HOW TO KEEP YOUR EXPERT IN AND THEIR EXPERT OUT

Written by
Sean E. Ponist, Esq.
and
Harold A. Justman, Esq.

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HOW TO KEEP YOUR EXPERT IN AND THEIR EXPERT OUT

I. Expert Report/Exchange Requirements

A. Requirements under the Federal Rules of Civil Procedure

1. Timing

a. Exchange—usually, by deadline set by court order; absent an order, 90 days before trial (FRCP 26(a)(2)(D)(i))

b. Rebuttal exchange—usually, by deadline set by court order; absent an order, 30 days thereafter (FRCP 26(a)(2)(D)(ii))

c. Duty to supplement (FRCP 26(a)(2)(E) (intended to supplement, not allowed to add new expert or new opinions)

2. Disclosure Requirements (FRCP 26(a)(2), see Appendix—1 hereto)—statement providing:

a. Identity of experts;
b. Written expert reports;
c. As to experts not required to provide reports, a disclosure re expected subject matter and summary of facts and opinions of expert.

(Note—FRCP(a)(2)(C) re handling where no expert report required.)

3. Expert Report (FRCP 26(a)(2))

a. In writing and signed;
b. "Complete statement" of:

(i) all opinions and bases of opinions;
(ii) All facts/data considered;
(iii) Any exhibits to be used by expert;
(iv) Qualifications of expert, including publications in last 10 years;
(v) Trial or depo testimony in last 4 years;
(vi) Compensation.

4. Further expert discovery—expert disclosure requirements not exhaustive; further discovery permissible at deposition. (Adv. Comm. Notes to 1993 Amendments to FRCP 26(a)(2)(B)(v).)

5. Failure to comply with disclosure obligations/insufficient report—move for order directing proper report and then move to exclude if not forthcoming (FRCP 37(c)(1), 26(a)(1)).

B. Requirements under the California Code of Civil Procedure

1. Timing

a. Demand for exchange—10 days after initial trial setting or 70 days before trial (CCP § 2034.210).

b. Exchange—50 days before initial trial date (CCP § 2034.230).

c. Supplemental exchange: 20 days thereafter (CCP §2034.280).

d. Discovery cutoff: 15 days before initial trial date (CCP § 2024.030).

2. Expert Witness Declaration

a. Disclose experts or state no experts (*Fairfax v. Lords* (2006) 138 Cal.App.4th 1019).

b. Non-retained or party experts.

c. Substance of Declaration.

(i) Qualifications: A brief statement of the expert's qualifications (CCP § 2034.260(c)(1)).

(ii) General substance of intended testimony (CCP § 2034.260(c)(2)).

(iii) Ready to testify: representation that the expert has agreed to testify at trial and will be sufficiently familiar with the pending action to provide a meaningful oral deposition (CCP § 2034.260(c)(3) & (4).

(iv) Costs and fees: a statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining (CCP § 2034.260(c)(5)).

3. Production of Discoverable Reports and Writings—if demand is made for reports and writings, parties are required to produce all discoverable reports and writings (CCP § 2034.270).

a. Timing

(i) At time of exchange, if available (CC §2034.270)

(ii) Three business days before deposition otherwise (CCP § 2034.415)

b. Report requirements under California law.

c. To prepare or not to prepare a written report.

(Appendix—2, relevant provisions of the California Code of Civil Procedure.)

(Note—Handling communications with attorneys (see Appendix—3 hereto, stipulation re treatment of communications.)

4. Exclusion of Expert Testimony for Failure to Comply with Exchange Requirements

a. Trial court "shall exclude" expert opinion by party who has "unreasonably" failed to comply with exchange requirements (CCP 2034.300)

(i) Informal efforts not required, but advisable
(ii) Showing of prejudice not required, but advisable

b. Grounds for exclusion of expert testimony (where "unreasonable"):

(i) Failure to list the witness as an expert;
(ii) Failure to submit an expert witness declaration (or inadequate declaration);
(iii) Failure to produce discoverable reports and writings;
(iv) Failure to make the expert available for deposition.

(CCP § 2034.300; *Richaud v. Jennings* (1993) 16 Cal.App.4th 83, 90.)

II. Expert Opinion Requirements

A. Statutory Requirements

1. FRE 702 (see Appendix—4 hereto)
2. CA EC 801/802 (see Appendix—5 hereto)

B. Basic Requirements in a nutshell

1. Proper Expert
2. Proper Opinion
3. Proper Methodology
4. Proper Data

III. Ethos/Logos and Syllogisms

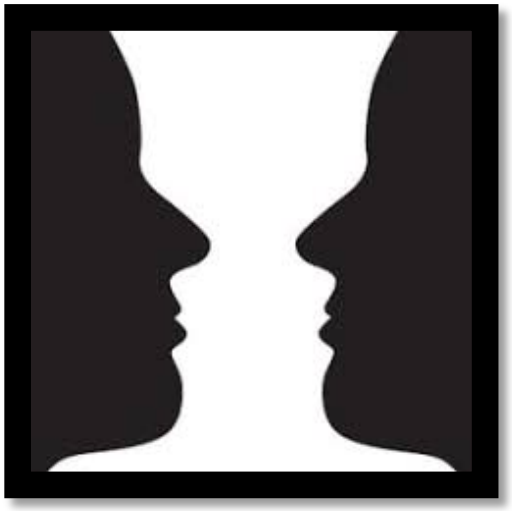
A. When Ethos is not Enough

Aristotle's theory of persuasion teaches us that there are three ways to convince an audience that an opinion is true. A speaker's expertise (Ethos) can convince an audience that an opinion is true.

A witness testifying in the form of an opinion may state on direct examination the

reasons for his opinion and the matter (<u>including, in the case of an expert, his special knowledge, skill, experience, training, and education</u>) upon which it is based . . . (California Evidence Code § 802.)

However, sometimes Ethos is not enough to convince a jury that an opinion is true. The following pictures with their accompanying opinions illustrate that Ethos is not always enough.



The Plaintiff's expert's opinion is that this is the picture of a wine goblet.

The Defendant's expert's opinion is that this is the picture of the profiles of two people.

B. When Logos is Needed

When the Ethos of the experts is similar, Aristotle teaches us that the speaker's rational arguments (Logos) can convince an audience that an opinion is true. A rational argument by an expert generally is based upon a methodology and appropriate data.

1. An Appropriate Methodology

An expert's credibility is based upon the methodology chosen for the problem presented

by the Plaintiff's complaint. The selection of an inappropriate methodology is a mistake.

> "207 Expert Employs Inappropriate Methodology.
> One of the important tasks for an expert in a real estate litigation matter is the selection of an appropriate methodology. Many experts compromise the ultimate credibility of any testimony they might present by selecting an inappropriate methodology."
>
> *222 Litigation Mistakes* by Stephen Roulac.

2. Appropriate Data

An expert's credibility is based upon the data chosen for the methodology used to address the problem presented by the Plaintiff's complaint. The selection of inappropriate data is a mistake.

> "219 Expert Employs Inappropriate Data.
>
> An effective damages calculation requires the appropriate methodology, data, and calculations.
> If the expert utilizes either inappropriate data − for the wrong period, wrong point of comparison, or wrong order of magnitude − or fundamentally unreliable and erroneous data, any calculations that the expert might make are going to be flawed. The right model with the wrong data inescapably leads to the wrong conclusion."
>
> *222 Litigation Mistakes* by Stephen Roulac.

C. Use of Syllogisms

A syllogism is a two-premise deductive argument. To test an expert's opinion, one may consider methodology as the major premise and data as the minor premise. (*Critical Thinking*, Moore and Parker, 10th edition.)

D. Examples of Syllogisms

1. Example One—Appraisal and valuations (see Appendix—6 hereto).

2. Example Two—Fiduciary duties and business opportunities (see Appendix—7 hereto).

3. Example Three—Fiduciary duties, *Horiike* and square footage (see Appendix—8 hereto).

E. Effective Use of Expert Reports Based on Syllogisms

An effective Rule 26 Expert Report can be based upon a syllogism. The major premise states the expert's methodology and the minor premise states the expert's data in support of the conclusion. When the expert's major and minor premises are appropriate for the problem presented by the Plaintiff's complaint, the expert's concluding opinion will be sound.

IV. Experts Depositions

A. Federal Court

1. Depositions take place only after report (FRCP 26(b)(4)(A)) [no report, no deposition, no expert testimony].

2. No obligation to produce expert—usually, stipulation; otherwise, need subpoena.

3. Expert fees:

a. No obligation to pay in advance of deposition.
b. Deposing party responsible for travel costs if chooses deposition location (note re common practice).

(Query—to take (or not take) expert deposition in a federal case.)

B. California State Court

1. Expert must state all opinions which she intends to give at trial. (*Jones v. Moore* (2000) 80 Cal.App.4th 557; *DePalma v. Rodriguez* (2007) 151 Cal.App.4th 159.)

a. Opinions withheld at deposition inadmissible. (*Jones v. Moore* (2000) 80 Cal.App.4th 557.)
b. Expansion on opinions offered at deposition admissible. (*DePalma v. Rodriguez* (2007) 151 Cal.App.4th 159.)
c. Changed or additional opinions may be admissible. (*Easterby v. Clark* (2009) 171 Cal.App.4th 772.)

2. Deposition particulars.

The general rules for depositions apply to expert depositions (CCP § 2034.410), with the exception of the following:

a. Location of deposition: within 75 miles of the courthouse where the action is pending (CCP § 2034.420).

b. Compensation for deposition.

(i) Party taking deposition shall pay "the expert's reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed … until the expert is dismissed" (C.C.P. § 2034.430(b)).

(ii) "The party designating an expert is responsible for any fee charged by the expert for preparing for a deposition and for traveling to the place of the deposition" (C.C.P. § 2034.440).

(iii) "The party taking the deposition shall either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition, or tender that fee at the commencement of the deposition … If the deposition of the expert takes longer than anticipated, the party giving notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an itemized statement from the expert" (C.C.P. 2034.450).

C. Deposition examination

a. Qualifications.

b. Bias toward litigation work and/or plaintiff or defense side. (*Stony Brook I Homeowners v. Sup. Ct.* (2000) 84 Cal.App.4th 691.)

c. Opinions.

d. Bases for opinions.

e. Matters referred to, considered or relied upon (including publications admitted to be a reliable authority).

f. Additional work.

g. Hypothetical questions: looking for the major gap in facts or logic.

h. Prior expert work (and the internet).

i. Criticisms of your expert.

(See Appendix—9 hereto, examination outline.)

V. Trial Judge as the Gatekeeper—*Daubert, Sargon* and *Motions in Limine*

Both the California Supreme Court and the Supreme Court of the United States have emphasized the trial judge's gatekeeping responsibility to exclude at trial opinions that are not sound.

A. Federal Court—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*

Federal Rule of Evidence 702 provides a handy summary of the trial court's gatekeeper responsibility, allowing testimony when:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion if (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

The following factors assist in determining the admissibility of particular expert testimony:

— whether the theory or technique involved can or has been tested;
— whether it has been subjected to peer review or publication;
— whether it has a high known or potential rate of error;
— whether it enjoys "general acceptance in the relevant scientific community";
— whether the opinion is admissible under the hearsay exception; and
— whether its probative value outweighs any prejudicial effect.

(*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US at 579, 593-595.)

B. California State Court—*Sargon Enterprises, Inc. v. University of Southern Calif.*

In the case of *Sargon v. U.S.C.*, the California Supreme Court affirmed a trial court's determination that an expert's opinion was not founded upon sound logic. The California Supreme Court held, in part, that the trial court had properly excluded at trial the expert's methodology as too speculative. In Sargon, the Court found that under Evid. Code § 802, a court may review not only the kind of material relied on by the expert, but also whether the matter supports the expert's analysis. (*Sargon Enterprises, Inc. v. University of Southern Calif.* (2012) 55 Cal.4th 747, 771-772.)

1. Facts of *Sargon*

Briefly, the case involved a lawsuit by a dental implant company against the University of Southern California for breach of a contract to clinically test the new implant that the company had invented. The company claimed damages for lost profits. The company's expert, an attorney and certified public accountant, testified that the company's lost profits ranged from $220 million to $1.18 billion. The company's expert had selected the market share methodology. According to the expert, market share in the dental implant industry is driven by (1) innovation, (2) clinical studies, and (3) marketing to general practitioners. Despite the company's lack of a meaningful marketing and sales department and net profits of merely $101,000, the expert projected the company's lost profits by comparing the company to the six dominant market leaders in the industry.

2. Holding of *Sargon*

The California Supreme Court affirmed the trial court's order excluding the expert's opinion holding that the expert's testimony provided no logical basis to infer that the company would become a dominant market leader. Accordingly, the expert's methodology was not sound.

C. Syllogistic Approach to *Daubert* and *Sargon*

Admissibility may be expressed through the following syllogism:

Major Premise

Reliable principles and method.

Minor Premise

Sufficient facts or data.

Conclusion

Reliable application of the methodology to the data.

D. Grounds for Exclusions

1. Expert not qualified on subject of opinion (EC §720)
2. Opinion not based on reliable facts, data or methodology (EC § 801)
3. Opinion based on "improper matter" (EC § 801)
4. Opinion not likely to assist trier of fact (EC § 801)
5. Opinion likely to prejudice, confuse or mislead jury (EC § 352)

(Note—EC §§ 402/802, Evidentiary Hearings.)

E. Tips to Avoid Exclusion and Best Practices

1. Suggestions re expert reports

    a. The power of the "introduction."
    b. Clearly laying out the expert's qualifications.
    c. Clearly laying out the expert's methodology.
    d. High-level vs. detailed opinions.
    e. Reviewing for weaknesses/cross-examination.

2. Suggestions re depositions

    a. Preparing expert.
    b. Legal opinions.
    c. Door shut/open.

APPENDIX—1

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in two separate documents. Notes of Decisions for subdivisions I to III are contained in this document. For Notes of Decisions for subdivisions IV to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 26.>

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by

stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.
(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.
(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.
(2) *Disclosure of Expert Testimony*.
(A) *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.
(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the facts or data considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;
(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
(vi) a statement of the compensation to be paid for the study and testimony in the case.
(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:
(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
(ii) a summary of the facts and opinions to which the witness is expected to testify.
(D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
(i) at least 90 days before the date set for trial or for the case to be ready for trial; or
(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.
(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*
(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:
(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;
(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and
(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.
(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.
(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.
(b) Discovery Scope and Limits.
(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
(2) *Limitations on Frequency and Extent.*
(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.
(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.
(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).
(3) *Trial Preparation: Materials*.
(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
(i) they are otherwise discoverable under Rule 26(b)(1); and
(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.
(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:
(i) a written statement that the person has signed or otherwise adopted or approved; or
(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.
(4) *Trial Preparation: Experts*.
(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.
(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.
(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
(i) relate to compensation for the expert's study or testimony;
(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.
(D) *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or

to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:
(i) as provided in Rule 35(b); or
(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.
(E) *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery:
(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and
(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.
(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***
(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
(i) expressly make the claim; and
(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.
(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.
(c) Protective Orders.
(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
(A) forbidding the disclosure or discovery;
(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
(C) prescribing a discovery method other than the one selected by the party seeking discovery;
(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
(E) designating the persons who may be present while the discovery is conducted;
(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.
(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.
(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.
(d) Timing and Sequence of Discovery.
(1) ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.
(2) ***Early Rule 34 Requests.***
(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:
(i) to that party by any other party, and
(ii) by that party to any plaintiff or to any other party that has been served.
(B) ***When Considered Served***. The request is considered to have been served at the first Rule 26(f) conference.
(3) ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:
(A) methods of discovery may be used in any sequence; and
(B) discovery by one party does not require any other party to delay its discovery.
(e) Supplementing Disclosures and Responses.
(1) ***In General.*** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:
(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
(B) as ordered by the court.
(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.
(f) Conference of the Parties; Planning for Discovery.
(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).
(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and

develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.
(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.
(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 28, 2010, effective December 1, 2010; April 29, 2015, effective December 1, 2015.)

APPENDIX—2

§ 2034.210. Simultaneous exchange of information; time to issue demand; discoverable reports and writings supporting opinion

Currentness

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:

(a) 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.
(b) If any expert designated by a party under subdivision (a) 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 Section 2034.260.
(c) 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 subdivision (b) in the course of preparing that expert's opinion.

Credits
(Added by Stats.2004, c. 182 (A.B.3081), § 23, operative July 1, 2005.)

§ 2034.220. Persons authorized to issue demand; time to make demand

Currentness

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.

Credits
(Added by Stats.2004, c. 182 (A.B.3081), § 23, operative July 1, 2005.)

§ 2034.230. Written demand; form and contents of demand

Currentness

(a) 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 chapter.

(b) 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.

Credits
(Added by Stats.2004, c. 182 (A.B.3081), § 23, operative July 1, 2005.)

§ 2034.260. Method of exchange; form and contents; expert witness declaration; form and contents

Currentness

(a) 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 serving the information on the other party by any method specified in Sections 1011 or 1013, on or before the date of exchange.
(b) The exchange of expert witness information shall include either of the following:
(1) A list setting forth the name and address of a person whose expert opinion that party expects to offer in evidence at the trial.
(2) A statement that the party does not presently intend to offer the testimony of an expert witness.
(c) If a witness on the list is an expert as described in subdivision (b) of Section 2034.210, 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 all of the following:
(1) A brief narrative statement of the qualifications of each expert.
(2) A brief narrative statement of the general substance of the testimony that the expert is expected to give.
(3) A representation that the expert has agreed to testify at the trial.
(4) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including an opinion and its basis, that the expert is expected to give at trial.
(5) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.

Credits
(Added by Stats.2004, c. 182 (A.B.3081), § 23, operative July 1, 2005. Amended by Stats.2017, c. 64 (S.B.543), § 3, eff. Jan. 1, 2018.)

§ 2034.270. Production of reports and writings; time and place to exchange

Currentness

If a demand for an exchange of information concerning expert trial witnesses includes a demand for production of reports and writings as described in subdivision (c) of Section 2034.210, all parties shall produce and exchange, at the place and on the date specified in the demand, all discoverable reports and writings, if any, made by any designated expert described in subdivision (b) of Section 2034.210.

Credits

(Added by Stats.2004, c. 182 (A.B.3081), § 23, operative July 1, 2005.)

§ 2034.280. Supplemental expert witness lists

Currentness

(a) Within 20 days after the exchange described in Section 2034.260, any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject.

(b) This supplemental list shall be accompanied by an expert witness declaration under subdivision (c) of Section 2034.260 concerning those additional experts, and by all discoverable reports and writings, if any, made by those additional experts.

(c) The party shall also make those experts available immediately for a deposition under Article 3 (commencing with Section 2034.410), which deposition may be taken even though the time limit for discovery under Chapter 8 (commencing with Section 2024.010) has expired.

Credits

(Added by Stats.2004, c. 182 (A.B.3081), § 23, operative July 1, 2005.)

§ 2034.300. Exclusion of expert opinions; failure of party to comply with certain conditions

Currentness

Except as provided in Section 2034.310 and in Articles 4 (commencing with Section 2034.610) and 5 (commencing with Section 2034.710), on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:

(a) List that witness as an expert under Section 2034.260.

(b) Submit an expert witness declaration.

(c) Produce reports and writings of expert witnesses under Section 2034.270.
(d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410).

Credits
(Added by Stats.2004, c. 182 (A.B.3081), § 23, operative July 1, 2005.)

§ 2034.310. Experts not designated on party's list; testimony at trial; permissible conditions

Currentness

A party may call as a witness at trial an expert not previously designated by that party if either of the following conditions is satisfied:
(a) That expert has been designated by another party and has thereafter been deposed under Article 3 (commencing with Section 2034.410).
(b) That expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion.

Credits
(Added by Stats.2004, c. 182 (A.B.3081), § 23, operative July 1, 2005.)

APPENDIX—3

Sean E. Ponist (SBN 204712)
sponist@ponistlaw.com
Georgia Z. Schneider (SBN 251358)
gschneider@ponistlaw.com
PONIST LAW GROUP, P.C.
12626 High Bluff Dr, Ste 440
San Diego, CA 92130
(415) 798-2222 (T)
(888) 350-5442 (F)

Attorneys for _____

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF XXXXX

XXXXX Plaintiff, vs. XXXXX; and DOES 1 through 10, inclusive, Defendants.	CASE NO. XXXXX **STIPULATION AND ORDER REGARDING DISCLOSURE AND DISCOVERY OF EXPERT TESTIMONY**
AND RELATED CROSS-ACTIONS.	

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve attorney-expert communications for which disclosure and discovery and use for any purpose would chill and discourage the interactive process between an attorney and an expert. Accordingly, the parties hereby stipulate to and petition the Court to enter the following Stipulation and Order Regarding Disclosure and Discovery of Expert Testimony ("Order"). The parties intend that this Order will confer the same work-product privilege in this action that is available pursuant to Rule 26, Section (b)(4)B and (b)(4)(c) of the Federal Rules of Civil Procedure.

2. DEFINITIONS

2.1 PARTY: any party to this action, including all of its officers, directors, employees, consultants, and their support staff.

2.2 DISCLOSURE or DISCOVERY MATERIAL: all items or information, regardless of the medium or manner generated, stored, or maintained (including, among other things, testimony, transcripts, or tangible things) that are produced or generated in communications by and between the expert of a PARTY and that PARTY and/or that PARTY's COUNSEL. This definition includes trial consultants retained in connection with this litigation.

2.3 COUNSEL: attorneys who are retained to represent or advise a PARTY in this action.

2.4 TRIAL EXPERT: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a PARTY or its COUNSEL to serve as a trial expert witness in this action.

2.5 RECEIVING PARTY: a PARTY who receives DISCLOSURE or DISCOVERY MATERIAL.

3. SCOPE

The protections conferred by this Order cover not only DISCLOSURE or DISCOVERY MATERIAL (as defined above), but also any information copied or extracted therefrom, as well as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by PARTIES or COUNSEL to or in court or in other settings that might reveal DISCLOSURE or DISCOVERY MATERIAL.

4. DURATION

Even after the termination of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until the parties agree otherwise in writing or a court order otherwise directs.

5. DISCLOSURE AND DISCOVERY LIMITATIONS

5.1 TRIAL EXPERT Preparation Protection for Draft Reports: The work-product

privilege shall protect drafts of any report or disclosure regardless of the form in which the draft is recorded.

5.2 Trial Preparation Protection for Communications Between a PARTY and PARTY'S COUNSEL and Expert Witnesses: The work-product privilege shall protect communications between a PARTY or a PARTY's attorney and any TRIAL EXPERT regardless of the form of the communication, except to the extent that the communications:

(a) relate to compensation for the expert's study or testimony;

(b) identify facts or data that the PARTY or PARTY's attorney provided and that the expert considered in forming the opinions to be expressed; or

(c) identify assumptions that the PARTY or PARTY's attorney provided and that the expert relied on in forming the opinions to be expressed.

6. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a RECEIVING PARTY learns that, by inadvertence or otherwise, it has received DISCLOSURE or DISCOVERY MATERIAL from any person or in any circumstance not authorized under this Order, the RECEIVING PARTY must immediately (a) notify in writing the other parties of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the DISCLOSURE and DISCOVERY MATERIAL, and (c) inform the person or person to whom unauthorized disclosures were made of all the terms of this Order.

7. MISCELLANEOUS

7.1 Right to Further Relief: Nothing in this Order abridges the right of any person to seek its modification by the Court in the future.

7.2 Right to Assert Other Objections: By stipulating to the entry of this Order, no PARTY waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Order. Similarly, no PARTY waives any right to object on any ground to use in evidence of any of the material covered by this Order.

7.3 The parties agree to be bound by the terms of this Stipulation and Order.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD,

Dated:_____ **_____**

Attorney for Plaintiff JOHN DOE

Dated:_____ **_____**

Attorney for Defendant ANITA ROE

IT IS SO ORDERED:

Dated:_____ **_____**

JUDGE OF THE SUPERIOR COURT

APPENDIX—4

Rule 702. Testimony by Expert Witnesses
Currentness

<Notes of Decisions for Rule 702 are displayed in two separate documents. Notes of Decisions for subdivisions I and II are contained in this document. For Notes of Decisions for subdivisions III to end, see second document for Rule 702.>

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

APPENDIX—5

§ 801. Expert witnesses; opinion testimony

Currentness

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.

Credits
(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

§ 802. Statement of basis of opinion

Currentness

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.

Credits
(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

APPENDIX—6

EXAMPLE ONE—APPRAISALS AND VALUATIONS

The Plaintiff's complaint alleges that the Defendant's conduct wrongfully prevented the Plaintiff from remodeling the home that she was selling.

Plaintiff's Syllogism

Statement of the Problem

The appraisal problem presented by Plaintiff's damage claim is as follows:

What is the job cost of a remodel project at Plaintiff's home; what is the resale value of the improvement; and what is the cost recouped by the improvement?

Major Premise

Plaintiff's expert selected the sales comparison methodology.

Minor Premise

Plaintiff's expert selected a project to remodel the kitchen and existing bath.

Plaintiff's expert assumed a job cost of $30,000.

Plaintiff's expert reviewed comparable sales. These sales showed that homes with a remodeled kitchen and bath sold for more than Plaintiff's home.

Conclusion

Plaintiff's expert concluded that a remodel project costing $30,000 would have increased the resale value of Plaintiff's home by $120,000. This is a 400% cost recovery.

This is a valid argument; but is it a sound argument? (See *Critical Thinking*, Moore and Parker, 10th edition.)

Defendant's Syllogism

Statement of the Problem

The appraisal problem presented by Plaintiff's damage claim is as follows:

What is the job cost of a remodel project at Plaintiff's home; what is the resale value of the improvement; and what is the cost recouped by the improvement?

Major Premise

Plaintiff's expert selected the sales comparison methodology to solve this appraisal problem.

Minor Premise

The sales comparison methodology uses the following formula: Adjusted value = comparable sales price + or − adjustments.

The sales comparison methodology applies adjustments by using a comparison grid.

The sales comparison methodology employs a process that summarizes selected data regarding the as-built, physical condition of existing homes. The process includes collecting market data regarding comparable sales, verifying the market data, and applying adjustments to the comparable sales properties. The quality of the analysis performed is directly related to the quality of the data relied upon. In order to provide a good analysis the data used must be reliable.

Conclusion

The Plaintiff's expert selected the wrong methodology to calculate the alleged damages. The sales comparison methodology does not estimate the job cost of a remodel but only its value. Because the sales comparison methodology does not collect appropriate market data regarding the cost of a remodel project, it is fatally flawed as a methodology to address the appraisal problem presented by the Plaintiff's damage claim. The sales comparison methodology does not compare the cost of a remodel project to the resale value of a remodel project.

Moreover, the expert's use of the sales comparison methodology was wrong in a major data point. The Plaintiff's expert assumed a job cost of $30,000, which job cost was provided by the Plaintiff's attorney as a hypothetical assumption. The job cost was not validated and the Plaintiff's expert should not have relied on that improper data.

An effective damage calculation requires an appropriate methodology and appropriate data. The Plaintiff's expert had the wrong methodology and inappropriate data. He should have accessed and utilized an appropriate methodology and appropriate data. The sales comparison methodology is not an accepted, authoritative methodology in the real estate industry to compare the cost of an improvement to the resale value of the improvement.

The Defendant’s argument demonstrates that the Plaintiff’s syllogism is not a sound argument. The Plaintiff’s syllogism is not sound because both the major and minor premises are not appropriate for the problem presented by the Plaintiff’s complaint. (See *Critical Thinking*, Moore and Parker, 10th edition.)

A Sound Argument

Statement of the Problem

The appraisal problem presented by Plaintiff's damage claim is as follows:

What is the job cost of a remodel project at Plaintiff's home; what is the resale value of

the improvement; and what is the cost recouped by the improvement?

Major Premise

The contingent valuation methodology should be selected to solve this appraisal problem. The contingent valuation methodology uses a market survey of knowledgeable participants within a local market. Significantly, knowledgeable participants within a local market provide estimates of the cost of a remodel job and estimates of the resale value of the remodel project. This methodology is expressed in a contingent value grid consisting of a job cost column, a resale value column and a cost recouped column.

Minor Premise

The Remodeling Magazine publishes an annual report. This report uses figures from survey responses from members of the National Association of Realtors regarding the resale value of proposed remodel projects and cost estimates for the proposed remodel projects from RemodelMAX, the publisher of remodeling cost estimating tools. The data collected for the Cost. vs. Value report is considered by the real estate industry as reliable and the annual report is an authoritative publication. The annual Cost vs. Value Report is an accepted, authoritative resource for accessing both the cost of an improvement and its resale value. The Cost vs. Value Report collects the appropriate data necessary to directly address the Plaintiff's damage claim.

The contingent valuation methodology is the accepted methodology in the real estate industry to compare the cost of an improvement to the resale value of the improvement. The Cost vs. Value Report is the accepted data source in the real estate industry regarding the calculation of the recoupment percentage between the cost of a remodel project and the resale value of the improvement.

Conclusion

The use of the contingent valuation methodology and the Cost vs. Value Report would have resulted in an appropriate range for the cost recoupment of a minor kitchen and bath remodel project of Plaintiff's property. The appropriate cost recoupment percentage for the Plaintiff’s remodel project should be between 120% and 130%.

This is a sound argument because both the major and minor premises are appropriate for the problem presented by the Plaintiff’s complaint. (See *Critical Thinking*, Moore and Parker, 10th edition.)

APPENDIX—7

EXAMPLE TWO—BREACH OF FIDUCIARY DUTY

The fiduciary duty of a real estate broker is undisputed.

> "As a fiduciary, a real estate broker must disclose to his or her client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction." CACI 4107 (See also, Disclosure Regarding Real Estate Agency Relationships.)

However, some experts lack a methodology for this issue.

A. Examples of the Use of Syllogisms Regarding Methodology

The Plaintiff alleges that the real estate agent breached a fiduciary duty in the sale of a business opportunity. The facts of the case are not important to a syllogism regarding this problem of methodology.

Plaintiff's Syllogism

Statement of the Problem

Did the real estate agent breach a fiduciary duty in the sale of a business opportunity?

Major Premise

Plaintiff's expert selected the reasonably prudent real estate agent methodology. (See Civil Code § 2079.2, Broker's Standard of Care.)

Minor Premise

The real estate agent did not exercise the degree of care that a reasonably prudent real estate agent would have exercised.

Conclusion

The real estate agent breached her fiduciary duty to the Plaintiff. This is a valid and sound conclusion.

Defendant's Syllogism

Statement of the Problem

Did the real estate agent breach a fiduciary duty in the sale of a business opportunity?

Major Premise

Defendant's expert selected the customs and practices methodology.

Minor Premise

The real estate agent met or exceeded the customs and practices in the sale of a business opportunity.

Conclusion

The real estate agent did not breach her fiduciary duty to the Plaintiff.

This is a valid conclusion but it is not a sound conclusion. Where expert testimony regarding the standard of care of a professional is conclusive, evidence of customs and practices in a business are inadmissible. (See CACI 413.) Accordingly, the major premise that customs and practices set the standard of care was the wrong methodology.

Other experts disagree on the methodology and data to be used in determining what standard of care the real estate agent owes to a buyer or seller. A common ground of disagreement is regarding whether or not the real estate agent breached the standard of care when representing the square footage of a house.

B. Examples of the Use of Syllogisms in a Square Footage Case

The Plaintiff alleges that the real estate agent breached a fiduciary duty. The facts of the case are as follows:

"1. The property in question was a luxury residence in Malibu, California.
2. The property was owned by a family trust.
3. The trust engaged Chris Cortazzo, a sales representative associated with Coldwell Banker's Malibu West Office to list the property.
4. Cortazzo obtained information from public records at the County Assessor's Office stating the square footage of the property's living area was 9,434 square feet.
5. Cortazzo also obtained additional square footage information from a building permit stating the property contained a single family residence of 9,224 square feet, a guest house of 746 square feet, and a garage of 1,080 square feet.
6. Cortazzo listed the property in September 2006 and submitted the property information to the Multiple Listing Service ("MLS") stating the property "offers approximately 15,000 square feet of living areas.
7. Cortazzo prepared a flyer reiterating the square footage filed with the MLS.
8. In 2007 an offer was made to purchase the property. Cortazzo prepared a handwritten
10. The prospective buyer cancelled the transaction after requesting an extension to purchase the property and the seller refused to grant it.
11. At the same time, Hiroshi Horiike had been working with a sales representative in the Coldwell Banker Beverly Hills office.
12. Horiike viewed the property in November 2007 and was provided with the same flyer Cortazzo prepared when the property was filed with the MLS stating the property contained approximately 15,000 square feet. At the same time Horiike received a disclaimer that "the Broker/Agent does not guarantee the accuracy of the square footage."
13. Horiike made an offer, which was accepted.
14. Before completing the purchase, Horiike received and signed the two agency disclosure forms, acknowledging Coldwell Banker was acting as a dual agent.
15. Cortazzo did not provide Horiike with a handwritten note advising Horiike to hire a qualified specialist to verify the square footage; however, Cortazzo provided to Horiike's agent a copy of the building permit

note to the prospective buyer "that Coldwell Banker did not 'guarantee or warrant' the square footage of the residence and advised the couple to hire 'a qualified specialist to verify the square footage.'"

9. Cortazzo provided documentation from an architect of the residence stating the square footage was approximately 15,000 square feet, and at the same time provided the prospective buyer with another admonition to hire a qualified specialist.

and a form advisory stating "[o]nly an appraiser can reliably confirm square footage."

16. Horiike subsequently learned the square footage on the building permit conflicted with the flyer prepared by Cortazzo."

Case Comment: *Horiike v. Coldwell Banker* − reaffirming the Broker-Agent Relationship by Thomas N. Jacobson, California Real Property Journal, Vol. 35 No. 2, page 37.

Plaintiff's Syllogism

Statement of the Problem

The standard of care problem presented by Plaintiff's breach of fiduciary duty claim is as follows:

Did Cortazzo breach his fiduciary duty to the Plaintiff by neglecting to specifically advise the Plaintiff to hire a specialist to verify the square footage of the home?

Major Premise

"The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. The broker must place himself or herself in the position of the client and consider the type of information required for the client to make a well-informed decision." CACI 4107

Minor Premise

The buyer of a luxury residence will consider remodeling the residence. In order to properly remodel a luxury residence the buyer will be required to have the accurate square footage of the residence. The buyer of a luxury residence requires accurate information regarding the square footage of a luxury residence in order to make a well-informed decision.

Conclusion

The real estate agent, Cortazzo, breached his fiduciary duty to the Plaintiff by failing to specifically advise the Plaintiff to hire a specialist to verify the square footage of the luxury residence.

APPENDIX—8

EXAMPLE THREE—HORIIKE AND SQUARE FOOTAGE

Defendant's Syllogism

Statement of the Problem

The standard of care problem presented by Plaintiff's breach of fiduciary duty claim is as follows:

Did Cortazzo breach his fiduciary duty to the Plaintiff by neglecting to specifically advise the Plaintiff to hire a specialist to verify the square footage of the home?

Major Premise

"The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. The broker must place himself or herself in the position of the client and consider the type of information required for the client to make a well-informed decision." CACI 4107

"The stand of care owed by a broker under this article is the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination, required to obtain a license under Division 4 (commencing with Section 10000) of the Business and Professions Code." California Civil Code § 2079.2 − Broker's Standard of Care

Minor Premise

The degree of knowledge through education, experience and examination, required to obtain a real estate license does not provide to real estate agents an expertise in confirming the square footage of a luxury residence. The real estate agent, Cortazzo, provided the Plaintiff with a form advisory ("Advisory") regarding the type of information required by a buyer to make a well-informed decision. The Advisory contained, in relevant part, the following advice in writing:

> "SQUARE FOOTAGE, LOT SIZE AND BOUNDARIES: Buyer and Seller are advised that only an appraiser or land surveyor, as applicable, can reliably confirm square footage, lot size, Property corners and exact boundaries of the

> Property. Representations regarding these items that are made in a Multiple Listing Service, advertisements, and from property tax assessor records are often approximations, or based upon inaccurate or incomplete records. Fences, hedges, walls or other barriers may not represent actual boundary lines. Brokers have not verified any such representations. Brokers do not have expertise in this area. If Buyer wants information about the exact square footage, lot size or location of Property corners or boundaries, Broker recommends that Buyer hire an appraiser or licensed surveyor to investigate these matters during Buyer's inspection contingency period." C.A.R. Form SBSA, Revised 4/07

Directly above the buyer's signature that acknowledged that the buyer had read and understood the Advisory was the following disclaimer:

> "The Broker shall not be responsible for providing other advice or information that exceeds the knowledge, education and experience required to perform real estate licensed activity. Buyer and Seller agree to seek legal, tax, insurance, title and other desired assistance from appropriate professionals." C.A.R. Form SBSA, Revised 4/07

Conclusion

The real estate agent, Cortazzo, did not breach his fiduciary duty to the Plaintiff. By providing the Plaintiff with the Advisory, the real estate agent exercised the degree of care that a reasonably prudent real estate licensee would exercise in advising the buyer of a luxury residence regarding the square footage of the residence. The real estate agent complied with the standard of care in the real estate industry by providing an industry Advisory.

APPENDIX—9

EXPERT DEPOSITION QUESTIONS

1. When retained and by whom.

2. Brief review of CV.

3. Prior work as consultant or expert witness:

   A. Number of times.
   B. Number of times for this attorney.
   C. Number of times for plaintiffs v. defendants.
   D. Types of cases.
   E. Names of other cases, depos. and counsel.

4. How many hours spent on this case, including:

   A. Review of documents and material.
   B. Conferences with others.
   C. Research.
   D. Examination, tests and demonstrations.

5. Opinions or conclusions reached in this case.

6. Facts relied upon in forming these opinions.

7. What facts inconsistent with these opinions, or that cannot be reconciled with opinions.

*** * ***

(Repeat 5-7 as many times as necessary, always asking, "Any other opinions?")

(Review experts' file and mark as exhibits.)

8. Opinions re your expert and his/her opinions?

9. Do you need any further research, review, examinations, testing, demonstration, etc.

10. What else would you like to do in this matter if possible.

BIOGRAPHY

HAROLD A. JUSTMAN

Mr. Justman graduated from Stanford University in 1972, and he graduated from Hastings College of the Law in 1975. He was a real estate attorney from 1976 to 2012. He was also an Adjunct Professor of Real Estate at Menlo College in Atherton from 2013 to 2016.

Mr. Justman is a licensed California Real Estate Broker. In 1979 he began serving as an expert witness. He has qualified as a trial expert witness regarding the standard of care of real estate brokers and other real property matters in the counties of Alameda, Marin, Merced, Contra Costa, Shasta, Santa Cruz, Fresno, Placer, Santa Barbara, Santa Clara, San Diego, San Mateo, San Francisco, San Joaquin and Sonoma. Also, he has been qualified to testify in court as an expert witness in the United States District Court, Northern District of California.

Mr. Justman has also co-authored the following articles: "Foreclosure Law in California", California Real Property Journal, volume 31, no. 4 (2013); "Loan Modification Law in California", California Real Property Journal, volume 32, no. 2 (2014); "The Co-Evolution of the Mortgage Market and Mortgage Law", California Real Property Journal, volume 33, no. 1 (2015); and "An Economic Interpretation of the Yvanova v. New Century Mortgage Corporation Decision", California Real Property Journal, volume 34, no. 2 (2016).

BIOGRAPHY

SEAN E. PONIST

Sean Ponist is the founder of the Ponist Law Group, a firm specializing in real estate, construction defect and business litigation. Prior to founding his own firm, Mr. Ponist was a prosecutor with the Marin County District Attorney's Office and in-house counsel for Marcus & Millichap Real Estate Investment Brokerage Company. He has successfully tried over 30 cases to verdict.

In acknowledgment of his accomplishments, he has been recognized as a "Super Lawyer," a distinction awarded to less than 5% of attorneys, for the past seven years (2011-2017). He is also a fellow of the Litigation Counsel of America, a trial lawyer honorary society whose membership is limited to less than one-half of 1% percent of North American lawyers, judges and scholars. He has also been recognized as one of the Best of the Bar by the San Diego Business Journal.

Mr. Ponist has published numerous articles on real estate topics, including recent articles in The Daily Journal ("Recovering Lost Profits in Real Estate Transactions" and "Should Equitable Indemnity Apply Against Negligent Misrepresentation Claims?"), California Lawyer magazine ("The Nonrefundable Deposit – Not!") and Commercial Investment Real Estate ("Going to the Source: Minimize your liability by providing attributions").

He has further lectured for the San Diego County Bar Association ("Deconstructing Commercial Leases" and "Commercial Real Estate Brokerage Standard of Care"), San Francisco Bar Association ("Bringing Down the House: Assessing Damages in Real Estate Cases," "Best Use of Experts in Real Estate Cases," "The Rogue Agent: Agency Issues In Real Estate," "Private Investigation and the Legal Community," and "Commercial Real Estate Brokerage Standard of Care," and "Contract Interpretation"), the San Mateo County Bar Association ("When Real Estate Deals Go Bad," "Expert Witnesses at Trial," and the "Agent-Principal Relationship") as well as for the National Business Institute ("Direct and Cross-Examination for Civil Litigators").

Mr. Ponist graduated from *UC Davis School of Law*, receiving his Juris Doctor degree in 1999. Prior to law school, Mr. Ponist attended *UCLA* where he earned a Bachelor of Arts in Philosophy in 1995 and was a Departmental Scholar.

COLIN C. WEST
PARTNER

Colin C. West is an experienced litigator and trial lawyer, with an emphasis on antitrust, class actions, and other high-stakes litigation. He has achieved defense verdicts and other favorable results for his clients in a wide variety of industries, including high technology, chemical additives, energy, and automotive. He is also a frequent instructor and lecturer on litigation techniques and strategies.

colin.west@morganlewis.com

San Francisco
One Market, Spear Street Tower
San Francisco, CA 94105-1596
United States

Phone
+1.415.442.1121

Fax
+1.415.442.1001

Download VCard

EXTENDED PROFILE

Colin frequently counsels clients in the United States and the Pacific Rim on antitrust and e-discovery issues. He is the former chair of the Antitrust and Business Regulation Section of the Bar Association of San Francisco, and is a frequent contributor to the industry and legal publications in the United States and Japan.

Colin is also deeply involved in efforts to reform the San Francisco Police Department's use-of-force policies, serving as an adviser to the San Francisco District Attorney's Office's Blue Ribbon Panel on Transparency, Accountability and Fairness in Law Enforcement on this issue, as well as serving on a Working Group advising San Francisco Police Commission on changes to its use of force policies.

Prior to joining Morgan Lewis, Colin was a partner in the antitrust and trade regulation practice of another international law firm, where he led the Northern California regional hiring committee.

SELECTED REPRESENTATIONS

EDUCATION

SECTORS

- **Healthcare**

SERVICES

- **Product Liability & Mass Torts**
- **Antitrust & Competition**
- **Litigation, Regulation & Investigations**
- **Japan Practice**

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