop offers participants a step-by-step procedure for planning, drafting and evaluating worker training materials. Participants read and analyzed a case study concerning a small manufacturing firm. They were then called upon to plan, write and test "performance-based" training objectives, using the procedures introduced.

Mellon Institute for Science and Research, Materials Characterization Center, "Editing for Effective Technical Communications" 4 Sessions, Pittsburgh, Pa., July, 1982 (with Kenneth Dye). We analyzed problems in a variety of technical reports produced by chemical engineers, geologists, and other staff researchers of the Institute. To make sure our analysis and instruction was appropriately tailored to the problems of the participants, we created a workbook composed entirely of the technicians' own documents. We then used these documents in exercises illustrating revision principles.

Westinghouse Corporation, Law Division, "Writing for Work: Adapting Legal Communications for Business," 4 Sessions, Gateway Center, Pittsburgh, April, 1982 (with Kenneth Dye and Patricia Sullivan). Working with the Corporate Law Office Manager, we collected legal and business documents from Westinghouse attorneys. We analyzed these documents for both rhetorical and linguistic problems, and then developed an instructional program using the attorneys' own work in various inventional, organizational and revision exercises. We also investigated the underlying stasis formulated by the lawyers in their legal pleadings, and suggested methods for clarifying this stasis in complex disputes.

International Program For Executives, Graduate School of Industrial Administration, Carnegie Mellon University, "Writing and Editing as Problem-Solving Activities: Applications for Business Managers and Executives" 2 Sessions, April, 1982. The Program For Executives is an intensive six-week course in financial analysis, operations and management research,

strategic planning and other topics in administration science for corporation executives. I provided practical applications of recent research in writing, editing and document design.

Robert Morris College, "The Design and Evaluation of Business Case Studies: A Rhetorical Perspective." 2 Sessions, Coraopolis & Pittsburgh, Pa., January 26 - 27, 1982. This workshop provided college deans and business communications faculty with a rationale for using the case study method to teach written "problem-analyses," "policy statements," and other reports. The workshop also outlined basic methods for evaluating quality in writing, including an analysis of the strengths and weaknesses of each of these methods.

Western Pennsylvania School for the Blind, "Rhetorical Strategies for School-to-Home Correspondence" 1 Session, Pittsburgh, Pa., September, 1981 (with Kenneth Dye and Patricia Sullivan). Administrators, counselors and faculty of the School contracted for a workshop that would improve the quality of parent-teacher correspondence, and parent-teacher relations. As a major part of the workshop we simulated a problem in parent-teacher relations, based upon a review of sample letters and replies. We offered workshop participants alternative heuristics for understanding their audience's needs and sensitivities, and helped them plan a response.

University of Pittsburgh, Informal Education Program, "Editing: Top-Down and Bottom-Up," 1 Day Workshop, Pittsburgh, Pa. November, 1981 (with Kenneth Dye). For professional journal editors in the fields of medicine, computer science and engineering. We designed a "hierarchical" model for editing documents, i.e., a model that directed writers to first consider questions of audience and purpose, and to take an "inventory" of textual problems, before attempting to revise.

University of Pittsburgh, Informal Education Program, "Problem Solving Strategies for Business and Professional Writing," 3 Week Course, Pittsburgh, Pa. May - June, 1981.

University of Pittsburgh, Informal Education Program, "Editing: Top-Down and Bottom Up," 1 Day Workshop, Pittsburgh, Pa. May, 1981 (with Patricia Sullivan).

Procter & Gamble International, Cincinnati, Ohio, 1975 - 77. Employed to organize individualized programs of instruction in speaking and writing for Japanese managers and engineers from Procter & Gamble's Sunhome (Japan) subsidiary; wrote learning progress reports and recommendations concerning the Japanese interns' future training for the Sunhome subsidiary; edited brochures and bi-weekly technical reports for Sunhome engineers and managers.

University of Cincinnati, Department of Continuing Education, 1975 - 77. Served as cultural consultant and English language (ESL) tutor to new U.S. immigrants, including Russians, Indonesians, Chinese and Lebanese.

PROFESSIONAL AND SCHOLARLY SERVICE RECORD (Non-Compensated)

1992 - Present. Reviewer, *Research In The Teaching Of English*

1990 - Present. Reviewer, *College Composition And Communication*

1990 - Present. Reviewer, *Journal of Business and Technical Communication*

1993 - 2006. Reviewer, *Rhetoric Review*

1995 - Present. Research proposal reviewer, *National Science Foundation (NSF), Human Cognition and Perception Division, Language Sciences Subdivision*

1992 - Present. Editorial Board of *Legal Writing, The Journal of the Legal Writing Institute*, University of Seattle, School of Law.

1990 - 1997 Conference Proposal Reviewer. *American Educational Research Association (AERA) Annual Conference*. Have served as referee for 26 research proposals for the annual conference.

1992 - 1993 Reviewer, *Philosophy And Rhetoric*

1987 - 1992 Reviewer and Special Editor, *Management Communication Quarterly*

PROFESSIONAL AFFILIATIONS

- Member, International Association of Forensic Linguistics
- Member, National Council of Teachers of English
- Member, College Conference on Composition and Communication
- American Educational Research Association (AERA), Special Interest Group On Writing, Conference Paper Reviewer
- Former Member, Board of Directors, Legal Writing Institute
- Former Member, American Bar Association, Committee On Legal Writing (ABA)
- Former Member, American Bar Foundation (ABF)

UNIVERSITY SERVICE

Member, CLAS Ethics Committee (2005- 2008). Review allegations of student academic misconduct.

Member, CLAS Council Executive Committee. (2005 – 2008).

Member, University Human Research Committee (IRB), 2000 - 03. Review human subject research protocols for ethical and regulatory compliance, communication of risk issues.

Chair, Research Subcommittee, 2000-01, for Professor Barbara Walkosz, Department of Communication, University of Colorado at Denver. Supervise research evaluation of Professor Walkosz's performance for 4th year review.

Chair, Search Committee, Assistant Professor in Technical Communication, 1999. Search resulted in the hire of Dr. Filipp Sapienza.

Member, Graduate School Rules Committee, 1999, College of Liberal Arts & Sciences, University of Colorado at Denver. Empaneled to draft graduate school rules for the College as part of an ongoing decentralization process across the campus.

Member, Search Committee for Department Administrative Assistant, 1999, Department of Communication, University of Colorado at Denver.

Chair, Research Subcommittee, 1998-99, for Professor Benita Dilley, Department of Communication, University of Colorado at Denver. Supervise research evaluation of Professor Dilley's performance for comprehensive review.

Member, Dean's Advisory Council, 1996-98, College of Liberal Arts and Sciences, University of Colorado at Denver. Empaneled to review all cases for tenure and promotion, sabbatical, and reappointment within the College.

Member, Search Committee for Department Chair, 1995-97, Department of Communication, University of Colorado at Denver.

Chair, Personnel Review Committee, 1996, for Professor Benita Dilley, Department of Communication, University of Colorado at Denver. Supervise evaluation of Professor Dilley's performance for third year review.

Member, Tenure Review Committee, 1995, for Professor Michael Monsour, Department of Communication, University of Colorado at Denver. Carried out evaluation of Professor Monsour's research performance for seventh year review.

Director of Graduate Studies, 1991-93. Department of English, University of Colorado At Denver. Coordinate and revise graduate admission requirements with Directors of Master Degree programs in Technical Communication, Literature, Applied Language and Teaching of English; revise program procedures for submitting Master's level thesis and project proposals;

design and coordinate the Introduction to Graduate Studies Course for the Department of English; advise graduate students in all four programs concerning committee selection and thesis proposal procedures.

UCD Representative/Advisor, "Next Step" Project For Standards Based Education (SBE), Colorado Standards and Assessment Development and Implementation Council, 1994-95. Provide consultation to the Aurora, CO and Mapleton, CO School Districts to ensure that the high school graduation standards they develop to satisfy the draft *Colorado Content Model Standards for English Reading and Writing* are also congruent with UCD's current and future admission standards in these areas.

Member, Executive Committee, Department of English, University of Colorado At Denver, 1992-94.

Member, Academic Review Committee, University of Colorado at Denver, 1992-93. Responsible for assessing the self-evaluation reports of the Auraria Campus Library and the Ethnic Studies Program.

Member, Arts & Humanities Computer Lab Steering Committee, University of Colorado at Denver, 1992-93. Prepare recommendations for allocation of resources and pedagogical applications of a full-service Macintosh laboratory.

Member, Ad Hoc Committee For Minority Faculty Recruiting, 1991-92. University of Colorado At Denver, Department of English. Assisted with the successful recruitment of Professor Cynthia Wong.

Member, Composition Program Committee, University of Colorado At Denver, Department of English, 1991-92. Review and assist in revising undergraduate course sequence in composition; assist committee chair (Dr. Liz Hamp-Lyons) in establishing coherence in teaching of introductory composition courses; provide in-class evaluation of part-time, adjunct, and graduate assistant teachers of composition.

Member, Curriculum Development Committee, Ph.D. in Applied Language Program, Department of English, University of Colorado at Denver, 1990. Assisted in designing degree requirements and course sequence for new Ph.D. program.

Member, Professional Certificate Program in Technical Communication Committee, Department of English, University of Colorado at Denver, 1990-91. Planned curriculum, enrollment procedures, and guidelines for the Program.

Member, Personnel Review Committee, 1990, for Professor Charles E. Beck, Department of English, University of Colorado at Denver. Carried out evaluation of Professor Beck's teaching performance for third year review, and service performance for fifth year review.

Member, Salary Increment Review Committee, Department of English, University of Colorado at Denver, 1990-91. Designed evaluation form and criteria for assessing faculty publication and presentations as part of annual departmental salary review.

Member, University Task Force On Audio-Visual Services, Carnegie Mellon University, 1985. Responsible for collecting data from other universities on the need for and use of audio-visual technology in teaching written and oral communications; assisted in the preparation of comprehensive report for Vice-President of Academic Affairs.

Member, Task Force To Investigate Written Communication Skills, Carnegie Mellon University, 1982. Represented the Graduate School of Industrial Administration; advised University President regarding written communication problems of business students.