

MANAGING YOUR ENGAGEMENT

ANDREW A. AUGUST, ESQ.
PINNACLE LAW GROUP
SAN FRANCISCO, CALIFORNIA

LYNN CARL JONES, CPA, CFE
JONES & CO.
LOS ANGELES, CALIFORNIA

CHRISTIAN D. TREGILLIS, CPA, ABV
KROLL ZOLFO COOPER
LOS ANGELES, CALIFORNIA

Andrew A. August, Esq.

Andrew August is the founder of Pinnacle Law Group LLP in San Francisco and a founding member of *Ad Valorum* Solutions, LLC, a real property tax assessment consulting firm. Since 1983, Mr. August has practiced exclusively in the areas of business and real estate litigation, trying cases in both federal and California state courts. For more than ten years, Mr. August has been litigating Business and Professions Code Section 17200 cases on behalf of both plaintiffs and defendants and has been lead counsel in several prominent representative action cases. Mr. August has been a frequent lecturer on the subject. He also has extensive appellate experience in both federal and California state courts.

Mr. August co-authored one of the earliest articles written on RICO: "The Williams Act After RICO: Has the Balance Been Tipped in Favor of Incumbent Management," (35 *Hastings Law Journal* 53) with Professor William C. Tyson of the University of Pennsylvania School of Law. He has authored numerous other articles.

Mr. August is a graduate of the University of Colorado and the University of San Francisco School of Law. He is a former law clerk to Associate Justice Stuart R. Pollak of the First District Court of Appeal and the Honorable Roy L. Wonder (Ret.), when each presided in the Law and Motion Department of the San Francisco Superior Court.

Lynn Carl Jones, CPA, CFE

Lynn Jones is founder and managing principal of Jones & Co. He has practiced in litigation services as a certified public accountant for more than twenty years and as a certified fraud examiner for twelve years. Mr. Jones's practice includes forensic accounting, investigations for audit committees, economic damages measurement, and consulting in connection with banking, construction, CPA professional liability and a range of commercial litigation matters.

Mr. Jones was formerly a senior managing director for PricewaterhouseCoopers, LLP, and an accounting instructor at UCLA. He is CalCPA's Litigation Sections' Economic Damages Section chair.

Christian D. Tregillis, CPA, ABV

Christian Tregillis is a managing director in the Los Angeles office of Kroll Zolfo Cooper's Forensic and Litigation Consulting practice. In this role, he performs financial, economic, statistical and accounting investigations, and his work is often directed toward valuations of businesses and intellectual property, as well as damages and other issues in litigation. He has worked on over 300 matters in his 15-year career and has provided expert testimony in deposition, arbitration and at trial in both superior and federal court.

Prior to joining Kroll Zolfo Cooper, Mr. Tregillis was a partner at Deloitte & Touche, where he led the Los Angeles office's Intellectual Property Services Practice, as well as that practice's national Media & Entertainment industry team. He has authored numerous articles and spoken on economic damages issues, including *The Use of Multiple Regression in Legal Proceedings*, *The Valuation of Intellectual Property*, and *Lost Profits and Diminution in Value Calculations as a Measure of Damages*.

Mr. Tregillis is CalCPA's Litigation Sections' Economic Damages Section secretary. He also serves on the board of trustees and as the chief financial officer of the Center for Law in the Public Interest.



FEDERAL RULES OF EVIDENCE

Effective July 1, 1975, as amended to December 1, 2000

VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be

admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court-appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness'

duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

California Evidence Code

§ 800. Opinion testimony by lay witness

If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

- (a) Rationally based on the perception of the witness; and
- (b) Helpful to a clear understanding of his testimony.

§ 801. Opinion testimony by expert witness

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

- (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
- (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

§ 802. Statement of basis of opinion

A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

§ 803. Opinion based on improper matter

The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

California Code of Civil Procedure

§ 2034. Exchanges of expert trial witness information

(a) After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses to the following extent:

(1) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial.

(2) If any expert designated by a party under paragraph (1) is a party or an employee of a party, or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, the designation of that witness shall include or be accompanied by an expert witness declaration under paragraph (2) of subdivision (f).

(3) Any party may also include a demand for the mutual and simultaneous production for inspection and copying of all discoverable reports and writings, if any, made by any expert described in paragraph (2) in the course of preparing that expert's opinion.

This section does not apply to exchanges of lists of experts and valuation data in eminent domain proceedings under Chapter 7 (commencing with Section 1258.010) of Title 7 of Part 3.

(b) Any party may make a demand for an exchange of information concerning expert trial witnesses without leave of court. A party shall make this demand no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date.

(c) A demand for an exchange of information concerning expert trial witnesses shall be in writing and shall identify, below the title of the case, the party making the demand. The demand shall state that it is being made under this section.

The demand shall specify the date for the exchange of lists of expert trial witnesses, expert witness declarations, and any demanded production of writings. The specified date of exchange shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless the court, on motion and a showing of good cause, orders an earlier or later date of exchange.

(d) The party demanding an exchange of information concerning expert trial witnesses shall serve the demand on all parties who have appeared in the action.

(e) A party who has been served with a demand to exchange information concerning expert trial witnesses may promptly move for a protective order. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

The court, for good cause shown, may make any order that justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. The protective order may include, but is not limited to, one or more of the following directions:

- (1) That the demand be quashed because it was not timely served.
- (2) That the date of exchange be earlier or later than that specified in the demand.
- (3) That the exchange be made only on specified terms and conditions.
- (4) That the production and exchange of any reports and writings of experts be made at a different place or at a different time than specified in the demand.
- (5) That some or all of the parties be divided into sides on the basis of their identity of interest in the issues in the action, and that the designation of any experts as described in paragraph (2) of subdivision (a) be made by any side so created.
- (6) That a party or a side reduce the list of employed or retained experts designated by that party or side under paragraph (2) of subdivision (a).

If the motion for a protective order is denied in whole or in part, the court may order that the parties against whom the motion is brought, provide or permit the discovery against which the protection was sought on those terms and conditions that are just.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(f) All parties who have appeared in the action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand. The exchange of information may occur at a meeting of the attorneys for the parties involved or by a mailing on or before the date of exchange.

(1) The exchange of expert witness information shall include either of the following:

(A) A list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial.

(B) A statement that the party does not presently intend to offer the testimony of any expert witness.

(2) If any witness on the list is an expert as described in paragraph (2) of subdivision (a), the exchange shall also include or be accompanied by an expert witness declaration signed only by the attorney for the party designating the expert, or by that party if that party has no attorney. This declaration shall be under penalty of perjury and shall contain:

(A) A brief narrative statement of the qualifications of each expert.

