GUIDELINES FOR NEUTRAL EXPERTS TO THE COURT

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1. INTRODUCTION

You have been selected as a neutral expert to assist the court in a dispute involving technical issues outside of the court's experience. You have taken on a role with significant responsibility. Cases in which a neutral is required are generally complex and will require much time and hard work by all involved. Improper behavior on your part could result in a waste of this effort.

Although the use of neutral experts to the court is growing, it is still not a widely accepted practice. Many judges have concerns about the departure from their normal practice limiting private discussions on the merits of a case. And attorneys involved in the litigation may have concerns about your private sessions with the judge and their possible inability to present their point of view on topics covered in such sessions.

Therefore, how you perform as a neutral expert will not only have an impact on the case for which you are serving but also on the future use of neutrals in complex cases.

1.1. PURPOSE OF THE GUIDELINES

These Guidelines are intended to help you perform your duties efficiently and properly. Any concerns you have with regard to these guidelines should be discussed with the judge you are assisting. You should also verify that the court is in full agreement with these Guidelines as some judges may wish to handle certain issues differently than suggested here. Some courts may provide a written document spelling out preferences in use. There will probably be a document specifying agreements between the judge and the attorneys as to the scope of your assignment in the particular case in which you are involved.

At the beginning of the case you may be asked to sign an affidavit that you will abide by certain rules and at the end you may be asked to confirm that you did so.

1.2. HOW A NEUTRAL EXPERT MAY BE USED

The judge will instruct you, verbally and/or in writing, on the way you will be used. You may be asked to serve in one or more of the following capacities:

Technical Advisor – The primary use of this type of expert is to help the judge understand the technology. Your job is essentially to be a teacher with a class of one (or two if the judge's law clerk is involved). It is usually best to start with broad concepts, narrow down to specifics only when necessary, and recognize that you may have to explain something a number of times before you hit on the right way to explain it. These discussions are most frequently carried out privately in chambers.

Tutorial Presenter – In this role, the expert gives a lecture on the technology involved in the case – either prior to the trial or as part of the trial. Such lectures are generally open to the parties and may even have to be approved by both sides before being presented to the judge and/or jury. The limited interaction in a presentation may make it more difficult for you to determine whether the audience understands you. Good visual aids that can be referred to later are usually a must.

Independent Investigator – Here the judge will ask you to perform some kind of analysis and report the results. The report may be verbal or written and may be delivered in private or in open court.

Report Writer – Alternatively, the judge may instruct you to put together a report explaining some technical concept or issue, a summary of the technical issues advanced by each side, and/or a comparison of these issues.

Testifying Expert – In this role you will testify in open court, possibly in front of a jury. The attorneys will have the right to cross-examine you. Such an appointment is made in accordance with either Federal Rule of Evidence 706[1] or California Evidence Code sections 730 through 733[2]. This role is rarely used with a jury because it is likely that the jury will give your testimony undue weight if they find out you were selected by the judge.

[1] Available at http://www.uscourts.gov/rules/Evidence_Rules_2007.pdf
[2] Available at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=00001-01000&file=730-733

Master[3] –This is a role involving a formal assignment to deal with particular aspects of the case requiring your expertise. The assignment will be spelled out in a court order, which will be based on the requirements of Federal Rule of Civil Procedure 53[4] or on California Code of Civil Procedure sections 638 through 645[5]. As a master you may hold hearings, make findings, issue orders, and/or file a report with the court.

While there are a number of procedural issues that may vary depending on the nature of your assignment, the guidelines below apply in most circumstances.

2. BASIC ISSUES

2.1. NEUTRAL EXPERT LIMITATIONS

It is important to realize that your job is not to decide the case (with the limited exception of findings you may be asked to make as a master). Decision making is exclusively the job of the court and/or the jury. Your role is to assist the judge in making informed decisions. A fundamental rule is not to offer your opinion on the merits of a case unless it is requested.

A common task is to explain technical points or to clarify testimony of the experts engaged by the parties. How well you do this depends to a large extent on your innate teaching ability. Whatever your style, it is critical to avoid showing bias in your explanations and to limit your explanations to the questions asked. If you disagree with an expert, be sure that the judge wants to know your opinion before giving it (see Section 3.1).

The judge may determine that you need to do outside research to deal with the questions presented. Be sure to discuss this with the judge to determine the scope of the research in advance. Under no circumstances should you do independent research without the specific request of the court.

2.2. DISCUSSIONS WITH COUNSEL

It may be necessary for you to communicate with one or all of the attorneys in the lawsuit. For example, you might have to discuss production of materials, reveal a possible conflict, or craft the method of handling an issue. Except for administrative matters (such as setting up a meeting or checking of the status of payment) you should communicate with all attorneys equally on all substantive matters. That means setting up a conference call or sending written communications to all counsel simultaneously. If in doubt, err on the side of dealing with all attorneys equally.

Any discussions about issues in the case should be at the direction of or with the approval of the court. For other communications, you should keep the court informed (such as by sending a copy of any written material or periodic summaries).

2.3. DISCUSSIONS WITH THE PARTIES THEMSELVES

It may be desirable for you to communicate with technical people of the actual parties involved. If you do, it should be with the concurrence of the judge and/or the attorneys. Meetings with one or more parties are normally limited to explanations of technology and not to any legal issues. Counsel will undoubtedly want to participate in any such discussion but their attendance may inhibit a free exchange between you and the engineers. If such discussions do occur, they will undoubtedly cover confidential information and would not normally include technologists from any other party.

[3] This role is often referred to as a Special Master. Under California law, it is called a referee. Masters and referees have powers beyond those of a neutral expert that are not discussed in this document. For more information refer to www.CourtAppointedMasters.org.

[4] Avaliable at http://www.uscourts.gov/rules/civil2007.pdf

[5] Available at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=00001-01000&file=638-645.2

Possible scenarios are:

Neutral meets with only the technologists – This is generally the most productive environment because there is no need to explain material understood by you and the engineers. Also, the engineers are more likely to give you the facts without feeling constrained. You can only get such meetings if the attorneys are confident you will avoid any discussion of issues in the case or the technology of the other side. Your objective is to gain an understanding of the technology being discussed so you can do your job better and faster.

Neutral meets with the technologists and an expert witness – In this circumstance, a party's expert witness, or the expert witness of the other party, is present at your meeting with the company's technologists. There should be agreement beforehand as to the expert witness' role and whether the expert witness may receive documents provided to you.

Neutral meets with technologists and silent attorneys – In this arrangement, counsel for one or more party may be present with the technologists to observe but not to comment. This may inhibit the technologists and make extracting the information you need more difficult. Also, the attorneys may find it difficult not to speak up and you will need to be firm if they attempt to do so. An alternative is to have the discussions transcribed for the attorneys to review later.

Neutral meets with technologists and 'speaking' attorneys – This makes all counsel comfortable but is likely to be the least productive for you. It can also break down into arguments between the attorneys if counsel for more than one party is present.

If meeting with the parties is deemed valuable, you will need to work with the attorneys to determine the best way of handling any such discussions. Be sure you listen to their concerns and address them. If you cannot work out a reasonable agreement with counsel, you may have to take the matter to the judge as a last resort.

2.4. DISCUSSIONS WITH THIRD PARTIES

About the only things you can discuss with outsiders are the fact that you are acting as a neutral, the general nature of your role, and a brief statement of what the case is about. You should never disclose to anyone else (including your spouse) your opinions, the specifics of any discussions with the judge, how you think the case will come out, what you like and dislike about the attorneys, how you feel about other cases in which a party is involved, and so on and on. If in doubt, keep quiet or discuss it with the judge. It is far better to be too brief than too loquacious.

If third parties start discussing the case in your presence or even the merits of any of the participants, you should request that they stop or else you should leave. Canon 3A(4) of the Code of Conduct for United States Judges[6] requires that judges "neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." You should be at least this circumspect.

2.5. CONFIDENTIALITY

Even after the case is over, you should be careful how much you divulge. You may have been privy to confidential information and this, of course, must not be released without permission. In most cases you will have been required to sign a confidentiality agreement. But it is usually wise to limit discussions even more broadly. Certainly, you should avoid discussing any logic used by the court to reach decisions and should not publicly express your agreement or lack of agreement with any of the court's decisions.

The court may direct that your reports be sent to the clerk to be placed in the case file. Since these reports will generally contain proprietary information, they will normally be filed under seal. This means that they are not available to the general public and you must not breach this confidentiality.

2.6. OBJECTIVITY

Your role is to assist the court in reaching informed decisions based solely on the facts and the law. The judge expects you to be completely neutral and will probably stop listening to you if you show bias. Therefore, your

[6] Available at http://www.uscourts.gov/guide/vol2/ch1.html

personal opinion of the parties, your opinion of the attorneys and their tactics, or the nature of your past or current relationships with the attorneys, expert witnesses, or parties must have no impact on how you fulfill your role. You are required to provide a *neutral* service to the parties. This is true even if there is an imbalance in the payment terms.

2.7. CONFLICTS

To serve as a neutral, you must not have any conflicts of interest with the parties or attorneys. Obvious conflicts are stock ownership or a present or past business relationship with a party or attorney. You must also avoid serving as an expert in another case or doing any other kind of work for one of the law firms[7] or parties. If you are part of a company, the conflicts of everyone in your company will be considered along with your own personal conflicts. If in doubt, ask for guidance from the parties and/or the judge. Not all conflicts (such as some past relationships with participants) will bar you from serving as a neutral, especially if all parties are in agreement. But be sure to disclose all potential conflicts so the judge and/or parties can make an appropriate decision.

You will probably be able to serve as a neutral in another case involving one of the firms or parties but this must be communicated to everyone before committing.

2.8. DISCLOSURES

You must disclose the following as soon as you become aware of them:

Any relationships you have now or have had in the past with anyone involved in the lawsuit

Any conflicts of interest.

Any work you have done or testimony you have offered in the subject matters involved in the suit.

Any materials you referred to other than those provided to you by the parties or the court. However, if not specifically instructed, you should ask if you need to report the use of general materials. See Section 3.6 for discussion on this point.

3. PROCEDURAL ISSUES

The handling of procedural issues will depend on the preferences of the judge and the attorneys, the nature of the case, and your role in the proceedings.

3.1. OPINIONS

One of the more important questions is whether the scope of your assignment includes the offering of opinions (which should otherwise be avoided as discussed above) and, if so, the timing of them. As an independent investigator, testifying expert, or master you may be asked to offer opinions on narrow issues. If you are acting as a report writer, you may or may not be setting out opinions. Whatever your role, your instructions will spell out the specific areas in which you are to offer opinions.

The other roles are focused on helping the judge understand the technology. In these limited circumstances you will generally be providing explanations and not opinions and you will have to be vigilant about keeping any opinions out of your explanations. For example, you can certainly explain how something works but should be careful about expressing any consequences at issue in the lawsuit that you think might result out of its operation.

If you are acting in more than one role, say as a technical advisor and as a master, be careful to limit your opinions to those detailed in your master assignment.

But what if you have an opinion that is outside the scope of your assignment? You think one side is wrong in their argument. Should you tell the judge? Most judges want to know if an expert witness has stated something

[7] Note the conflict is with the whole firm not just the individual attorney(s) involved.

that is not a generally accepted scientific fact. However, they generally do not want you to provide an unsolicited contradiction of an expert's opinion. You should clarify the judge's desires on this beforehand.

The judge may instruct you on when to offer unsolicited opinions. If not, you should ask for clarification. Sample questions that might need to be resolved include:

> Should you offer unsolicited opinions or only when requested?
>
> If you believe that someone (*e.g.* an expert for one side) has made an incorrect statement, should you point this out? One possibility is that you should not do so unless the judge brings up the statement in a discussion.
>
> Should you offer an opinion that you believe an expert is acting as an advocate and is stretching the truth?
>
> Should opinions you give to the judge be communicated to the attorneys?

3.2. TAKING NOTES

If you are acting as a technical advisor or acting as an independent investigator providing a verbal report, you will probably be instructed as to whether you are to take notes of your private discussions with the judge. If you are not given specific instructions, you should inquire. Depending on the circumstances of the case and the judge's preferences, no notes may be needed, you will take any notes, or the judge will take notes. Another approach is to have the discussions recorded by a court reporter. These notes or transcripts can be given to the attorneys at appropriate intervals so that they can discover the questions that have been covered. As a consequence, they may realize that they need to clarify their positions in certain respects.

If you are asked to take notes, you should prepare them immediately after your session and send a copy to the judge while the discussion is still fresh. In addition to normal corrections or additions to your notes, the judge might want to have you restate something in a way that does not reveal any tentative decisions to the parties.

The notes should only be sent to the attorneys when the judge considers it appropriate to do so. Usually, the notes are disseminated at infrequent intervals and at a time when the judge understands the technical issues sufficiently to form decisions.

Anything contained in the notes is likely to trigger a response by one or more parties. This, of course, will be especially true for statements that favor one party over the other. Even though these responses might attack a position you have taken, you must deal with them carefully and objectively. You may find that the responses alter your opinion, especially if they provide new information. If so, you should communicate this to the judge as soon as you determine that your original opinion was incorrect or incomplete. The judge will probably direct that you reveal the change to the parties.

3.3. DISCUSSING IN-CHAMBER MEETINGS WITH COUNSEL

The attorneys may be given an opportunity to interview you about any private discussions with the judge. The purpose of such an interview is to allow them to discover the subjects covered more fully than disclosed in your notes. They can then clarify issues or challenge your statements in subsequent briefs.

The judge is usually not present for the interview but may ask that it be conducted in the courtroom so that the court can convene if a line of questioning seems inappropriate. There will probably be a court reporter present to transcribe the proceedings. Since you are acting as an agent of the judge, you may not be asked to swear that you will answer truthfully. It will be understood that you are under such a requirement and you should do so.

You need to be careful during the interview to focus on what you told the judge. Attorneys may attempt to use the interview—inappropriately—to find out what the judge is thinking. It is unlikely that you will have a full understanding of the judge's leanings but you must avoid passing along any clues beyond the technical responses that you provided.

You should expect responses from the parties that challenge some of your statements. Again, you must deal with these carefully and objectively and be prepared to alter your position if justified.

3.4. TESTIFYING

Unless you are a court-appointed expert witness as discussed in Section 1.2 above, you will not normally be required to testify. However, it is possible that one or more parties may decide to have you testify at trial. If so, you will probably be deposed by all sides beforehand. At trial, you can be expected to be questioned and cross-examined by all sides.

3.5. WRITTEN COMMUNICATIONS WITH THE COURT

You may be asked to put an opinion in writing, organize technical points in a meaningful way, do some research, or do some other task that results in you preparing a written document to give to the judge. The judge will probably provide copies of these documents to the parties. In any case, you should assume that all written communications with the judge might be given out. Again, they may result in responses from the attorneys and you must remain neutral even when your statements are being attacked.

These communications may be confidential and you must respect this confidentiality (*see* Section 2.5).

3.6. ACCESS TO MATERIALS

There will likely be substantial written or machine-readable materials in the case that will require your review. Sometimes the judge decides what to provide to you and sometime the parties do. It is not unusual for the attorneys to each provide a set of documents to you that cover the important technical issues. This might also include background material not a part of the official record to help you fully understand the technology involved.

If you are generally knowledgeable but not an expert in the particular technology at issue, it will probably be acceptable to obtain public material on your own in order to improve your understanding. It is also probably permissible to use books or papers you already own to refresh your memory. However, you should verify that this is acceptable and determine if you are to notify the parties of any such references you access.

3.7. ATTENDANCE AT HEARINGS

During the preliminary stages before trial, a multitude of issues may arise requiring that the judge understand the underlying technology sufficiently to make informed decisions.

For each issue to be decided, the parties will submit written briefs that explain their positions. The judge will then normally hold one or more hearings so that the parties can present their arguments in person. If technical issues are involved, you may be asked to read briefs or to attend hearings. If you do attend a hearing, it is highly unlikely that you will be expected to say anything (unless, of course, the hearing is for you to tutor the court). You should speak only when spoken to unless otherwise instructed. Even if you think the judge has misunderstood something or you have a burning question, you should probably not interrupt the proceedings. You can always clarify the issues when back in chambers with the judge. You may wish to discuss this with the judge beforehand.

You may find that one or more of the attorneys will indulge in name-calling in their pre-hearing briefs or their remarks at the hearing. You must ignore these kinds of attacks no matter how offensive you find them. Remember that your job is to help the judge understand the technical issues and not be concerned with the personalities involved.

3.8. REVIEWING ORDERS

The decisions reached by the court during the pre-trial activities are given to the parties as orders. The judge may ask you to proofread some of the orders for technical accuracy before they are released. It is important that you restrict your comments to the areas of your expertise. You should certainly point out where you think technical issues are presented incorrectly or where you have suggestions as to how a technical matter could be better expressed. However, it is not your job to critique the decisions themselves or the logic behind them. They are, after all, based primarily on legal principles and you are serving as a technical expert, not as a legal advisor. You must set aside any feelings about what you consider a “fair” resolution of the matter. The court’s job is to decide the case based on the governing law.

Of course, the draft order is confidential and the conclusions must not be revealed to anyone before the order is filed. If the order is filed under seal, you may not discuss it with any unprivileged person.

3.9. PAYMENT FOR YOUR SERVICES

Neutral experts are normally paid for their time although there are occasions when they serve *pro bono*. If you are being paid, you will be instructed on how to submit invoices. The normal way is to submit the bill to both parties and have them each pay one-half. Alternatively, some other ratio may be selected or you may be told to submit invoices to one individual (perhaps even the judge) who will arrange payment.

No matter how you bill the parties, you should determine if the court should be sent copies of the invoices. You should be careful in the billing entries to avoid disclosure of details of discussions with the judge or any confidential matters.

3.10. RETURN OF MATERIALS

You will undoubtedly receive confidential materials in the course of your assignment. Clearly, you must protect those materials and not divulge them to any unauthorized person. At the end of your involvement, you need to gain agreement on what to do with these materials. You might suggest to the attorneys that all materials (including any e-mail communications) be kept for six months. At the end of that time counsel would be asked if confidential materials should be destroyed, returned, or continue to be kept.